This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

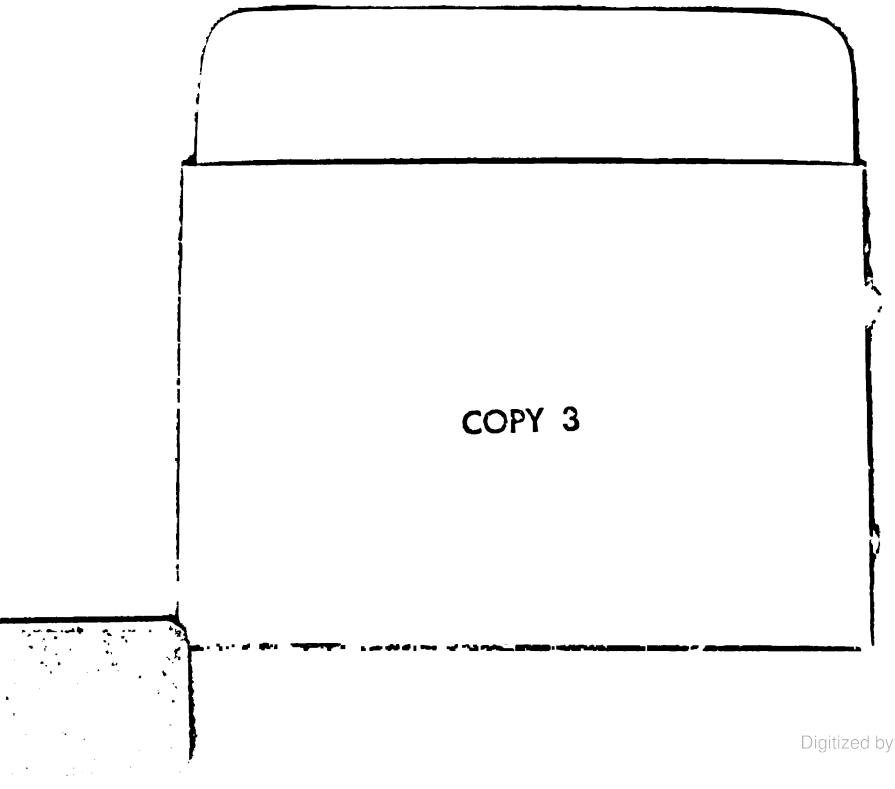
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

Law Library
Univ. of Calif.
Berkeley



Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

National Reporter System.—State Series.

THE

ATLANTIC REPORTER,

VOLUME 31.

CONTAINING ALL THE DECISIONS OF THE

Supreme Courts of MAINE, NEW HAMPSHIRE, VERMONT, RHODE ISLAND, CONNECTICUT, and PENNSYLVANIA; Court of Errors and Appeals, Court of Chancery, and Supreme and Prerogative Courts of NEW JERSEY; Court of Errors and Appeals and Court of Chancery of DELAWARE; and Court of Appeals of MARYLAND.

PERMANENT EDITION.

MARCH 6—JUNE 12, 1895.

WITH TABLES OF ATLANTIC CASES PUBLISHED IN VOLS. 78, MARYLAND REPORTS; 56, NEW JERSEY LAW REPORTS; 164 AND 165 PENNSYLVANIA STATE REPORTS.

A TABLE OF STATUTES CONSTRUED IS GIVEN IN THE INDEX.

ST. PAUL:
WEST PUBLISHING CO.
1895.

Digitized by Google

Law Library

COPYRIGHT, 1895,
BY
WEST PUBLISHING COMPANY.

Digitized by Google

C. 3

JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

CONNECTICUT—Supreme Court of Errors.

CHARLES B. ANDREWS, CHIEF JUSTICE.

ASSOCIATE JUDGES.

DAVID TORRANCE. SIMEON E. BALDWIN.
AUGUSTUS H. FENN. WILLIAM HAMERSLEY.

DELAWARE—Court of Errors and Appeals.

JAMES L. WOLCOTT, CHANCELLOR.

CHARLES B. LORE, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

IGNATIUS C. GRUBB. CHARLES M. CULLEN.
DAVID T. MARVEL.

Court of Chancery.

JAMES L. WOLCOTT, CHANCELLOR.

MAINE—Supreme Judicial Court.

JOHN A. PETERS, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

CHARLES W. WALTON. THOMAS H. HASKELL.
LUCILIUS A. EMERY. WM. PENN WHITEHOUSE.
ENOCH FOSTER. ANDREW P. WISWELL.
SEWALL C. STROUT.

MARYLAND—Court of Appeals.

J. M. ROBINSON, CHIEF JUDGE.

ASSOCIATE JUDGES.

WILLIAM SHEPARD BRYAN. DAVID FOWLER.
JOHN P. BRISCOE. CHARLES B. ROBERTS.
JAMES McSHERRY. HENRY PAGE.
A. HUNTER BOYD.

NEW HAMPSHIRE—Supreme Court.

CHARLES DOE, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

ISAAC W. SMITH. ALONZO P. CARPENTER.
LEWIS W. CLARK. WILLIAM M. CHASE.
ISAAC N. BLODGETT. ROBERT M. WALLACE.

Digitized by Google

NEW JERSEY—Court of Errors and Appeals.

ALEXANDER T. McGILL, CHANCELLOR.

MERCER BEASLEY, CHIEF JUSTICE.

JUSTICES.

DAVID A. DEPUE.
BENNETT VAN SYCKEL.
ALFRED REED.[1]
JONATHAN DIXON.
WILLIAM J. MAGIE.
CHARLES G. GARRISON.
JOB H. LIPPINCOTT.
WILLIAM G. GUMMERE.
GEORGE C. LUDLOW.[2]

JUDGES.

H. H. BROWN.
ABRAHAM C. SMITH.[4]
GOTTFRIED KRUEGER.
JOHN W. BOGERT.
CLIFFORD S. SIMS.
ROBERT S. GREEN.[3]
GEORGE F. SMITH.[5]
ALBERT R. TALMAN.[6]

Court of Chancery.

ALEXANDER T. McGILL, CHANCELLOR.

VICE-CHANCELLORS.

JOHN T. BIRD.
HENRY C. PITNEY.
ROBERT S. GREEN.[3]
JOHN R. EMERY.
ALFRED REED.[1]

Supreme Court.

MERCER BEASLEY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

DAVID A. DEPUE.
BENNETT VAN SYCKEL.
WILLIAM J. MAGIE.
JOB H. LIPPINCOTT.
JONATHAN DIXON.
ALFRED REED.[1]
WILLIAM S. GUMMERE.
GEORGE C. LUDLOW.[2]

Prerogative Court.

ALEXANDER T. McGILL, ORDINARY.

VICE-ORDINARY.

ABRAHAM V. VAN FLEET.[3]

PENNSYLVANIA—Supreme Court.

JAMES P. STERRETT, CHIEF JUSTICE.

JUSTICES.

HENRY GREEN.
HENRY W. WILLIAMS.
J. BREWSTER McCOLLUM.
JAMES T. MITCHELL.
JOHN DEAN.
D. NEWLIN FELL.

RHODE ISLAND—Supreme Court.

CHARLES MATTESON, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

JOHN H. STINESS.
PARDON E. TILLINGHAST.
GEORGE A. WILBUR.
HORATIO ROGERS.
WILLIAM W. DOUGLAS.

VERMONT—Supreme Court.

JONATHAN ROSS, CHIEF JUDGE.

ASSISTANT JUDGES.

RUSSELL S. TAFT.
JOHN W. ROWELL.
JAMES M. TYLER.
LOVELAND MUNSON.
HENRY R. START.
LAFORREST H. THOMPSON.

[1] Appointed Vice-Chancellor June 4, 1895.
[2] Appointed June 18, 1895.
[3] Died May 4, 1895.
[4] Died Feb., 1895.
[5] Appointed March 28, 1895.
[6] Appointed May 10, 1895.

Digitized by Google

CASES REPORTED.

	Page
Acton v. State (Md.)	419
Acton v. State (Md.)	420
Adams v. Carey (N. J. Ch.)	600
Adams, Gum v. (Del. Super.)	895
Adams, Pemberton Bldg. & Loan Ass'n v. (N. J. Ch.)	280
Addeman v. Rice (R. I.)	429
Agricultural Ins. Co. of Watertown, N. Y., McGonigle v. (Pa.)	626
Allegheny County, Commonwealth v. (Pa.)	1061
Allegheny Valley R. Co., Ruppel v. (Pa.)	478
Allen v. Arnold (R. I.)	268
Allen v. Commissioners of Taxation for Bernards Tp. (N. J. Sup.)	219
Allen, Culp v. (Pa.)	93
American Forcite Powder Manuf'g Co. v. Locust Mountain Coal & Iron Co. (Pa.)	90
American Legion of Honor, Fischer v. (Pa.)	1089
American Union Tel. Co., City of Philadelphia v. (Pa.)	628
Amsden v. Atwood (Vt.)	448
Amsden v. Danielson (R. I.)	4
Anderson, Poole v. (Md.)	207
Annexation to Borough of Plymouth, In re (Pa.)	933
Appel, Baltimore Traction Co. v. (Md.)	964
Applegarth, State v. (Md.)	961
Arnault v. Arnault (N. J. Prerog.)	606
Arnold, Allen v. (R. I.)	268
Ashhurst v. Eastern Pennsylvania Phonograph Co. (Pa.)	116
Ashworth, Landis v., two cases (N. J. Sup.)	1017
Atlantic City R. Co., Fenderson v. (N. J. Err. & App.)	767
Atlas Nat. Bank of Chicago, Richardson v. (Pa.)	740
Atwood, Amsden v. (Vt.)	448
Auburn & Rush Poor Asylum, Great Bend Township Poor Dist. v. (Pa.)	628
Aurora Fire Ins. Co., McGonigle v. (Pa.)	875
Babbitt's Adm'rs, Boomhower v. (Vt.)	838
Badart v. Foulon (Md.)	513
Bailey v. City of Philadelphia (Pa.)	925
Bailie v. Bailie (Pa.)	246
Baird, Stockwell v. (Del. Super.)	811
Baker v. Guarantee Trust & Safe-Deposit Co. (N. J. Ch.)	174
Baker, Miller v. (Pa.)	121
Baldwin v. Taylor (Pa.)	250
Baldwin v. Town of Worcester (Vt.)	413
Balfour v. Russell (Pa.)	570
Baltimore Belt R. Co., Rieman v. (Md.)	444
Baltimore, C. & E. M. P. R. Co., President, etc., of Baltimore & F. Turnpike Road v. (Md.)	854
Baltimore Traction Co. v. Appel (Md.)	964
Baltimore Traction Co., Cooke v. (Md.)	327
Baltimore & E. S. R. Co. v. Spring (Md.)	208
Baltimore & F. Turnpike Road v. Baltimore, C. & E. M. P. R. Co. (Md.)	854
Baltimore & O. R. Co. v. Cain (Md.)	801
Baltimore & Y. Turnpike Co., City of Baltimore v. (Md.)	420
Barber v. James (R. I.)	264
Barber, Batchelder v. (Vt.)	293
Barker v. Fairchild (Pa.)	1102
Barker, Edgerly v. (N. H.)	900
Barner, Appeal of (Pa.)	1093
Barry v. Hill (Pa.)	126
Bash, Dougherty v. (Pa.)	729
Batchelder v. Barber (Vt.)	293
Baugh & Sons Co. v. Mitchell (Pa.)	341
Bauman v. Whiteley (N. J. Sup.)	982
Bayless, West Boundary Real-Estate Co. of Baltimore City v. (Md.)	442
Beakhurst v. Crumby (R. I.)	753
Beaumont v. Beaumont (Pa.)	336
Beaver v. Slear (Pa.)	1094
Beck v. Snyder (Pa.)	555
Becker's Estate, In re (Pa.)	95
Beckett Foundry & Machine Co., Columbia Rolling-Mill Co. v. (N. J. Err. & App.)	770
Beecher, Montgomery v. (N. J. Ch.)	451
Beekman v. Cottrell (N. J. Err. & App.)	29
Behler v. Daniels (R. I.)	582
Bell, Commonwealth v. (Pa.)	123
Bell, McKnight v. (Pa.)	942
Belloff, Lang v. (N. J. Ch.)	604
Benedict v. Lawrence (Vt.)	291
Bennetsch, Appeal of (Pa.)	337
Bennett's Ex'rs, Ethridge v. (Del. Super.)	813
Benscoter v. Long (Pa.)	863
Bergen, Haas v. (Pa.)	652
Bergen Neck R. Co. v. Point Breeze Ferry & Imp. Co. (N. J. Err. & App.)	724
Berks County v. Reading City Pass. R. Co. (Pa.)	474, 663
Betz, Mixel v. (Pa.)	1007
Bew, Hemsley v. (N. J. Ch.)	210
Binder, Peacock v. (N. J. Sup.)	215
Binkley, Crouse v. (Pa.)	551
Bird, Valentino v. (N. J. Sup.)	606
Bitting, City of Reading v. (Pa.)	359
Blackford v. Robinson (Md.)	448
Blanchard v. Bowers (Vt.)	848
Blue Mountain Manuf'g Co., Dale v. (Pa.)	633
Board of Chosen Freeholders of Mercer County, Murphy v. (N. J. Sup.)	229
Board of Education of Borough of Elmer, Thompson v. (N. J. Sup.)	168
Board of Education of Cranbury Tp. in Middlesex County, Chamberlain v. (N. J. Sup.)	1033
Board of Excise of City of Elizabeth, Decker v. (N. J. Sup.)	235
Board of Finance of Jersey City v. City of Jersey City (N. J. Err. & App.)	625
Board of Public Works of City of Trenton, McGovern v. (N. J. Sup.)	613
Board of Township Committee of Kearney Tp., Schefbauer v. (N. J. Sup.)	454
Bodge v. City of Philadelphia (Pa.)	728
Boley, Bradford v. (Pa.)	751
Bolles, Morris v. (Conn.)	538
Bolton v. Hey (Pa.)	1097
Bond, Appeal of (Pa.)	682
Bonitz, Dwyer v. (N. J. Ch.)	172
Bonn, Schweitzer v. (N. J. Ch.)	24
Bonnel, City of Newark v. (N. J. Err. & App.)	408
Boomhower v. Babbitt's Adm'rs (Vt.)	838
Borie, Kennedy v. (Pa.)	98
Borland, Merchants' & Miners' Transp. Co. v. (N. J. Ch.)	272
Borough of Bloomsburg, Ringrose v. (Pa.)	863
Borough of Columbus, Fee v. (Pa.)	1076
Borough of Darby, Lewis v. (Pa.)	335
Borough of Freeport, Philadelphia Co. v. (Pa.)	571
Borough of Rutherford, De Witt v. (N. J. Sup.)	228
Borough of Susquehanna Depot, Wellman v. (Pa.)	566
Borough of Wilbur v. Trenton Pass. R. Co. (N. J. Sup.)	238

Digitized by Google

	Page
Boston & M. R. Co., Magoon v. (Vt.)	156
Boucher, State v. (R. I.)	1058
Boud, Wilson v. (Pa.)	78
Bowers, Blanchard v. (Vt.)	848
Bowman, In re (Pa.)	932
Bowman, City of Philadelphia v. (Pa.)	142
Boyce, Fisher v. (Md.)	707
Boyer's Estate, In re (Pa.)	359
Bradbury v. City of Philadelphia (Pa.)	929
Bradbury v. Mutual Reserve Fund Life Ass'n (N. J. Ch.)	775
Bradford v. Boley (Pa.)	751
Bradford v. King (R. I.)	166
Bradley v. Irwin (Pa.)	261
Bradley v. Vernon (Pa.)	330
Bradley Curtis v. (Conn.)	591
Bradley's Estate, In re (Pa.)	96
Bradner v. Roffsell (N. J. Err. & App.)	387
Bredin v. Pittsburgh & W. R. Co. (Pa.)	39
Bremer's Sons, Labe v. (Pa.)	342
Brenniser, Talcott v. (Pa.)	574
Bridgman v. Town of Hardwick (Vt.)	33
Brightman, Trim v. (Pa.)	1071
Brill Co. v. City of Philadelphia (Pa.)	348
Brindley v. Lawton (N. J. Ch.)	394
Brown, Commonwealth Title Insurance & Trust Co. v. (Pa.)	205
Brown, Heller v. (N. J. Sup.)	168
Brown, Jones v. (Pa.)	647
Brown, Rockingham Bldg. Co. v. (N. H.)	23
Browning v. Kempton (N. J. Ch.)	390
Bryan, Cox v. (Md.)	447
Bryan, Cox v. (Md.)	852
Bryson v. Home for Disabled and Indigent Soldiers (Pa.)	1008
Buckhannon Bank of West Virginia, First Nat. Bank of Grafton v. (Md.)	302
Budd, Scudder v. (N. J. Err. & App.)	717
Bullard, Western Union Tel. Co. v. (Vt.)	286
Bullock v. Bullock (N. J. Sup.)	1024
Burgwin v. St. Clair Incline-Plane Co. (Pa.)	71
Burlingame, Rockingham Bldg. Co. v. (N. H.)	23
Burr v. Kase (Pa.)	954
Burrill v. Garst (R. I.)	436
Busch, City of McKeesport v. (Pa.)	49
Buzby v. Darnell (N. J. Err. & App.)	382
Byrne v. Schuyler Electric Manuf'g Co. (Conn.)	833
Byrnes, Fidelity Insurance, Trust & Safe-Deposit Co. v. (Pa.)	255
Cain, Baltimore & O. R. Co. v. (Md.)	801
Calandriello, Destefano v. (N. J. Sup.)	385
Camley, State v. (Vt.)	840
Campbell, Collins v. (R. I.)	832
Campbell, Kedward v. (Pa.)	114
Cannon, Jones v. (Del. Super.)	521
Carbondale Traction Co., May v. (Pa.)	667
Carey, Adams v. (N. J. Ch.)	600
Carey, Jones v. (Del. Super.)	976
Carmany, Appeal of (Pa.)	334
Carpenter, Thurber v. (R. I.)	5
Carroll v. Weaver (Conn.)	489
Carroll County, Tasker v. (N. H.)	14
Carter v. Wilds (Del. Super.)	715
Caryl, Chase v. (N. J. Sup.)	1024
Casler, Hulick v. (N. J. Sup.)	223
Cassidy v. Knapp (Pa.)	638
Cassidy, Scranton Lathe Turning Co. v. (Pa.)	734
Castree, Mershon v. (N. J. Sup.)	602
Caufield, City of Newark v. (N. J. Err. & App.)	409
Central Coal Dealers' Ass'n, Rhoads v. (Pa.)	79
Central R. Co. of New Jersey, Kearney v. (Pa.)	637
Chamberlain v. Board of Education of Cranbury Tp. in Middlesex County (N. J. Sup.)	1033
Chambers, Sullivan v. (R. I.)	167
Chapman, Reynolds v. (R. I.)	832
Chase v. Caryl (N. J. Sup.)	1024
Chase, Gillis v. (N. H.)	18
Chesapeake Guano Co. of Baltimore City, Classen v. (Md.)	808
Chew v. Perkins (Md.)	507
Church, Patton v. (Pa.)	1079
City Council of Pawtucket, Maroney v. (R. I.)	265
City of Annapolis, Revell v. (Md.)	695
City of Baltimore v. Keeley Institute of Maryland (Md.)	437
City of Baltimore v. President, etc., of Baltimore & Y. Turnpike Co. (Md.)	420
City of Baltimore v. Smith & Schwarz Brick Co. (Md.)	423
City of Baltimore, Kilpatrick v. (Md.)	805
City of Baltimore, Shanfelter v. (Md.)	439
City of Chester v. Eyre (Pa.)	634
City of Frostburgh, Cochrane v. (Md.)	703
City of Hoboken, Stewart v. (N. J. Sup.)	278
City of Jersey City, Board of Finance of Jersey City v. (N. J. Err. & App.)	625
City of Jersey City, United New Jersey Railroad & Canal Co. v. (N. J. Sup.)	1020
City of McKeesport v. Busch (Pa.)	49
City of Newark v. Bonnel (N. J. Err. & App.)	408
City of Newark v. Caufield (N. J. Err. & App.)	409
City of Newark v. Spaeth (N. J. Err. & App.)	409
City of Newark, Jackson v. (N. J. Ch.)	233
City of Newark, Morris v. (N. J. Err. & App.)	771
City of Newark, Mulcahy v. (N. J. Sup.)	226
City of Perth Amboy, Green v. (N. J. Sup.)	980
City of Philadelphia v. American Union Tel. Co. (Pa.)	628
City of Philadelphia v. Bowman (Pa.)	142
City of Philadelphia v. Kelly (Pa.)	47
City of Philadelphia v. Odd Fellows' Hall Ass'n (Pa.)	917
City of Philadelphia v. Rudderow (Pa.)	53
City of Philadelphia v. Schofield (Pa.)	119
City of Philadelphia, Bailey v. (Pa.)	925
City of Philadelphia, Bodge v. (Pa.)	728
City of Philadelphia, Bradbury v. (Pa.)	929
City of Philadelphia, Heidenwag v. (Pa.)	1063
City of Philadelphia, J. G. Brill Co. v. (Pa.)	348
City of Philadelphia, Warden v. (Pa.)	928
City of Reading v. Bitting (Pa.)	359
City of Reading v. Krause's Estate (Pa.)	366
City of Reading v. Reiner (Pa.)	357
Clark, In re (Conn.)	522
Clark v. State (N. J. Sup.)	979
Classen v. Chesapeake Guano Co. of Baltimore City (Md.)	808
Clearfield & M. R. Co., Hall v. (Pa.)	940
Cleveland Mach. Works v. Lang (N. H.)	20
Clewell, Ford v. (Del. Super.)	715
Cobb, Appeal of (Pa.)	1092
Cochran, Hanson v. (Del. Super.)	880
Cochran, Williams v. (Del. Super.)	1050
Cochrane v. City of Frostburgh (Md.)	703
Coffrin v. Cole (Vt.)	313
Coggeshall v. Home for Friendless Children (R. I.)	694
Colburn, Matchette v. (Pa.)	74
Cole, Coffrin v. (Vt.)	313
Collins v. Campbell (R. I.)	832
Collins v. Lavelle (R. I.)	434
Collins v. Lynch (Pa.)	921
Columbia Rolling-Mill Co. v. Beckett Foundry & Machine Co. (N. J. Err. & App.)	770
Colvin v. Pitney (N. J. Err. & App.)	382
Colvin, Young v. (Pa.)	1094
Commissioners of Taxation for Bernards Tp., Allen v. (N. J. Sup.)	219
Commissioners of Taxation for Bernards Tp., Post v. (N. J. Sup.)	219
Commonwealth v. Allegheny County (Pa.)	1061
Commonwealth v. Bell (Pa.)	123
Commonwealth v. Cook (Pa.)	56
Commonwealth v. Degitz (Pa.)	635
Commonwealth v. Freeman (Pa.)	115
Commonwealth v. Green (Pa.)	1007
Commonwealth v. Karpowski (Pa.)	572

Digitized by Google

	Page
Commonwealth v. Latta (Pa.)	1007
Commonwealth v. Mann (Pa.)	1003
Commonwealth v. Meanor (Pa.)	552
Commonwealth v. Merchants' & Manufacturers' Nat. Bank of Pittsburgh (Pa.)	1065
Commonwealth v. Pittsburgh & W. R. Co. (Pa.)	202
Commonwealth v. Ramsay (Pa.)	345
Commonwealth v. Rooney (Pa.)	562
Commonwealth v. Schnelpp (Pa.)	118
Commonwealth v. Shields (Pa.)	1007
Commonwealth v. Weber (Pa.)	481
Commonwealth v. Woodley (Pa.)	202
Commonwealth v. Wunch (Pa.)	551
Commonwealth Title Insurance & Trust Co., Appeal of (Pa.)	681
Commonwealth Title Insurance & Trust Co. v. Brown (Pa.)	205
Commonwealth Title Insurance & Trust Co., Fidelity Insurance, Trust & Safe-Deposit Co. v. (Pa.)	344
Cone, Security Co. of Hartford v. (Conn.)	7
Congregation of Sons of Abraham v. Gerbert (N. J. Err. & App.)	383
Connell v. Shryock (Pa.)	731
Connellsville Water Co., Hogg v. (Pa.)	1010
Conner v. Reardon (Del. Super.)	878
Conover v. Parker (N. J. Sup.)	769
Conshohocken Tube Co. v. Iron Car Equipment Co. (Pa.)	934
Conshohocken Tube Co. v. Iron Car Equipment Co. (Pa.)	949
Consolidated Traction Co., Dodd v. (N. J. Sup.)	980
Cook, Commonwealth v. (Pa.)	56
Cooke v. Baltimore Traction Co. (Md.)	327
Coombs v. Patterson (R. I.)	428
Cooper v. Cooper (Del. Err. & App.)	1043
Coray, Young v. (Pa.)	856
Corse, Ketchum v. (Conn.)	486
Cottrell, Beekman v. (N. J. Err. & App.)	29
Cox v. Bryan (Md.)	447
Cox v. Bryan (Md.)	852
Cox v. Truitt (N. J. Sup.)	168
Cox's Estate, In re (Pa.)	747
Cramer v. Water Com'rs of New Brunswick (N. J. Sup.)	384
Crampton v. Seymour (Vt.)	889
Cridland, McNeile v. (Pa.)	939
Crockett v. Davis (Md.)	710
Crook, Wagner v. (Pa.)	576
Crosier v. Stillson (Vt.)	779
Crouse v. Binkley (Pa.)	551
Crumby, Beakhurst v. (R. I.)	753
Crusins, State v. (N. J. Sup.)	235
Culp v. Allen (Pa.)	93
Culver v. Town of Fair Haven (Vt.)	143
Cumberland & P. R. Co., Frostburg Min. Co. v. (Md.)	698
Cummins v. Cummins (Del. Super.)	816
Cunningham, Shattuck v. (Pa.)	136
Curtis v. Bradley (Conn.)	591
Curtis, Martin v. (Vt.)	296
Cutler v. Dix (Vt.)	780
Dale v. Blue Mountain Manuf'g Co. (Pa.)	633
Daly v. Ely (N. J. Ch.)	396
Dampman v. Pennsylvania R. Co. (Pa.)	244
Danbech, New Jersey Traction Co. v. (N. J. Sup.)	1038
Daniels, Behler v. (R. I.)	582
Danielson, Amsden v. (R. I.)	4
Darnell, Buzby v. (N. J. Err. & App.)	382
Darnell, Engle v. (N. J. Err. & App.)	383
Davenport Co. v. Pennsylvania R. Co. (Pa.)	245
Davidson v. Young (Pa.)	557
Davis v. Davis (N. J. Sup.)	218
Davis, Crockett v. (Md.)	710
Davis, Kinsloe v. (Pa.)	934
Davis, Kinsloe v. (Pa.)	935
Dear, Pennypacker v. (Pa.)	89
Deaven, Felty v. (Pa.)	333
Dech, Stocker v. (Pa.)	555
Decker v. Board of Excise of City of Elizabeth (N. J. Sup.)	235
Deering & Co., Hull v. (Md.)	416
De Forest, Monroe v. (N. J. Ch.)	773
Degitz, Commonwealth v. (Pa.)	635
Delaware, L. & W. R. Co., Hardy v. (N. J. Sup.)	281
Delaware & A. Telegraph & Telephone Co., State v. (Del. Super.)	714
Delaware & H. Canal Co., Goodman v. (Pa.)	670
Denison v. Foster (R. I.)	894
Dennis v. Pittsburgh & C. S. R. Co. (Pa.)	52
Derickson, Wilcox v. (Pa.)	1080
Destefano v. Calandriello (N. J. Sup.)	385
Devecmon, Shaw v. (Md.)	709
Devereux, Stafford v. (Pa.)	87
De Witt v. Borough of Rutherford (N. J. Sup.)	228
De Wolf v. Middleton (R. I.)	271
Dickson, Gandy v. (Pa.)	127
Dix, Cutler v. (Vt.)	780
Dock v. Schlichter Jute Cordage Co. (Pa.)	656
Dodd v. Consolidated Traction Co. (N. J. Sup.)	980
Dodd v. Fisher (N. J. Err. & App.)	392
Dodge v. Hogan (R. I.)	268
Dodge v. Hogan (R. I.)	1059
Dodge v. South Royalton Graded School Dist. (Vt.)	784
Dole, Hickey v. (N. H.)	900
Donnelly, Wilson v. (R. I.)	966
Doolittle v. Willet (N. J. Err. & App.)	385
Dorner, Saake v. (Pa.)	574
Dougherty v. Bash (Pa.)	729
Dow v. Electric Co. (N. H.)	22
Dowdall v. O'Rourke (Pa.)	749
Dowling v. Merchants' Ins. Co. of Newark (Pa.)	1087
Duffield, Appeal of (Pa.)	1070
Duffy v. Webster (R. I.)	433
Dungan v. Read (Pa.)	639
Dunham v. Marsh (N. J. Err. & App.)	619
Durr v. Replogle (Pa.)	645
Dwelling-House Ins. Co., Renninger v. (Pa.)	1083
Dwyer v. Bonitz (N. J. Ch.)	172
Eastern Pennsylvania Phonograph Co., Ashhurst v. (Pa.)	116
Easton Transit Co., Smith v. (Pa.)	557
Eaton v. Robinson (R. I.)	1058
Eaton, Logan v. (N. H.)	13
Eby v. Lebanon County (Pa.)	332
Eddy v. Granger (R. I.)	831
Eddy, Murphy v. (R. I.)	435
Eddy, White v. (R. I.)	823
Edgerly v. Barker (N. H.)	900
Edison General Electric Co. v. Thackara Manuf'g Co. (Pa.)	856
Edison United Phonograph Co. v. State Board of Assessors (N. J. Sup.)	1019
Ehret v. Gunn (Pa.)	200
Elder, Smith v. (Pa.)	735
Electric Co., Dow v. (N. H.)	22
Elk County Bank v. Ridgway Bank (Pa.)	1007
Elk County, St. Mary's Gas Co. v. (Pa.)	1077
Elliott v. Newport St. R. Co. (R. I.)	694
Ely, Daly v. (N. J. Ch.)	396
Emsley v. Young (R. I.)	692
England v. Forbes (Del. Super.)	895
Engle v. Darnell (N. J. Err. & App.)	383
Engles' Estate, In re (Pa.)	76
Engles' Estate, In re (Pa.)	681
Enright, In re (Vt.)	786
Equitable Aid Union, Hale v. (Pa.)	1066
Ervin, Smith v. (Pa.)	1067
Estabrooks, Huse v. (Vt.)	293
Estey, Vittum v. (Vt.)	144
Ethridge v. Bennett's Ex'rs (Del. Super.)	813
Evans v. McCormick (Pa.)	563
Evans v. Smith (Pa.)	346
Everly v. Harrison (Pa.)	668
Ewins, Leavens v. (Vt.)	297
Excelsior Electric Co., Sweet v. (N. J. Err. & App.)	721
Eyre, City of Chester v. (Pa.)	634
Fairchild, Barker v. (Pa.)	1102

Digitized by Google

	Page
Farmers' Bank v. Tatnall (Del. Super.)	879
Farmers' Mut. Fire Ins. Co. of Dug Hill, Schaeffer v. (Md.)	317
Farrow v. Springer (N. J. Sup.)	215
Fassett, Appeal of (Pa.)	686
Fayette County, Wilhelm v. (Pa.)	1009
Fee v. Borough of Columbus (Pa.)	1076
Feeney v. Rueger (N. J. Sup.)	217
Felix, Frame v. (Pa.)	375
Felty v. Deaven (Pa.)	333
Fenderson v. Atlantic City R. Co. (N. J. Err. & App.)	767
Fenner v. Luzerne County (Pa.)	862
Fennimore, Flinn v. (Del. Super.)	586
Ferguson, Appeal of (Pa.)	733
Ferree v. Wyckoff (Pa.)	1102
Ferree, Wyckoff v. (Pa.)	1101
Fick, Hartman v. (Pa.)	342
Fidelity Insurance, Trust & Safe-Deposit Co. v. Byrnes (Pa.)	255
Fidelity Insurance, Trust & Safe-Deposit Co. v. Commonwealth Title Insurance & Trust Co. (Pa.)	344
Finch, Lang v. (Pa.)	84
First Baptist Church of Hoboken v. Syms (N. J. Err. & App.)	717
First Nat. Bank of Grafton v. Buckhannon Bank of West Virginia (Md.)	302
First Nat. Bank of Grafton, Riley v. (Md.)	585
First Nat. Bank of Jamestown v. Scofield (Pa.)	1012
First Nat. Bank of Jamestown v. Scofield (Pa.)	1016
Firth v. Hamill (Pa.)	676
Fisher, In re (R. I.)	579
Fischer v. American Legion of Honor (Pa.)	1089
Fisher v. Boyce (Md.)	707
Fisher, Dodd v. (N. J. Err. & App.)	392
Fitzwater v. Roberts (Pa.)	204
Flinn v. Fennimore (Del. Super.)	586
Flynn v. Flynn (N. J. Ch.)	30
Foran, Kyte v. (Pa.)	575
Forbes, England v. (Del. Super.)	895
Ford v. Clewell (Del. Super.)	715
Foster, Denison v. (R. I.)	894
Foster's Ex'x v. Stone (Vt.)	841
Foulon, Badart v. (Md.)	513
Fountain v. Linn (N. J. Sup.)	982
Fournier v. Wilson (R. I.)	306
Fox v. Merfeld (Md.)	583
Frack v. Gerber (Pa.)	640
Frame v. Felix (Pa.)	375
Frank v. Morehead (N. J. Ch.)	1016
Frear, Roat v. (Pa.)	861
Freedman v. Sandknop (N. J. Ch.)	232
Freeman, Commonwealth v. (Pa.)	115
Freeny v. Freeny (Md.)	304
Frick Coke Co., Lewey v. (Pa.)	261
Fritz v. Jenner (Pa.)	80
Frostburg Min. Co. v. Cumberland & P. R. Co. (Md.)	698
Frutchey, Lutz v. (Pa.)	638
Fulton v. Town of Dover (Del. Err. & App.)	974
Gackenbach v. Lehigh County (Pa.)	142
Gaffney v. J. O. Inman Manuf'g Co. (R. I.)	6
Gandy v. Dickson (Pa.)	127
Gardner, New Jersey Traction Co. v. (N. J. Err. & App.)	893
Garrison v. Hill (Md.)	794
Garst, Burrill v. (R. I.)	436
Geiger v. President, etc., of Perkiomen & R. Turnpike Road (Pa.)	918
Gennert v. Wuestner (N. J. Ch.)	609
Gentelle, Gnecco v. (N. J. Ch.)	396
Genz v. State (N. J. Sup.)	1037
Gerber, Frack v. (Pa.)	640
Gerbert, Congregation of Sons of Abraham v. (N. J. Err. & App.)	383
Gerli v. Poidebard Silk Manuf'g Co. (N. J. Err. & App.)	401
Gilchrist v. Strong (Pa.)	931
Gillis v. Chase (N. H.)	18
Gilmore, Sommer v. (Pa.)	884
Gilton v. Hestonville, M. & F. P. R. Co. (Pa.)	249
Glassmire, Patterson v. (Pa.)	40
Gnecco v. Gentelle (N. J. Ch.)	396
Good v. Rogers (R. I.)	264
Goodman v. Delaware & H. Canal Co. (Pa.)	670
Goodwin Gas-Stove & Meter Co.'s Estate, In re (Pa.)	91
Gorgas' Estate, In re (Pa.)	86
Gorham, State v. (Vt.)	845
Gowen v. Pierson (Pa.)	83
Grabrues v. Klein (Md.)	504
Granger, Eddy v. (R. I.)	831
Grant v. Watson (N. J. Sup.)	1040
Gray, Hamilton v. (Vt.)	315
Great Bend Township Poor Dist. v. Auburn and Rush Poor Asylum (Pa.)	628
Green v. City of Perth Amboy (N. J. Sup.)	980
Green v. Skoqvist (N. J. Sup.)	228
Green, Commonwealth v. (Pa.)	1007
Greenwich Tp., Trexler v. (Pa.)	1090
Grier v. Simpson (Del. Super.)	587
Griffin v. Mulley (Pa.)	664
Griffin v. Wanser (N. J. Sup.)	222
Griffith, Middleton v. (N. J. Err. & App.)	405
Gross v. Sheeler (Del. Super.)	812
Guarantee Trust & Safe-Deposit Co., Baker v. (N. J. Ch.)	174
Gum v. Adams (Del. Super.)	895
Gunby v. Porter (Md.)	324
Gunn, Ehret v. (Pa.)	200
Haas v. Bergen (Pa.)	652
Hain's Estate, In re (Pa.)	337
Hale v. Equitable Aid Union (Pa.)	1066
Hall v. Clearfield & M. R. Co. (Pa.)	940
Hambleton's Estate, In re (Pa.)	258
Hamill, Firth v. (Pa.)	676
Hamilton v. Gray (Vt.)	315
Handy's Estate, In re (Pa.)	983
Handy's Estate, In re (Pa.)	986
Hanson v. Cochran (Del. Super.)	880
Hardy v. Delaware, L. & W. R. Co. (N. J. Sup.)	281
Harker's Estate, In re (Pa.)	553
Harker's Estate, In re (Pa.)	554
Harrigan, State v. (Del. O. & T.)	1052
Harrison, Everly v. (Pa.)	668
Harrison, Huston v. (Pa.)	987
Hart v. Hart (Pa.)	352
Hartley v. Millard (Pa.)	641
Hartman v. Fick (Pa.)	342
Haught v. Irwin (Pa.)	260
Hawkins, Mathewson v. (R. I.)	430
H. C. Frick Coke Co., Lewey v. (Pa.)	261
Heidenwag v. City of Philadelphia (Pa.)	1063
Helden v. Hellen (Md.)	506
Hellen, Helden v. (Md.)	506
Heller v. Brown (N. J. Sup.)	168
Hemsley v. Bew (N. J. Ch.)	210
Henry, Norton v. (Vt.)	787
Henry, Romberger v. (Pa.)	634
Hepburn v. Spotts (Pa.)	1083
Hestonville, M. & F. P. R. Co., Gilton v. (Pa.)	249
Hewitt, Trumbull v. (Conn.)	492
Hey, Bolton v. (Pa.)	1097
Hickey v. Dole (N. H.)	900
Hickok v. Still (Pa.)	1100
Hiester v. Yerger (Pa.)	122
Hill, Barry v. (Pa.)	126
Hill, Garrison v. (Md.)	794
Hill, Schultze v. (R. I.)	165
Hillside Coal & Iron Co., Neilson v. (Pa.)	1091
Hincks, Seeley v. (Conn.)	533
Hoffman v. Shupp (Md.)	505
Hogan, Dodge v. (R. I.)	268
Hogan, Dodge v. (R. I.)	1059
Hogg v. Connellsville Water Co. (Pa.)	1010
Holden v. Wells (R. I.)	265
Holmes v. Seashore Electric R. Co. (N. J. Sup.)	227
Holt v. Tennallytown & R. R. Co. (Md.)	809
Home for Disabled and Indigent Soldiers, Bryson v. (Pa.)	1008

Digitized by Google

	Page
Home for Friendless Children, Coggeshall v. (R. I.)	694
Home Ins. Co., Tobyhanna & Lehigh Lumber Co. v. (Pa.)	564
Home Life Ins. Co. v. Selig (Md.)	503
Hooper v. Hooper (Md.)	508
Hopkins, Swerdferger v. (Vt.)	153
Hopson, Appeal of (Conn.)	531
Horn, Richardson v. (Del. Super.)	896
Horn, Smith v. (Pa.)	1078
Horowitz v. Weidner (N. J. Ch.)	771
Horton, Mason v. (Vt.)	291
Hostetter v. United Brethren Mut. Aid Soc. (Pa.)	333
Howard, Kenney v. (Vt.)	850
Howell, Reynolds v. (Del. Err. & App.)	875
Howett v. Philadelphia, W. & B. R. Co. (Pa.)	336
Huey, Taylor v. (Pa.)	199
Hughes v. Keichline (Pa.)	887
Hughes, Pattison v. (Md.)	320
Hulick v. Casler (N. J. Sup.)	223
Hull v. William Deering & Co. (Md.)	416
Hunter, McTwiggan v. (R. I.)	693
Huntingdon & B. T. R. Co., Port v. (Pa.)	950
Huse v. Estabrooks (Vt.)	293
Huston v. Harrison (Pa.)	987
Huston's Estate, In re (Pa.)	553
Hutchins v. Pearce (Md.)	501
Hutchinson v. Woodruff (N. J. Sup.)	224
Incorporation of Borough of Prospect Park, In re (Pa.)	254
Indiana Bicycle Co., Tradesmen's Nat. Bank v. (Pa.)	337
Ingebregtsen v. Nord Deutscher Lloyd Steamship Co. (N. J. Err. & App.)	619
Ingersoll's Estate, In re (Pa.)	858
Ingersoll's Estate, In re (Pa.)	859
Ingersoll's Estate, In re (Pa.)	860
Inhabitants of City of Trenton, Inhabitants of Ewing Tp. v. (N. J. Sup.)	223
Inhabitants of City of Trenton, Wilson v. (N. J. Err. & App.)	775
Inhabitants of Ewing Tp. v. Inhabitants of City of Trenton (N. J. Sup.)	223
Inhabitants of Township of East Orange, Newark Pass. R. Co. v. (N. J. Ch.)	722
Inman Manuf'g Co., Gaffney v. (R. I.)	6
Insurance Co. of North America, Martin v. (N. J. Sup.)	213
Inter-County St. R. Co., Lehigh Coal & Nav. Co. v. (Pa.)	471
Inter-County St. R. Co., McMichael v. (Pa.)	477
Inter-County St. R. Co., Tamaqua & L. St. R. Co. v. (Pa.)	473
Inter-County St. R. Co., Thomas v. (Pa.)	476
Iron Car Equipment Co., Conshohocken Tube Co. v. (Pa.)	934
Iron Car Equipment Co., Conshohocken Tube Co. v. (Pa.)	949
Irwin, Bradley v. (Pa.)	261
Irwin, Haught v. (Pa.)	260
Isaac, Philadelphia Trust, Safe-Deposit & Insurance Co. v. (Pa.)	651
Jackson v. City of Newark (N. J. Ch.)	233
James, Barber v. (R. I.)	264
Jamison v. McWhorter (Del. Err. & App.)	517
Jenner, Fritz v. (Pa.)	80
Jermyn, Pennsylvania State Agricultural Soc. v. (Pa.)	660
Jernee v. Jernee (N. J. Ch.)	716
Jewett, Philler v. (Pa.)	204
J. G. Brill Co. v. City of Philadelphia (Pa.)	348
Johnson v. Kelley (Vt.)	849
Johnson, Ogontz Land & Improvement Co. v. (Pa.)	1008
Johnson, Platt v. (Pa.)	935
Johnson's License, In re (Pa.)	203
J. O. Inman Manuf'g Co., Gaffney v. (R. I.)	6
Jones v. Brown (Pa.)	647
Jones v. Cannon (Del. Super.)	521
Jones v. Carey (Del. Super.)	976
Jones, Nickols v. (Pa.)	329
Jordan v. Peckham (R. I.)	305
Kane v. Moore (Pa.)	631
Karpowski, Commonwealth v. (Pa.)	572
Kase, Burr v. (Pa.)	954
Kean v. Union Water Co. (N. J. Err. & App.)	282
Kearney v. Central R. Co. of New Jersey (Pa.)	637
Kedward v. Campbell (Pa.)	114
Keeler, Philler v. (Pa.)	205
Keeley Institute of Maryland, City of Baltimore v. (Md.)	437
Keichline, Hughes v. (Pa.)	887
Keiley v. Turner (Md.)	700
Kelley, Johnson v. (Vt.)	849
Kelly, City of Philadelphia v. (Pa.)	47
Kempton, Browning v. (N. J. Ch.)	380
Kennedy v. Borie (Pa.)	98
Kenney v. Howard (Vt.)	850
Ketchum v. Corse (Conn.)	486
Kilpatrick v. City of Baltimore (Md.)	805
Kimball, Lavelle v. (R. I.)	166
King, Bradford v. (R. I.)	166
King, Sargent v. (Vt.)	781
Kinsloe v. Davis (Pa.)	934
Kinsloe v. Davis (Pa.)	935
Kitby v. State (N. J. Sup.)	213
Klein, Grabrues v. (Md.)	504
Kline, Lender v. (Pa.)	550
Knapp, Cassidy v. (Pa.)	638
Knight's Estate, In re (Pa.)	682
Knowles Loom Works v. Vacher (N. J. Sup.)	306
Koenig v. Smith (N. J. Sup.)	979
Koller, Appeal of (Pa.)	353
Krause's Estate, City of Reading v. (Pa.)	366
Kuehne, Appeal of (Pa.)	95
Kugel v. Painter (Pa.)	338
Kuser v. Wright (N. J. Err. & App.)	397
Kyte v. Foran (Pa.)	575
Labe v. Lewis Bremer's Sons (Pa.)	342
Lackawanna Iron & Coal Co., Scranton Gas & Water Co. v. (Pa.)	484
Ladd v. Town of Grand Isle (Vt.)	34
Laird v. Pittsburgh Traction Co. (Pa.)	51
Lake Roland El. R. Co. v. McKewen (Md.)	797
Lamborn, Appeal of (Pa.)	258
Landis v. Ashworth, two cases (N. J. Sup.)	1017
Landis v. Sea Isle City Hotel Co. (N. J. Ch.)	755
Lane v. Nelson (Pa.)	864
Lane v. Scagel (Vt.)	289
Lang v. Belloff (N. J. Ch.)	604
Lang v. Finch (Pa.)	84
Lang, Cleveland Mach. Works v. (N. H.)	20
Langhammer v. Munter (Md.)	300
Larned, Appeal of (Pa.)	983
Latrobe, State v. (Md.)	788
Latta, Commonwealth v. (Pa.)	1007
Lavelle v. Kimball (R. I.)	166
Lavelle, Collins v. (R. I.)	434
Lawrence, Benedict v. (Vt.)	291
Lawson v. Nicholson (N. J. Err. & App.)	386
Lawton, Brindley v. (N. J. Ch.)	394
Leach, Parker v. (N. H.)	19
Leach, Robinson v. (Vt.)	32
Leavens v. Ewins (Vt.)	297
Lebanon County, Eby v. (Pa.)	332
Lebanon Trust & Safe-Deposit Bank's Estate, In re (Pa.)	334
Lebanon & A. St. R. Co., Yingst v. (Pa.)	687
Lehigh Coal & Nav. Co. v. Inter-County St. R. Co. (Pa.)	471
Lehigh County, Gackenbach v. (Pa.)	142
Lehlbach, Ex parte (N. J. Ch.)	396
Leighton v. Ossipee School Dist. (N. H.)	899
Lender v. Kline (Pa.)	550
Leonard's Adm'r v. Leonard's Ex'r (Vt.)	783
Leonard's Ex'r, Leonard's Adm'r v. (Vt.)	783
Leslie v. Leslie (N. J. Ch.)	170
Leslie v. Leslie (N. J. Err. & App.)	724
Lewey v. H. C. Frick Coke Co. (Pa.)	261
Lewis v. Borough of Darby (Pa.)	335
Lewis, Mack v. (Vt.)	888

Digitized by Google

	Page
Lewis Bremer's Sons, Labe v. (Pa.)	342
Lindenberger, Appeal of (Pa.)	860
Linn, Fountain v. (N. J. Sup.)	982
Lippincott, McNeal Pipe & Foundry Co. v. (N. J. Sup.)	399
Lisiewski, Schmid v. (N. J. Err. & App.)	603
Livingood's Estate, In re (Pa.)	550
Lloyd v. Town of Fair Haven (Vt.)	164
Locust Mountain Coal & Iron Co., American Forcite Powder Manuf'g Co. v. (Pa.)	90
Loeser's Estate, In re (Pa.)	732
Logan v. Eaton (N. H.)	13
Long, Benscoter v. (Pa.)	863
Long's Estate, In re (Pa.)	1093
Ludlow v. Strong (N. J. Ch.)	409
Lukens, Unruh v. (Pa.)	110
Lutz v. Frutchey (Pa.)	638
Luzerne County, Fenner v. (Pa.)	862
Lynch, Collins v. (Pa.)	921
McAuliffe, Vogel v. (R. I.)	1
McCadden, Restein v. (Pa.)	99
McCaulley, Rice v. (Del. Err. & App.)	240
McConaghy v. Pemberton (Pa.)	996
McCormick, McGlade v. (N. J. Err. & App.)	460
McElroy, Municipal Court of City of Providence v. (R. I.)	435
McGlade v. McCormick (N. J. Err. & App.)	460
McGonigle v. Agricultural Ins. Co. of Watertown, N. Y. (Pa.)	626
McGonigle v. Aurora Fire Ins. Co. (Pa.)	875
McGonigle v. Susquehanna Mut. Fire Ins. Co. (Pa.)	868
McGovern v. Board of Public Works of City of Trenton (N. J. Sup.)	613
Mack v. Lewis (Vt.)	888
McKewen, Lake Roland El. R. Co. v. (Md.)	797
McKnight v. Bell (Pa.)	942
Mack Paving Co. v. Young (Pa.)	85
McMichael v. Inter-County St. R. Co. (Pa.)	477
McNeal v. Rebman (Pa.)	1002
McNeal Pipe & Foundry Co. v. Lippincott (N. J. Sup.)	399
McNeilan's Estate, In re (Pa.)	727
McNeile v. Cridland (Pa.)	939
Macomber v. Macomber (R. I.)	753
McCormick, Evans v. (Pa.)	563
McTague, Sea Isle City Lot & Building Ass'n No. 3 v. (N. J. Err. & App.)	727
McTwiggan v. Hunter (R. I.)	693
McWhorter, Jamison v. (Del. Err. & App.)	517
Madden, Appeal of (Pa.)	1012
Magoon v. Boston & M. R. Co. (Vt.)	156
Main, Mish v. (Md.)	799
Manchester & N. W. R. R., Northern R. R. v. (N. H.)	17
Mann, Commonwealth v. (Pa.)	1003
Marean v. New York, S. & W. R. Co. (Pa.)	562
Marlor v. Philadelphia, W. & B. R. Co. (Pa.)	255
Maroney v. City Council of Pawtucket (R. I.)	265
Marsden's Estate, In re (Pa.)	46
Marsh, Dunham v. (N. J. Err. & App.)	619
Martin v. Curtis (Vt.)	296
Martin v. Insurance Co. of North America (N. J. Sup.)	213
Martling v. Martling (N. J. Ch.)	27
Mason v. Horton (Vt.)	291
Mason v. Wheeler (R. I.)	426
Mason Fruit-Jar Co. v. Paine (Pa.)	98
Matchette v. Colburn (Pa.)	74
Mathews v. Smith (Del. Super.)	879
Mathewson v. Hawkins (R. I.)	430
Maury, Appeal of (Pa.)	859
May v. Carbondale Traction Co. (Pa.)	667
Meanor, Commonwealth v. (Pa.)	552
Merchants' Ins. Co. of Newark, Dowling v. (Pa.)	1087
Merchants' & Manufacturers' Nat. Bank of Pittsburgh, Commonwealth v. (Pa.)	1065
Merchants' & Miners' Transp. Co. v. Borland (N. J. Ch.)	272
Merfeld, Fox v. (Md.)	583
Mershon v. Castree (N. J. Sup.)	602
Mershon v. Williams (N. J. Ch.)	778
Metalline Land Co. of Lake Superior, Morris v. (Pa.)	114
Meyers v. Schuman (N. J. Ch.)	460
Middleton v. Griffith (N. J. Err. & App.)	405
Middleton, De Wolf v. (R. I.)	271
Middleton, Pennsylvania R. Co. v. (N. J. Err. & App.)	616
Millard, Hartley v. (Pa.)	641
Miller v. Baker (Pa.)	121
Miller v. Teeter (N. J. Ch.)	394
Miller's Estate, In re (Pa.)	58
Mills, Stafford v. (N. J. Sup.)	1023
Mish v. Main (Md.)	799
Mitchell v. Pittsburgh, Ft. W. & C. R. Co. (Pa.)	67
Mitchell, Baugh & Sons Co. v. (Pa.)	341
Mixel v. Betz (Pa.)	1007
Monongahela Water Co., St. Clair School Dist. v. (Pa.)	71
Monroe v. De Forest (N. J. Ch.)	773
Montgomery v. Beecher (N. J. Ch.)	451
Montgomery v. Phillips (N. J. Err. & App.)	622
Montgomery County Pass. R. Co., Pennsylvania R. Co. v. (Pa.)	468
Moore v. Pennsylvania R. Co. (Pa.)	734
Moore, Kane v. (Pa.)	631
Moore, Sewell v. (Pa.)	370
Morehead, Frank v. (N. J. Ch.)	1016
Morgan v. Morgan (Pa.)	130
Morris v. Bolles (Conn.)	538
Morris v. City of Newark (N. J. Err. & App.)	771
Morris v. Metalline Land Co. of Lake Superior (Pa.)	114
Morris & E. R. Co. v. Newark Pass. R. Co. (N. J. Err. & App.)	383
Mulcahy v. City of Newark (N. J. Sup.)	226
Mulholland v. Wood (Pa.)	248
Mulley, Griffin v. (Pa.)	664
Mumford v. Weaver (R. I.)	1
Mundy v. Strong (N. J. Err. & App.)	611
Municipal Court of City of Providence v. McElroy (R. I.)	435
Munter, Langhammer v. (Md.)	300
Murphy v. Board of Chosen Freeholders of Mercer County (N. J. Sup.)	229
Murphy v. Eddy (R. I.)	435
Mutual Reserve Fund Life Ass'n, Bradbury v. (N. J. Ch.)	775
Nathanson v. Spitz (R. I.)	690
National Bank of The Republic, Appeal of (Pa.)	91
National Docks & N. J. J. Connecting R. Co. v. Pennsylvania R. Co. (N. J. Sup.)	462
National Docks & N. J. Junction Connecting Railroad Co., United New Jersey Railroad & Canal Co. v. (N. J. Sup.)	981
Neal v. Thornton (Vt.)	296
Neilson v. Hillside Coal & Iron Co. (Pa.)	1091
Nelson, Lane v. (Pa.)	864
Newark Pass. R. Co. v. Inhabitants of Township of East Orange (N. J. Ch.)	722
Newark Pass. R. Co., Morris & E. R. Co. v. (N. J. Err. & App.)	383
New Haven Steamboat Co., Sargent & Co. v. (Conn.)	543
New Jersey Traction Co. v. Danbech (N. J. Sup.)	1038
New Jersey Traction Co. v. Gardner (N. J. Err. & App.)	893
Newport St. R. Co., Elliott v. (R. I.)	694
Newton v. Town of Waterford (Vt.)	782
New York Cent. & H. R. R. Co., Plummer v. (Pa.)	887
New York, S. & W. R. Co., Marean v. (Pa.)	562
Niantic Mills Co. v. Riverside & Oswego Mills (R. I.)	432
Nicholson, Lawson v. (N. J. Err. & App.)	386
Nickols v. Jones (Pa.)	329
Nord Deutscher Lloyd Steamship Co., Ingebregtsen v. (N. J. Err. & App.)	619

Digitized by Google

Page

Northern R. R. v. Manchester & N. W. R. R. (N. H.) 17
Norton v. Henry (Vt.) 787
Norton's Adm'r v. Perkins (Vt.) 148

Odd Fellows' Hall Ass'n, City of Philadelphia v. (Pa.) 917
Oesterle, Appeal of (Pa.) 254
Ogontz Land & Improvement Co. v. Johnson (Pa.) 1008
Opening of Pringle St. in Kingston Borough, In re (Pa.) 948
O'Rourke, Dowdall v. (Pa.) 749
Ossipee School Dist., Leighton v. (N. H.) .. 899
Ott v. Sweatman (Pa.) 102
Overseers of Poor of Borough of Bellefonte v. Somerset County Poor Dist. (Pa.) 1086

Paddock v. Potter (Vt.) 784
Paine, Mason Fruit-Jar Co. v. (Pa.) 98
Painter, Kugel v. (Pa.) 338
Paist, In re (Pa.) 256
Palethorp v. Palethorp (Pa.) 917
Palethorp's Estate, In re (Pa.) 885
Parker v. Leach (N. H.) 19
Parker, Conover v. (N. J. Sup.) 769
Parker, State v. (N. J. Sup.) 214
Patterson v. Glassmire (Pa.) 40
Patterson, Coombs v. (R. I.) 428
Patterson, Shellenberger v. (Pa.) 943
Pattison v. Hughes (Md.) 320
Patton v. Church (Pa.) 1079
Payne v. School Dist. of Borough of Coudersport (Pa.) 1072
Peacock v. Binder (N. J. Sup.) 215
Pearce, Hutchins v. (Md.) 501
Pearson v. Wartman (Md.) 446
Peckham, Jordan v. (R. I.) 305
Pedrick, Pile v. (Pa.) 646
Pedrick, Pile v. (Pa.) 647
Pemberton, McConaghy v. (Pa.) 996
Pemberton Bldg. & Loan Ass'n v. Adams (N. J. Ch.) 280
Pennsylvania, P. & B. R. Co. v. Trimmer (N. J. Ch.) 310
Pennsylvania R. Co. v. Middleton (N. J. Err. & App.) 616
Pennsylvania R. Co. v. Montgomery County Pass. R. Co. (Pa.) 468
Pennsylvania R. Co., Dampman v. (Pa.) ... 244
Pennsylvania R. Co., Davenport Co. v. (Pa.) 245
Pennsylvania R. Co., Moore v. (Pa.) 734
Pennsylvania R. Co., National Docks & N. J. J. Connecting R. Co. v. (N. J. Sup.) 462
Pennsylvania R. Co., Wendell v. (N. J. Sup.) 720
Pennsylvania State Agricultural Soc. v. Jermyn (Pa.) 660
Pennsylvania S. V. R. Co. v. Schuylkill Nav. Co. (Pa.) 858
Pennsylvania S. V. R. Co., Rudolph v. (Pa.) 131
Pennsylvania, S. V. R. Co., Spring City Gaslight Co. v. (Pa.) 368
Pennypacker v. Dear (Pa.) 89
Pepper's Estate, In re (Pa.) 100
Perkins, Chew v. (Md.) 507
Perkins, Norton's Adm'r v. (Vt.) 148
Perkiomen & R. Turnpike Road, Geiger v. (Pa.) 918
Perrigo, State v. (Vt.) 844
Pfeister & Vogel Leather Co., Salomon v. (N. J. Err. & App.) 602
Philadelphia Co v. Borough of Freeport (Pa.) 571
Philadelphia Trust, Safe-Deposit & Insurance Co., Appeal of (Pa.) 76
Philadelphia Trust, Safe-Deposit & Insurance Co., Appeal of (Pa.) 986
Philadelphia Trust, Safe-Deposit & Insurance Co. v. Isaac (Pa.) 651
Philadelphia, W. & B. R. Co., Howett v. (Pa.) 336
Philadelphia, W. & B. R. Co., Marlor v. (Pa.) 255

Page

Philadelphia & R. R. Co. v. River Front R. Co. (Pa.) 1098
Philadelphia & R. R. Co., Schaeffer v. (Pa.) 1088
Philadelphia & R. R. Co., Sheehan v. (Pa.) 120
Philler v. Jewett (Pa.) 204
Philler v. Keeler (Pa.) 205
Phillips v. St. Clair Incline-Plane Co. (Pa.) 69
Phillips v. St. Clair Incline-Plane Co. (Pa.) 71
Phillips, Montgomery v. (N. J. Err. & App.) 622
Pierce, School Dist. No. 20 in Chester v. (Vt.) 783
Pierce, Wheeler v. (Pa.) 649
Pierson v. Springfield Fire & Marine Ins. Co. (Del. Super.) 966
Pierson, Gowen v. (Pa.) 83
Pile v. Pedrick (Pa.) 646
Pile v. Pedrick (Pa.) 647
Pitney, Colvin v. (N. J. Err. & App.) 382
Pittsburgh, Ft. W. & C. R. Co., Mitchell v. (Pa.) 67
Pittsburgh Traction Co., Laird v. (Pa.) ... 51
Pittsburgh & C. S. R. Co., Dennis v. (Pa.) .. 52
Pittsburgh & W. R. Co., Bredin v. (Pa.) .. 39
Pittsburgh & W. R. Co., Commonwealth v. (Pa.) 202
Platt v. Johnson (Pa.) 935
Plumb, Appeal of (Pa.) 117
Plummer v. New York Cent. & H. R. R. Co. (Pa.) 887
Plymouth Tp., Appeal of (Pa.) 933
Poidebard Silk Manuf'g Co., Gerli v. (N. J. Err. & App.) 401
Point Breeze Ferry & Imp. Co., Bergen Neck R. Co. v. (N. J. Err. & App.) 724
Poole v. Anderson (Md.) 207
Port v. Huntingdon & B. T. R. Co. (Pa.) .. 950
Porter, Gunby v. (Md.) 324
Post v. Commissioners of Taxation for Bernards Tp. (N. J. Sup.) 219
Potter, Paddock v. (Vt.) 784
Potts, Appeal of (Pa.) 747
Potts v. Rose Valley Mills (Pa.) 655
President, etc., of Baltimore & F. Turnpike Road v. Baltimore, C. & E. M. P. R. Co. (Md.) 854
President, etc., of Baltimore & Y. Turnpike Co., City of Baltimore v. (Md.) 420
President, etc., of Perkiomen & R. Turnpike Road, Geiger v. (Pa.) 918

Raeder, In re (Pa.) 929
Rahn Tp. v. Tamaqua & L. St. R. Co. (Pa.) 472
Ramsay, Commonwealth v. (Pa.) 345
Read, Dungan v. (Pa.) 639
Reading City Pass. R. Co., Berks County v. (Pa.) 474, 663
Reardon, Conner v. (Del. Super.) 878
Rebman, McNeal v. (Pa.) 1002
Rees' Estate, In re (Pa.) 254
Reiner, City of Reading v. (Pa.) 357
Remmey, Ryan v. (N. J. Sup.) 766
Renninger v. Dwelling-House Ins. Co. (Pa.) 1083
Replogle, Durr v. (Pa.) 645
Restein v. McCadden (Pa.) 99
Revell v. City of Annapolis (Md.) 695
Reynolds v. Chapman (R. I.) 832
Reynolds v. Howell (Del. Err. & App.) 875
Rhoads v. Central Coal Dealers' Ass'n (Pa.) 79
Rice v. McCaulley (Del. Err. & App.) 240
Rice, Addeman v. (R. I.) 429
Richardson v. Atlas Nat. Bank of Chicago (Pa.) 740
Richardson v. Horn (Del. Super.) 896
Ridgway Bank, Elk County Bank v. (Pa.) 1007
Rieman v. Baltimore Belt R. Co. (Md.) .. 444
Riley v. First Nat. Bank of Grafton (Md.) 585
Riner v. Riner (Pa.) 347
Ringrose v. Borough of Bloomsburg (Pa.) 863
Rist, Watkins v. (Vt.) 413
Ritchie v. Walter (Pa.) 334
River Front R. Co., Philadelphia & R. R. Co. v. (Pa.) 1098
Riverside & Oswego Mills, Niantic Mills Co. v. (R. I.) 432

Digitized by Google

	Page
Road in Ohio and Ross Townships, In re (Pa.)	74
Roarty v. Smith (N. J. Ch.)	1031
Roat v. Frear (Pa.)	861
Roberts, Fitzwater v. (Pa.)	204
Robinson, Appeal of (Pa.)	86
Robinson v. Leach (Vt.)	32
Robinson, Blackford v. (Md.)	448
Robinson, Eaton v. (R. I.)	1058
Rockingham Bldg. Co. v. Brown (N. H.)	23
Rockingham Bldg. Co. v. Burlingame (N. H.)	23
Roffsell, Bradner v. (N. J. Err. & App.)	387
Rogers, Good v. (R. I.)	264
Roland Park Co. of Baltimore City v. State (Md.)	298
Romberger v. Henry (Pa.)	634
Rooney, Commonwealth v. (Pa.)	562
Rose Valley Mills, Potts v. (Pa.)	655
Rudderow, City of Philadelphia v. (Pa.)	53
Rudolph v. Pennsylvania S. V. R. Co. (Pa.)	131
Rueger, Feeney v. (N. J. Sup.)	217
Runyon v. Wilkinson Gaddis & Co. (N. J. Err. & App.)	390
Ruppel v. Allegheny Valley R. Co. (Pa.)	478
Russell, Balfour v. (Pa.)	570
Ryan v. Remmey (N. J. Sup.)	766
Saake v. Dorner (Pa.)	574
St. Clair Incline-Plane Co., Burgwin v. (Pa.)	71
St. Clair Incline-Plane Co., Phillips v. (Pa.)	69
St. Clair Incline-Plane Co., Phillips v. (Pa.)	71
St. Clair School Dist. v. Monongahela Water Co. (Pa.)	71
St. Mary's Gas Co. v. Elk County (Pa.)	1077
Salomon v. Pfeister & Vogel Leather Co. (N. J. Err. & App.)	602
Sandcroft, In re (Pa.)	948
Sandknop, Freedman v. (N. J. Ch.)	232
Sann, Wiedemann v. (N. J. Ch.)	211
Sargent v. King (Vt.)	781
Sargent & Co. v. New Haven Steamboat Co. (Conn.)	543
Sawyer, State v. (Vt.)	285
Scagel, Lane v. (Vt.)	289
Scanlon v. Walshe (Md.)	498
Schaeffer v. Farmers' Mut. Fire Ins. Co. of Dug Hill (Md.)	317
Schaeffer v. Philadelphia & R. R. Co. (Pa.)	1088
Schefbauer v. Board of Township Committee of Kearney Tp. (N. J. Sup.)	454
Schlichter Jute Cordage Co., Dock v. (Pa.)	656
Schmick, Snyder v. (Pa.)	124
Schmid v. Lisiewski (N. J. Err. & App.)	603
Schmidt, State v. (N. J. Sup.)	280
Schneipp, Commonwealth v. (Pa.)	118
Schofield, City of Philadelphia v. (Pa.)	119
Schofield's Estate, In re (Pa.)	742
School Dist. No. 9 in Williamstown, Scott v. (Vt.)	145
School Dist. No. 20 in Chester v. Pierce (Vt.)	783
School Dist. of Borough of Coudersport, Payne v. (Pa.)	1072
Schultze v. Hill (R. I.)	165
Schuman, Meyers v. (N. J. Ch.)	460
Schuyler Electric Manuf'g Co., Byrne v. (Conn.)	833
Schuylkill Nav. Co., Pennsylvania S. V. R. Co. v. (Pa.)	858
Schwartz's Estate, In re (Pa.)	1085
Schweitzer v. Bonn (N. J. Ch.)	24
Scofield, First Nat. Bank of Jamestown v. (Pa.)	1012
Scofield, First Nat. Bank of Jamestown v. (Pa.)	1016
Scott v. School Dist. No. 9 in Williamstown (Vt.)	145
Scranton Gas & Water Co. v. Lackawanna Iron & Coal Co. (Pa.)	484
Scranton Lathe Turning Co. v. Cassidy (Pa.)	734
Scudder v. Budd (N. J. Err. & App.)	717
Sea Isle City Hotel Co., Landis v. (N. J. Ch.)	755
Sea Isle City Lot & Building Ass'n No. 3 v. McTague (N. J. Err. & App.)	727
Seashore Electric R. Co., Holmes v. (N. J. Sup.)	227
Security Co. of Hartford v. Cone (Conn.)	1
Seeley v. Hincks (Conn.)	533
Seep, Thayer v. (Pa.)	1072
Selig, Home Life Ins. Co. v. (Md.)	503
Sewell v. Moore (Pa.)	370
Seymour, Crampton v. (Vt.)	889
Shanfelter v. City of Baltimore (Md.)	439
Shattuck v. Cunningham (Pa.)	136
Shaw v. Devecmon (Md.)	709
Sheehan v. Philadelphia & R. R. Co. (Pa.)	120
Sheeler, Gross v. (Del. Super.)	812
Sheldon v. Town of Stockbridge (Vt.)	414
Shellenberger v. Patterson (Pa.)	943
Shields, Commonwealth v. (Pa.)	1007
Short v. State (Md.)	322
Shryock, Connell v. (Pa.)	731
Shupp, Hoffman v. (Md.)	505
Simon, Appeal of (Pa.)	256
Simpson, Grier v. (Del. Super.)	587
Skinner, Ex parte (N. J. Ch.)	396
Skoqvist, Green v. (N. J. Sup.)	228
Slater, Taylor v. (R. I.)	165
Slear, Beaver v. (Pa.)	1094
Smith, Appeal of (Conn.)	529
Smith v. Easton Transit Co. (Pa.)	557
Smith v. Elder (Pa.)	735
Smith v. Ervin (Pa.)	1067
Smith v. Horn (Pa.)	1078
Smith v. Town Council of the Town of Burrillville (R. I.)	578
Smith, Evans v. (Pa.)	346
Smith, Kline & French Co. v. Smith (Pa.)	343
Smith, Koenig v. (N. J. Sup.)	979
Smith, Mathews v. (Del. Super.)	879
Smith, Roarty v. (N. J. Ch.)	1031
Smith, Smith, Kline & French Co. v. (Pa.)	343
Smith, State v. (Conn.)	206
Smith, State v. (Del. Err. & App.)	516
Smith & Schwarz Brick Co., City of Baltimore v. (Md.)	423
Snyder v. Schmick (Pa.)	124
Snyder, Beck v. (Pa.)	555
Somerset County Poor Dist., Overseers of Poor of Borough of Bellefonte v. (Pa.)	1086
Sommer v. Gilmore (Pa.)	884
South Royalton Graded School Dist., Dodge v. (Vt.)	784
Spaeth, City of Newark v. (N. J. Err. & App.)	409
Spitz, Nathanson v. (R. I.)	690
Spotts, Hepburn v. (Pa.)	1083
Spring, Baltimore & E. S. R. Co. v. (Md.)	208
Spring City Gaslight Co. v. Pennsylvania, S. V. R. Co. (Pa.)	368
Springer, Farrow v. (N. J. Sup.)	215
Springfield Fire & Marine Ins. Co., Pierson v. (Del. Super.)	966
Spruance v. Truax (Del. Err. & App.)	589
Stackhouse v. Vendig (Pa.)	349
Stafford v. Devereux (Pa.)	87
Stafford v. Mills (N. J. Sup.)	1023
Stannard, Stiles v. (Vt.)	294
State, Acton v. (Md.)	419
State, Acton v. (Md.)	420
State v. Applegarth (Md.)	961
State v. Boucher (R. I.)	1058
State v. Camley (Vt.)	840
State v. Crusins (N. J. Sup.)	235
State v. Delaware & A. Telegraph & Telephone Co. (Del. Super.)	714
State v. Gorham (Vt.)	845
State v. Harrigan (Del. O. & T.)	1052
State v. Latrobe (Md.)	788
State v. Parker (N. J. Sup.)	214
State v. Perrigo (Vt.)	844
State v. Sawyer (Vt.)	285
State v. Schmidt (N. J. Sup.)	280
State v. Smith (Conn.)	206
State v. Smith (Del. Err. & App.)	516

Digitized by Google

	Page
State v. Stevens (Conn.)	496
State v. Taylor (N. J. Err. & App.)	771
State v. Tomasi (Vt.)	780
State, Clark v. (N. J. Sup.)	979
State, Genz v. (N. J. Sup.)	1037
State, Kitby v. (N. J. Sup.)	213
State, Roland Park Co. of Baltimore City v. (Md.)	298
State, Short v. (Md.)	322
State, Whitman v. (Md.)	325
State Board of Assessors, Edison United Phonograph Co. v. (N. J. Sup.)	1019
State Board of Assessors, Tide Water Pipe Co. v. (N. J. Sup.)	220
Steinmetz's Estate, In re (Pa.)	1070
Steinmetz's Estate, In re (Pa.)	1092
Stevens, State v. (Conn.)	496
Stewart v. City of Hoboken (N. J. Sup.)	278
Stiles v. Stannard (Vt.)	294
Still, Hickok v. (Pa.)	1100
Stillson, Crosier v. (Vt.)	779
Stocker v. Dech (Pa.)	555
Stockwell v. Baird (Del. Super.)	811
Stone, Foster's Ex'x v. (Vt.)	841
Strong, Gilchrist v. (Pa.)	931
Strong, Ludlow v. (N. J. Ch.)	409
Strong, Mundy v. (N. J. Err. & App.)	611
Sullivan v. Chambers (R. I.)	167
Sunday's Estate, In re (Pa.)	353
Suplee, Wilkinson v. (Pa.)	36
Susquehanna Mut. Fire Ins. Co., McGonigle v. (Pa.)	868
Sweatman, Ott v. (Pa.)	102
Sweet v. Excelsior Electric Co. (N. J. Err. & App.)	721
Swerdferger v. Hopkins (Vt.)	153
Syms, First Baptist Church of Hoboken v. (N. J. Err. & App.)	717
Taggart's Estate, In re (Pa.)	733
Talcott v. Brenniser (Pa.)	574
Tamaqua & L. St. R. Co. v. Inter County St. R. Co. (Pa.)	473
Tamaqua & L. St. R. Co., Rahn Tp. v. (Pa.)	472
Tasker v. Carroll County (N. H.)	14
Tatnall, Farmers' Bank v. (Del. Super.)	879
Taylor v. Huey (Pa.)	199
Taylor v. Slater (R. I.)	165
Taylor, Baldwin v. (Pa.)	250
Taylor, State v. (N. J. Err. & App.)	771
Teeter, Miller v. (N. J. Ch.)	394
Tennallytown & R. R. Co., Holt v. (Md.)	809
Tennent, Appeal of (Pa.)	254
Thackara Manuf'g Co., Edison General Electric Co. v. (Pa.)	856
Thayer v. Seep (Pa.)	1072
Theiss v. Weiss (Pa.)	63
Thomas, Appeal of (Pa.)	858
Thomas v. Inter-County St. R. Co. (Pa.)	476
Thomas, Wertheimer v. (Pa.)	1096
Thompson v. Board of Education of Borough of Elmer (N. J. Sup.)	168
Thornton, Neal v. (Vt.)	296
Thurber v. Carpenter (R. I.)	5
Tide Water Pipe Co. v. State Board of Assessors (N. J. Sup.)	220
Titlow, Appeal of (Pa.)	553
Titus v. Warren (Vt.)	297
Tobyhanna & Lehigh Lumber Co. v. Home Ins. Co. (Pa.)	564
Tomasi, State v. (Vt.)	780
Town Council of the Town of Burrillville, Smith v. (R. I.)	578
Town of Dover, Fulton v. (Del. Err. & App.)	974
Town of Fairfax v. Town of Westford (Vt.)	847
Town of Fair Haven, Culver v. (Vt.)	143
Town of Fair Haven, Lloyd v. (Vt.)	164
Town of Grand Isle, Ladd v. (Vt.)	34
Town of Hardwick, Bridgman v. (Vt.)	33
Town of Rupert, Town of Sandgate v. (Vt.)	289
Town of Sandgate v. Town of Rupert (Vt.)	289
Town of South Burlington v. Town of Worcester (Vt.)	891
Town of Stockbridge, Sheldon v. (Vt.)	414
Town of Waterford, Newton v. (Vt.)	782
Town of Westford, Town of Fairfax v. (Vt.)	847
Town of Worcester, Baldwin v. (Vt.)	413
Town of Worcester, Town of South Burlington v. (Vt.)	891
Tradesmen's Nat. Bank v. Indiana Bicycle Co. (Pa.)	837
Trenton Pass. R. Co., Borough of Wilbur v. (N. J. Sup.)	238
Trexler v. Greenwich Tp. (Pa.)	1090
Trim v. Brightman (Pa.)	1071
Trimmer, Pennsylvania, P. & B. R. Co. v. (N. J. Ch.)	310
Truax, Spruance v. (Del. Err. & App.)	589
Truitt, Cox v. (N. J. Sup.)	168
Trumbull v. Hewitt (Conn.)	492
Tucker and Frankford Streets, In re (Pa.)	117
Turner, Keiley v. (Md.)	700
Turner's Estate, In re (Pa.)	867
Tynan v. Warren (N. J. Ch.)	596
Union Water Co., Kean v. (N. J. Err. & App.)	282
United Brethren Mut. Aid Soc., Hostetter v. (Pa.)	333
United New Jersey Railroad & Canal Co. v. City of Jersey City (N. J. Sup.)	1020
United New Jersey Railroad & Canal Co. v. National Docks & N. J. Junction Connecting Railroad Co. (N. J. Sup.)	981
Unruh v. Lukens (Pa.)	110
Vacher, Knowles Loom Works v. (N. J. Sup.)	306
Valentino v. Bird (N. J. Sup.)	606
Van Syckel, Woolverton v. (N. J. Err. & App.)	603
Vendig, Stackhouse v. (Pa.)	349
Vernon, Bradley v. (Pa.)	330
Vittum v. Estey (Vt.)	144
Vogel v. McAuliffe (R. I.)	1
Waddell, Appeal of (Pa.)	727
Wagner v. Crook (Pa.)	576
Walker v. Walker (N. H.)	14
Walshe, Scanlon v. (Md.)	498
Walter, Ritchie v. (Pa.)	334
Wanser, Griffin v. (N. J. Sup.)	222
Warden v. City of Philadelphia (Pa.)	928
Warren, Titus v. (Vt.)	297
Warren, Tynan v. (N. J. Ch.)	596
Warren, Woodbury v. (Vt.)	295
Wartman, In re (N. J. Sup.)	1040
Wartman, Pearson v. (Md.)	446
Water Com'rs of New Brunswick, Cramer v. (N. J. Sup.)	384
Watkins v. Rist (Vt.)	413
Watson, Grant v. (N. J. Sup.)	1040
Weaver, Carroll v. (Conn.)	489
Weaver, Mumford v. (R. I.)	1
Webb, Appeal of (Pa.)	742
Weber, Commonwealth v. (Pa.)	481
Webster v. Wiggin (R. I.)	824
Webster, Duffy v. (R. I.)	433
Weidner, Horowitz v. (N. J. Ch.)	771
Weiss, Theiss v. (Pa.)	63
Weiss, Wessels v. (Pa.)	247
Wellman v. Borough of Susquehanna Depot (Pa.)	566
Wells, Holden v. (R. I.)	265
Wendell v. Pennsylvania R. Co. (N. J. Sup.)	720
Wertheimer v. Thomas (Pa.)	1096
Wessels v. Weiss (Pa.)	247
West Boundary Real-Estate Co. of Baltimore City v. Bayless (Md.)	442
Western Union Tel. Co. v. Bullard (Vt.)	286
Wheeler v. Pierce (Pa.)	649
Wheeler, Mason v. (R. I.)	426
White v. Eddy (R. I.)	823
White, Appeal of (Pa.)	554
Whiteley, Bauman v. (N. J. Sup.)	982
White's Estate, In re (Pa.)	569
Whitman v. State (Md.)	325
Whitney, Appeal of (Pa.)	867
Wiedemann v. Sann (N. J. Ch.)	211
Wiggin, Webster v. (R. I.)	824

Digitized by Google

	Page
Wilcox v. Derickson (Pa.)	1080
Wilds, Carter v. (Del. Super.)	715
Wilhelm v. Fayette County (Pa.)	1009
Wilkinson v. Suplee (Pa.)	36
Wilkinson Gaddis & Co., Runyon v. (N. J. Err. & App.)	390
Wilkins' Will, In re (N. J. Err. & App.)	382
Willet, Doolittle v. (N. J. Err. & App.)	385
William Deering & Co., Hull v. (Md.)	416
Williams v. Cochran (Del. Super.)	1050
Williams, Mershon v. (N. J. Ch.)	778
Wilson v. Boud (Pa.)	78
Wilson v. Donnelly (R. I.)	966
Wilson v. Inhabitants of City of Trenton (N. J. Err. & App.)	775
Wilson, Fournier v. (R. I.)	306
Wood, Mulholland v. (Pa.)	248
Woodbury v. Warren (Vt.)	295
Woodley, Commonwealth v. (Pa.)	202
Woodruff, Hutchinson v. (N. J. Sup.)	224
Woolverton v. Van Syckel (N. J. Err. & App.)	603
Wright, Kuser v. (N. J. Err. & App.)	397
Wuestner, Gennert v. (N. J. Ch.)	609
Wunch, Commonwealth v. (Pa.)	551
Wyckoff v. Ferree (Pa.)	1101
Wyckoff, Ferree v. (Pa.)	1102
Yerger, Hiester v. (Pa.)	122
Yingst v. Lebanon & A. St. R. Co. (Pa.)	687
Youghiogheny Bridge Co., Appeal of (Pa.)	1096
Youghiogheny River County Bridge, In re (Pa.)	1096
Young v. Colvin (Pa.)	1094
Young v. Coray (Pa.)	856
Young, Davidson v. (Pa.)	557
Young, Emsley v. (R. I.)	692
Young, Mack Paving Co. v. (Pa.)	85
Young's Estate, In re (Pa.)	373

See End of Index for Tables of Atlantic Cases in State Reports.

†

Digitized by Google

THE

ATLANTIC REPORTER.

VOLUME 31.

MUMFORD v. WEAVER et ux.

(Supreme Court of Rhode Island. Feb. 8, 1895.)

PROMISSORY NOTE—OWNERSHIP—RIGHT TO SUE.

A plea, in an action on a note, which alleges that plaintiff is not the owner of the note, but holds it merely for the purpose of collecting it and paying the proceeds to the owner, is demurrable.

Action by Charles C. Mumford against Charles B. Weaver and wife on a promissory note. Plaintiff demurred to the plea. Demurrer sustained.

Van Slyck & Mumford, for plaintiff. Clarence A. Aldrich, for defendants.

PER CURIAM. The defendants plead that the note in suit is the property of one Maria S. Sanders, a resident of Massachusetts, and that the plaintiff has no interest in the note, having received it after maturity and without consideration, and that he holds it as custodian, merely, for the purpose of collecting it and paying the proceeds to the said Maria S. Sanders. The plaintiff demurs to the plea. The question thus presented for decision is whether the plaintiff is entitled, in the circumstances stated in the plea, to sue upon the note. We think he is. The plea does not aver that the plaintiff's possession of the note is mala fide. Any one in possession of a note indorsed in blank is prima facie the holder, and may sue upon it, until his right is disproved. It is no defense to an action on such paper that the property in it is in another, and not in the plaintiff. All that is required of the plaintiff, in the first instance, is to present the note; its possession being prima facie evidence of his ownership of the note, and his right to sue. It is only after the defendant has adduced evidence that the note was obtained by undue means, such as fraud, duress, theft, or the like, that the plaintiff is called upon to offer proof of other facts in support of his title. 2 Pars. Notes & B. 436; Bank v. Senior, 11 R. I. 376; Third Nat. Bank v. Angell, Index O O, 176, 29 Atl. 500. The plaintiff being a resident of Providence, the suit was properly brought in Providence county. Judiciary Act, c. 13, § 2. The cases from the Reports of the United States supreme court, cited by the defendants in support of the plea, hold merely that in determining the question of jurisdiction the citizenship of parties substantially interested in the suit, rather than that of nominal parties, is to be regarded. We do not see that they have any application to the question before us.

VOGEL v. McAULIFFE.

(Supreme Court of Rhode Island. Feb. 2, 1895.)

ACTION ON THE CASE — CONSEQUENTIAL DAMAGES —DESTRUCTION OF FURNACE IN DWELLING—EVIDENCE—DAMAGES—MENTAL ANXIETY.

1. When defendant, having a right to enter the premises occupied by plaintiff for the purpose of repairing a furnace, wrongfully removed and destroyed the furnace, the injury being consequential in its nature, case is the proper form of action.

2. In an action for the wrongful destruction of a furnace on premises occupied by plaintiff, evidence that plaintiff's infant child was ill at the time, and had to be removed to a room not so convenient or suitable as the one previously occupied, is admissible as a basis for damages for mental suffering and anxiety on plaintiff's part, though the child suffered no injury by the change.

3. A tenant cannot deduct from the rent due his landlord the amount of damages involved in a diminution of the enjoyment of his tenancy by the tortious act of a stranger.

4. In trespass on the case for the destruction of a furnace on premises occupied by plaintiff, evidence that defendant ordered his servants to take it down and destroy it, if they chose; that they did destroy it; and that defendant, in a subsequent conversation with plaintiff, refused to repair or replace it, and did not deny responsibility for its destruction,—will sustain a verdict for plaintiff.

5. Where defendant destroyed a furnace on property occupied by plaintiff, at a time when there was sickness in plaintiff's family, and the furnace was essential to the proper heating of the house, and, on demand, refused to repair or replace it, a verdict of $400 will not be disturbed.

Action on the case by Michel Vogel against Owen McAuliffe for damages caused by defendant's wrongfully neglecting to replace a furnace belonging to premises leased by plaintiff, which he had taken down. There was a verdict for plaintiff, and defendant petitions for a new trial. Denied.

Digitized by Google

Irving Champlin, for plaintiff. George J. West, for defendant.

TILLINGHAST, J. 1. We do not think the plaintiff misconceived his form of action. The declaration does not allege, nor does the proof show, that the defendant's servants wrongfully entered the plaintiff's premises,—that is, that they committed any trespass in so doing; but, on the other hand, the proof shows that they entered with the implied permission of the plaintiff, he having been present at the time, and having asked them as to their purpose; and, upon being informed that they were there to repair his furnace so as to prevent the gas from escaping therefrom into the tenement of one Page, who lived in the same house, he made no objection, but went away, leaving them at work thereon. The proof also shows that, after the defendant's said servants had taken the furnace apart, they then and there destroyed the same, by breaking some parts of it in pieces, and that the defendant wrongfully neglected and refused to replace said furnace, although requested by the plaintiff so to do, by reason whereof the plaintiff suffered much inconvenience and injury. It was conceded by the plaintiff at the trial that the defendant, who was a tenant in common with his son, Eugene T. McAuliffe, the plaintiff's landlord, of the house in which the plaintiff lived, had the right to enter said premises for the purpose of making repairs upon said furnace. And, moreover, the defendant's attorney requested the court to charge the jury "that the defendant had a right to take the furnace apart to repair it, or to ascertain if it was leaking gas," and the court so instructed them. It appears, then, that the substantial injury of which the plaintiff complains was not the effect of the force, direct and intentional, but resulted from the wrongful and fraudulent conduct of the defendant in removing and destroying said furnace, and neglecting and refusing to replace the same, and hence was consequential in its nature. And it is well settled that case, and not trespass, is the proper form of action where the damages sought to be recovered are consequential. And the general principle laid down by Chitty in his exhaustive work on Pleading (see volume 1, p. 117) is that "an injury is considered as immediate when the act complained of itself, and not merely a consequence of that act, occasions the injury." See, also, Scott v. Bay, 3 Md. 443; Scott v. Shepherd, Smith, Lead. Cas. and note thereon, 696-700; Brennan v. Carpenter, 1 R. I. 474; Hunt v. Pratt, 7 R. I. 283; Fallon v. O'Brien, 12 R. I. 521. Nor does it matter whether the original act was lawful or unlawful, as this is not the true criterion, but the true distinction is whether the injury is immediate or consequential. See Oliv. Prec. (4th Ed.) p. 144, and cases cited; Howe v. Newmarch, 12 Allen, 49; 26 Am. & Eng. Enc. Law, pp. 699-707, where most of the leading cases on this subject are collected.

2. We do not think the court erred in admitting the testimony offered by the plaintiff as to the condition of his infant child at the time of, and immediately following, the destruction of his furnace. The child was ill with bronchitis, and on account of the destruction of the furnace had to be taken into the kitchen, and cared for there, which, according to the testimony, was not so convenient or suitable a place as it had previously occupied. And although it does not appear that any injury was sustained by the child on account of the change, yet the plaintiff was annoyed, and subjected to more or less mental suffering and anxiety, by reason thereof.

3. The defendant requested the court to charge the jury: "That the plaintiff had a right to deduct from his rent any damage resulting from any diminution of his enjoyment of the premises during the month of his tenancy; and, if he kept on living there after the month expired in which the furnace was taken apart, he can recover for no discomfort thereafter, as he took the tenement as he found it." The request was refused, and the defendant excepted. We fail to see the pertinency of the first branch of this request, as the relation of landlord and tenant did not subsist between the plaintiff and the defendant. Eugene T. McAuliffe was the plaintiff's landlord, and he was not the author of the injury complained of; and it would certainly be a strange doctrine to advance that rent due to a landlord could be retained by the tenant for damages caused by the tortious acts of a stranger. As to the second branch of said request, viz. that, if the plaintiff continued to live in said tenement after the expiration of the month in which the furnace was destroyed, he could recover for no discomfort thereafter, as he took the tenement as he found it, it is to be observed—First, that as the plaintiff's landlord was not in any way responsible for said furnace, nor bound to replace said furnace, the plaintiff could not leave said tenement without becoming liable for future accruing rent, without first giving the statutory notice of his intention to quit (Pub. St. R. I. c. 232, §§ 3, 4); and, as the furnace was destroyed on the 24th day of November, 1893, it was not possible for the plaintiff to have given a notice which would have had the effect to terminate his tenancy on the first of the following month, or prior to the 1st day of January, 1894. And, second, that while it is doubtless true that the plaintiff had no right to aggravate his damages by remaining in said tenement for an unreasonable length of time without himself providing proper means for heating the same, yet, under the proof submitted as to his efforts to supply the place of the furnace by using stoves and a fireplace, and in promptly looking for another tenement, we do not think it can be

Digitized by Google

successfully contended that it was unreasonable to allow him to recover such damages as he was able to show he had suffered up to the time of the bringing of this action, which was on January 4, 1894.

4. The defendant alleges that the verdict was against the evidence and the weight thereof. An examination of the evidence, which is quite voluminous, shows that it is very conflicting, especially upon the vital issues in the case. The plaintiff offered evidence to the effect that the furnace was taken down and destroyed by the defendant's servants, in pursuance of his orders, on the 24th of November, 1893, while the defendant offered evidence to the effect that he was confined at home by illness at that time, and had no connection with or knowledge of the acts complained of until some time afterwards. Among the witnesses called by the plaintiff was one Abontius B. Lawrent, who testified that he was in the defendant's employ at the time, and was personally ordered by him, at his store, on November 24th, to go with one Fitzgerald, another servant of defendant, and take down plaintiff's furnace, and not put it up again, stating to them at the same time that he did not care if they broke it all to pieces, and that they obeyed the order, and then reported to him as to what they had done. Charles A. Springer testified that in the latter part of November, 1893, he went with the plaintiff to defendant's store on Weybosset street, and, finding him there, plaintiff asked him if he intended to repair the furnace, or what he intended to do about it, and he said, "Nothing at all; he would have nothing at all to do about it." The plaintiff testified that he saw the defendant at his store on the 27th or 28th of November, and asked him if he was going to repair the furnace, and that he replied, "No, he would not." Owen McAuliffe, the defendant, testified on cross-examination that the plaintiff came to him about Christmas with another man, and "said he wanted to know what right I had to tear down the furnace. I said I supposed it was because it was not fit to use. I told him I thought it was a benefit to him if he had a leaky, gassy furnace to have it torn down." And in answer to the question, "Didn't you tell him, when he asked you that question of why you destroyed his furnace, that it was because of escaping gas from your furnace into Charles Page's tenement?" he replied: "I told him it was because it was leaking gas into Mr. Page's tenement, and if it did not cost more than five or ten dollars I would replace it. They tell me that the furnace is in the cellar just as it was torn down, and you can send an expert, and find out all about it." Moreover, the defendant made no pretense to the plaintiff that he was not responsible for the destruction of the furnace, nor would he swear positively that the said interview with the plaintiff did not take place early in December. With this testimony before them, together with other testimony which tended more or less strongly to fortify the position taken by the plaintiff, we cannot say that the jury were not warranted in finding that the defendant was guilty as charged in the plaintiff's declaration. At any rate, there is substantial evidence in support of the verdict, and it was competent for the jury, who saw the witnesses and heard their testimony, to have accepted the same as worthy of belief; and, where the evidence is conflicting, it is for the jury to determine from all the circumstances to whom they will give credit. See Beattie v. Thomason, 16 R. I. 15, 11 Atl. 172; Sweet v. Wood, Index N. N. 12, 28 Atl. 835; Hil. New Trials (2d Ed.) 451, and cases cited. Moreover, it was competent for the jury to find, under the evidence offered, and the instruction of the court thereon, that, even though the defendant did not personally order his said servants to take down and destroy said furnace, yet that he subsequently adopted and ratified their acts in the premises, and, as they were done in his interest, thereby he became liable for the consequence thereof. Cooley, Torts (2d Ed.) 146; Hagan v. Railroad Co., 3 R. I. 91.

5. We do not feel satisfied that the damages are excessive, as contended by the defendant. The wrongful acts of the defendant in destroying the plaintiff's furnace and refusing to replace the same, and thereby depriving him and his family of its use at a season of the year when it was absolutely essential that his house should be heated, were such as not only to entitle him, or, more strictly speaking, to warrant the jury in awarding him, not only actual damages, but, in their discretion, if they found that the acts were prompted by malice, exemplary damages also; it being a well-settled doctrine of the common law that a jury in actions of this sort may, in their discretion, inflict exemplary damages, having in view the enormity of the defendant's conduct, rather than mere compensation to the plaintiff (Kenyon v. Cameron, 17 R. I. 122, 20 Atl. 233; Sedg. Dam. (6th Ed.) 564, and cases; Hagan v. Railroad Co., 3 R. I. 38); although we are not unmindful of the rule that ordinarily, in an action on the case, the actual injury is the measure of damages (Bradt v. Holden, 12 R. I. 335). The amount of the verdict in this case ($400) is not so large, in view of the evidence as to the physical condition of the plaintiff and his family, and the trouble and expense to which he was subjected, as to naturally lead us to the conclusion that the jury were influenced by passion, prejudice, or ignorance. And the well-established rule in this country is that, in cases of tort, the verdict will not be disturbed unless it is so excessive or outrageous, in view of all the circumstances of the case, as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them. Whipple v. Mau-

Digitized by Google

facturing Co., 2 Story, 661, Fed. Cas. No. 17,516; Berry v. Vreeland, 21 N. J. Law, 183.

The defendant's petition for a new trial is denied and dismissed, and the case remitted to the common pleas division, with direction to enter judgment upon the verdict.

AMSDEN v. DANIELSON.

(Supreme Court of Rhode Island. Feb. 2, 1895.)

EXECUTOR — ACTION ON NOTE — WHEN BARRED — COLLUSIVE PAYMENT BY MAKER — NOTE PAYABLE IN FOREIGN STATE — JURISDICTION.

1. Where the maker of a note due to an estate resides in a foreign state, a voluntary and collusive payment of the note to an administrator whom such maker procures to be appointed where he resides is not a bar to an action in attachment on the note by the executor in the state in which letters issued.

2. An executor may maintain attachment in the state in which his letters issued, on a note made to the decedent by a nonresident, and payable at the maker's residence.

Action by Frederick B. Amsden, executor, against Simeon Danielson. Heard upon demurrers to the replications. Demurrers overruled.

John F. Lonsdale, for plaintiff. Edwards & Angell, for defendant.

STINESS, J. The plaintiff, executor of the will of Lucretia C. Danielson, late of Providence, deceased, sues the defendant, a resident of Killingly, Conn., upon a promissory note made by him, dated at said Killingly, and payable to the testatrix. The action was commenced January 12, 1894, by attachment of real estate of the defendant in the city of Providence, in this state. It appears by the defendant's plea that after said will was probated here, and since the commencement of this suit, a copy of the will was recorded in Killingly, and William H. Cholar was appointed administrator, who has qualified, and to whom the defendant has made payment of the amount due on the note. To this the plaintiff replies that there was no property in Connecticut, except a trifling amount of furniture, which had been fully administered by him before the application to record the will in Killingly; that there were no creditors in Connecticut; that the defendant, knowing the intention of the plaintiff to bring suit here, induced the plaintiff to forbear his suit by promising to pay the debt on a certain day, and thereupon, contriving to prevent said attachment, and to evade the payment of the note, took advantage of the plaintiff's forbearance, and procured the recording of the will, and the appointment of Cholar as administrator, in Connecticut; that the note is, and has been, since the death of the testatrix, in the plaintiff's possession, upon which the defendant paid him the sum of $234.20 in October, 1893; and that the defendant had notice of the attachment before he made the payment to Cholar as administrator. The defendant demurs to the replications.

The main question raised by the pleadings is whether, under these circumstances, the suit can be maintained in Rhode Island after the payment to the administrator in Connecticut. We think it can be maintained. First, the fact is set up that this was a voluntary and collusive payment, which, upon demurrer, must be taken to be true. While a party will be protected from paying a second time that which he has once, in good faith, been compelled to pay, it is clear that these facts do not make such the case. A person cannot oust the court of one state of jurisdiction by a collusive judgment, and much less by a voluntary payment, in another. So it has been held that where a man, by willful default, has suffered judgment to go against him as garnishee in another state, when he might have prevented it, a payment is no bar in the state where a suit upon the claim had been previously commenced. Whipple v. Robbins, 97 Mass. 107; Wilkinson v. Hall, 6 Gray, 568. See, also, Hull v. Blake, 13 Mass. 157, and Stevens v. Gaylord, 11 Mass. 256.

Passing over the question whether the promise of the defendant made a new cause of action, about which there seems to be little room for doubt, we come to the main question which has been argued, viz. whether the executor in Rhode Island can sue at all for the amount due upon the note. The argument is that the note was payable in Killingly, the domicile of the defendant, and hence its proceeds were assets in Connecticut, and not in Rhode Island. This argument is sustained by Pinney v. McGregory, 102 Mass. 186; Abbott v. Colburn, 28 Vt. 663; and Wyman v. Halstead, 109 U. S. 654, 3 Sup. Ct. 417. Admitting that the note was payable in Killingly, the fact does not control this case. If it were necessary to bring suit upon it in Connecticut, of course, an administrator would be appointed there. But it does not follow that it cannot be collected elsewhere. The plaintiff, having the note, and finding property of the defendant in this state, had as much right to proceed to collect it here as though it had been his own debt. It would be a most absurd rule of law which would require him to go to another state, record the will, secure the appointment of an administrator, and go through all the requirements of a probate court, in order to bring a suit where possibly there might be no property, when he could attach property here, and secure his judgment without trouble. The cases cited by the defendant do not hold this. Slocum v. Sanford, 2 Conn. 533, appears to have been a case where the defendant, in 1813, had proved his claim against the estate of the payee before insolvent commissioners in Rhode Island, from which the amount of the note sued upon had been deducted, and the administrator in Rhode Island had given

Digitized by Google

him a discharge from it before the suit was brought in Connecticut; but certainly before the trial in 1818, wherein this fact was held to be good defense. Undoubtedly, the bona fide settlement of a debt with a foreign administrator is a bar. In Stevens v. Gaylord, 11 Mass. 256, the defendant had been appointed administrator in Connecticut before an administrator had been appointed and suit brought in Massachusetts. It is indeed held in both these cases that the debt was assets in the state where the debtor resided, and this is the point to which they are cited. But that is not the question before us. Assuming this to be so, the question is whether the administrator may collect the debt in another state, if he has the chance to do so. Upon this question we have no doubt. It is well settled that a bona fide, voluntary payment to a foreign administrator is a good discharge of a debt. Mackay v. St. Mary's Church, 15 R. I. 121, 23 Atl. 108. And, if this be so, an involuntary judgment based upon an attachment of property cannot be less valid. As said by Wells, J., in Merrill v. Insurance Co., 103 Mass. 245–248: "Having possession of, and a legal title to, the instrument or evidence of the demand, and finding the debtor or his property within the jurisdiction of his appointment, he may enforce it there, without the necessity of any resort to the foreign jurisdiction. The debtor is equally responsible in either, if means of enforcing payment can be reached." The same doctrine was announced in Perkins v. Stone, 18 Conn. 270, 274, where debtors resident in Massachusetts were sued by an administrator in Connecticut. "Had it been necessary for the plaintiff to go into the state of Massachusetts to bring his action, it is conceded that he must have taken out letters there, to enable him to sue in his representative capacity. But, as he is under no necessity of invoking the aid of the courts of that state, his case is not brought within the operation of the rule which precludes an administrator appointed in one state from suing in the courts of another." The case which comes most closely to opposing these cases is that of Pond v. Makepeace, 2 Metc. (Mass.) 114. There a Rhode Island administrator had brought suit in Massachusetts, and obtained judgment by default, under which execution was levied on real estate, and it was sold in satisfaction of the judgment. It was held that the suit was no bar to a subsequent suit by a Massachusetts administrator, because the Rhode Island administrator had no power to sue in that state, and so could pass no title to the real estate under the levy and sale. But that is not like this case. Here the plaintiff is suing in Rhode Island, the state in which he holds his letters testamentary. We see no reason why he may not so sue. The cases we have quoted from sustain the right, and we know of none which deny it. The reason upon which the right is based is satisfactory, and we therefore decide that the plaintiff has that right under the pleadings in this case. The demurrers of the defendant to the plaintiff's replications are overruled.

THURBER et ux. v. CARPENTER et al.

(Supreme Court of Rhode Island. Jan. 26, 1895.)

MORTGAGE SALE — FOREIGN ADMINISTRATOR — RIGHT TO EXECUTE POWER—NOTICE.

1. A sale of land under foreclosure is not invalid because the administrator of the mortgagee signed the notice of sale, "C., Assignee of the Mortgagee," and did not state in the notice that he was such assignee by virtue of his office as administrator.

2. A foreign administrator may execute a power of sale contained in a mortgage on land to his intestate.

Bill by C. E. Thurber and wife against Edwin F. Carpenter, administrator, and another, to enjoin the sale of certain real estate under power of sale contained in a mortgage executed to a nonresident by the duly-appointed foreign administrator of said nonresident. Decree for respondents.

J. Osfield, Jr., and Henry J. Dubois, for complainants. James L. Jenks and T. W. Robinson, for respondents.

STINESS, J. This is a bill to enjoin the completion of a sale of real estate in Pawtucket, in this state, under a power of sale contained in a mortgage given by the complainants to William Carpenter, deceased, late of Attleboro, Mass., and also to set aside the mortgage. The respondent Edwin F. Carpenter was duly appointed administrator upon the estate of William Carpenter in Massachusetts, and under the power in the mortgage, which ran to the mortgagee, his executors, administrators, and assigns, he advertised the property for sale at public auction, and sold the same to the respondent Phillips. The preliminary question, whether a foreign administrator can execute such a power in this state, is the one which is now argued to the court. The advertisement of the sale was signed by "Edwin F. Carpenter, Assignee of the Mortgagee," and the complainants urge that he was not an assignee, because there had been no formal assignment of the mortgage to him; and also that, as administrator in another state, he has no standing or power to act as such in this state. In Douglas v. Hennessy, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, and 10 Atl. 583, it was held that an administrator is an "assign" of his intestate by act of law, if such a construction comports with the character and intent of the instrument, as it certainly does in this case. The proper name having been signed, by one who was in fact an assignee, we do not see that there was need to set out the mode of the assignment, whether by act of the parties or by act of law.

But the question remains, could he, as a foreign administrator, execute the power

Digitized by Google

in this state? There can be no doubt of the rule that an administrator cannot sue, as such, outside of the state where he is appointed; nor of the rule that, as to real estate, the law of the place where it lies is to govern in case of its transfer. Under these rules it has been held that a foreign administrator cannot assign a mortgage where it affects the title to real estate. Cutter v. Davenport, 1 Pick. 81, was a case of this kind which is very often cited. The opinion held that, under the statute common to most of the states, both the land and the debt were to be treated as personal property in the hands of the executor, and that he could dispose of it as if it had been personal estate pledged, but that the statute related only to local, and not to foreign, executors and administrators. It then goes on to say that after foreclosure the land becomes the principal thing, because the debt is then extinguished to the extent of the value of the land, and that an administrator who is appointed in the state could not convey real estate, except as provided by statute. The harmony of these positions is not clearly apparent, but, from other parts of the opinion, and from the cases cited, the real ground of the decision seems to be that, as a suit for foreclosure or a writ of entry may be necessary to enforce the right under the mortgage, a foreign administrator cannot give a right which he cannot exercise himself. This seems also to have been one of the grounds of decision in Kerr v. Moon, 9 Wheat. 565. In Reynolds v. McMullen, 55 Mich. 568, 22 N. W. 41, and in Sloan v. Frothingham, 65 Ala. 593, the disability of a foreign administrator was based upon statutory provisions. However applicable this rule may be to mortgages which require proceedings for foreclosure, it is to be noted that the modern form of mortgage, with a power of sale, brings in a new and distinct point to be considered. This point is whether the executor or administrator, acting, not strictly in his official capacity as the representative of the deceased mortgagee, but rather as a persona designata, and so as the appointee of the mortgagor, may not exercise the power by virtue of the contract between the parties. This question was early considered by Chancellor Kent in Doolittle v. Lewis, 7 Johns. Ch. 45, where it was held that the whole authority rested upon the convention of the parties, and not upon the decision of any court; that the exercise of the power was a matter of contract, and not of jurisdiction, since the authority to sell is derived from the power, and not from the court of probate of another state. So in Holcombe v. Richards, 38 Minn. 38, 35 N. W. 714, and in Hayes v. Frey, 54 Wis. 503, 11 N. W. 695, it was held that the power was contractual, and might be exercised by a foreign executor or administrator. We think the reasoning of these cases is sound. Its adoption carries out the contract of the parties, and violates no statute of the state. It prevents conflict of authority, for, were an administrator appointed in this state, he might not be able to obtain from the administrator of the domicile of the deceased the evidence of the debt upon which the title under the mortgage must rest. But it is urged that the mortgagor, upon payment of the debt, is entitled to have the mortgage discharged upon the record (Pub. St. c. 176, §§ 6, 7), and that this cannot be enforced against a foreign administrator. Neither can it be enforced against a mortgagee who is out of the state; yet no one, on that account, would question his power to sell for a default. It is also urged that the records in this state will not show the appointment of the administrator, and so a purchaser cannot know whether he has the right to sell. There is some force in the objection, but the same trouble may be found in other cases. Suppose a living mortgagee assigns his mortgage, a purchaser must satisfy himself of the identity of the person as best he can. So with an executor, as the agent of the mortgagor named in the power, the purchaser must satisfy himself of identity and consequent authority in the same way. The executor is simply the appointee in the mortgagor's power of attorney. He is the agent of the mortgagor in making the sale and applying the proceeds. He would naturally give, and would be bound to give, all reasonable information as to his agency, and there seems to be no more real difficulty in finding out who is making the sale than in any case of a transfer where the transferee is out of the state. We are therefore of opinion that the sale by the respondent executor of the mortgage was in this respect a valid sale, and the case will stand for trial upon the issues of fact. Before the parties go to the expense of taking testimony upon these issues, however, we deem it proper to suggest that the averments in the bill seem to amount simply to an attempt by the complainants to impeach or contradict their own deed.

GAFFNEY v. J. O. INMAN MANUF'G CO.

(Supreme Court of Rhode Island. Jan. 26, 1895.)

MASTER AND SERVANT—INJURY TO EMPLOYÉ—CONTRIBUTORY NEGLIGENCE.

Where, in an action by an employé for personal injuries, it appeared that plaintiff placed his hand in a machine while in motion, knowing that, by reason of defects in the machine, it was dangerous to do so, it was proper to direct a verdict for defendant.

Action by Owen Gaffney against the J. O. Inman Manufacturing Company for personal injuries. A verdict was directed for defendant, and plaintiff petitions for a new trial. Denied.

George A. Littlefield, for plaintiff. William G. Roelker, for defendant.

Digitized by Google

PER CURIAM. The plaintiff's own testimony shows that he was aware of the danger, in putting his hand into the picker while it was in operation, of having his hand caught by the teeth of the feed roll, by reason of the defective condition of the curved iron shell, the office of which was to prevent the wool, as it passed from the apron to the feed roll, from dropping down under the machine, and to hold the wool close enough to the feed roll to bring it into contact with the teeth of the roll; that, notwithstanding his knowledge of the danger, the plaintiff put his hand into the picker while it was running, to take out the wool which had dropped down and lodged on the frame of the machine, in consequence of the defective condition of the shell, instead of first stopping the picker, as, for aught that appears, he might have done, the result being that his finger was caught by the teeth of the feed roll, and crushed between them and the frame of the machine. These being the facts, we are of the opinion that the court properly held, as a matter of law, that the plaintiff was guilty of contributory negligence, and directed the jury to return a verdict for the defendant. No person of ordinary prudence would have taken the chance of injury in such circumstances by attempting to remove the wool while the machine was in motion, when he could have done so safely by stopping it. The case is within the class of cases mentioned in Clarke v. Lighting Co., 16 R. I. 463, 465, 17 Atl. 59, which constitutes an exception to the general rule that the question of contributory negligence is for the jury. Plaintiff's petition for a new trial denied and dismissed. The common pleas division is directed to enter judgment on the verdict.

SECURITY CO. OF HARTFORD v. CONE et al.

(Supreme Court of Errors of Connecticut. April 2, 1894.)

WILLS—CONSTRUCTION — ESTATE DEVISED — PROVISIONS FOR CHILDREN'S SUPPORT.

1. Testator devised to his executors, as trustees, his entire estate, providing that the net income should belong to his wife for life, "in trust for the maintenance of herself" and of his unmarried daughter so long as she remained single. He also provided that, at the death of his wife, each of his two daughters should have the use of their legal proportion of his estate; and by another paragraph a certain sum was given to the unmarried one "at her marriage," "which sum she is to have, if she remains single, at her mother's decease," provision being also made for the distribution of the income at that time. His other child, a son, was given a contingent use of his "legal proportion." *Held*, that during the time such daughter remained single the net income of two-thirds of the trust estate should be divided equally between her and her sister.

2. Where the first paragraph of a will conveys an estate in trust to certain persons named, "and their successors," and the entire scheme of the will requires that such successors should possess the same powers and discretion as the trustees named, the powers conferred upon the original trustees, though discretionary, may be exercised by their successors in the trust.

3. Testator devised his entire estate in trust for certain purposes during his widow's life, she to have the net income for her maintenance and that of her unmarried daughter, except a sum, not to exceed a certain amount per annum, to be paid testator's son after the widow's death. His three children were to have the use of their "legal proportion" of his estate; but the will further provided that testator's son, who was a spendthrift, should receive a certain sum per annum. There was a further provision for a contingent payment to the son "of a sum not exceeding $4,000" "from his portion of my estate." *Held*, that his annuity should be paid from the income of the son's one-third of the estate, the remainder to be accumulated in trust.

4. Testator devised his entire estate in trust for certain purposes, one of which was the payment to his son, who was a spendthrift, of a certain yearly amount, and provided that the trustees should withhold the sum entirely, or pay to him such a part of it from time to time as they may "deem most conducive to his reformation." The original trustees had died, and a corporation was appointed their successor. *Held*, that the payment to the son, who had remained unmarried, was conditioned only upon the sound discretion of the trustee, having due regard to the wishes of the testator.

5. Testator devised his entire estate in trust, for the care of his wife and children during their lives, with a provision that "the full fee" should go to his grandchildren "when they attain the age of 21 years, if their parents are dead"; and further provided for certain charitable bequests in ultimate remainder, "but in no case shall the provision be carried out or take effect if any one of my children have children," in which case "my property is all to descend to my children as herein provided, and to my grandchildren who may be born 21 years after my death." Discretionary power was also given to the trustees, if "necessary and advisable, to spend from my estate for the education of my grandchildren." *Held*, that the grandchildren living at testator's decease, or, if not then born, the first born thereafter, took, as and in behalf of a class opening to let in after-born grandchilden, a vested remainder in trust in fee of the entire estate.

6. Testator disposed of his estate in trust for certain purposes, providing for the maintenance of his wife and children during their lives, and willed that, "should one or both of my daughters die without children, then I give to one or both, as the case may be," a certain sum "in full fee, to be distributed as they choose, * * * and the same to my beloved wife." On a former consideration of the same instrument 25 years before, the supreme court formed its conclusions in reference to another point, on the ground that testator gave "nothing to his wife, unless it be the income." *Held*, that the administrator of the wife could not demand the payment of such sum, the widow never having claimed it while living.

Case reserved from superior court, Hartford county; Robinson, Judge.

Suit by the Security Company of Hartford against Martha I. Cone and others to construe the will of John G. Mix, deceased. Reserved to supreme court.

George G. Sill, for plaintiff. John C. Parsons, for defendant Eliza F. Mix. Daniel A. Markham, for defendant George H. Mix Henry S. Robinson, for defendant Connecticut Trust & Safe-Deposit Co., Adm'r.

Digitized by Google

Charles E. Gross, for defendants Martha I. Cone, Clara M. Cone, Harry F. Cone, and Martha I. Cone, guardian ad litem of Lillian C. Cone.

FENN, J. The questions arising upon the record, reserved for the consideration and advice of this court, relate to the construction of certain provisions in the last will of John G. Mix, late of Hartford, who died September 23, 1809, seised and possessed of a considerable estate, both real and personal. The instrument in question, as will appear, is so peculiar in its phraseology as to make interpretation difficult, and this court has heretofore been called upon, in the case of Kellogg v. Mix, 37 Conn. 243, to construe one of its paragraphs, and, in doing this, has supplied certain words necessary to express the intended meaning of that paragraph, as held to be clearly inferable from the will, taken as a whole. Reading this portion of the will as thus determined, the parts of the document material to the questions now before us may be partly quoted and partly summarized as follows: After appointing three trustees (all now deceased), giving to an unmarried daughter, Eliza F. Mix, "at her marriage, the sum of two thousand dollars, to equal the sum given my beloved daughter Martha Isham Cone, which sum she is to have, if she remain single, at her mother's decease," and also making some minor bequests, the will proceeds:

"Fourth. After paying all my just debts, and erecting a suitable family memorial to our memory, I give and bequeath to my beloved wife, Clarissa, the net income of my estate, in trust for the maintenance of herself, during her life, and the maintenance of my daughter Eliza F. Mix, so long as she remains single, and to my beloved and unfortunate son, George H. Mix, a sum not exceeding four hundred dollars a year. And I hereby authorize and request my trustees to withhold this sum entirely, or pay to him such a part or portion of it, from time to time, as my said trustees shall deem most conducive to his reformation, by doing all they can to induce him to reform and earn his own support honestly. Should he remain at home, a fair consideration is to be deducted from this sum for his board. In case of my son's marriage before the death of his mother, then my trustees may give him two hundred dollars more per annum, if the support of the family require it, and it will not be more than an equitable proportion of the income from my estate, giving my trustees full power to exercise a sound discretion in paying to him or his wife, from time to time, such part of this six hundred dollars a year as they shall think best, or withhold the whole sum; the provisions of this clause to extend from the date of his marriage to the death of my wife. But, in case of my son's remaining single after the death of his mother, then they will continue the payment of the four hundred dollars, on the conditions hereinbefore provided, except in case of sickness or disease, when they may pay him an additional sum, but in no case to exceed the sum of six hundred dollars per annum. But, in case of his marriage before or after his mother's death, then I give him and his wife the use only of his legal proportion of my estate, to be held in trust by my trustees, to be paid to him or his wife, for their proper support, as my trustees shall think best; this proviso to commence at my wife's decease, the use only to be held by him during the life of himself and wife, and, if they die without children, then the use of it to go to my surviving children during their life, and the full fee to go to my grandchildren when they attain the age of twenty-one years, if their parents are dead. But in case of my son's death without children, and his wife marries again, then the use of my property from the date of her marriage shall go to my surviving children or their children, at the age of twenty-one years. In case of my son's wife's death without children, then my trustees will continue to pay my son a sum not exceeding six hundred dollars, as hereinbefore provided, a year. This preceding clause, No. 4, relating to my son, Geo. H. Mix, is made with the following conditions, viz.: Should my trustees be fully satisfied that my son would make a safe and judicious use of capital, means or money, then I hereby authorize them to supply him from his portion of my estate a sum not exceeding four thousand dollars, but not to be given him till after his mother's death, without her full and cordial approval.

"Fifth. At the death of my wife, I give to each of my daughters, Martha I. Cone and Eliza F. Mix, the use of their legal proportion of my estate, to be held in trust, as hereinbefore provided, for their use and benefit, after making the bequests, paying the debts, and doing all the acts herein provided for, then the full fee to go to their children when they attain the age of twenty-one years. Should my daughter Martha die without children, before her husband, J. E. Cone, then I give to him in full fee, for his own use and disposal, the sum of $2,500, for his great kindness to his wife and my beloved daughter. Should one or both of my daughters die without children, then I give to one or both, as the case may be, the sum of five thousand dollars, in full fee, to be disposed of as they choose, by will or otherwise, and the same to my beloved wife, always provided that they are, each and all of them, to retain the entire use of my estate till their death."

The testator, further, after other minor provisions, continues: "And after doing this, and paying the legacies, none of the principal of my estate is to be used, except for the purpose named in clause four of this instrument, till after the death of my wife and

Digitized by Google

children, except the bequest to my son J. E. Cone [meaning his son-in-law] in case of the death of Martha before her brother and sister, as provided for in clause fifth of this instrument." The testator then, in paragraph 7, provides for the disposition of the rest and residue of his estate, to collaterals and to charities, in case his "children all die without issue"; adding that this provision applies to "estate that may exist at the death of my last child, without children"; that it is "to take effect at the death of my last child without any of my children having children, but in no case shall the provision be carried out or take effect if any one of my children have children, in which case this clause is to be null and void, and my property is all to descend to my children, as herein provided, and to my grandchildren who may be born twenty-one years after my decease." "I repeat, that in no event shall any of my property go to [the parties named] unless my children all die without children or issue, or made children by legal adoption of or by my children." Finally, paragraph 9 contains a provision that, "should it be necessary and advisable to spend from my estate for the education of my grandchildren, then I hereby authorize my trustees to use such sums as may be necessary for the above-named purpose."

It is alleged in the complaint, and found by the superior court, that, the trustees named in the will all having died, the Security Company of Hartford has been appointed the trustee to execute the trusts created by the will; that "said company duly accepted said trust, and is now the sole trustee, and has the legal right to and is in possession of certain real estate, situated in said Hartford, of the estimated value of $35,000, from which it receives a gross income of about $3,325.08, and is also in possession of and has title to certain personal property, and receives an income therefrom of about $315.58." It was further alleged and found that the widow of the testator died June 22, 1889, intestate, and the Connecticut Trust & Safe-Deposit Company was duly appointed administrator de bonis non. All the children of the testator, namely, Martha I. Cone (now a widow), Eliza F. Mix, and George H. Mix, are living, the last two having neither ever married. Upon these facts, we are asked, in substance, the following questions: "(1) What disposition of the net income of the estate shall be made during the time Eliza F. Mix remains single? Shall it all be paid to her, less the legacy to George, or shall the two daughters each receive one-third thereof? (2) What disposition is to be made of the net income during the time George remains unmarried? (3) From what source is the present trustee to take the $400 or $600 given to George? From the corpus, the whole net income, or the income of one-third? Is such payment conditioned upon its being conducive as to his reformation, or inducive to his earning his own support, honestly? Is it the duty of the trustee to pay him $600 a year, from income, in event of his sickness or disease? (4) Do grandchildren living at the decease of the testator, and those born less than twenty-one years thereafter, take any interest in the estate? (5) Does the discretion conferred upon the original trustees extend to and vest in the plaintiff, as their successor?"

It is the claim of counsel for the daughter Eliza F. Mix that she is entitled to the whole income of the estate while she remains unmarried, subject to the discretionary payments to George H. Mix. This claim is based upon the language of paragraph 4 of the will, as construed to read by this court in Kellogg v. Mix, and also upon the expression there used by this court, in the advice given: "The amount so received [from the trustees] to be held by her [the widow] in trust for the maintenance of herself during her life, and of her daughter Eliza F. Mix so long as she remains single." But, on the other hand, it is very evident that the generality of the language quoted from the opinion of this court was intended to be qualified and limited by other language therein used, in which it was expressly stated that the testator "gave the entire income of his estate to his children, after the death of his wife." It is also clear from the will itself what the intention of the testator in this respect was. While the fourth paragraph, standing alone, leaves it uncertain whether the testator desired the entire income, after the death of his wife, to be appropriated to the support of the daughter Eliza, provided she survived her mother and continued unmarried, the next paragraph, read, as it should be, in connection with it, removes all possible doubt, and conclusively proves that such was not his intention, for he provides as follows: "At the death of my wife, I give to each of my daughters, Martha I. Cone and Eliza F. Mix, the use of their legal proportion of my estate, to be held in trust, as hereinbefore provided, for their use and benefit." Nor do we discover in the will any evidence whatever of what counsel for Miss Mix claims to be evident,—that this latter provision is "subject to and contingent on the previous marriage of the single daughter." On the contrary, the intent that the trust for the benefit of the daughter should in no event continue after the death of the wife is further manifest from other provisions of the will. Thus, in paragraph 2, $2,000 is given to the daughter Eliza "at her marriage," "which sum she is to have, if she remains single, at her mother's decease." Again, in paragraph 4, there are various provisions making a new scheme for distribution of income at and after the death of the testator's wife. Finally, the fact that there was no gift to the wife and daughter jointly, but only to the wife, in trust to maintain herself and the daughter while being single, as such daughter would, in all

Digitized by Google

probability, be a member of her mother's family, without any other means or income derived from the testator for her support, coupled with other provisions equally ample, presumably, for such support after her mother's decease, without depriving his other daughter, whom nothing in the will indicates any desire on the part of the testator to treat other than equally with her sister, from any share in his bounty, would be in itself, and if it stood alone and unsupported, conclusive of the testator's intent.

In behalf of George H. Mix it is claimed "that during his life he is entitled to such a sum, not exceeding six hundred dollars per year, as the trustees, in their discretion, may from time to time pay him." The determination of this claim involves the decision of the question proposed by the plaintiff, whether the discretion vested in the original trustees was personal or whether it extended to their successors. Concerning this we entertain do doubt. The first paragraph of the will, in which the trust is created, expressly gives the estate to the persons named "and their successors"; and the entire scheme of the will requires for its effect that such successors should possess identically the same powers and discretion as the trustees named. Such was the manifest and undoubted design of the testator. This being the case, we reach directly the claim made in behalf of the son, George H. Mix, concerning which we think the language of the will clear that, during the life of the wife of the testator, the sum to be paid to the son was not to exceed $400 per year, except in the contingency of his marriage, which did not happen. Since the son remained single after the death of his mother, and still remains so, he is entitled to be paid a discretionary sum, not exceeding $400 per annum, which sum, in case of sickness or disease, may be increased, not to exceed $600 per annum while he so remains single.

In answer to the question of the plaintiff whether this payment is "authorized at all, except as conducive to his reformation and inducive for him to earn his own support honestly," we will say that, taking the whole provisions of the will of the testator in reference to his "beloved and unfortunate son" into consideration, we think it is sufficiently manifest that while the testator desired that the trustees, in the exercise of their discretion, should, in making or withholding payment, have regard to and do all they could to promote reformation and self-support by the son, yet he did not intend that, such reformation and self-support failing, the son should be left to suffer the pangs of hunger, the humiliation of a pauper, or be, in sickness or disease, dependent, as an outcast, upon the charity of the world. The discretion of the trustees should be exercised in recognition of the spirit of a loving parent, who could not forget that a wayward son, even when hope of his reformation or self-support had failed, did not cease to be his father's child.

But it is further claimed, in behalf of George H. Mix, "that during his unmarried life and the lives of his two sisters, after the payment, if any is made, of the aforesaid discretionary sum, he is entitled to one-third of the income then remaining; that, after the death of either of said sisters, then, during his unmarried life and the life of his surviving sister, he is entitled to one-half of the net income remaining after the payment, if any, of said discretionary sum; that, after the death of both of said sisters, then, during his unmarried life, he is entitled to the entire net income from said estate." This claim appears to be based solely upon the language in the fourth paragraph of the will, which provides that, in case of the said marriage "before or after his mother's death, then I give him and his wife the use only of his legal proportion of my estate, to be held in trust by my trustees, to be paid to him or his wife, for their proper support, as my trustees shall think best. This proviso to commence at my wife's decease." The argument is that the words "in case of his marriage before or after his mother's death, then," modify the gift to the son's wife only: that, if construed as making marriage a condition precedent to the gift to the son, they are contradictory to the words "this proviso to commence at my wife's decease." But, surely, this is not so. The meaning of the testator here is, we think, entirely plain and consistent throughout. Stated fully, it is this: While his mother lived, the son might be paid a sum not exceeding $400 per annum. If he remained at home, a fair deduction from this sum (or the portion thereof which would otherwise be paid him by the trustees in their discretion) was to be deducted for his board. In case of marriage, which the testator, not unreasonably, it would seem, appeared to consider desirable for the son, then, if such marriage occurred in the life of his mother, he might be paid $200 more per annum, if the support of the family required it, and it would not be more than an equitable proportion of the income from the estate. This latter contingent provision extended from the date of such marriage to the death of the testator's wife. So much as to what might be done for the son during the life of his mother. Then the testator passes to what should take place after her death. If the son remained single after the death of his mother, the trustees would continue the payment to him of the $400 per annum while he continued single, which might be increased to not exceed $600 per annum in case of sickness or disease. If he had married before the death of his mother, then, commencing at her death, if he married after her death, then, commencing at such marriage, to him and his wife were given the use of his legal proportion of the estate, not absolutely, however, but "to be

Digitized by Google

held in trust by my trustees, to be paid to him or his wife, for their proper support, as my trustees shall think best." We repeat that we think the language here used by the testator entirely clear, and add that to give it such a meaning as claimed in behalf of George H. Mix would be at once to violate all recognized rules of construction, and defeat the manifest general intent and purpose of the testator, expressed throughout those provisions designed for the benefit and protection of his "beloved and unfortunate" son.

We are thus brought to a consideration of the question of "what disposition shall be made of the net income of the estate during the time that George shall remain unmarried?" This may include, also, the question as to the source from which the trustee is to take the payment to George,—the corpus, the net income, or the income of one-third? This last question does not appear to present any difficulty, however. It was evidently the intention of the testator that after the death of his wife, and during the continuation of the trust, each of his daughters should receive the use and income from such an aliquot portion of his estate as would equal their share in it, under the statute of distributions, in case of intestacy; namely, one-third. The words "legal proportion," used by him, were doubtless intended to convey that meaning, both in reference to the daughters and when used in relation to the son and his prospective wife. Assuming, therefore, for the purpose of illustration, the net income of the estate, before any payment to the son, to be $3,600, we think one-third, or, in the case assumed, $1,200, should be paid to each of the daughters, and the payment to the son should be made from the remaining third. But what disposition shall then be had of the remainder of that third? Shall it be accumulated to meet some special provisions, or shall it go to increase the principal of the whole estate, thereby becoming income-producing, and thus increasing the income to be divided annually among the daughters? The latter construction is claimed by counsel for the daughters, and is not seriously contested by the counsel for the son, who says that the contingency of the son's marriage is now most unlikely to happen; and, if the construction of the will claimed by him is not maintained, it can make little or no difference to the son which view may be taken of this question. We cannot, however, overlook two considerations: First, that we are not at liberty to make a will for the testator different in any respect, even the slightest, from the one which he has made for himself; second, that in certain contingencies the construction may be of importance to the son, and, in any event, it is so to those who are in the remainder, and would therefore be benefited by the accumulation of the estate. Bearing these considerations in mind, and looking carefully into the will, we can discover no ground upon which to infer that the testator desired his daughters to profit, during the life of the son, from the use of that part of his estate which he denominated such son's "legal proportion," any more than that he intended the son to so benefit during the life of the daughters from the income of the shares which he styled their "legal proportion." So that in supporting the contention in behalf of the daughters to the extent of holding that the payments to the son should be taken from the income of a single share, and not from that of the whole estate, we are led, by the same line of reasoning, towards the view that the testator did not intend that the son's share should be kept less intact from the daughters' than theirs should be from him.

But if we discover no basis in the will for supporting the further contention of the daughters now under consideration, on the contrary we do find in the instrument grounds for the opposite conclusion. Whatever the present income of the estate may be, and however likely it is that such rate will approximately continue, concerning which it is evident that nothing more certain than speculation exists, it is manifest that, at the date when the intention of the testator must be ascertained and taken (the time of the making of the will), he had in mind and provided for the contingency that $600 per annum might be more than the son's equitable proportion of the income from his estate. With such possibility in view, it is not to be supposed that the testator contemplated that such proportion would be diminished from what it otherwise might be, by conferring upon the daughters two-thirds of the benefit in the way of accretion which might arise either from the excess of income upon the "proportion" of the son above the payment of $600 or $400 per annum, or from withholding any proportion of that amount in any year. The provision, also, for the contingent payment to the son of "a sum not exceeding four thousand dollars," "from his portion of my estate," is significant. It may be possible, even if not probable, that the effect of paying annual discretionary sums to the son out of one portion called his, and then putting the balance of the income from that portion into the whole fund, so as to benefit the daughters, might at some subsequent time prevent a payment to the son of as great an amount as the trustees might otherwise, in the exercise of their discretion, feel it their duty to make. We also think the testator intended that, in the event of the son's marriage, the legal proportion of the estate, the use of which was to be held in trust and used for his benefit and that of his wife, should be all that part of what, under the statute of distributions, would be the son's aliquot share of his estate, and of its accumulations, after the death of the testator's wife, not previously paid to the son, under the discretionary powers vested in the trustees. We therefore cannot hold that the contention in behalf of the daughters

Digitized by Google

in reference to the disposition of the surplus income is correct.

We are also asked to say whether "grandchildren living at the decease of the testator, and those born less than twenty-one years thereafter, take any interest in the estate." The form of this question was probably suggested by somewhat peculiar and perhaps conflicting language of the will; but we think the general intent of the testator is manifest, and, in declaring that intent, we shall necessarily make our examination and determination somewhat broader than the exact language of the question calls for, though probably not wider than its meaning and purpose. The object of the testator was apparently fourfold: First. To care for his wife during her life. We have already seen how this purpose was accomplished. Second. To provide for his children during their lives. To accomplish this, he gave "the entire income of his estate to his children, after the death of his wife." Kellogg v. Mix, 37 Conn. 246. Third. To provide for his grandchildren, if such there were. This he did by giving them "the full fee." Fourth. To avoid intestacy. This he accomplished by remainder over to collaterals and to charity. That he intended the trust which he created to continue until the death of his last surviving child is unquestionable. The only possible question is as to when and in whom he intended the first remainder in fee to grandchildren to vest in interest, and in regard to this there is certainly some apparent conflict of expression, out of which we, nevertheless, think it is entirely clear to see what the real thought and meaning of the testator was. Let us repeat the various provisions which bear upon this question. In paragraph 4, after providing for the contingency of the son's marriage, the testator adds: "The use only to be held by him during the life of himself and wife; and, if they die without children, then the use of it to go to my surviving children during their life, and the full fee to go to my grandchildren when they attain the age of twenty-one years, if their parents are dead. But in case of my son's death without children, and his wife marries again, then the use of my property from the date of her marriage shall go to my surviving children or their children, at the age of twenty-one years." In paragraph 5, the testator provides a trust estate for each of his daughters of their "legal proportion" of his estate; "then the full fee to go to their children when they attain the age of twenty-one years." He then makes provision—First, in case his daughter Martha die without children, before her husband; second, in case one or both his daughters die without children; adding "always provided that they are each and all of them to retain the entire use of my estate till their death." In paragraph 7 provision is made for the contingency that his children all die without issue, adding: "The foregoing provision is to take effect at the death of my last child, without any of my children having children: but in no case shall the provision be carried out or take effect if any one of my children have children, in which case this clause is to be null and void, and my property is all to descend to my children, as herein provided, and to my grandchildren who may be born twenty-one years after my death." In paragraph 9, discretionary power is given to the trustees, if "necessary and advisable, to spend from my estate for the education of my grandchildren."

The reference to the disposition to be made of the property should his son or either daughter "die without children" would, taken by themselves, indicate an intention to create, in event of the death of either surviving child, an interest in such surviving child in the nature of an equitable estate tail in the real estate, and an executory devise in the personal estate; but, taking the whole will together, we think the testator meant—First, that his children should only receive the use of life trust estates, together with such additional discretionary or contingent benefits as were expressly provided; second, that grandchildren, if any such there were, should receive the remainder in fee; that only in the event of the death of his last child, without any of his children having children, could the gift to collaterals and to charities take effect. It seems manifest, therefore, that grandchildren living at the decease of the testator, or, if none were then born, the first born thereafter, took, as and in behalf of a class, opening to let in after-born grandchildren, a vested remainder interest in fee in the entire estate; that, in addition to this, it was the wish of the testator, as expressed in paragraph 4, in the event provided, of the marriage of the son, then the death of the son, and of his wife, without issue, or the survival and subsequent marriage of the wife after the death of the son without issue, that the use of the testator's entire property should then go to his other children, but that if one of his other children were then dead, leaving children, or should thereafter die, leaving children, such children, during the life of the testator's still surviving child, and at the age of 21 years (previous to which time the discretionary power in paragraph 9 would apply to them), should stand in the place of the deceased parent, in reference to the receipt of income, during the continuance of the trust estate, which would determine when the last survivor of the testator's children was dead, and the youngest grandchild had reached the age of 21 years. The same intention to continue the trust in the event of grandchildren being within the age of 21 years at the death of the last surviving child is expressed in the fifth paragraph, before quoted. It seems probable, also, that by the quite indefinite and ambiguous language used by the testator in the seventh paragraph, as above recited, the testator intended, in any event, that the trust created should continue

Digitized by Google

for a period of 21 years after his own decease, notwithstanding all his children might have before deceased, and without regard to the ages of their children, or even if they did not leave any. But whatever the intention of the testator here was, which is not clear to us, perhaps for the reason that it was not to its author, it seems certain that he did not intend what the question asked us suggests,—that grandchildren born at the testator's decease and those living 21 years thereafter should not take. Nor do we feel at liberty from this language to imply an intent on the part of the testator to designate a particular class of grandchildren, and by such implication to defeat the clear general purpose to treat all his grandchildren alike.

In addition to the questions directly presented by the complaint, it has been somewhat informally, though with the consent of all parties to the record, asked, in behalf of the Connecticut Trust & Safe-Deposit Company, the administrator on the intestate estate of the wife of the testator, whether the gift of $5,000 to her, made at the end of paragraph 5 of the will, was an absolute gift, which should be paid to the administrator and taken from the corpus of the trust fund. The language was as follows: "Should one or both of my daughters die without children, then I give to one or both, as the case may be, the sum of five thousand dollars, in full fee, to be disposed of as they choose, by will or otherwise, and the same to my beloved wife, always provided that they are each and all of them to retain the entire use of my estate till their death." It seems to us that, whatever weight there may be to the argument in favor of the claim,—that such language as that here used by the testator in reference to his wife is construed by courts not merely to confer a power, but to convey a fee, overruling and rendering void inconsistent conditions or limitations, and that, in general, absolute estates are favored when they can be established,—we are not called upon to consider such a claim in a case where the court has already, in Kellogg v. Mix, as one of the reasons on which it bases its conclusion in favor of the contention of the intestate, and presumably one of the grounds urged in her behalf in support of that contention and for such conclusion, held that the testator gave "nothing to his wife, unless it be the income." After this conclusion had been so declared, and acquiesced in by Mrs. Mix for 20 years, we ought not now, after a quarter of a century, and five years after her death, to entertain the same question, even for the sake of reversing such former statement and conclusion of this court. She ought at least to have had the privilege of refusing the legacy, and, if she had, she may now fairly be presumed to have availed herself of such right.

The superior court is advised: First. During the time Eliza F. Mix remains single, the net income of two-thirds of the trust estate should be divided equally between her and her sister, Mrs. Cone. Second. During the time George H. Mix remains unmarried, the net income of one-third of said trust estate, after deducting the discretionary payments, should be accumulated by the trustees. Third. The payments to George H. Mix should be taken from the income of said one-third. Such payment is not conditioned otherwise than upon the sound discretion of the trustees, having due regard to the wish of the testator that the reformation or self-support of the beneficiary should be kept in view and its accomplishment sought. Payments from income may be made, not to exceed $600 per annum, in the event of sickness or disease of the beneficiary. Fourth. No distinction between grandchildren born or living at a certain time or date and others was intended to be made by the testator. All grandchildren take, as members of a class, the remainder in fee. Fifth. All the discretionary powers conferred upon the original trustees exist, and may be exercised by their successor. Sixth. The claim of the Connecticut Trust & Safe-Deposit Company, as administrator of Mrs. Mix, should not be entertained.

The other judges concurred.

LOGAN et al. v. EATON et al.

(Supreme Court of New Hampshire. Hillsborough. July 31, 1891.)

ESTOPPEL BY DEED.

A grantor is estopped by a clause in a deed conveying his five-twelfths interest in certain land with a covenant of warranty to deny that the deed conveyed five-twelfths.

Case reserved from Hillsborough county.

Bill by E. D. Greely and another against A. S. Eaton and others for partition.

The plaintiff Mrs. Logan had quitclaimed to Chase, the defendants' grantor, her interest in a tract of land by a deed containing this clause, "my interest in the same being one undivided half of the interest of the said Samuel Greeley at his decease, which interest was five undivided sixth part," and a covenant to warrant and defend "said premises" against all persons claiming by, from, or under the grantor.

H. B. Atherton, for plaintiffs. G. B. French, for defendants.

DOE, C. J. The plaintiff is estopped to deny the truth of the deed by which she undertook to convey five-twelfths of the land. Case discharged.

CLARK, J., did not sit. The others concurred.

Digitized by Google

TASKER v. CARROLL COUNTY.

(Supreme Court of New Hampshire. Carroll. July 31, 1891.)

Case reserved from Carroll county.

Action by A. Birney Tasker against the county of Carroll to recover for the expenses of a coroner's inquest. Case discharged.

A. Birney Tasker, pro se. P. Wentworth, for defendant.

DOE, C. J. The reserved case presents no question of law. Laws 1889, c. 26. Case discharged.

SMITH, J., did not sit. The others concurred.

WALKER v. WALKER et al.

(Supreme Court of New Hampshire. Merrimack. March 13, 1891.)

CONVEYANCES IN FRAUD OF WIFE.

1. Conveyances of personal property made by the husband, during coverture, for the purpose of defeating his wife's rights, are, as to her, fraudulent and void.

2. Where a husband conveys a homestead estate to his children,—it being small, in comparison to the entire amount of his property, and before any estrangement from his wife,—the conveyance is not void as to her.

Exceptions from Merrimack county.

Action by Lorinda Walker against Edward J. Walker and others to recover her legal share in the estate of Nathaniel B. Walker, her deceased husband. Judgment for plaintiff. Defendants except. Exception overruled.

Nathaniel B. Walker died in January, 1889, leaving a will, in which he gave one-third part of his estate to the plaintiff, and the remainder to his two sons by a former wife,—the defendants Edward J. and Charles H. Walker. The defendant Mellen holds in trust for Edward J. and Charles H. Walker a large amount of corporate stocks and bonds, valued at over $38,000, delivered to him to be kept for them by Nathaniel B. Walker in his lifetime. The defendant Stevens is executor of the will. The plaintiff married Nathaniel B. Walker in 1873. May 12, 1877, he purchased a house in Concord for $6,500; taking the deed in his name, as trustee for his two sons, Edward and Charles. This house the plaintiff and her husband occupied as a homestead from that date until his death, in January, 1889. It did not appear that anybody living knew how the title in this house stood until the day before the trial, when, the deed in the hands of the executor being called for by the plaintiff's counsel, the nature of the title was discovered. The house had been assigned to the plaintiff as dower and homestead out of her husband's real estate, she having waived the provisions made for her in his will. Upon discovery of the state of the title to this house, the plaintiff moved to amend her bill so as to claim a share—one third part—of this estate. The court finding that, at the time he took the deed as trustee for his sons, the deceased had ample means remaining for a suitable provision for his wife, denied the motion, and the plaintiff excepted. In 1883, jealousy had arisen between the plaintiff and her husband, and this feeling grew into an estrangement between them, which continued until his death. In that year his two sons, Edward J. and Charles H., being then 19 and 17 years of age, respectively, left home. About this time their father assigned to them certain shares of railroad stock; giving up his own certificates, and taking certificates, some in the name of Charles, and some in the name of Edward. He took powers of attorney from the boys, to enable him to collect the dividends, but made no delivery or change of possession of the stock and bonds at that time; informing them, in a general way, without specifying the securities, that he had given them, or proposed to give them, certain property of that kind, without specifying the amount. Mr. Walker retained the possession of this property—collecting the interest upon the bonds and the dividends upon the stocks, as upon his own property, sending Charles and Edward certain sums, as their needs required, and using the balance for his own personal and other expenses—until about the 1st of November, 1887, when he went to Worcester, and, at Mellen's office, delivered to him a tin box containing bonds and certificates, and requested Mellen to keep it for his sons Charles and Edward; saying that the securities belonged to them (Charles and Edward), and that he had powers of attorney from them to manage the property and collect the income. Mellen told him he would take the securities, and hold them as he might direct. Mellen found in the box a large amount of corporate stock and bonds, with two lists, written upon a small piece of paper, enumerating the property,—one list having the name "Charles H. Walker" written over it, and the other the name of "Edward J. Walker." These names were in N. B. Walker's handwriting. These stocks and bonds have since remained in Mellen's possession, except that certain other stocks or bonds were added by Mr. Walker, in his lifetime, for the purpose of making the lists more nearly even in amount, and an exchange of one lot was at one time made by him. Mellen collected the interest on the bonds and the dividends upon the stock. Some of the income collected by him he paid to Charles, and some to Edward, either with or without express directions from their father, and sent him the balance; always accounting to their father, N. B. Walker, for all collections and payments. Mr. Walker died in January, 1889. Charles and Edward did not know the amount or kind of these securities until after their father's death. The value of the whole on the 1st

Digitized by Google

day of April, 1890, was $37,737. No part of this property was ever delivered to Charles or Edward in the lifetime of Mr. Walker, their father. In the management and control of the property, Mr. Mellen acted entirely under the advice and direction of Mr. Walker, who did not intend that the gift to his sons should take effect until his death. Without the property claimed to be embraced in the gift to the sons, and her interest in the homestead premises, lost as before stated, the value of the plaintiff's entire right in the estate of over $50,000 left by her husband is only $2,211.97. The court found that the gift to his sons by the deceased was testamentary in its character, designed to deprive his wife, the plaintiff, of her rightful share in his estate, and, as to her, was fraudulent and void, and that the plaintiff was entitled to a decree; that Charles and Edward Walker, or said Mellen for them, should pay to the plaintiff the sum of $12,579, being one-third of the value of the property in Mellen's hands claimed by Charles and Edward, and interest on said sum from April 1, 1890, or that said Mellen deliver all of said property to said Stevens, to be administered as part of the estate of said Walker. The defendants excepted.

Chase & Streeter, for plaintiff. Wm. L. Foster, for defendants.

BLODGETT, J. Upon the facts found at the hearing, the bill can be maintained. The attempt of the plaintiff's husband to dispose of nearly all of his personal estate so that he should have the enjoyment and control of it for life, and the plaintiff be deprived of any portion of it at his decease, cannot be sanctioned. It is settled law that conveyances of real estate made by the husband, during coverture, for the purpose of defeating the wife's rights, are, as to her, fraudulent and void. Whether the same rule obtains in transfers of personal property for the like purpose, when the husband reserves therein no right to himself, is a question upon which the authorities are somewhat at variance; but where the transfer is a mere device or contrivance by which the husband, not parting with absolute dominion over the property during his life, seeks at his death to deprive his widow of her distributive share, there is no substantial conflict of authority that the rule applicable to conveyances of realty prevails. Thayer v. Thayer, 14 Vt. 107; Hays v. Henry, 1 Md. Ch. 337; Rabbitt v. Gaither, 67 Md. 95, 100, 105, 8 Atl. 744; Littleton v. Littleton, 1 Dev. & B. 327; McGee v. McGee, 4 Ired. 105; Davis v. Davis, 5 Mo. 183; Stone v. Stone, 18 Mo. 389; Tucker v. Tucker, 29 Mo. 350; Smith v. Smith, 12 Cal. 216, 225; Lord v. Hough, 43 Cal. 581; Cranson v. Cranson, 4 Mich. 230; Holmes v. Holmes, 3 Paige, 363; Richards v. Richards, 11 Humph. 429; Petty v. Petty, 4 B. Mon. 215. Such, also, were the decisions under the ancient customs of London, from which our statute of distributions is said to have been borrowed. Thus, in Hall v. Hall, 2 Vern. 277, it was held that if a freeman gives away goods in his lifetime, and yet retains the deed of gift in his own power, or retains the possession of the goods, or any part of them, it is a fraud upon the custom, and will not conclude the widow; and in Fairebeard v. Bowers, Id. 202, a voluntary judgment by a freeman, payable after his death, was postponed to the widow's claim for her customary share. So, in City v. City, 2 Lev. 130, where the deceased had, by deed, assigned a term to his son, and the son had gone into possession, it was held that this did not bar the widow of her customary share, the assignment being without consideration; and it was said, "The same is the law as to goods." And Edmundson v. Cox, 7 Vin. Abr. 203, is of the like general purport. That case was a bill by the widow of a freeman of London for her customary share. The husband had made his will, and devised to the wife certain real and personal estate. There was sealed up in the will the bond of the testator, executed before the date of the will, conditioned to pay the defendant a given sum of money, or transfer to him a given amount of bank stock. The obligee was the testator's nephew, and the bond without valuable consideration. It was held by the master of the rolls that the widow, on first disclaiming all benefit under the will, could have a decree for her customary share, and that the bond should not stand in her way; and he adds, "Such sort of contrivances to evade the custom have always been set aside in this court." See, also, Smith v. Fellows, 2 Atk. 62, and Coomes v. Elling, 3 Atk. 676. These decisions well illustrate what should be the course of decision under our statute. The widow's claim for her share under the statute being strictly analogous to the claim of the widow of a freeman under the custom of London, if a contrivance to evade the rights of the widow under that custom was never tolerated there is no reason why it should meet with more favor under the statute. By the declaratory statute of 13 Eliz. c. 5, made perpetual by 29 Eliz. c. 5, and adopted as part of the common law in this state, for avoiding feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands, tenements, and hereditaments as of goods, chattels, wares, and merchandise, which feoffments, etc., have been devised of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, etc., not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, it

Digitized by Google

was declared and enacted, in the second section, "that all and every feoffment, gift, grant, alienation and conveyance, and all and every bond, suit, judgment and execution, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken," as against such creditors and others, and their representatives, "to be utterly void and of none effect."

There is no ground to claim, and none is made by the defendants, that the act of the plaintiff's husband in relation to the stocks and bonds comes within the proviso in the sixth section exempting from the operation of the act transactions upon a good consideration and bona fide; but it is contended that the plaintiff is not within the act, as a creditor, and therefore is not within its protection. Technically, and in a strict legal sense, she may not, perhaps, be a creditor; but "the statute, by the words 'creditors and others,' embraces others than those who are strictly and technically creditors. Even the word 'creditor' does not receive a strict definition, for a party who is not, strictly speaking, a creditor, may stand in the equity of a creditor, and have an interest that may be defrauded. * * * The character of the claim, if it is just and lawful, is immaterial, * * * and a contingent claim is as fully protected as one that is absolute." Bump, Fraud. Conv. (2d Ed.) 491, 492. Under this construction of the statute, which is fully supported by the decisions, it is not open to reasonable doubt that the plaintiff comes within its protection. The character of her claim is just and lawful, in the highest degree; she stands in the equity, if not in the attitude, of a creditor; she is as much injured as any creditor can be; and the fact that, at the time the securities were transferred, her distributive right therein was contingent, entitles it none the less to protection than if it had been absolute. And this should be so. Marriage is equivalent to a pecuniary consideration; that is to say, it is a valuable consideration. The plaintiff's right to her distributory share of her husband's large estate, and which is quite likely to have been one of the inducements to her marriage with him, is therefore in the nature of an actual purchase of that right, and may well be given the same effect, under the liberal and beneficial construction which the statute is entitled to receive for the suppression of fraud, the advancement of justice, and the promotion of the public good. But however this may be, inasmuch as the design of the statute, obviously, was to embrace others than those who are creditors, in a strict and technical sense, we think that under its designation of "creditors and others" the plaintiff is fairly included; "and if," in the language of Mason, J., in Feigley v. Feigley, 7 Md. 537, "under such a comprehensive clause as 'creditors and others,' a wife who has been made the victim of her husband's fraud is not to be included, we are at a loss to ascertain to whom it was designed to relate." The same or equivalent statutory language is also held to apply to and include the defrauded wife in Tyler v. Tyler, 126 Ill. 525, 21 N. E. 616; Green v. Adams, 59 Vt. 602, 10 Atl. 742; Jiggitts v. Jiggitts, 40 Miss. 718; Reynolds v. Vance, 1 Heisk. 844; Boils v. Boils, 1 Cold. 287; Brewer v. Connell, 11 Humph. 500; Killinger v. Reidenhauer, 6 Serg. & R. 581; Bouslough v. Bouslough, 68 Pa. St. 495, 499; and Johnson v. Johnson, 12 Bush, 485. And if it were even held that the statute does not include the plaintiff, either as a creditor, or as one to whom the conveyancer owes a lawful duty in respect of his property, which he fraudulently attempts to avoid, it would not leave her remediless under the common law, which is still in force. "As the act is merely declaratory, resort may always be had to the principles of the common law whenever the statute fails to reach a case of fraud. The act itself is not affected by this doctrine, and will in general be received as a true declaration of what the law was; but wherever the statute is ineffective, either through a change of custom, or the introduction of a new kind of property, or the concoction of some new device, there the common law intervenes, with its pure and elevated principles of morality and justice, and enforces the dictates of common honesty and common sense." Bump, Fraud. Conv. 11. But, irrespective of the statute and the common law, the obligations and duties of husbands and wives to each other disable each of them, alike, to successfully defraud the other by such a disproportionate, unreasonable, and fraudulent transfer of property as appears in this case (Laton v. Balcom, 64 N. H. 92, 94–96, 6 Atl. 37); and upon general principles of equity, alone, the plaintiff's bill may be supported. It is an established rule that a husband will, upon a proper case being made out, be restrained by injunction from transferring property in fraud of the legal or equitable rights of the wife. 2 Story, Eq. Jur. (12th Ed.) § 955; Kerr, Inj. (2d Ed.) 534, and cases cited; Eden, Inj. 295, 296. And, if such transfers are made, equity puts her on the same footing with a creditor who finds himself hindered, delayed, or defrauded by his debtor. With these views of the transaction, the plaintiff is entitled to her distributive share of the stocks and bonds, as if no transfer of them had been made or attempted. If, however, the transfer were not fraudulent as against her, the same conclusion follows. The gift was not perfected. It was not valid as a gift inter vivos, for that goes into absolute and immediate effect,—the donor parting not only with the possession, but with the dominion of the property; nor as a donatio causa mortis, for the securities were not delivered by the deceased in his last sickness, nor when in any particular peril of

Digitized by Google

death, or under any special apprehension of such peril. Craig v. Kittredge, 46 N. H. 57, and authorities cited.

As to the house occupied by the plaintiff and her husband as a homestead, a different case is presented. At the hearing the plaintiff moved to amend her bill so as to claim one third part of the homestead premises; but the claim was denied on the ground that, at the time her husband took the homestead deed as trustee for his sons, he had ample means remaining for a suitable provision for the plaintiff, to which denial she excepted. If the purpose which prompted the husband's act was not to defraud the plaintiff, but a desire to make a reasonable provision for his minor children, whose interests it was his duty to guard and protect, it would be a misnomer to call the transaction fraudulent, and it must be allowed to stand. In such cases the facts are always open to inquiry, "and it seems settled that the court is warranted in considering such circumstances as the meritorious object of the conveyance and the situation of the husband in point of pecuniary means." Schouler, Dom. Rel. 270. And this is right and reasonable. Marriage does not debar a man from all right to dispose of his property during his life according to his will and pleasure. On the contrary, "nothing is better settled than the power of a husband to dispose of his personal property in good faith, by gift or otherwise, during coverture, free from all post mortem claims thereon by his widow." Dickerson's Appeal, 115 Pa. St. 198, 8 Atl. 64. It simply debars him from making gifts and conveyances with the view of defeating his wife's marital rights, and to this extent only is his power of disposal clogged and fettered. When his object is not to defraud her, he may therefore lawfully sell or convey, and he may even make a gift of his property for any lawful purpose. If possessed of large estate, the voluntary conveyance of a small portion of it to a stranger would scarcely be deemed fraudulent as against her; and if the conveyance is to his children by a former marriage, and he retained that which would, in the ordinary course of events, be ample provision for himself and wife and family, there surely would be no fraud upon her marital rights cognizable in equity. See Butler v. Butler, 21 Kan. 521, and authorities generally. Taking into consideration Mr. Walker's pecuniary circumstances, the comparatively small amount invested in the homestead trust estate with reference to the entire amount of his property, the meritorious claims of his children, as such, upon him, and the pregnant fact that this trust was created long before his estrangement from the plaintiff, we are of opinion that the provision made by him for his children was, under the existing circumstances, a just and reasonable one, that no fraud upon the plaintiff was intended, and that her claim for a share of the homestead estate was properly denied. Exceptions overruled.

DOE, C. J., and ALLEN, J., did not sit. The others concurred.

NORTHERN R. R. v. MANCHESTER & N. W. R. R.

(Supreme Court of New Hampshire. Merrimack. July 31, 1891.)

CONSTITUTIONAL LAW—DELEGATION OF POWERS—INJUNCTION.

1. Laws 1856, c. 1911, authorizing the union of two railroad companies, and authorizing the united company to discontinue such portions of the road as the directors should deem necessary, is not unconstitutional, as being a delegation of legislative power.

2. Where two railroad companies exchange property on consideration that a certain road should be discontinued, a successor to one of said roads, under a charter granted after such contract was made, wherein no allusion was made to such discontinuance, will be enjoined in using such discontinued road.

Bill in equity by the Northern Railroad against the Manchester & North Weare Railroad Company and others. Case discharged.

O. E. Branch, C. H. Burns, and I. W. Drew, for plaintiff. D. Cross and F. S. Streeter, for defendants.

DOE, C. J. Chapter 1911, Laws 1856, provided for the foreclosure of the mortgage of the Contoocook Valley Railroad by sale to the Contoocook River Railroad, authorized the River Company to unite with the Merrimack & Connecticut Company, and authorized the united companies "to provide for the discontinuance of such portion or portions of the tracks and road of either of said corporations as shall be deemed by the directors of said corporations unnecessary by reason of such union; and after such union the portion or portions of track and road so agreed to be discontinued may and shall be discontinued: provided, however, that there shall be at least one line of railroad extending to and beyond Henniker." Corning and Gilmore were the River Company. Laws 1856, c. 1914. October 17, 1857, the Valley road was conveyed to Corning, who conveyed it to the Contoocook River Company (i. e. to Gilmore and himself). The River Company paid him for the Valley by giving him a note of the Valley for $30,000, and gave him a mortgage of the road to secure the note, and he transferred the note and mortgage to the Northern. Laws 1858, c. 2168, provided that all powers relating to discontinuance, granted by the act of 1856 to the River and Merrimack & Connecticut, to be exercised upon their union into one corporation, might be exercised by them without such union, and authorized the River to execute all deeds, mortgages, and conveyances that might be deemed necessary to carry into

Digitized by Google

effect section 2, c. 1911, Laws 1856. The Merrimack & Connecticut Company had been formed by the union of the Central and the Concord & Claremont. The Central had been mortgaged, and delivered to the mortgagees, who were operating it, and the Northern owned the mortgage bonds to the amount of $195,000. October 13, 1858, Corning and Kettell (one of the mortgage trustees of the Central and a director of the Northern) signed an agreement for carrying out the plan of discontinuance; Kettell explaining his position by adding to his signature, "for the parties in interest," the Northern. The last clause of the agreement was: "Said Corning and his assigns agree so to conduct the business of said N. H. Central Railroad as in no way whatever to compete with the Contoocook River Railroad." October 29, 1858, the River Company and the Merrimack & Connecticut Company passed votes for discontinuance. On the same day there were transactions which were, in effect, an exchange made by the Northern of the Central for the River. October 31, 1858, the track of the Central between North Weare and Henniker was taken up, and the bridge at Henniker was removed by Gilmore, who was superintendent of the Concord, and the rails and ties were sold under the agreement of October 13th, and that part of the Central has not been operated since October 31, 1858.

The entire legal character and effect of the discontinuance authorized by the acts of 1856 and 1858, agreed to by all parties in interest, and carried into execution in pursuance of their agreements and the statute, need not now be determined. The defendants contend that the acts authorizing it were an unconstitutional delegation of legislative power. The charter of the Central Company (Laws 1848, c. 662) authorized them to construct and keep in use a railroad from Manchester to Claremont, and provided (section 7) that the charter should be void as to every portion of the road not completed January 1, 1860. Although the question whether any part of the road should be constructed was submitted to the company, there was no delegation of legislative power. Petition of Mt. Washington Road Co., 35 N. H. 134, 140, 141; Tied. Pol. Powers, § 121a. The legislative question was decided by the legislature. The expediency of the investment was a question of discretion, necessarily referred to the stockholders. The same distinction is to be observed in the acts of discontinuance. The legislature determined the legislative question, released the company from their obligation to remain in the public service, and left them to judge of their own interests as investors. Whatever else the discontinuance may be, it is an executed agreement of all parties in interest, authorized by express statute. The facts stated in the case show that it was a part of the transaction in which the Northern exchanged the Central for the River, and a part of the basis of that exchange. Upon those facts a restoration of the disused road by the defendants would be a violation of contract and a breach of faith. What new rights may be acquired in future proceedings under recent laws is a question to be considered when it arises. Upon the facts stated in the case, it would be inequitable for the defendant to reconstruct and operate the disused road, unless they derive an equitable power to do it from the charter of the Manchester & North Weare. Laws 1858, c. 2155. This charter was granted two years after the first act, authorizing the discontinuance on the union of the River and the Merrimack & Connecticut, and two days after the passage of the second act, authorizing the discontinuance without such union. It contains no allusion to either of the discontinuing acts. There is no express repeal of the discontinuing law, and no repugnancy from which a repeal can be implied. The general terms, "all the rights, franchises, and privileges heretofore conferred by law upon said N. H. Central," to "be held and enjoyed * * * in the same manner as the same were held and enjoyed by said N. H. Central R. R. Company before said Merrimack & Connecticut River Railroad was constituted," are explained by what follows: "And the provisions of the act relating to the union of the Concord & Claremont Railroad and the N. H. Central Railroad Company, approved January 8, 1853 (Laws 1852, c. 1347), so far as inconsistent with the provisions of this act, shall become and thereafter be inoperative and void." The clause referring to the powers held and enjoyed by the Central before the Merrimack & Connecticut was constituted by the union of the Central and the Concord & Claremont has no reference to the discontinuance authorized with and without the union of the River and the Merrimack & Connecticut. There is no reason to believe these general terms were intended to repeal the discontinuing acts, or to authorize a breach of any agreement that had been or might be made under existing law, and the question of power to authorize a breach of contract does not arise. The plaintiffs are entitled to an injunction against the use of the discontinued part of the road. Case discharged.

BLODGETT and CHASE, JJ., did not sit. The others concurred.

GILLIS v. CHASE et al.

(Supreme Court of New Hampshire. Hillsborough. March 11, 1892.)

RIPARIAN RIGHTS—USE OF WATER.

1. A riparian owner has a right to the reasonable use of the water as it passes his land, either for his own purposes or for a sale to others.

2. Whether the use by a riparian owner of the water as it passes is reasonable is a question of fact for the jury.

Digitized by Google

Case reserved from Hillsborough county.

Five actions by John F. Gillis, administrator of John Gillis, against William F. Chase and others, for diverting water, and diminishing the flow on plaintiff's land.

Facts found by the court: The plaintiff and one J. S. Winn are riparian owners. Winn's land is above the plaintiff's upon the stream. About 15 years ago Winn built a dam to hold back the water, and formed a reservoir, from which, by an aqueduct, he supplied water to his farm buildings. He also permitted the defendants, who are not riparian owners, to connect aqueducts with the reservoir, and thereby supply their buildings with water, conveying to same by deed a right to such use. The defendants all claim the right to take the water from the reservoir under J. S. Winn, the owner of the land where the reservoir is located, and the owner of a part of the meadow from which the water is collected. The use of the water made by the several defendants is reasonable as to the quantity used. Should all the defendants cease using the water, the amount flowing by the plaintiff's land would not be perceptibly increased. Judgment for defendants.

Henry B. Atherton, for plaintiff. Chas. H. Burns, for defendants.

BLODGETT, J. The case finds that "the defendants all claim the right to take the water from the reservoir under J. S. Winn, the owner of the land where the reservoir is located, and the owner of a part of the meadow from which the water is collected." In virtue of the ownership, Winn's right to divert the water for use to a reasonable extent was incident to the land, and, as the plaintiff has failed to show any actual damage, it is only for an unreasonable and unauthorized diversion that the law will imply damage to him, because, each riparian proprietor having the right to a just and reasonable use of the water as it passes through and along his land, it is only when he transcends his right by an unreasonable and unauthorized use of it that an action will lie against him by another proprietor, whose common and equal right to the flow and enjoyment of the water is thereby injuriously affected. And as the reasonableness of the use is, to a considerable extent, a question of degree, and largely dependent on the circumstances of each case, it is to be judged of by the jury, and must be determined at the trial term as a mixed question of law and fact. Jones v. Aqueduct Co., 62 N. H. 488, 490; Rindge v. Sargent, 64 N. H. 294, 295, 9 Atl. 723. This question having been found adversely to the plaintiff by the trial court, the finding is conclusive against him (Jones v. Aqueduct Co., supra), and consequently the only question now open to him is as to the right of Winn, in his character as a riparian proprietor, to sell the nonriparian defendants any of the water belonging to him as incident to his land. The English rule is understood to be that "a riparian owner cannot, except as against himself, confer on one who is not a riparian owner any right to use the water of the stream; and any used by a nonriparian proprietor, even under a grant from a riparian owner, is unlawful." Ormerod v. Mill Co., 11 Q. B. Div. 155; Swindon Waterworks Co. v. Wilts & Berks Canal Nav. Co., L. R. 7 H. L. 697; Nuttall v. Bracewell, L. R. 2 Exch. 1. But this rule is otherwise in this jurisdiction, for it is held here to be a question of fact whether the use of the water made by a riparian owner for his own purposes or for sale to others, is, under all the circumstances, a reasonable use. Jones v. Aqueduct and Rindge v. Sargent, supra. And in view of the finding that the sale of the water to the defendants by Winn is a reasonable use of his right as a riparian owner, the plaintiff has no standing on this branch of the case. Judgment for the defendants.

CLARK, J., did not sit. The others concurred.

PARKER et al. v. LEACH et al.

(Supreme Court of New Hampshire. Hillsborough. March 13, 1891.)

WILLS—NATURE OF ESTATE.

A legacy to each of the children of L., begotten during his natural life, to be paid when they severally arrive at the age of 21 years, at the death of testator vests in those that are living, and in after-born children at their birth.

Bill by Walter M. Parker and David S. Leach, executors, against Charles W. Leach and others, for direction of construction of a will.

The plaintiffs are executors of the will of David S. Leach, made April 24, 1877, which contained, among others, the following bequests: "3rd. I give, bequeath, and devise unto the sons of David R. Leach, begotten by him during his natural life, my undivided half of a certain parcel of land, with the brick buildings thereon, called the 'Martin Block,' * * * to have and to hold the same, to them and their heirs and assigns, in equal shares, subject to the following legacy: 4th. I give, bequeath, and devise to the daughters of David R. Leach, begotten by him during his natural life, the sum of five hundred dollars each, to be paid, in one year from my decease, from the income of said Martin Block." January 19, 1878, the testator made a codicil to his will, containing the following: "I hereby revoke item 3rd in said will, devising to the sons of David R. Leach one undivided half of Martin's Block, and in lieu of said legacy I give and bequeath unto said legatees the sum of one thousand dollars each, and no more, payable on their arriving at the age of twenty-one years, respectively, without interest. I hereby revoke and strike out of item 4 the words 'out of the income of said Martin Block,' being the last eight words in said

Digitized by Google

item. I also revoke so much of said item as relates to the time of payment of said legacies, and instead thereof I direct that the same be paid when the legatees arrive at the age of twenty-one years, respectively." The residuary clause gave all of the estate undisposed of to the trustees of funds for a certain charity, upon condition that the trustees should serve without compensation in the execution of their trust. And in case of the failure of said legacy by reason of that condition the residue is given to another charity. David R. Leach is living, 51 years of age, and married. There have been born to him eight children, both sons and daughters. One, born February 25, 1876, died shortly after birth; one, George B. Leach, born November 8, 1863, died November 24, 1878. The testator died April 1, 1878. One child—a daughter—has been born to David R. Leach since the testator's death. The executors have performed all the duties imposed upon them, except the payment of the legacies to such of the sons and daughters of David R. Leach as have not attained the age of 21 years, and such as may hereafter be born to him, and the payment of the residue of the estate to the party entitled. They ask the direction of the court, in the further administration of the estate: (1) Whether, under said will and codicil, sons or daughters of David R. Leach, born after the death of the testator, are legatees; (2) whether the daughters of David R. Leach are entitled to interest on the legacy of $500 each, and, if so, from what time; (3) whether, if any son or daughter should die before attaining the age of 21 years, the legacy would lapse, or pass to the heirs of such child; (4) whether the son of David R. Leach, who died before the testator, is entitled to any legacy; and (5) as to the duty of the executors in relation to the residue of the estate.

N. P. Hunt, for plaintiffs. J. W. Fellows, for defendants.

BINGHAM, J. It was the intention of the testator in his will, as modified by his codicil, that each son of David R. Leach, whether begotten before the testator's death or afterwards, should be paid out of his estate the sum of $1,000, payable to each on his arrival at the age of 21 years, without interest, and to each daughter begotten by said David R., either before or after the death of the testator, the sum of $500, payable when each should arrive at the same age, and that neither the legacies to the sons nor the daughters should carry interest till after they were payable, and they do not. These legacies vested in the legatees living at the death of the testator, payable as provided in the will, and in those born subsequent to his death, when born, to be paid when they become 21. Felton v. Sawyer, 41 N. H. 202; Brown v. Brown, 44 N. H. 281, 283; Ordway v. Dow, 55 N. H. 11; Benton v. Benton, 66 N. H. 169, 20 Atl. 365. The testator intended, if a son or daughter should die before his death, that the legacy should lapse, but that no legacy to a legatee living at his death, or to one born subsequently thereto, should lapse if such legatee should die after the death of the testator, and before arriving at the age of 21 years, because, the legacy having vested, it would pass to the heirs of such legatee. It was also the testator's intention that the portion of his estate left after meeting the previous requirements of his will should pass to certain trustees, on the condition that they serve without compensation. When this shall be accomplished, the trustees will become residuary legatees. The legacy to Ethel M. Leach, the youngest child, will not become payable till September 22, 1899; and it is understood that David R. Leach, of Litchfield, is now living, and that sons and daughters may yet be begotten by him. The executors may settle their accounts, and pass the remaining estate to the trustees, subject to the payment of all legacies which now or may hereafter exist under the will, on the trustees furnishing bonds to the executors to pay these legacies, and save them harmless from not paying the same.

BLODGETT, J., did not sit. The others concurred.

CLEVELAND MACH. WORKS v. LANG, Sheriff.

(Supreme Court of New Hampshire. Merrimack. March 17, 1893.)

CONDITIONAL SALES—CONFLICT OF LAWS—ATTACHMENT.

1. Where personal property is sold in Massachusetts, conditionally, under a contract valid in Massachusetts, and is removed into New Hampshire, it is not within the provisions of Laws 1885, c. 30, requiring a memorandum and record of the lien, though, when sold, it was understood it was to be taken to New Hampshire.

2. One attaching property conditionally sold as the property of the purchaser acquires no lien.

Case reserved from Merrimack county.

Replevin by the Cleveland Machine Works against William P. Lang, sheriff, for two machines, situate in the Granite Mills in Northfield, in said county, and attached as both real and personal estate by the defendant, a deputy sheriff, on a writ in favor of Denny, Rice & Co. against Edward P. Parsons. Plea, general issue, and brief statement that the machines were the property of said Parsons, and that they had become annexed to the Granite Mills and liable to attachment as part of the realty. Reserved. Judgment for plaintiff.

The negotiations for the machines were had and completed with the plaintiffs at their place of business in Worcester, Mass., by one Greene, as agent for Parsons who re-

Digitized by Google

sided in Boston. Aside from the agreement of the plaintiffs to send one of their employés to Northfield to set up the machines, which they did, the terms of the contract were as follows: "Tilton, N. H., Oct. 14, 1890. Borrowed and received of Cleveland Machine Works, Worcester, Mass., the following machinery. If the price set against them is paid as per memorandum below, the property is then to belong to Edward P. Parsons; otherwise, it remains the property of the said Cleveland Machine Works. Notes and drafts, if given, are not to be considered as payments until they are paid, and all part payments are to be forfeited by the nonpayment of balance at time stated. In the meantime the said Edward P. Parsons is to keep the property in good order, and may use it free from any other charge; and the said Edward P. Parsons further agrees to pay such price as per memorandum below, and to keep the property sufficiently insured for the benefit of the said Cleveland Machine Works. List of machinery included in the above agreement as follows, with prices annexed: One 10/4 cloth dryer, with No. 8 exhauster, 1,000-feet heater, and clothing of brass wire set in leather and paper, $1,100.00. Terms of payment: $300.00 cash thirty days after shipment; balance, four-months note ($800.00), dated at time of shipment, and interest added. One 90-inch blanket gig, and one set of slats, $215.00. Terms of payment: $50.00 cash thirty days after shipment; balance ($165.00), five-months note, dated at time of shipment, with interest added. Edward P. Parsons." This paper was signed by Parsons in Boston, and delivered to the plaintiff before the machines were shipped, but it has never been recorded in Northfield or elsewhere in this state. Soon after the plaintiff shipped the machines from Worcester, Parsons paying the freight to Northfield. The machines were placed in his mill, and used therein until his failure, which occurred shortly afterwards. The dryer weighed 7,000; and the gig, 3,800 pounds. The gig was not fastened to the floor at all, and the dryer by only two or three screws. Parsons never paid but $100 on the contract, and never claimed the machines to be his property. At the time of the Denny, Rice & Co. attachment, neither they nor the defendant had notice of the plaintiffs' lien.

C. C. Rogers and H. A. & C. B. Hibbard, for plaintiffs. W. B. Fellows and F. N. Parsons, for defendant.

CLARK, J. By the terms of the contract the machines were to remain the property of the Cleveland Machine Works until paid for. The contract was negotiated in Massachusetts, by citizens of Massachusetts, respecting property situated in Massachusetts. The shipment of the machines at Worcester, Parsons paying the freight from that point, made Worcester the place of delivery, and vested in Parsons all the right and interest he ever acquired in the property. The agreement to send a man to set up the machines at Northfield was not a condition precedent to the vesting of the conditional title in Parsons, any more than an agreement to furnish instruction as to the mode of operating the machines would have been. The written agreement shows that the parties understood that the conditional title passed upon the shipment of the machines by fixing the times of payment from that date. The contract was a conditional sale of chattels in Massachusetts, negotiated and completed there by Massachusetts parties, and valid by the law of Massachusetts; and, being valid where it was made, its validity was not affected by the subsequent removal of the property to New Hampshire. Sessions v. Little, 9 N. H. 271; Smith v. Godfrey, 28 N. H. 379; Stevens v. Norris, 30 N. H. 466. As a general rule, contracts respecting the sale or transfer of personal property, valid where made and where the property is situated, will be upheld and enforced in another state or country, although not executed according to the law of the latter state, unless such enforcement would be in contravention of positive law and public interests. A personal mortgage of property in another state, executed and recorded according to the laws of that state, is valid against the creditors of the mortgagor attaching the property in this state, although the mortgage is not recorded here. Offutt v. Flagg, 10 N. H. 46; Ferguson v. Clifford, 37 N. H. 86. A mortgagor of horses in Massachusetts, bringing them into this state, cannot subject them to a lien for their keeping against the Massachusetts mortgagee. Sargent v. Usher, 55 N. H. 287. A boarding house keeper's lien under the laws of Massachusetts is not lost by bringing the property into this state. Jaquith v. Express Co., 60 N. H. 61. Formerly, by the law of Vermont a chattel mortgage was invalid against creditors of the mortgagor, if the property remained in his possession. But it was held both in Vermont and New Hampshire that a mortgage of personal property in New Hampshire, duly executed and recorded according to the law of New Hampshire, was valid against creditors of the mortgagor attaching the property in his possession in Vermont. Cobb v. Buswell, 37 Vt. 337; Lathe v. Schoff, 60 N. H. 34. In Cobb v. Buswell, the property was taken to Vermont with the consent of the mortgagee, and in Lathe v. Schoff it was understood when the mortgage was executed that the horses mortgaged were to be removed to Vermont by the mortgagor, and kept there after the season of summer travel closed. So a chattel mortgage made by a citizen of Massachusetts temporarily in New York with the mortgaged property, if valid by the law of New York, is valid against the creditors of the mortgagor attaching the property in his possession in Massachusetts. Langworthy v. Little, 12 Cush. 109.

Digitized by Google

The law of New Hampshire respecting conditional sales has no extraterritorial force, and does not apply to sales made out of the state. Neither the parties nor the subject-matter of the contract respecting the machines were within its operation. If the conditional sale had been made in this state, before the statute requiring an affidavit of the good faith of the transaction and a record in the town clerk's office, it would not have been affected by the statute. When the machines were brought to this state, there was no provision of the statute for recording the plaintiff's lien. There was no change or transfer of title in this state, and the title of the plaintiff, valid against creditors under a contract completed in Massachusetts, was not destroyed by the removal of the property to New Hampshire. Smith v. Moore, 11 N. H. 55, cited by the defendant as sustaining the position that the plaintiff's lien was destroyed because there was no law in this state providing for a record in such a case, is an authority against the defendant. In that case the property was in this state when the mortgage was made, the mortgagor residing out of the state. The court says: "If the property had been situated out of the state when the mortgage was made, and the mortgage had been valid according to the law of the place, a subsequent removal of the property to this state would not have affected its validity;" citing Offutt v. Flagg, 10 N. H. 46. Conditional sales were valid in this state, without record, until January 1, 1886. McFarland v. Farmer, 42 N. H. 386; Holt v. Holt, 58 N. H. 276; Weeks v. Pike, 60 N. H. 447. The statute of 1885 (chapter 30) had no application to contracts between parties residing out of the state, and made no provision for recording such contracts. The fact that the contract is not within the statute is an answer to the position that the plaintiff's title is to be tested by the law of New Hampshire. The attachment of the real estate gave the defendant no possession of, or right of property in, the machines. Scott v. Print Works, 44 N. H. 507. By attaching them as personal property, the defendant claims to hold the possession and property in them, as the property of Parsons, for the benefit of the attaching creditors. If Parsons had an attachable interest subject to the plaintiff's lien, the defendant's claim to hold the entire property under the attachment entitles the plaintiff to maintain replevin, if it has any title to the machines, and there is no estoppel. As between the plaintiff and Parsons, the machines were the property of the plaintiff. They were never the property of Parsons. He was simply a bailee, and never claimed to own them. "Judgment and execution liens attach to the defendant's real, instead of his apparent, interest in the property. It follows from this that the sale made under such a lien can ordinarily transfer no interest beyond that in fact held by the defendant when the lien attached, or acquired by him subsequently thereto, and before the sale." Freem. Ex'ns, § 335. A purchaser at a sheriff's sale, there being no estoppel, acquires no title to property not belonging to the debtor. Bryant v. Whitcher, 52 N. H. 158. An attaching creditor is not in the position of a purchaser for a valuable consideration, without notice of any defect of title. The defendant and the creditors of Parsons whom he represents do not occupy the relation of bona fide vendees or mortgagees for value, without notice. They stand no better than Parsons, who never owned or claimed to own the machines. Their claim to hold the property against the plaintiff's title is based upon Parsons' ownership, and not upon any attempted transfer of title by him to them; and, as he had no title, they took nothing by the attachment. The case has no analogy to an attachment of property to which the debtor has a voidable title, valid until rescinded (Bradley v. Obear, 10 N. H. 477), or to the numerous class of cases where the debtor once had a valid title, which he has conveyed or transferred in fraud of creditors. As Parsons had no title to the machines, and no legal or equitable ground of estoppel to the assertion of the plaintiff's title is shown, the plaintiff is entitled to judgment. Judgment for plaintiff.

BLODGETT, J., did not sit. The others concurred.

DOW v. ELECTRIC CO.

(Supreme Court of New Hampshire. Hillsborough. July 27, 1894.)

DAMAGES FOR FLOWAGE — PETITION FOR ASSESSMENT—AMOUNT OF COMPENSATION—CONSTITUTIONALITY OF ACT—REMARKS BY COUNSEL.

1. On a petition for the assessment of damages under the flowage act, the question whether the statutory requirement that 50 per cent. be added to the damages as assessed was repealed by a later act is immaterial when the petition was filed before the passage of the later act.

2. Persons availing themselves of the permission granted by Pub. St. c. 142, §§ 12, 18, to flow others' lands, and applying for an assessment of damages, cannot attack, as being unconstitutional, the provision requiring one so flowing others' land to pay 50 per cent. in addition to the actual damages.

3. A statement by counsel for one flowing the land of another, on a petition to assess damages therefor, that "the law not only gives compensation; it gives more," is not ground for complaint by petitioners, whether or not the jurors knew that, under the law, 50 per cent. would be added to their verdict.

Exceptions from Hillsborough county.

Petitions by Samuel J. Dow against the Electric Company and by said company against Dow for the assessment of damages under the flowage act. Verdict for said Dow. Both parties except. Exceptions overruled.

The plaintiff moved that 50 per cent. be added to the amount of the verdict. The

Digitized by Google

defendants objected on the ground that the provision of the statute requiring the addition is (1) unconstitutional, and (2) has been repealed. In his opening statement, counsel for the defendants said: "The law not only gives compensation; it gives more." To this the plaintiff objected. The court ruled that the statement was improper, and told the jury they could give only fair compensation. Thereupon the defendants' counsel proceeded as follows: "I am sorry that I cannot state the whole law under the objection of my brother and the ruling of the court. I don't know how you can be made familiar with it unless you are familiar with the statute law of the state. The law gives full damages, full and running over, adequate and more than adequate, for the injuries inflicted."

Burnham, Brown & Warren, for plaintiff. D. Cross and Sulloway & Topliff, for defendants.

CARPENTER, J. The question whether the statute requiring 50 per cent. to be added to the damages estimated by the committee or assessed by the jury (Pub. St. c. 142, §§ 16 and 17) is repealed by the act of March 30, 1893 (Laws 1893, c. 50), need not be determined. The plaintiff's petition for the assessment of the damages was filed August 31, 1891, and the defendants' like petition in March, 1892. A subsequent repeal of the statute could not affect the decision of the cause in this particular. Bill of Rights, art. 23; Woart v. Winnick, 3 N. H. 473; Dow v. Norris, 4 N. H. 16; Willey v. Epping, 16 N. H. 58; Towle v. Railroad Co., 18 N. H. 547; Smart v. Railroad Co., 20 N. H. 233; Rich v. Flanders, 39 N. H. 304; Kent v. Gray, 53 N. H. 576. When a legislative grant of authority to exercise the power of eminent domain contains a condition that the grantee shall pay more than the value of the property taken under the power, the grantee accepting the grant and exercising the power cannot question the constitutionality of the condition. The defendants were authorized to flow the plaintiff's land upon the condition, among others, that they pay the damages thereby done to him and 50 per cent. in addition. Pub. St. c. 142, §§ 12–18. The statute is permissive. It confers a privilege, which the defendants were at liberty to exercise or not, as they saw fit. But they cannot take and enjoy the benefit without performing the condition on which it is given. By their exercise of the power conferred, flowing the plaintiff's land and applying for an assessment of the damages, they are precluded from denying the validity of the condition. The question of its constitutionality under either the federal or state constitution is not open to them. Pitkin v. Springfield, 112 Mass. 509; Deverson v. Railroad Co., 58 N. H. 129, 131, and cases cited; Dodge v. Stickney, 61 N. H. 607, 610, 611; People v. Murray, 5 Hill, 468, 472. The defendants' objection that the statute is in conflict with both constitutions, or either of them, is overruled.

The remarks of the defendants' counsel related not to the facts of the case, but to the law. They could not have injured the plaintiff if the jurors knew that 50 per cent. was to be added to their verdict. If the jurors did not know that their verdict was to be so increased, the counsel did not inform them, and his statements, if they had any effect, would seem quite as likely to operate in favor of the plaintiff as against him. Exceptions overruled.

BLODGETT, J., did not sit. The others concurred.

ROCKINGHAM BLDG. CO. v. BURLINGAME.

SAME v. BROWN.

(Supreme Court of New Hampshire. Rockingham. March 17, 1893.)

STOCK SUBSCRIPTION—SUIT FOR ASSESSMENT.

When a subscriber for stock agrees to take only a specified number of shares, without expressly promising to pay assessments, he cannot be personally sued for refusal to pay an assessment until his shares have been sold to pay the assessment.

Actions by the Rockingham Building Company against William Burlingame and Andrew J. Brown, in which plaintiff was nonsuited.

Action by the plaintiff, a voluntary corporation, to recover as damages from the defendants for refusing to accept and pay for certain shares of stock the par value of said shares. The agreement signed is stated in the case.

H. A. Shute, for plaintiff. Thomas Leavitt and C. H. Knight, for defendants.

CLARK, J. The plaintiff, a voluntary corporation, seeks to recover damages from the defendants for refusing to take and pay for shares of stock subscribed for by them under the following agreement: "We, the undersigned, hereby agree to take the number of shares in the capital stock of the Rockingham Building Company set opposite our respective names, the par value of said shares being one hundred dollars each." A subscription for shares in a corporation is an agreement to take them upon the conditions of the charter, and subjects the subscriber to those liabilities only which are imposed by the charter or the statute under which the corporation is organized. Railroad Co. v. Johnson, 30 N. H. 390, 403; Railroad Co. v. Eastman, 34 N. H. 124. Section 16, c. 148, Gen. Laws, relating to dividend-paying corporations, prescribes and defines the mode of enforcing payment of assessments upon stock in such corporations, and is as follows: "If the owner of any share or shares, being present either in person or by proxy, at the meeting when any as-

Digitized by Google

sessment is voted, or being notified thereof by the treasurer or cashier by letter, shall neglect to pay the sum so assessed on his share or shares for thirty days after the time appointed for the payment thereof, the treasurer or cashier may sell at auction a sufficient number of his shares to pay all assessments due from him with necessary charges." This provision of the statute applies to all dividend-paying corporations, and prescribes the mode of enforcing the defendants' contract, there being no express promise to pay assessments in the articles of agreement. In Railroad Co. v. Johnson, 30 N. H. 390, 403, it is said: "Upon an examination of the authorities, and upon principle, we think the true rule to be this: that where a party makes an express promise to pay the assessments he is answerable to the corporation upon such promise for all legal assessments, and its performance may be compelled by action at law, before resorting to a sale of the shares. It is a personal undertaking beyond the terms of the charter. Where, on the other hand, he only agrees to take a specified number of shares, without promising expressly to pay assessments, then resort must first be had to a sale of the shares to pay the assessments, before an action at law can be maintained. His agreement simply to take the shares is an agreement upon the faith of the charter, and by it alone is he to be governed, so far as his shares are to be affected. He takes them upon the conditions of the law of the charter. They exist only by virtue of the charter, and are to be governed by the provisions therein contained." The contract of the defendants was to take a certain number of shares in the Rockingham Building Company, the par value of said shares being $100 each. There was no promise to pay the assessments, and the remedy of the corporation on refusal to pay, in the first instance, is by a sale of the shares. Nonsuit.

CARPENTER, J., did not sit. The others concurred.

SCHWEITZER et al. v. BONN et al.

(Court of Chancery of New Jersey. Feb. 5, 1895.)

RES JUDICATA — DECREE OF ORPHANS' COURT—EQUITY—ACCOUNTING BY ADMINISTRATOR.

1. The decree of the orphans' court allowing the account of an administrator on an alleged sale of assets at a certain price is not conclusive as to the value of such assets, where the account was false, no sale having in fact been made.

2. Where an administrator reports the sale of assets at a certain price, when there was no sale in fact, equity will avoid the decree of the orphans' court allowing the account, and require an accounting of the value of the assets, regardless of the value stated in such report.

3. Where it appears that the president of a corporation, holding over 6,000 shares of the corporate stock in his own name, and 500 shares as administrator of a decedent's estate, reported a sale of his decedent's stock to the orphans' court at 116, when no sale had in fact been made, and that he actually sold 500 shares, seven months after such report, to his brother-in-law, at 116, while the shares were worth nearly 200, the sale of 500 shares should be considered as from his own holding, and decedent's shares should be accounted for at their true value.

Bill by Lena Schweitzer and others against Hillaric J. Bonn and another, executors, to recover certain securities. Decree for complainants.

R. O. Babbitt and Gilbert Collins, for complainants. J. O. & S. A. Besson, for defendants.

PITNEY, V. C. The complainants (two of whom are infants, and all residents of France) are the next of kin and beneficiaries under the will of Emile Schweitzer, deceased, late a resident of France. The defendants are the executors of John H. Bonn, late of the county of Hudson, deceased. Mr. Bonn, on the 10th of February, 1890, took out from the orphans' court of the county of Hudson letters of administration with the will annexed of Schweitzer, and administered upon certain personal property belonging to said Schweitzer situate in the county of Hudson. The main object of this suit is to recover from the executors of Bonn the estate of which he so possessed himself. The estate of Schweitzer, according to the inventory filed by Mr. Bonn on the 16th of April, 1890, consisted of cash $1,000; 500 shares of the capital stock of the North Hudson County Railway (of which Bonn was president), par value $12,500, appraised at $13,000; two mortgage bonds of the same railway, par value $2,000, valued at $2,250; and one land-purchase bond of the Flower Hill Cemetery Company, par value $1,000, valued at $900,—making a total valuation of $17,250. These securities, as well as the cash, were in Mr. Bonn's custody as Schweitzer's agent at the latter's death. Early in January, 1891, Mr. Bonn filed his final account, in which he charged himself with the amount of the inventory, $17,250; with the dividend of July 1, 1890, upon the Hudson County Railway stock at 4 per cent. for six months, $500; one year's interest to January 1, 1891, on the two bonds of that company, $120; one year's interest to January 1, 1891, on the Flower Hill Cemetery bond, $60; and the net proceeds of the sale of the 500 shares of the capital stock of the North Hudson County Railway, $1,500 above the inventoried price; and the net proceeds of the sale of the Flower Hill Cemetery bond, $100 above the inventoried price; total, $19,530. After taking out the cost of settling the estate, there remained a balance in his hands of $18,360.55. It thus appears that he charged himself in his account with having sold the 500 shares of the North Hudson County Railway stock at the inventory price of $13,000, and $1,500 in addition,—in all, $14,500,—being at the rate of

Digitized by Google

16 per cent. above par value. That account was allowed by the court on the 31st of January, 1891, and the administrator charged with the balance shown of $18,360.55. The allegation of the bill is that the securities stated in the account as having been sold were not sold, but were retained by the administrator, Mr. Bonn, and that they were of much greater value than the amount with which the accountant was charged in said account. The answer of the executors of Bonn denies the allegation that the securities had not been sold prior to the filing of the account, but alleges that he had, prior to the filing of his account, sold all the securities belonging to the estate, for the best price that could then be obtained, and that he had actually sold the 500 shares of North Hudson County Railway stock at 16 per cent. above par value; and the executors deny that any of the assets of the estate of Schweitzer came into their hands, but admit that the cash balance shown by the account was in their hands, and was ready to be paid over. Mr. Bonn died on the 15th of November, 1891.

It appeared at the hearing that in point of fact, in the month of August, 1891, some eight months after the allowance of his account by the orphans' court, the 500 shares of railway stock standing in Schweitzer's name on the books were transferred by Mr. Bonn to one Jan Smith, of Holland, a relative of Bonn, to whom he was largely indebted, and that Smith did not pay him any cash for the same, but credited Mr. Bonn with the amount, $14,500, upon his (Bonn's) debt to Smith; and Mr. Bonn did not, as an individual, pay to himself, as administrator of Schweitzer, the price of the shares at 116, or at any other rate, nor did he open any account in any bank as administrator of Schweitzer, or otherwise earmark or set aside any money as money of that estate. No actual formal transfer of the railway shares standing in Mr. Schweitzer's name appears on the books of the company. All that does appear is that in the month of August, 1891, the old certificate issued to Mr. Schweitzer was surrendered, and a new certificate issued in its place to Mr. Smith. On the stub of the new certificate is a memorandum in Mr. Bonn's handwriting as follows: "Sold, January 5, 1891." Palpably, this memorandum was made not earlier than the date of the certificate,—August 8, 1891,—and, timely objection having been made by the complainants, I feel constrained to disregard it. In this connection it is to be observed that a dividend of 4 per cent. was declared on this stock on January 1, 1891, which should have been credited to the estate if the stock was not sold until January 5th. The only other proof of the sale and of its terms, as distinguished from the mere transfer of the stock, was a letter from Mr. Smith to Mr. Bonn, dated in August, 1891, accepting his offer to sell the stock at 116, the proceeds to be applied on Bonn's indebtedness to him. The letter or letters from Bonn to Smith upon the same subject were not produced. This letter seems to fix the date of the sale in August, 1891. It further appears that Mr. Bonn's estate was inventoried on the 14th of December, 1891, by his executors and two appraisers, at $560,000, of which $300,250 consisted of stock in the North Hudson County Railway; that is to say, 6,005 shares of a par value of $25 a share, making $150,125 at par value, appraised at $50 a share, or at 200, making $300,250. It further appears in the case that these 6,005 shares were shortly afterwards sold for cash at about that rate. It abundantly appeared in the course of several motions made in the cause, and was frankly admitted at the hearing, that, if the railway stock had not been sold at the price obtained for it, Mr. Bonn's estate would have been insolvent. This was due to the fact that a considerable portion of the assets, other than the railway stock, proved to be not worth its appraised value, and his debts were considerable. The effect of this situation was that, if 116 was the fair value of Mr. Bonn's 6,005 shares at the time that the transfer of the 500 shares of Schweitzer stock was made to Mr. Jan Smith, he (Bonn) was at that moment hopelessly insolvent; and, as he did not pay, as an individual, to himself, as administrator of Schweitzer, or set aside or otherwise earmark, the purchase-money price, $14,500, for which he received credit from Jan Smith, he, in effect, took the money of the complainants to pay his private debt at a moment when he was insolvent. Some time after the transfer to Smith, and shortly before Mr. Bonn's death, the then counsel for complainants called upon him, to ascertain the condition of the Schweitzer estate, and to devise means by which Mr. Bonn might safely transmit and pay to the complainants the fund in his hands. In that interview Mr. Bonn did not mention the sale to Smith, but spoke of the securities of the estate as still in his hands, unconverted, and asked why he could not transmit the stock in specie to Europe, instead of the actual money. Counsel, having no notice of the actual transfer to Mr. Smith, or of the sale of the other securities, prepared his bill in its present shape on the supposition that the securities still existed in specie in the hands of the executors.

The question to be decided is whether complainants are confined in their recovery to the amount fixed and allowed by the decree of the orphans' court, or are entitled to surcharge that account with a sum equal to the difference between 116, the price by the account fixed upon the railway stock, and 200, the price afterwards obtained by the defendants for similar stock held by their testator. The defendants' counsel took the

Digitized by Google

preliminary objection that this court cannot, in this cause, go behind the decree of the orphans' court, and contended that such decree is conclusive. The bill attacks the decree of the orphans' court directly. It charges, in effect, that the statement in the account as allowed to the effect that the securities in question had been sold at the prices named was untrue, and that they were still in existence in defendants' hands and were worth much more than the sum they were stated in the account to have produced. This was, in effect, charging fraud in the account; for I conceive it to be a fraud for an accountant to report that he has sold an asset at a certain price when he has not sold it. If, then, we have here the element of fraud, the jurisdiction of this court is established without resort to the other familiar ground, viz. that of mistake. Boulton v. Scott, 3 N. J. Eq. 231; Burtis v. Hopkins, cited in Boulton v. Scott, at page 238; Van Meter v. Jones, Id. 520, at page 523; Herbert v. Herbert, 47 N. J. Eq. 13, 20 Atl. 290, and 49 N. J. Eq. 565, 25 Atl. 360, —to which may be added Beatty v. Society, 41 N. J. Eq. 563, 7 Atl. 338, in which case the element of mistake alone seems to have been sufficient to sustain the jurisdiction of this court to go behind the decree of the orphans' court. It is true that at the hearing the facts proved did not fully sustain the allegation of the bill, since, as already stated, it appeared that there had been an actual formal sale and delivery of the assets several months after the account was allowed at the price therein stated, and so the precise question litigated was whether that sale and transfer can, under the circumstances, avail the defendants as an answer to the charges of the bill. No objection was made that this question was not within the issues raised by the pleadings, for the reason, presumably, that the objection could have been met by an amendment.

Complainants attack this sale on two grounds: First. That it was not made in the ordinary course of business, or in such manner as to insure the production of the highest market value. Second. That it was made to a mere relative of the trustee in payment, pro tanto, of the trustee's indebtedness, and was not accompanied by any payment of the price to the trustee as such, and setting aside of the proceeds among the assets of the estate, and was, therefore, a palpable and gross breach of trust, of which the trustee can have no advantage whatever. And upon this part of the case counsel for complainants makes the ingenious and charitable suggestion that Mr. Bonn—who was a gentleman of high standing—never intended to treat the transfer of the stock to his brother-in-law as an actual sale and disposition of the Schweitzer assets, but always intended to account for the 500 shares (there is no dispute as to the value or disposition of the other assets) as if they still existed in specie in his hands, he being the owner of a large block of the same stock standing in his name. This, so counsel suggests, is manifest from his interview with the then counsel of complainants a few days before he died. I am inclined to think that this is the true explanation of his conduct. It will certainly be less reproach to his memory to accept it, and hold his statement to that effect as true and binding, than to hold to the bare facts. But to return to the actual points taken. First, as to the irregularity of the sale. It was clearly the duty of the trustee to procure the best price he could honestly for these shares. It is admitted, and is a part of the defendants' case that the stock was closely held; that there were very few sales,—none at auction, and none of any kind about the time of the allowance of the trustee's account, so that it had no known market value. He, as president of the company, had the means of knowing of actual sales and prices, and, above all, of knowing who would be likely to buy, and at what place and under what circumstances the best price was likely to be obtained. Under these circumstances, it seems to me that his clear duty was to sell at auction, upon full general advertisement and such special notices to individual investors as he supposed would be likely to purchase. This was not done. The company owned and operated an extensive network of surface street railroads in Hoboken and Jersey City, and had recently erected an expensive elevated cable road from the Hoboken Ferry to the Heights, with branches from thence, which, as I understand, were then in the course of construction. The company had been paying dividends at 8 per cent. per annum, and, according to its books, had, besides, laid up each year a comfortable surplus. Its prospects were good, and with its present actual earnings its stock must have attracted purchasers in the neighborhood. A sale of such stock, privately negotiated with a relative living in a foreign country, answers none of the requisites of a proper sale by a trustee. To sanction such a sale by adopting the price so obtained as the market value of the thing sold would be to allow a highly dangerous latitude to trustees in the disposition of the trust property. It is argued that Mr. Bonn knew the intrinsic value of this stock, and knew it was worth no more than 116. It is probable that Mr. Bonn knew as much about its actual cost and immediate prospects as any other person, but, after all, its value depended upon so many elements other than its actual cost—such as earning capacity, and prospects of business, and the like—that it became a matter rather of speculative judgment than of actual cost. Besides, the value of the franchise must be added to the actual cost. It seems that within six months after the transfer to Smith a syndicate of intelligent capitalists

Digitized by Google

were willing to pay 200 for it. They bought a portion of Mr. Bonn's holdings at that price. Then, or about the 1st of July, 1892, they proceeded to declare a stock dividend of 40 per cent. upon all the stock, and then paid 140 for the balance of the Bonn stock, including the shares given as a dividend, making the lowest price paid 196 for the original shares. But the vicious effect of this irregular mode of sale is felt with its full force when to it is added the fact that nothing was in fact paid for the stock. The trustee received no money for it, but applied it to the payment of his own debt to Smith, without at the same time, or at any other time, setting aside out of his private funds the price thereof, and earmarking it as the money of the estate.

It is said that Mr. Bonn acted in good faith, and obtained a price which it is to be presumed he believed to be adequate. If that were so, then it is asked, and properly asked, on the part of the complainants, why did he not take an equal number of shares of his own stock, and transfer them to his brother-in-law in payment, pro tanto, of his own debt? And to this question, in my judgment, no satisfactory answer can be given, unless it be that suggested by the complainants' counsel, namely, that he intended to treat, and did treat, the transaction as, in equity, a transfer of his own shares, and held an equal number of his own shares for the benefit of the estate. Any other view leaves him guilty, not only of a technical breach of trust, but one liable, and in this case likely, to produce disastrous consequences. For such conduct on the part of a trustee this court can have no words except those of condemnation, and cannot permit him to derive any benefit from it. In my judgment, the case must be treated precisely as though the shares in question had not been transferred to Smith, but had been retained in specie by Mr. Bonn as a part of his own holdings. I will advise a decree that the defendants account for all dividends received on these shares after the one already accounted for, and for their value at the average price which they received for the whole of their holdings, with interest from the date of sale. They must also account for interest on the balance found in the hands of the executors, viz. $18,360.35, less $14,500, the portion thereof due to the railroad shares, which, being deducted, leaves $3,860.35 to bear interest. The question arising upon the face of the will of Schweitzer is reserved.

MARTLING v. MARTLING et al.

(Court of Chancery of New Jersey. Feb. 1, 1895.)

TRUST DEED—WHEN DECREED—DEED ABSOLUTE.

The court of chancery will not decree that a deed which is in terms one of trust conveys a fee simple, unless the case is so clear that a purchaser of the land by contract would be decreed to accept title on a bill for specific performance.

Bill by Elizabeth Martling, a cestui que trust, against Stephen V. R. Martling, infant trustee, David Martling, and others, to have the trust declared terminated, and the legal title held by the infant trustee conveyed to her by him without consideration. Decree for defendants.

The bill is by a cestui que trust against the infant heir at law of the surviving trustee and the children and heirs apparent of the cestui que trust. The subject of the trust is land. The prayer is—First, that the trust may be decreed to have been surrendered and determined; or, second, that the infant trustee may be decreed to convey the land without consideration, to such person as the cestui que trust shall direct; or, third, that the infant trustee be removed, and a new trustee be appointed. David Martling, son and one of the heirs apparent of complainant, answers admitting the allegations of the bill, and by cross bill sets up a conveyance from complainant to him of a portion of the trust estate, and prays a confirmation of his title. The other adult defendants join in an answer which asserts the existence of the trust, and join in the prayer for a new trustee. The infant defendant submits himself to the direction of the court. The trust was created by a deed of bargain and sale dated May 30, 1851, and acknowledged July 9, 1851, given by Richard H. Paulison to Stephen Martling (husband of complainant) and Peter Acker, and to their heirs and assigns, and the survivor of them, and his heirs and assigns, as joint tenants, "in trust, nevertheless, and upon the condition and limitations following, that is to say: That the said parties of the second part, their heirs and assigns, and the survivor, and his heirs and assigns, shall and will suffer and permit Elizabeth [complainant], now the wife of the said Stephen Martling, of the township of Hackensack aforesaid, to have, receive, and enjoy the rents, issues, and profits thereof during her natural life, free from the control of her present or any future husband, and to her separate use (subject, however, to the limitations hereinafter mentioned), and in further trust to sell and convey in fee simple the whole or any part thereof, lease, rent, or mortgage the same, or any part thereof, to such person or persons, for such term or terms, for such sum or sums, and on such conditions, as the said Elizabeth by writing under hand of her own free will may direct, said writing to be binding notwithstanding the coverture of the said Elizabeth; and, in case of a sale and conveyance as aforesaid, to invest the net proceeds, after paying said incumbrances, upon good and sufficient security, and pay her, the said Elizabeth, the interest accruing thereon yearly, and every year, or to reinvest said net proceeds in the purchase of other real estate, as the said Elizabeth by writing as aforesaid

Digitized by Google

may direct, to be held according to the trusts herein declared; and in further trust to sell and convey, if necessary, the whole or any part of said premises, to pay off, satisfy, and discharge the incumbrances now being and existing on the same as aforesaid; and in further trust, upon the death of said Elizabeth, to convey the lands held under the trusts herein declared, or such parts thereof as may then remain, or, if the same shall then have been sold, to dispose of the proceeds thereof, unto such person or persons as the said Elizabeth, by any writing in the nature of a last will, executed by her in her lifetime, may have appointed and directed, and, in default of such appointment, unto her heirs at law or next of kin as may be; said writing in the nature of a last will to be binding for the purposes of this trust, notwithstanding the coverture of the said Elizabeth at the execution thereof." The farm was purchased with the separate estate of the complainant, previously held in trust for her by her brother Peter Acker. Both the trustees are dead, Peter Acker dying first. Complainant, the wife of Stephen Martling, deceased, at his death had three children,—Stephen H. Martling (oldest son and heir at law of Stephen Martling, the surviving trustee), Annabella Acker, and David Martling,—the defendants above named. These were all born before the conveyance in question. Stephen H. Martling died December, 1891, leaving the defendant Stephen V. R. Martling, an infant, his only son and heir at law. Both the trustees joined with complainant in a conveyance, for a nominal consideration, of a portion of the trust lands to the daughter, Mrs. Acker, the defendant. Stephen Martling, as surviving trustee, joined with complainant in conveying another part, for a full consideration, to her son David Martling, the defendant. Complainant and her husband as such, and not as trustee, conveyed another portion to David Martling for a nominal consideration. Complainant and her husband as such, and not as trustee, conveyed to their son Stephen H. Martling, now deceased, for a nominal consideration, another portion of the trust estate. There were, besides, two conveyances by complainant to her son David, which were the subject of controversy in Martling v. Martling, reported in 47 N. J. Eq. 122, 20 Atl. 41, which controversy was settled by another deed from complainant to David dated December 16, 1891.

C. Christie, for complainant. Gilbert Collins, for defendant David Martling. W. B. Williams, for other defendants.

PITNEY, V. C. (after stating the facts). The defendants Mrs. Acker, and Mrs. Martling as guardian ad litem of her infant son Stephen V. R. Martling, are entirely willing that a new trustee should be appointed in place of Stephen, who is incapacitated by infancy for the discharge of an active trust involving the duty to look after and protect the rights of the heirs at law of the complainant, who, under the trust as claimed by the defendants, must, in default of appointment by her, take the estate at her death. Mrs. Acker denies the right of complainant to terminate the trust and to assume unlimited control over the estate. On the other hand, complainant and her son David contend that at the death of the husband of complainant the object and purpose of the trust was accomplished, and the same came to an end, and that the power of the complainant under the terms of the trust was so full and complete as to give her, at her option, the right to have a fee simple in herself, and to that end to release and extinguish the trust. They found this claim—First, upon the construction of the deed itself, which they claim shows such to have been the actual intention of the settlor; and, second, they claim that the case comes within the rule in Shelley's Case, which is still in force in New Jersey as to conveyances of land, and that the effect of the conveyance, by force of that rule, was to vest in Mrs. Martling, the complainant, an equitable estate in fee, and that the legal estate is held by the trustee as a naked and executed trust, with the result that the complainant has the right to ask this court to determine it by directing a conveyance by the trustee directly to the complainant, and without consideration. The real object of the suit is to obtain a declaration and decree of this court to that effect. There is an allegation in the bill that Mrs. Martling had been unable to carry out a proposed sale of a part of the premises on account of a doubt of her ability to make a good title by her individual conveyance. The difficulty which at once presents itself in granting the relief first prayed for, viz. that the trust is terminated, is as to how far such a decree would be of any value in the direction of enabling complainant to make a merchantable title. Upon the face of the conveyance, the persons ultimately interested in the trust are, in the absence of testamentary disposition by complainant, "her heirs at law or next of kin, as may be." Now, of course, unless it so happens that the persons who proved to be such heirs at law or next of kin at her death are parties to this suit, they will not be bound by the decree of this court, made herein. I think this court ought not to make such a decree, unless the case is so clear that a purchaser by contract would be decreed to accept it on a bill for specific performance. In the well-considered and important case of Jervoise v. Duke of Northumberland, 1 Jac. & W. 539, Lord Eldon declined to decree specific performance against a purchaser where the title was held under a trust somewhat like the present, although he entertained a strong opinion that the case was within the rule in Shelley's Case, and the present cestui que trust was tenant in tail and competent to convey.

The same difficulty meets us in granting the second prayer, viz. to direct the infant trustee to convey to the complainant without

Digitized by Google

consideration. I am unable to adopt the view that, looking at the scheme of the settlement, it was the intention of the settlor to give such an absolute control of the title to the complainant as that she may dispose of it to her own use at any time during her lifetime. The limitation of the trust seems to have been prepared with care by a conveyancer of some experience, and he seems to have avoided giving such right. The mere fact that he does not give it in express terms, when it was so easy to do so, is significant, and it may well be doubted whether, if he had done so, it would not have defeated the very object of the trust. The provision for a sale and conveyance seems to me to mean a sale and conveyance for value. Else why provide for the investment of the proceeds? I think it is the duty of the trustee of such a trust to see to it that upon the sale of the estate a proper price is obtained. Mortlock v. Buller, 10 Ves. 292; Doran v. Wiltshire, 3 Swanst. 699; 2 Sugd. Powers, *p. 487; Lewin, Trusts (Flint's Ed.) *p. 427, § 18; Chance, Pow. §§ 2418 et seq.

It is contended by complainant that this settlement must be treated as one made by herself in all respects as if it had been a covenant to stand seised to uses. Grant that it must be so construed, still I find in it no express reservation of a power of revocation. The power to direct a sale for a full consideration, which shall be subject to the same trusts, does not amount to a power in the settlor to revoke absolutely. But, then, complainant relies upon the rule in Shelley's Case. Her argument is that complainant clearly takes an equitable estate for life, with remainder to her right heirs, and hence she has a fee. It must be admitted that the rule in question applies to equitable as well as to legal estates, unless the legal estate be vested in trustees who have some duty to perform with regard to it. Or, as expressed by Mr. Cruise (6 Cruise, Dig. tit. "Devise," 284 et seq.; 3 Cruise, Dig. [Am. Ed. 1857] 356): "It has long been settled that in devises of mere trust estates, where no conveyance is directed to be made, the construction is the same in chancery as it would be in a court of common law upon a devise of the legal estate." Here a conveyance is directed to be made, and the argument that it is within the case of Papillon v. Voice, 2 P. Wms. 471, and Lord Glenorchy v. Bosville, Talb. p. 3, is not without force. I have looked at numerous cases, as well those collected in 1 Fearne, Rem. p. 114 et seq., and Prest. Est. *p. 387 et seq., as those collected by Mr. Cruise, ubi supra, and others still later, and, without commenting upon them in detail, I find it enough to say that I am not well enough satisfied that this case is within the rule in question to act upon such a conclusion in the way I am asked to do by the complainant. I will add that at this day the courts are not disposed to extend the rule in question to doubtful cases, because, confessedly, the effect of its application is to produce results contrary to the intention of the donor or testator, as the case may be. A modern case is In re Thurston, 154 Mass. 596, 29 N. E. 53. I therefore decline to advise a decree directing a conveyance by the infant trustee to the complainant without consideration. I will, of course, advise a decree directing him to convey to a new trustee to be appointed, the new trustee to hold upon the same trusts as the present trustee.

BEEKMAN v. COTTRELL et al.

(Court of Errors and Appeals of New Jersey. June Term, 1893.)

ACTION AGAINST ADMINISTRATRIX — RECOVERY OF PROPERTY.

Where an administratrix inventories certain property belonging to a third person as the property of the decedent, the owner can sue at law to recover.

Appeal from court of chancery.

Bill by Christian Grimm against Sarah Cottrell, administratrix of Thomas J. Cottrell, and others. On the death of complainant, Edwin Beekman was substituted as administrator. The bill alleges that complainant furnished to Thomas J. Cottrell moneys to purchase a launch; that Cottrell agreed to give complainant a chattel mortgage to secure the same, but died without having done so; that the defendant's administratrix inventoried said launch as the property of decedent, though Cottrell always spoke of it as belonging to complainant. The bill prayed for a receiver of the property of the deceased, and that the defendants account for the profits realized from the said launch, and that a certain writing given by Cottrell to complainant be decreed to be a valid chattel mortgage.

The following are the conclusions of Vice Chancellor GREEN on an order dismissing the bill of complainant:

"First. The suit cannot be maintained against the widow and children.

"Second. The title to the launch never was in Thomas J. Cottrell. He bought it for complainant; recognized it as complainant's property by his declaration that it was his, and by paying money for its rent. Nothing, then, prevents his suit at law to recover it of the administratrix.

"Third. So far as the difference between the amount alleged to have been paid for the launch and the amount given Cottrell for that purpose, and for balance of rent for the first year, complainant is a general creditor of the estate. For rent after first year, since Cottrell's death, his action is against those who have used the launch.

"Fourth. The bill cannot be maintained against the widow, administratrix, and next of kin and heirs at law, on the facts alleged, for discovery, nor for the specific performance of the alleged agreement to execute a

Digitized by Google

chattel mortgage to indemnify complainant against loss in the transaction.

"Fifth. The motion should be granted, and the bill dismissed, with costs."

Complainant appealed. Affirmed.

John S. Applegate, for appellant. Henry M. Nevius, for respondents.

PER CURIAM. Decree unanimously affirmed, for the reasons given in the court of chancery.

FLYNN v. FLYNN et al.

(Court of Chancery of New Jersey. Feb. 4, 1895.)

DELIVERY OF DEED.

The presumption that a deed was delivered at or about the day of its date and acknowledgment is rebutted by the execution and delivery of a similar deed several years later.

Bill by Harry A. Flynn against James Flynn and others, excepting to accounting of master in chancery. Decree for exceptant.

Rutherford Coleman, for complainant. Philip S. Scovel, for defendants.

GREEN, V. C. This bill is filed for partition of lands, the title to which stood in the name of Mary Flynn, who died unmarried and intestate, leaving the various parties to the suit, her heirs at law. The case was tried before me, and in my conclusions filed I found with reference to the tract of land in Bordentown, Burlington county, conveyed by John L. McKnight and wife to Mary Flynn, that there was a constructive trust therein in favor of James C. Flynn, her brother, one of the defendants, to the extent of the money he had actually paid on account of the purchase money, and that, subject to such trust, the property descended to the heirs at law of Mary Flynn; that it was not equitably devisable among them, and should be sold, and the proceeds divided, first, to James, the amount to be found due him, and afterwards, to the heirs at law, in the proportions named in said conclusions. An order was made referring the matter to Samuel W. Belden, Esq., as master, to take and state an account of the amounts actually paid by James C. Flynn for and on account of the purchase money of the said property. The said master was authorized to use the testimony and exhibits before taken and produced, as well as to examine any further testimony or documents which might be presented, and he has made his report, by which he has found that there had been actually paid by James C. Flynn towards the purchase money of the said lands the sum of $2,810.17, and that he had received as a credit the proceeds of the sale of a portion of the said property amounting to $820, leaving a balance of money actually advanced of $1,990.17. The complainant has excepted to the said master's report, and to the various items of which it is composed, with, I think, the exception of one item. The allowance by the master of the different amounts, with the exception of the last, is based upon receipts of John L. McKnight, and entries of cash received in an account book of his, produced by his executor, verified by the testimony of James C. Flynn, that he had paid to Mr. McKnight all of the money which was paid for the purchase of the property. The exception to these items is based on the ground that there was another James Flynn, who about the same time had real-estate dealings with the said John L. McKnight; that this party had no middle name, and that the receipts, as well as the entries in the book, purport to be of the receipt of money from James Flynn, not James C. Flynn. This James Flynn had married a sister of James C. Flynn, and had had transactions with John L. McKnight for lands in Bordentown. I do not attach much importance to the fact that the receipts or the account in the book are in the name of James Flynn and not James C. Flynn. James C. Flynn was undoubtedly a party to the purchase of the lands in question, for he signed the original agreement of May 14, 1860, but signed it as James Flynn, and it is not singular, therefore, that Mr. McKnight should so designate him with reference to payments on account of that contract. This agreement contains a receipt for $120 paid on account of the contract, and it is proved that the account in the book relates to this purchase by an entry in Mr. McKnight's handwriting on the opposite page to the account and adjoining it, as follow: "$120 is entered on the contract of James Flynn." Besides this, the receipts are in the possession of and produced by the claimant, James C. Flynn, and some of them are dated after the death of James Flynn, in 1863. These payments were evidently made on an open account of a purchase of land. While it is true, as stated, there had been transactions in real estate in Bordentown between Mr. McKnight and James Flynn, it is extremely improbable that they were the subject of small payments in 1860, 1861, and 1863. The first deed was in 1854, and there is no evidence to rebut the inference that the transaction between them was closed at that time. So far as appears, there was no mortgage or bond given to secure any part of the purchase money. It is true, the deed was not recorded until October 14, 1863, which was after the death of James, but it is coincident with the record of a conveyance by his widow to James C. Flynn of her dower right in all her husband's lands, indicating that the deed came into her possession on the death of her husband. As to the other transaction, there was a mortgage given back for part of the consideration money, and certainly there can be no presumption that any part of that was not paid or secured. On the other hand,

Digitized by Google

the evidence is that the property in question was to be paid for at the convenience of the purchasers. While the first deed for the land to Mary Flynn is dated July 1, 1861, there is no evidence when it was actually delivered. Of course, in the absence of all evidence to the contrary, the presumption would be that it was delivered at or about the day of its date and acknowledgment; but we have the fact that another deed, in all respects similar, was executed under date of February 9, 1865, the day after a settlement was had, according to an entry in Mr. McKnight's books; and this deed was recorded February 16, 1865, whereas the first deed was not recorded until June 18, 1868, a month after a second adjustment and settlement between Mr. McKnight and James C. Flynn. The giving of the second deed rebuts the presumption that the first was delivered. I think the fair inference from the facts is that the first deed was not delivered at the time of its date, and is not, therefore, evidence that the consideration money was then paid, but that, although executed, it was retained by Mr. McKnight as a muniment of his vendor's lien, and that he received the moneys on account of the purchase, gave receipts and credits in his book, until the settlement in 1865, when, the deed having been mislaid, or not found, the second one was made and delivered; that before or at the time of the second settlement, the first deed had been discovered, and was then delivered. This theory seems to harmonize with all known facts. I think all the items referred to, being all but the last, were properly credited, and that the exceptions thereto should be overruled.

Next, as to the credit allowed by the master of $2,000, the amount of a bond and mortgage made by James Flynn to James C. Flynn, and assigned by him to John L. McKnight. It may be well, in the attempt to get at the true history of these matters, to state in chronological order the transactions between the parties.

1854, April 18.	Deed from John L. McKnight to James Flynn for property on Park street; consideration, $8,000; recorded October 14, 1863. It does not appear that any mortgage was given in this transaction.
1860, January 3.	Deed from John L. McKnight to James Flynn for property on Park street; consideration, $4,250; not recorded.
" " "	Mortgage, James Flynn and wife to Mr. McKnight, on same property, for $3,250, recorded January 13, 1860.
" " "	Mortgage, James Flynn and wife to James C. Flynn, on both properties, for $2,000, recorded January 21, 1860.
" May 14.	Agreement between McKnight and Mary Flynn for property in question on Third street; consideration, $3,200.
1861, July 1.	Deed, McKnight and wife to Mary Flynn, recorded June 18, 1868.
1868.	James Flynn died.
" Oct. 8.	Conveyance by Wynie Flynn, widow of James, of her dower right in all his lands, to James C. Flynn.
" " 6.	Agreement by James C. Flynn to collect all rents and pay one-third to Wynie Flynn during her life.
" " 14.	The deed from McKnight to James Flynn of April 18, 1854, and the conveyance of dower right of Wynie Flynn to James C. Flynn, were recorded.
1865, February 8.	This entry in McKnight's book, page 38, under name of James C. Flynn, "settled so as to leave a balance due of $2,000 from Jan. 1, 1865."
" " 9.	James C. Flynn assigned to McKnight bond and mortgage of James Flynn and wife for $2,000.
" " "	Second deed from McKnight and wife to Mary Flynn for property on Third street, recorded February 18, 1865.
" " "	$200 indorsed on the bond of the $3,250 mortgage; and between this date and March 15, 1866, $1,750 was paid and indorsed on the bond, which appears to have been in full.
1867, Jany. 21.	$350 indorsed by McKnight on the bond of the $2,000 mortgage as paid by Mrs. Flynn, with the further indorsement by him that it leaves due $1,688.28, with interest from the 1st of the month.
1868, May 13.	McKnight assigned to James C. Flynn for the expressed consideration of $4,228.32—First, the $2,000 bond and mortgage, James Flynn to James C. Flynn; second, the $3,250 bond and mortgage, James Flynn to John L. McKnight.
" " "	James C. Flynn gave McKnight his note at 4 mos. for $658.32.
" June 18.	First deed, McKnight to Mary Flynn, recorded.

The allowance by the master of this $2,000 must have been on the assumption that the assignment of the bond and mortgage of that amount was a payment pro tanto on account of the purchase of the land in question. I think this would have been a fair inference from the facts, if they stood alone,—First, of the settlement, with balance due of $2,000, as entered in Mr. McKnight's book under date of February 8, 1865; second, the assignment, February 9, 1865, of the bond and mortgage of $2,000; and, third, the deed from McKnight and wife to Mary Flynn, dated February 9, 1865, which was recorded February 18, 1865, indicating its previous delivery. But this bond and mortgage were reassigned by McKnight to James C. Flynn May 13, 1868, he having received on it, according to indorsements, only $350. At the same time, and by the same instrument, he assigned the $3,250 bond and mortgage, and recites that it is in consideration of $4,228.32 paid by James C. Flynn. The latter does not pretend that he paid that amount, or the $1,650 balance due on the other bond at the time it was reassigned by McKnight. So far

Digitized by Google

as we know, the transaction was that McKnight assigned these two bonds and mortgages to James C. Flynn, and he gave McKnight a note at four months for $653.32. The $2,000 bond and mortgage, when it came back to James C. Flynn, was worth on the face $1,650, and interest from January 1, 1867, and $38.28 prior interest, and to that amount he could have enforced his security. As it does not appear that he had parted with anything but the $350 paid McKnight on the bond, I do not see how he can be credited with this whole amount. Counsel for the other heirs claim that the transfer of the $2,000 bond and mortgage to Mr. McKnight did not refer to this property, but that, as James C. Flynn had assumed the payment of the $3,250 mortgage to protect his sister, Wynie Flynn, the widow, the $2,000 bond and mortgage was assigned as collateral security for such assumption. The evidence of James C. Flynn clearly shows he undertook to take care of the $3,250 mortgage after his brother-in-law's death. He says Mr. McKnight was going to foreclose that mortgage, "so I went to work to save myself and save her,—not to be turned out. Mr. McKnight just took it, for me to pay that, and then, when it was paid, he turned that mortgage." Other parts of his testimony are to the same effect, and show that he did pay moneys to Mr. McKnight on account of that bond and mortgage. I think the fair weight of the evidence is that the assignment of the $2,000 bond and mortgage was not as payment of a balance due, but as collateral security for James C. Flynn's indebtedness or obligations to McKnight. That it was connected with this property is, I think, clearly shown by the fact that the deed for the property was given at the same time the bond and mortgage were assigned. Counsel insists that it was only as security for the $3,250 mortgage, the payment of which James C. Flynn had assumed; and that it and the note subsequently given have no reference to the property in question. He fortifies his position with a certainly remarkable coincidence of figures, as follows, deducting the payments made on the $3,250 bond after February 9, 1865, the date of the settlement, amounting to $1,750 from $2,000, and interest from January 1, 1865, to May 13, 1868, the date of the note, and the balance will be within a few cents of the amount of the note. But coincidence of figures may be very misleading if the calculation does not embrace all the factors of the transaction. We have here the $2,000 due McKnight from Flynn January 1, 1865. Interest should be added to that, of course. The allowance of $1,750 must be on the assumption that Flynn had paid it, or was to be credited with that amount; but he was also entitled to be credited on the $2,000 indebtedness with the $350 paid on the other mortgage, and this calculation disregards that altogether. Besides this, the $1,750 paid the $3,250 mortgage in full, so that the $350 and the note must have been on some other account,—and none other appears, but the purchase of the land in question. It will aid us, of course, if we can get at the true particulars of the settlement of May 13, 1868. The consideration named in the assignment from McKnight to Flynn is $4,228.32. The note given by Flynn to McKnight is $653.32. The odd cents being the same, would indicate that the amount of the note is included in the consideration of the assignment. Deducting the one from the other, we have left $3,575 of the consideration to be accounted for. The $350 paid on the $2,000 bond left $1,650 principal due. This, with interest from January 1, 1865, and $38.28 prior interest due, added to the $1,750 paid on the other bond after February 9, 1865, makes $3,575, within a few cents. (a discrepancy easily accounted for by different calculations of interest), and this would represent that $1,750 of the payments on the $3,250 bond and mortgage had been made by James C. Flynn, and therefore they should be assigned to him; that $1,650 and interest was the value of the other bond and mortgage which was reassigned; and the note, that Flynn still owed its amount to McKnight. It seems singular that Mr. McKnight should give up mortgage security for a debt for an unsecured promissory note, but the fact is he did so. This note, dated May 13, 1868, certainly had no connection with the $3,250 bond and mortgage, for Mr. McKnight received all he was entitled to on those securities on March 15, 1866. The $350 paid on the other bond had no connection with the $3,250 bond, for it was paid January 21, 1867, after the other was satisfied, so far as McKnight was concerned. This also proves that the $2,000 was assigned for other purposes than as collateral security for James C. Flynn's assumption of the $3,250 mortgage. The only other account on which these payments could have been made was the purchase of the land in question, and I think James C. Flynn is entitled to be credited on account of this purchase with $350 as of January 21, 1867, and with the amount of the note, $653.32. The exception to this item is allowed, and the amount will be corrected in accordance herewith.

ROBINSON v. LEACH.

(Supreme Court of Vermont. Rutland. Feb. 4, 1895.)

HOMESTEAD—LIABILITY TO EXECUTION.

Under a statute subjecting a homestead to attachment and levy on causes of action existing at the time it was acquired, a homestead is subject to a claim on a note given after its acquisition in renewal of a note given to the same person before its acquisition.

Exceptions from Rutland county court; Start, Judge.

Digitized by Google

Action by Lucy Robinson against M. V. B. Leach, as assignee in insolvency, to establish a claim against a homestead. To an order allowing the claim, defendant excepts. Affirmed.

J. C. Baker, for plaintiff. Fayette Potter, for defendant.

ROWELL, J. The question is whether a homestead is exempt from a note given by the homesteader after its acquisition, in renewal of his notes given before its acquisition, the parties to the notes being the same. The statute subjects the homestead to attachment and levy of execution upon "causes of action existing at the time" it is acquired. It is contended that the cause of action meant is the claim that the plaintiff makes and declares upon as the ground of his suit, and which is to be litigated on trial. But this construction is too strict. The words "causes of action" are evidently used in a sense broad enough to embrace the debt, as distinguished from the evidence of it. The statute is the same for the purposes of this case as though it read "debts existing," etc. Hence, if the original debt can be said to exist, the case is with the plaintiff.

Courts will, if they can, when justice requires it, look behind the evidence of the debt, and consider the debt itself, and decide according to that. This is always done when mortgage notes are renewed. As long as the original debt can be traced, the security remains, no matter how many renewals there have been. So in Conway v. Seamons, 55 Vt. 8, we looked behind a judgment rendered, after the defendant's discharge in insolvency, but founded on a note unaffected by the discharge, and held the judgment not discharged because the note was not. The ground of the holding was that although the note, as evidence of the indebtedness, was merged in the judgment, yet the judgment was not to all intents a new debt, but the old debt in a new form, for the purpose of protecting the right connected therewith before the judgment. The same view was held and applied in Pinney v. Kimpton, 46 Vt. 80. There the plaintiff held a note as collateral for signing with another. Having had to pay, he took the note of his principal for the amount, and afterwards brought suit on the collateral. It was held that, by taking his principal's note, he did not discharge his claim on the note he held as collateral. The court said that the debt still existed, though evidenced by the principal's note; that, in an action against the principal for the collection of the debt, the plaintiff would, in form, be confined to his remedy on the note, instead of the open account; that, in this sense and for this purpose, it is often said in this state that the giving of a promissory note for an existing debt is prima facie payment; but that it is not payment in the sense of extinguishing the debt so as to discharge the creditor's claim on property put into his hands by the debtor as collateral security for the debt, unless so agreed. This principle is entirely applicable here. The new note was but a new evidence of the old debt. True, the old notes were extinguished as affording a ground or cause of action, but the debt evidenced thereby continued to exist for the purpose of preserving the right against the homestead that was originally connected with it. Weaver's Estate, 25 Pa. St. 434, is a case precisely like this. There a creditor held the promissory note of his debtor, given before the passage of the homestead act. After its passage, he gave up that note, and took in place of it a single bill, with warrant of attorney for confession of judgment, and it was held that a judgment entered on the bill was not subject to the act. Even where a negotiable promissory note given for land, and payable to the vendor, went into the hands of a third person, who, while he held it, took a new note therefor, payable to himself, with a party added as surety, it was held that this was not such a novation of the original contract that a homestead laid off in the land was not subject to levy and sale to satisfy a judgment founded on the bill. Wofford v. Gaines, 53 Ga. 485. Cf. Perrin v. Sargeant, 33 Vt. 84.

The defendant relies on Hutchins v. Olcutt, 4 Vt. 549, where it was held that the taking of a negotiable promissory note is an extinguishment of any implied promise on the part of the maker to pay the consideration for which the note was given, and that, therefore, the taking of such a note in payment of an account for labor bestowed on an article is such a manifestation of the intent of the taker to rely on the personal security of the maker as to be a waiver of any lien given by law on the property. The ground of that decision seems to be that the lien is but an incident of the implied contract; and so, when the creditor takes a note, thereby extinguishing that contract, which is the principal thing, he must be taken to intend to waive the lien, which is the incident. If this case is opposed to what we now hold, it must be regarded as departed from to that extent. Judgment affirmed, and ordered to be certified to the court of insolvency.

BRIDGMAN et al. v. TOWN OF HARDWICK.

(Supreme Court of Vermont. Caledonia. Jan. 29, 1895.)

HIGHWAYS — LANE LESS THAN THREE RODS IN WIDTH — VALIDITY OF ORDER — HIGHWAY CONNECTING EXISTING HIGHWAYS — WHAT CONSTITUTES.

1. Under Acts 1884, No. 16, which provides that public highways shall not be less than three rods wide, but if laid within an incorporated village or city, to connect existing highways, or are crossroads and lanes, to be used as pent roads, they may be of less width, an order laying out a lane less than three rods wide, to be

Digitized by Google

used without gates or bars, outside of an incorporated village or city, is illegal.

2. A highway which intersects an existing highway at only one of its terminal points does not connect existing highways, within the meaning of such act.

Exceptions from Caledonia county court; Tyler, Judge.

Petition by M. Bridgman and others for the laying out of a highway. There was a judgment overruling exceptions of the petitioners to the report of commissioners, and establishing a highway according to the report, and petitioners except. Reversed.

The petitioners excepted to the report of the commissioners (1) because the road laid was an open public highway, and not three rods wide; (2) because the road was not laid over the route specified in the petition.

Bates & May, for petitioners. W. H. Taylor, for defendant.

START, J. On the report of the commissioners the court below laid out a lane, under No. 16 of the Acts of 1884, to be used without gates or bars. The lane does not connect with an existing highway at its westerly terminus, and is less than three rods wide, and it does not appear that it is in an incorporated village or city. It is claimed by the petitioners' counsel that the highway, as laid out, is an open, public highway, and that the statute does not authorize the laying out of such a highway less than three rods wide, except in incorporated villages and cities, to connect existing highways. It is clear that the highway, as laid out, is an open, public highway. It is to be used without gates or bars. This makes it an open highway, and not a lane, within the meaning of the act of 1884, as was held by the court below. This act provides that public highways shall not be less than three rods wide, but if laid within the limits of an incorporated village or city, to connect existing highways, they may be of less width, and crossroads and lanes, to be used as pent roads, may be of less width. This act does not authorize the laying out of a lane less than three rods wide, unless it is laid out to be used as a pent road. The lane was laid out less than three rods wide, and was not laid out as a pent road, as it was to be used without gates or bars. A pent road is one that may be inclosed by gates or bars, and is not an open highway. Wolcott v. Whitcomb, 40 Vt. 40; French v. Holt, 53 Vt. 364. The court below, by providing that the lane should be used without gates or bars, laid out the lane as an open highway, and its action was not authorized by that part of the act of 1884 which provides for the laying out of lanes.

It is claimed by the defendant's counsel that the highway, as laid out, is within the limits of the village of Hardwick; that the village is incorporated; that the highway connects existing highways, within the meaning of the act of 1884; and that the action of the court below can be sustained under that clause of the act which provides that if the highway is laid within the limits of an incorporated village or city, to connect existing highways, it may be less than three rods wide. This claim is not supported by the findings of the commissioners. It does not appear that the highway is within the limits of the village of Hardwick, nor does it appear that the inhabitants of the village have ever accepted of the act of incorporation, or organized under it; and it is expressly found that the westerly terminus of the highway, as laid out, does not connect with an existing highway. To authorize the laying of a highway under the provisions of this act, the highway, as laid, must connect with an existing highway at both terminal points. It is not enough that one terminal point connects with an existing highway. The language of the enactment is plain. To connect is to join, unite, bind, or fasten together. A highway that does not intersect an existing highway at more than one of its terminal points does not connect existing highways, and is not authorized by the provisions of the act relied upon by the defendant's counsel.

It is claimed by the petitioners' counsel that the highway is not laid over the route described in the petition, but over another and different route. We have not been furnished with a copy of the petition, and it does not appear that the terminal points of the proposed highway were definitely described in the petition. It appears from the exceptions that no part of the highway, as laid, is wholly off the route described in the petition. It would seem from this statement that some portion of the highway, as laid, extended to the terminal points of the proposed highway. From the record before us, we cannot say that the highway, as laid, is materially different from the proposed highway, as described in the petition. If it was not, the holding of the court upon this branch of the case was correct. Judgment reversed, order vacated, and cause remanded.

LADD v. TOWN OF GRAND ISLE.

(Supreme Court of Vermont. Grand Isle. Jan. 29, 1895.)

SUIT AGAINST TOWN—MATERIAL FURNISHED CONTRACTOR—PRINCIPAL AND AGENT—EXISTENCE OF RELATION.

In an action against a town for the price of stone used in a bridge, it appeared that the selectmen of the town verbally agreed to pay plaintiff a certain price per cubic yard for all the stone they might take from his quarry for the bridge. Afterwards, the town arranged with a contractor to build the bridge for a certain price; and, in order to induce the contractor to make the contract, plaintiff, with other citizens of the town, signed an agreement to indemnify him against loss on the job. Plaintiff then made an agreement in writing with the contractor for stone out of his quarry, and payments were made thereunder to plaintiff by the

Digitized by Google

contractor. *Held*, that plaintiff could not hold the town liable for an amount due for stone used in the bridge, on the ground that he believed that the contractor was the agent of the town.

Exceptions from Grand Isle county court; Thompson, Judge.

Assumpsit by Alfred H. Ladd against the town of Grand Isle for an amount alleged to be due for material sold. A verdict was directed for defendant, and plaintiff excepts. Judgment for defendant affirmed.

H. C. Adams and F. W. McGettrick, for plaintiff. Wilson & Hall and Jed P. Ladd, for defendant.

START, J. The plaintiffs' evidence tended to show that in October, 1889, he made a verbal contract with the defendant, through its selectmen, by which he agreed to permit them to quarry and take rubble from a ledge on his land for the construction of a bridge from Grand Isle to North Hero, and that the defendant agreed to pay him five cents per cubic yard for whatever rubble the selectmen should take for that purpose. The town did not construct the bridge, but, subsequent to the making of the contract claimed to have been made with the plaintiff, it made a contract with the firm of J. A. Chamberlin & Co., by the terms of which said firm agreed to construct the bridge. All the rubble taken from the plaintiff's ledge, and used in the construction of the bridge, was taken by Chamberlin & Co.; and they paid the plaintiff $703.10, during the progress of the work, in part payment for the rubble so taken, and the plaintiff or his agent gave receipts for the money so paid. It appeared that, before Chamberlin & Co. took the contract to build the bridge, they were importuned by citizens of Grand Isle to take the contract for $40,000, and they consented to do so, provided responsible citizens of the town would personally indemnify them against loss; and thereupon a written contract was executed and delivered between the members of the firm of Chamberlin & Co., of the one part, and 75 citizens, including the plaintiff, of the other part, by which the plaintiff and other citizens agreed to indemnify and save Chamberlin & Co. from all loss by reason of taking the contract to build the bridge. This agreement was read over and signed by the plaintiff before any rubble was taken from his ledge. On the 10th day of August, 1891, the plaintiff and the members of the firm of Chamberlin & Co. made a contract in writing whereby the plaintiff gave them the privilege of quarrying stone from his ledge for the construction of the bridge. There was no evidence tending to show that, in the construction of the bridge, Chamberlin & Co. were the agents of the defendant town, or acted as such; and it appeared from the uncontradicted evidence that, in all that they did in the construction of the bridge and procuring material therefor, they acted as independent contractors, and not as the servants or agents of the defendant. The plaintiff claimed that the rubble taken from his ledge was taken by Chamberlin & Co. as the agents or servants of the defendant, and that he was entitled to recover for the rubble so taken, under his contract with the selectmen.

The court directed the jury to return a verdict for the defendant. In this there was no error. By the contract between the plaintiff and the defendant's selectmen, the defendant was to pay for such rubble as the selectmen should take for the construction of the bridge. The selectmen did not build the bridge, nor did they take any rubble from the plaintiff's ledge for its construction. Chamberlin & Co. built the bridge, under a contract to do so, but not as agents or servants of the defendant, and they took the rubble in question for its construction. The rubble taken by Chamberlin & Co. was not taken under circumstances that would justify the plaintiff in believing that it was taken by them as agents or servants of the defendant. The undertaking of Chamberlin & Co. was to build the bridge and furnish the material therefor for $40,000, and the plaintiff knew that such was their contract. Before any rubble was taken, he read and signed the contract by which he and other citizens of the town agreed to indemnify and save Chamberlin & Co. harmless from any loss that might accrue to them by reason of their taking the contract for the construction of the bridge. In this agreement the contract of Chamberlin & Co. is distinctly referred to. It is stated that "it is the desire of the parties of the second part that the parties of the first part sustain no pecuniary loss of any kind under their contract with the town of Grand Isle to build a bridge between said Grand Isle and North Hero." The plaintiff having deliberately read and executed the contract containing this recital, he ought not to be heard to say that he did not know that Chamberlin & Co. had entered into a contract to build the bridge. The town was not a party to this contract signed by the plaintiff and other citizens. The plaintiff and other citizens were interested in having the bridge built, and, as an inducement to Chamberlin & Co. to take the contract, they agreed to indemnify them against loss; but the fact that Chamberlin & Co. were thus indemnified by citizens of the defendant town against loss had no tendency to show that they were agents or servants of the defendant. The undertaking of Chamberlin & Co. with the defendant was an absolute undertaking to furnish material and build the bridge for $40,000. There was no evidence in the case that tended to show that the defendant ever released Chamberlin & Co. from this undertaking, nor that the relation that they sustained to the defendant ever changed from that of contractors to that of agents or servants of the defendant, and the plaintiff had no right to understand or believe that there

Digitized by Google

was such a change. He received payments towards the rubble, from time to time, from Chamberlin & Co., and, during the progress of the work, made a written contract with them, whereby they were to take rubble from his ledge for the construction of the bridge. Under these circumstances, the plaintiff cannot be heard to say that he believed, and was justified in believing, that rubble was being taken from his ledge by Chamberlin & Co. under his claimed contract with the selectmen. He had no right to assume that Chamberlin & Co. were the agents or servants of the defendant. His knowledge of Chamberlin & Co.'s relation to the work was such that he could not remain passive, and assume that he was delivering rubble under his contract with the defendant. His knowledge was such that he was put upon inquiry, and, if he did not know that Chamberlin & Co. were building the bridge upon their own credit, he ought to have known it. The knowledge that he had would have put any reasonably prudent man upon inquiry. By inquiry he could have learned that Chamberlin & Co. had taken the contract to furnish the material and build the bridge, but no inquiry was necessary. A prudent man, with his knowledge, would not be deceived or misled. He knew that by the terms of his claimed contract with the selectmen the defendant was to pay him only for such rubble as was used by the selectmen in the construction of the bridge. He knew he had signed a contract to indemnify Chamberlin & Co. against loss that should accrue to them by reason of taking the contract to build the bridge. He knew that Chamberlin & Co. were in charge of the work, and taking rubble from his ledge; that he was receiving pay for the same from time to time from them; and that during the progress of the work he made a contract in writing with Chamberlin & Co., by which they were to take rubble from his ledge for the construction of the bridge. Under these circumstances, he was bound to know to whom, and upon whose credit, his rubble was being delivered; and the law charges him with the knowledge that it was not being taken by the defendant, nor upon its credit.

The view we have thus taken of the facts confessedly within the knowledge of the plaintiff renders it unnecessary to pass upon the questions raised upon the admission and rejection of testimony. Judgment affirmed.

WILKINSON v. SUPLEE et ux.

(Supreme Court of Pennsylvania. Feb. 4, 1895.)

PRIVATE WAY—INVALID DEDICATION.

The fact that the dedication of a street on defendant's land is invalid does not deprive an owner of land adjoining it from using it, where he surrendered the right to use a private way over defendant's land in consideration of defendant's agreement to open the street in question, and granting him the right of passage.

Appeal from court of common pleas, Philadelphia county.

Bill in equity by Charles Benjamin Wilkinson against Henry T. Suplee and Elizabeth Suplee to restrain defendants from erecting a fence upon or in any way interfering with complainant's right of way over a certain strip of ground called "Lincoln Square." From a decree for plaintiff, defendants appeal. Affirmed.

The matter was referred to a master, who reported as follows:

"Facts.

"The complainant obtained title to the large tract of land by two deeds, one dated October 5, 1883, and the other dated February 2, 1884, both deeds being duly recorded. The complainant conveyed a part of said large tract to John Bozorth, by deed dated July 24, 1884, and also conveyed another part of said large tract to John Bozorth, by deed dated October 8, 1883. The complainant conveyed to Henry T. Suplee a part of said large tract of land [designated as 'Tract D'], by deed dated May 25, 1887, reserving thereout a yearly ground rent of six hundred and sixty dollars ($660). Bicking street was laid out by the complainant prior to the conveyances to John Bozorth, who acquired by said conveyances the free use, right, liberty, and privilege of Bicking street at all times forever, and the conveyance to Henry T. Suplee, as referred to above, carried with it the soil or bed of said Bicking street, subject to the rights granted to said John Bozorth, his heirs and assigns, in said street. The premises conveyed by complainant to Henry T. Suplee were subsequently, by divers conveyances, conveyed unto Elizabeth Suplee, wife of Henry T. Suplee. On July 26, 1887, an agreement in writing, duly recorded, was entered into between the complainant and his wife, of the first part, and John Bozorth, of the second part, and Henry T. Suplee and Elizabeth, his wife, of the third part. This agreement recites that the complainant had laid out and opened a certain street called 'Bicking Street,' and that he had conveyed to John Bozorth two tracts of land, with the right to use Bicking street, and that he had granted to Henry T. Suplee tract D, together with the bed of Bicking street, subject to the right of John Bozorth, his heirs and assigns, etc., to use Bicking street, and had reserved out of the tract D the ground rent of six hundred and sixty dollars ($660), and that Elizabeth Suplee had become the owner in fee, subject aforesaid to tract D, and that the three parties to said agreement were all persons entitled to the use of said Bicking street; that, in consideration of the premises and the sum of one dollar each to the other paid, they agreed to waive and quitclaim all right, use, and privilege of Bicking street; and that the same should be vacated

Digitized by Google

and closed up; and that Henry T. Suplee and Elizabeth, his wife, for the aforesaid consideration, with the consent of the other parties, had agreed to lay out and open, for the mutual use and accommodation of all parties to the agreement, their heirs and assigns, two certain streets, known as 'Yocum Street' and 'Lincoln Square.' And the agreement further provided as follows: 'And the said Henry T. Suplee and Elizabeth, his wife, do hereby grant and convey unto the said parties of the first and second parts, their heirs and assigns, the free use, right, liberty, and privilege of the said Yocum street and Lincoln square, as and for streets, passageways, and water courses, in common with them, the said Henry T. Suplee and Elizabeth, his wife, and their heirs and assigns, owners, tenants, and occupiers of the ground bounding thereon, at all times hereafter, forever.' In the said agreement the exact location and width of said streets and the length thereof are particularly mentioned, and the said Lincoln square is described as 'running to line of ground of said Charles Benjamin Wilkinson.' This agreement was entered of record on the 28th day of May, A. D. 1886. On the 20th day of April, A. D. 1888, Henry T. Suplee and wife made a deed of dedication to the city of Philadelphia, in the usual form, of the strip of ground located and described in the agreement aforesaid, 'to and for the only proper use and behoof of the said city of Philadelphia, its successors and assigns, forever, for a public street or highway.' This deed of dedication was approved by the city solicitor, and was accepted by the board of surveyors, October 5, 1888, and recorded November 30, 1888. Bicking street, as laid out, did not touch the property of the complainant, nor does Yocum street touch the property of the complainant. According to the uncontradicted testimony of Henry T. Suplee, acting as the agent for Elizabeth Suplee, his wife, before he began the erection of the houses, he changed the plan of laying out the ground, in order to better adapt it to building purposes, and he prepared a plan which was submitted to Mr. Jones, a surveyor, who afterwards prepared the plan finally adopted. Mr. Suplee was advised by the complainant, who was then acting as his counsel and conveyancer, that it would be necessary, in order to make the change in the streets, to have the consent of all parties who subsequently signed the agreement above referred to. The complainant, or the firm of Wilkinson & Bro., of which the complainant was a member, prepared the agreement in question, and also the deed of dedication. The city of Philadelphia placed upon the confirmed plan of the city said Yocum street of its entire length, and Lincoln square, from Greenway avenue to the lower side of Yocum street, but the blind end of Lincoln square, from Yocum street to the line of the rear end of complainant's property, has never been put upon the city plan. Mrs. Suplee built houses on both sides of Lincoln square, and some houses upon Yocum street. Two brick houses were built on the east side of Lincoln square, south of Yocum street. There is a house at the corner of Yocum street and Lincoln square, fronting on Yocum street, and extending back towards the complainant's ground, leaving a space, however, on the west side of Lincoln square, sufficiently large to permit of the erection of a house fronting on Lincoln square. The only land of the complainant which abuts on Lincoln square is about ten feet of the rear of complainant's lot, and at the west side of the square. A water pipe was laid by the city in Lincoln square, extending its entire length, and a plug was placed by the city on the east side of the street close to the south end of the said street, on that portion not on the city plan. At the time Lincoln square was laid out, a fence already existed across the rear end of the complainant's lot, separating it from Lincoln square. After the houses were built on Lincoln square, by Mrs. Suplee, and about a month before the filing of the bill, she caused another fence to be put across the blind end of the square. Lincoln square has the usual curb and sidewalk on both sides of the street, extending to the extreme blind end. Without driving upon the sidewalk, there is not sufficient room for a wagon to pass from the rear of the complainant's lot to Lincoln square. The complainant produced a number of water pipe bills for pipe laid in Lincoln square. The receipts are in the name of Elizabeth Suplee. Lincoln square was at one time called Hansom street. The purpose of dedicating Lincoln square, according to the testimony of the complainant, was to enable Mrs. Suplee to obtain water pipe. This, however, Mr. Suplee denies, and says he could have obtained water pipe without dedication. The fence which the complainant tore down is the fence which was constructed by Mrs. Suplee. This fence, it is alleged, Mrs. Suplee proposes to restore. It is the purpose of the bill in question to prevent the reconstruction of this fence, and to prevent any obstruction on the part of the Suplees with the free use of Lincoln square by the complainant. The allegation in the answer of respondents filed, that if the agreement of July 26, 1887, conveyed to complainant the right to use Lincoln square, the agreement was obtained by fraud by the complainant, concealing the true intent and meaning of the contract from respondents, is not supported by the evidence, and the master finds that there was no fraud and no concealment in the matter.

"Findings of Law.

"The act of June 6, 1871 (section 3, P. L. 1353), provides: 'No street shall hereafter be added to any confirmed plan of the city of Philadelphia and called a public street, until the same shall have been approved by the

Digitized by Google

board of surveyors as to location, width and grades, and shall extend from street to street as a thoroughfare.' So much of Lincoln square, therefore, as extends southward from Yocum street, cannot, for the present, be placed upon the city plan without violating the act of assembly. There has, however, been a legal dedication to the public, and a legal acceptance by the city, of the strip of land called 'Lincoln Square,' as far as the southerly side of Yocum street. The approval of the city solicitor of the deed as to form for the entire strip of land called 'Lincoln Square,' and the acceptance of the deed of dedication by the board of surveyors, and the entry of the city upon that land for the purpose of laying down water pipe, would be construed as an acceptance of the dedication by the city of said land throughout its entire length for a public highway, were it not for the act of 1871, above referred to. City of Philadelphia v. Thomas' Heirs (Pa. Sup.) 25 Atl. 873.

"The question here is not, what rights have the public at large in the ground called 'Lincoln Square,' south of the south line of Yocum street? but what rights has the complainant? That the respondents did, by a deed duly recorded, grant to the complainant, as a part of the public, the right to use said strip of land for all purposes for which a street is generally used, and that the respondents did, by a duly-recorded agreement, also grant to complainant the right to use said ground for a street, passageway, and water course, are facts found by the master. So long as the grant in this deed remains unrevoked, and the written contract remains in force, it seems to the master that the complainant has, without regard to the general public, rights and easements in the land which the respondents cannot ignore.

"It is contended by the counsel for the respondents that, inasmuch as the blind end of Lincoln square was not legally accepted by the city, it is within the power of the grantor to revoke the dedication of so much of the land as has not been accepted, and he has cited authorities from other states to support this contention. While this may be true in some states, it is by no means clear that it is the law in Pennsylvania. Thus, in Patterson v. Harlan (Pa. Sup.) 16 Atl. 496, Chief Justice Paxson says: 'We need not discuss the question how far the deed was a dedication of the street to public use, nor the extent to which such dedication would be effective without an acceptance on the part of the municipal authorities. It is sufficient to say that there was a dedication of the street to the use of the grantees, and neither the grantor nor those claiming under him can now be allowed to repudiate such dedication.' Even if the respondents could revoke the dedication, so far as the public are concerned, on the theory that no legal rights have before acceptance of dedication been acquired by the public, it does not follow that the grant to the respondents in the written contract can be revoked. If so, any written contract can be destroyed to suit the convenience or pleasure of a dissatisfied party.

"Counsel for respondents contend that they joined in the agreement only at the request and upon the advice of the complainant, who acted as counsel for them; that it was never the intention of the respondents to grant any permanent easements to complainant in Lincoln square; and that they signed the agreement without understanding its legal effect. So far as the master understands the testimony, the respondents were not deceived by the concealment of any fact, nor were they wrongly advised or overreached. On the contrary, all the parties seem to have acted in good faith, and with a perfect understanding of what they were doing. If the respondents were willing to grant to complainant the use of Lincoln square in consideration of the complainant's and of Bozorth's relinquishing their rights in Bicking street, and enabling the respondents to open Yocum street and Lincoln square, there seems to be no good reason why the master should inquire into the value of the consideration passing between the parties. The consideration was considered by the parties at the time as adequate. The contract, so far as the evidence shows, was clearly understood, and the intent was clearly expressed. The rights which the complainant acquired thereunder have not been forfeited or lost in any manner, and there is no reason why the rights so acquired should not be enforced and maintained.

"In the opinion of the master, the complainant has a right, in common with the public at large, under the deed of dedication, to use so much of that strip of ground called 'Lincoln Square' as extends rrom the southerly line of Yocum street to Greenway avenue as a public highway; and he has the right, under the contract of July 26, 1887, and also under the deed of dedication, to use the blind end of said Lincoln square from the southerly side of Yocum street to the northerly line of the complainant's lot, which fronts on Woodland avenue, for all the purposes mentioned in the deed of dedication and in the said contract; and respondents have no right to construct or maintain a fence or other obstruction interfering with such use. As the material facts in this case are not in dispute, and the contention is really upon the construction and effect of written documents, the authorities cited by the respondents that no injunction can issue until the rights of the parties are established in an action of law are not to the point. The complainant is entitled to the relief prayed for."

Edwin O. Michener, for appellants. Alfred J. Wilkinson and A. Lewis Smith, for appellee.

Digitized by Google

STERRETT, C. J. An examination of this record has satisfied us that there is nothing in any of the 16 specifications of error that would justify either a reversal or modification of the decree. The learned master's findings of fact are abundantly sustained by the pleadings and proofs, and the decree complained of is the legal sequence of the clearly-established facts. The allegation of fraud in procuring the agreement of July 26, 1887, is not sustained by any sufficient evidence. After correctly reciting the facts as to the ownership of different parts of the property, etc., the agreement provides, on behalf of all the parties thereto, for the vacation of Bicking street, and, on behalf of the defendants, for laying out and opening, for the mutual use and accommodation of all the parties thereto, Yocum street and Lincoln square, the latter extending southeastwardly from the southwestwardly side of Greenway avenue, to the line of plaintiff's Woodland avenue lot, and then grants and conveys to plaintiff and John Bozorth, their heirs and assigns, the free use and privilege of said Yocum street and Lincoln square, as and for streets, passageways, and water courses, in common with the defendants, their heirs and assigns, owners, tenants, and occupiers of the ground bounding thereon, at all times thereafter, forever. So far as appears from any evidence in the case, the negotiations leading up to the execution of the agreement, and the subsequent deed of dedication, etc., were conducted as such transactions usually are. It is fair to presume that defendants knew the southwestwardly terminus of Lincoln square was partly on the northeastwardly line of plaintiff's Woodland avenue lot. The agreement calls for that line, and there is nothing to show that they were ignorant of the fact. But, whether they knew or not, plaintiff was not bound to explain to them what benefits, if any, might result to him from the agreement. It is enough to know that, so far as he was concerned, evidence of fraud is not in the case. It is unnecessary to specially notice either of the specifications. Neither of them is sustained. Decree affirmed, and appeal dismissed, with costs to be paid by appellants.

BREDIN v. PITTSBURGH & W. RY. CO.

(Supreme Court of Pennsylvania. Jan. 7, 1895.)

RAILROAD COMPANIES—GRANT OF RIGHT OF WAY—CONDITION.

A recital in a deed granting a right of way to a railroad company, that the grantor has been fully paid for the damage done or which may be done to her property by the location and construction of the railway, does not take away the grantor's right to have her damages assessed according to law, where the railway company has not fulfilled a condition in the deed requiring it to complete the road within a specified time.

Appeal from court of common pleas, Butler county; John M. Greer, Judge.

Petition by J. B. Bredin for appointment of viewers to view and assess damages for land taken and occupied by the Pittsburgh & Western Railway Company in construction of its railroad. From an order appointing viewers, defendant appeals. Affirmed.

Mrs. Nancy Bredin, being the owner in fee of a tract of land situate in the borough of Butler, Pa., containing about 80 acres, bounded by lands of Stoughton on the east and Dr. Bredin on the west, by a deed dated April 12, 1879, granted, sold, and conveyed to the Pittsburgh & Butler Railway Company the right of way for the use of its railway over and across said tract of land for the width or space of 30 feet on each side of the center line of said railway, making 60 feet in width, together with such additional widths as might be necessary for deep cuts and fills, admitting and specifying in said deed that she had been fully paid for the damage done to or that might be done her property by the location and construction of said railway. The conditions expressed in said right of way were "that said railway shall be constructed and in running order within three years from date, that Mrs. Bredin is to have a free pass for herself and family," and that said railway is to be "built on the line of said railway as now located." The Pittsburgh & Butler Railway Company having merged in the Pittsburgh East & West Railroad Company, a corporation of Pennsylvania, Mrs. Bredin, by indorsement dated June 2, 1881, transferred said right of way to the said Pittsburgh East & West Railroad Company, which company afterwards merged in the Pittsburgh & Western Railroad Company, a corporation of Pennsylvania. The Pittsburgh & Western Railroad Company entered upon, located, and constructed its railroad over and across said land, completing and putting the same in operation in January, 1883. In the meantime Mrs. Bredin died, and the petitioner, claiming that she had devised said land to him, on the 22d December, 1883, presented his petition for the appointment of viewers to assess damages alleged to have been sustained by him by reason of the construction of said railroad over and upon said land. The defendant company thereupon objected to the appointment of viewers, denied the petitioner's right to have damages assessed, upon the ground that it was in possession, and had constructed its railroad over said land under said right of way, a title paramount and superior to that of the appellee, in which the grantor had admitted payment of the damage done or likely to be done to said land by the location and construction of said railroad, and that the appellee had taken said land subject to the vested rights of the defendant company under said deed; whereupon the court granted a rule on said company to show cause why viewers should not be appointed as prayed for. To this rule the de-

Digitized by Google

fendant filed answer 14th January, 1884, stating at length its objections to the appointment of viewers, and attaching copy of said right of way thereto. The petitioner, on the 21st April, 1884, filed a traverse of defendant's answer, admitting, however, the deed of right of way by Nancy Bredin as aforesaid. On the 8th June, 1887, by virtue of a decree of the circuit court of the United States for the Western district of Pennsylvania, and the ancillary decree of the circuit court of the United States for the Northern district of Ohio, all the railroads, lands, rights, franchises, and property of the Pittsburgh & Western Railroad Company were sold by a commission appointed by said court; and the purchasers thereof, pursuant to the laws of this commonwealth, met and organized a new corporation, the Pittsburgh & Western Railway Company, which thereupon became the legal owner of said right of way granted by Nancy Bredin, and entitled to have, hold, use, and enjoy all the estate, rights, and privileges thereby granted and conferred. On the 7th May, 1894 (a period of more than 10 years after the granting of said rule to show cause), the petitioner placed said rule on the list for argument at June term, 1894, of said court. On June 1, 1894, the appellant, as successor in title to the Pittsburgh & Western Railroad Company, defendant of record, filed a protest against the court hearing argument of said rule or appointing viewers, averring as reasons therefor said sale and organization of new corporation, title and possession under deed of Nancy Bredin, nonjurisdiction of court for want of legal party defendant of record, abandonment of rule by lapse of time, etc. On June 8, 1894, the appellee filed a motion reciting said sale, organization of new company, title and possession as averred in appellant's protest, and requesting leave to amend his petition by joining the appellant as codefendant with the Pittsburgh & Western Railroad Company. The appellant objected to the allowance of said proposed amendment and the appointment of viewers. But the court overruled appellant's objections, allowed amendment as requested, and appointed viewers, and sealed a bill for appellant.

R. P. Scott, for appellant. Stephen Cummings, for appellee.

PER CURIAM. This certiorari brings before us nothing but the record proper of the court below. There is nothing in it that is sufficient to convict the court of error in allowing the amendment or in appointing the viewers. Defendant company's main objections to the latter are grounded upon matters of fact which are not admitted, and upon which we cannot undertake to pass at this stage of the proceedings. As to the alleged grant of the right of way by Mrs. Nancy Bredin, in April, 1879, the paper itself shows that said grant was "on the condition that said railway shall be constructed and in running order within three years from date." It is not even alleged that this condition was performed by the grantee of said right of way, or by any company claiming through or under said grantee. On the contrary, it is stated in defendant's history of the case that it "entered upon, located, and constructed its railroad over and across said land, completing and putting the same in operation in January, 1883,"—about nine months after the time named in said condition had expired. In plaintiff's replication, denying the allegations contained in the fourth paragraph of defendant's answer, he avers that under the last will of his mother, Mrs. Nancy Bredin, duly probated, etc., the title to the land appropriated by said company defendant became vested in him on the 7th day of July, 1881, and that defendant company did not commence to construct its road over said premises until long afterwards, the —— day of September, 1881, and did not complete the same until January, 1883. Other questions of minor importance are suggested by defendant's objections to the appointment of viewers, but it is neither necessary nor proper to consider them at present. If it should ever become necessary, these and other questions of fact can be better settled by proceeding in the regular and orderly way. The viewers have full power to inquire and report, inter alia, what, if any, damages should be paid by defendant company, and to whom payable. An attempt to anticipate and settle all questions, both of law and fact, before viewers are even appointed, is at least suggestive of obstructive proceedings. Neither of the specifications of error is sustained. Proceedings affirmed, without prejudice, and appeal dismissed, with costs to be paid by appellant; and it is ordered that the record be remitted with a procedendo.

PATTERSON et al. v. GLASSMIRE et ux.

(Supreme Court of Pennsylvania. Jan. 21, 1895.)

SALE OF GOOD WILL—INJUNCTION—ACCOUNTING.

1. A covenant, on a sale of a hair-goods business, not to engage in "said business of hair dressing, or any of the branches thereof," within certain specified limits, is broken by the vendor's engaging in the business of cutting and dressing the natural hair, though at the time of sale the dressing of artificial hair was the principal item of the business, and the cutting and dressing of the natural hair merely incidental.

2. On enjoining a breach of covenant by a vendor not to engage in a similar business to the one sold, a court of equity has power to take an account of the loss of profits suffered by the purchaser in consequence of such breach.

Appeal from court of common pleas, Philadelphia county.

Bill in equity by George R. Patterson and Elizabeth L. Brauning against William Glassmire and Alice Glassmire for an injunction to restrain defendants from carry-

Digitized by Google

ing on the business of dressing the natural hair in violation of a contract between the parties. From a decree for plaintiffs, defendants appeal. Affirmed.

The following are the findings of fact made by the master (F. A. Bregg):

"For some time prior to July, 1886, William Glassmire, one of the defendants, conducted a manufactory for artificial hair goods, and maintained three retail hair stores in Philadelphia. One of these stores was situated at 2113 Germantown avenue, and was conducted by Miss Elizabeth R. Brauning, one of the complainants, who was employed by Glassmire for the purpose. The daily returns of the shop were noted in a book kept for the purpose, and the cash was received by Glassmire, who maintained a general supervision of the accounts. The sign on the outside informed the public that the establishment was conducted by Mr. and Mrs. Glassmire. Mrs. Glassmire, however, took no part at all in the running of the shop; and, according to the uncontradicted testimony of herself and her husband, she had no pecuniary interest in the business. She contributed her time and labor, as far as was possible, in assisting in the business, by teaching and helping the girls in the other shops, but only in her husband's interest. 'She got,' as he says, 'no more than what any other wife gets—a mere living—in return for her labor.' On or about July 28, 1886, the stock, merchandise, fixtures, and good will of the business conducted at 2113 Germantown avenue, 'and all the branches thereunto appertaining,' were sold by defendants to the plaintiffs, George R. Patterson and Elizabeth R. Brauning. The sale was evidenced by a written contract, wherein William Glassmire and Alice Glassmire are represented as trading under the style and firm name of Mr. and Mrs. William Glassmire, hair dealers, and whereby the two agreed, as part of the consideration moving in said sale, that 'they, or either of them, shall not, either by themselves, or either of them, or any other person whomsoever, either directly or indirectly, engage in, manage, or conduct said business of hair dealing, or any of the branches thereof, as aforesaid, within eight squares of said place of business, No. 2113 Germantown avenue, at any time hereafter.' At the time of the execution of the agreement the defendant William Glassmire had another store on Front street, within the limit prescribed by the agreement, wherein hair cutting and hair dressing did then, and still continues to, form part of the business conducted. While not incorporated in the agreement, it was understood between the parties that the business of that store was not to be interfered with by the said agreement of sale. According to Glassmire's testimony, 'We could keep the business we were engaged in, but were not to commence a new store.' Miss Brauning testifies, 'It being the oldest establishment of the three stores, we did not object to that store at the time of the agreement'; and Mr. Patterson says, 'It was understood that Mr. Glassmire was to carry on the Front street store.' Accordingly, it has been carried on by Glassmire ever since without objection. Apart from this one particular, however, there has been no agreement or understanding between the parties, since the execution of the contract of sale, involving any alteration or modification of its terms. The consideration money named in the contract of sale was fifteen hundred dollars, payable in certain installments. The amount was subsequently discounted for twelve hundred cash, which was used in payment of Glassmire's debts. Plaintiffs have since continued to conduct the business at 2113 Germantown avenue. Some time in February, 1893, printed cards were circulated in the neighborhood, bearing the name of William Glassmire, informing the public of the opening of a ladies' and children's hairdressing establishment at 1931 North Sixth street, which is within two squares of 2113 Germantown avenue, and so situated as to compete with complainants' business. A sign, three feet by seven feet in size, painted black, with gold letters, bearing the name of 'William Glassmire, Ladies' Hair Artist,' and advertising the cutting and dressing of ladies' hair, was set up in front of the house, and the sitting room was fitted up with all appliances for the purpose. Artificial switches and bangs were displayed in this room, and there was a show case, with all sorts of toilet articles, and a shelf or table containing curling irons, crimpers, etc. Mrs. Glassmire explains in her testimony that the articles so displayed are samples from which orders are obtained and filled from the Front street store. After the injunction was dissolved the sign on the house was altered to 'Mrs. William Glassmire,' and advertising cards bearing the name 'Mrs. William Glassmire' were distributed in the neighborhood, announcing that this was a branch of the Front street store. Glassmire swears that there were cards with his wife's name thereon as well before as after the bill filed, and offered to produce them; but no such cards were produced, no witness declares having seen them, and there is no evidence to the effect that they were distributed, save his statement as to their existence. In other respects the establishment has been run since the injunction was dissolved the same as before the bill was filed. Subsequently to the opening of this establishment, the business at 2113 Germantown avenue fell off to an appreciable extent, but to what extent does not appear in the evidence. Plaintiff Brauning herself saw one of her customers in the defendants' shop. The witness Mrs. Smith, a customer of plaintiffs, testifies to having been induced to go there, and others would mention it in visiting plaintiffs' shop. It was also in evi-

Digitized by Google

dence that a man named Lehman had opened a similar establishment in November, 1892, within a block of plaintiffs' store; and this fact alone would render the question as to the effect of defendants' establishment upon plaintiffs' business impossible of solution. The account book produced by defendants shows that between the time of the opening of the shop at 1931 North Sixth street and June 17, 1893, the receipts of that shop amounted to $260.18. Considerable evidence was adduced on both sides bearing on the questions (1) whether or not the business of ladies' hair dressing, as applied to the natural hair, including bang cutting, shampooing, singeing, and the like, formed a branch of the business of a retail store at the time of this agreement; (2) whether or not such business formed at that time a branch of the business of this particular shop; and (3) whose business it is, and was at the time of filing the bill, that is conducted at 1931 North Sixth street.

"As to the first question: The testimony of Madame Vaunt and Mrs. Prandi, both experts, and in business at that time, is most positive that ladies' hair dressing and hair cutting did, in 1886, constitute a branch of the business of a retail artificial hair store. Nor is their testimony offset by the evidence introduced by defendants. Mr. Little, for defendants, it is true, says that in 1886 there was no call for experienced hair dressers for the purpose of conducting a retail hair store; but he admits that, being largely interested in the manufacture of artificial hair, he did not want to see any ladies with their bangs cut, and would not be competent to testify what was the fashion nine years ago. Nor does the testimony of Miss Butz and Mr. Lehman add any weight to defendants' contention. It must certainly be admitted that the fashions have effected a great change during the past six years in the conduct of a hair store. The discontinuance, to a great extent, of the use of artificial hair, and substitution therefor of the various styles in the wearing of natural hair, has greatly enlarged the business of what is termed the 'female barber shop.' But the dressing, cutting, shampooing, singeing, etc., of the natural hair, was certainly done at retail hair stores in 1886, and, as a rule, formed part of the business of every shop. Natural bangs were introduced as early as 1882, and bang cutting, trimming, etc., became thereupon a branch of the hair business, and has been so ever since.

"As to the second question: It seems equally well established by the evidence that ladies' hair dressing, with all that the term implies, formed a principal part of the business of the shop at 2113 Germantown avenue at the time of the sale. Apart from the testimony of the plaintiff Brauning, that of Mrs. Smith, Mrs. Leach, Mrs. Horn, and Mrs. Pereia, all customers of the shop before the time of the sale, is most positive that hair dressing and hair cutting were regularly done there. A large sign hung in the interior of the shop, giving the prices for the different kinds of work of this nature, and the entries in the cash book kept by Miss Brauning (Exhibit E), showing the returns of the business, give the amounts received from this source. These entries must necessarily have come under Mr. Glassmire's notice, inasmuch as he signed this book in one or two places in settlement of his account with Miss Brauning on the same page where some of them occur. Thus, on page 3, as of January 12, 1886 (Exhibit E), occurs an entry by him; and indeed the items in this book show from their number that hair dressing, bang cutting, shampooing, etc., as applied to the natural hair, constituted the principal business of the shop.

"Turning, then, to the third question, as to whose business it was and is at 1931 North Sixth street, the testimony discloses the fact that the house is the residence of William Glassmire and his family. It was purchased by him in 1886, just prior to the sale of the Germantown avenue business to plaintiffs, and the title put in his wife's name. He testifies that he purchased because he found it cheaper to do so than to rent. He was pecuniarily embarrassed at the time, and Mrs. Glassmire says the title was put in her name in case he should be unfortunate in business. Of the consideration, fifty dollars only was paid in cash, the balance being secured by mortgages, and by the deposit of a paid-up policy of life insurance on his life, in his wife's name. This policy was originally a ten thousand dollar endowment policy taken out by Glassmire in his wife's favor, upon which he paid the premiums; but, finding it onerous to do so at the time of his financial troubles, he converted it into a paid-up policy in her favor for sixteen hundred dollars. He shortly afterwards paid all the debts which occasioned his embarrassment. His wife still holds the title to the house, and held the policy until shortly before the business was started on Sixth street, when it was sold by Glassmire for seven hundred dollars, the proceeds being used in fitting up their residence for hairdressing purposes. It thus appears that both the house and policy were derived by Mrs. Glassmire from her husband, with the intention of protecting her and his children in the event of his business embarrassment or death. Apart from these two items, she possessed no separate estate. In the absence of any evidence upon the subject, it is to be presumed that all the furniture and belongings of the house are the property of the husband, and that he never abandoned his prerogative as master of the household, by whose authority everything was done. Mrs. Glassmire personally attends to the work of the shop at 1931 North Sixth street, and disposes of the proceeds. Being asked how it happened that she started in the business, she

Digitized by Google

replied that, being her own property, she thought she would like to have 'a business of my own to carry on, in case anything would happen to Mr. Glassmire.' Mr. Glassmire, being asked whose business it is, declared it to be his wife's, and averred he had no interest in the receipts. As opposed to this, however, the answer does not explicitly deny the averment in the bill that Glassmire, with his wife, is engaged in the business. On the contrary, in the fifth paragraph, it avers, 'that defendants have confined themselves to this work' (hair dressing); and in the seventh and eighth paragraphs they are both referred to as conducting the business. Before the bill was filed, as has been said, the sign was that of William Glassmire, and cards were distributed in his name. His explanation of how the establishment came to be started differs from that of his wife. He says that people would stop at the house, and leave samples for him to bring home work for them from the store on Front street, and neighbors and friends would come in to have their hair dressed and bangs cut. 'My wife,' says he, 'suggested starting a store on Sixth street, or, rather, branching out as we did, putting out a sign, and distributing cards; but what first started it, or suggested it, was that a man by the name of Lehman opened a place on Germantown avenue, just around the corner from our place. * * * We found he was taking a good deal of our trade we used to get over at Front street.' Now, the Front street store was William Glassmire's own business, in which his wife had no interest whatever. As to the disposition of the proceeds, while Mrs. Glassmire declares she can use them as she pleases, the evidence goes to show that they go to the support of the family. When asked whether she received any money for the household expenses from her husband, Mrs. Glassmire replied: 'Certainly; I could not run the house on what I was taking in there.' And it would be unreasonable to suppose she labored for any other purpose. It was contended by the defendants that the title to the policy and house constituted a separate estate in the wife, which, together with the appropriation of the proceeds of the store by her, served, in addition to their testimony to that effect, to stamp the business as hers. A careful consideration, however, of the defendants' answer, and all the evidence bearing upon this point, convinces the master that such was not the intention at the time the business was started. His conclusion, on the contrary, is as follows: William Glassmire, finding that his Front street business was suffering in consequence of the establishment of Lehman's store, and supposing that his covenant did not prohibit his engaging in the business of cutting and dressing natural hair, conceived the idea, at his wife's suggestion, of utilizing his own dwelling for the purpose of retaining the business which Lehman was drawing away from him. To this end he set about furnishing his sitting room for the purpose, and, with his wife's consent, negotiated the sale of the insurance policy, devoting the proceeds to such purpose, and gave notice to the world, by distributing cards and setting up a large sign, that the business was his. His wife, who had hitherto assisted him in his other shops, now attended to the business at home. She had always labored in his interest, and her present status was in no wise different, except that she had the handling of the proceeds. Such was the condition of affairs when the bill was filed. Then for the first time, in the answer, is the claim advanced that the wife is acting in her own behalf, though indeed the husband does not, even at that stage of the proceeding, disclaim any share or interest in the undertaking. The inscriptions on the signs and cards, however, were then changed to conform to the wife's claim; but, even in so doing, care was taken to preserve any advantage to be derived from the husband's name and good will; the sign being altered to 'Mrs. William Glassmire,' not 'Alice Glassmire,' as might be expected were she dealing on her own account, and the new cards bearing the inscription, 'Branch of 2041 North Front Street' (which was not upon the original cards), as if to inform the public that the man who had built up that business was still at the head of this. The master accordingly finds that the claim that the business was that of Alice Glassmire was an afterthought, and the business is William Glassmire's; his wife, Alice Glassmire, being merely his agent in conducting it. This conclusion finds additional support from the consideration of the possibility of fraud arising from the right to trade now fully accorded to married women. If a business which a man has covenanted not to carry on may nevertheless be maintained by his wife in his name, in his dwelling house, over which he has never resigned his prerogative as master, and for the same purpose for which he himself would carry it on, to wit, the support of his family, a court of equity would certainly require the most convincing proof that the business is hers, before declaring it as such. Proof of this order, in the master's opinion, is wanting in this case."

The master's opinion is as follows:

"Contracts in restraint of trade, if they are reasonable, and founded on a valuable consideration, and not, for any special reason, unjust or unequitable, will be enforced in equity (Bisp. Eq. § 228), as, for instance, in the case of the sale of a business, and a covenant not to pursue it within certain prescribed limits (McClurg's Appeal, 58 Pa. St. 51). 'We do not see,' says Tindall, C. J., in Horner v. Graves, 7 Bing. 743, cited in Kerr on Injunctions, 'how a better test can be applied to the question whether reasonable or not, than by considering whether the

Digitized by Google

restraint is such only as would afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public.' In respect to time, the restriction may be unlimited. Kerr, Inj. § 509. While the consideration should be a valuable one, its adequacy will not be inquired into, unless the inadequacy is such as to stamp the agreement as unreasonable. Bisp. Eq. § 228. The mere purchase of stock in trade is sufficient consideration for an agreement to restrain the purchaser from carrying it on in the locality. Beard v. Dennis, 6 Ind. 200. The basis of equitable intervention is that a suit at law would afford no remedy, since the damage will be continuing, and accruing from day to day, and, furthermore, that the object of the contract can only be obtained by the parties conforming expressly and exactly to its terms. Butler v. Burleson, 16 Vt. 176. The agreement should be certain and distinct (High, Inj. § 1178); and it should be established by clear and satisfactory evidence, in order to justify the court in restraining its breach by injunction. If in writing, it must be allowed to speak for itself. Hall's Appeal, 60 Pa. St. 458. But it is always permissible to explain the subject-matter of an agreement by extraneous evidence. Barnhart v. Riddle, 29 Pa. St. 96; Methodist Church v. Clime, 116 Pa. St. 146, 9 Atl. 163, and cases cited. And the sale of a business must be held to include everything which pertains to such business. Harms v. Parsons, 32 Beav. 332.

"Applying, then, these principles to the facts of this case, there can be no doubt that the covenant entered into by defendants imposed a fair and reasonable restriction against conducting the business in question. The subject-matter of the sale included 'all the stock, fixtures, merchandise, and good will now owned or conducted at No. 2113 Germantown avenue, in the hair-goods business, and all the branches thereto appertaining,' and the covenant provided that the covenantors should not, 'either directly or indirectly, engage in, manage, or control said business of hair dealing, or any of the branches thereof, sold as aforesaid, within eight squares of said place of business, 2113 Germantown avenue, at any time hereafter.' The evidence adduced to explain the subject-matter of the sale established the fact that the business of cutting and dressing the natural hair constituted at the time of the agreement a branch of the hair-goods business actually conducted at 2113 Germantown avenue. That it accordingly passed under the terms of the sale, and became the subject of the covenant, seems to be conclusively established. It appears by the evidence that a waiver or concession was allowed by the covenantees at the time the agreement was entered into, in favor of the Front street store. It was not incorporated in the written agreement, but was simply allowed by mutual understanding. Such waiver does not, in the master's opinion, tend to render obscure or uncertain the rights reserved by the covenantees under the agreement. It is confined solely to the business done at that particular store; and, as such, it is clear and precise in its nature, the testimony of all the parties to the contract being singularly in accord with regard to it. The evidence in this respect, therefore, does not offend against the rule above enunciated, that the contract should be clear and distinct, and established by satisfactory evidence.

"As to the breach, it was established that the dressing and cutting of the natural hair was and is being done at the Sixth street residence, which is within the limit prescribed, and that the business was that of William Glassmire, one of the covenantors and defendants. Articles in the hair-goods line were also sold there, by sample, to be furnished from the Front street store. It was contended by defendants that the question as to whether the procuring of orders by sample constitutes a breach of the agreement is too doubtful to warrant an injunction: citing High, Inj. § 1176. The case upon which such ruling was founded, however, is Turner v. Evans, 2 De Gex, M. & G. 740, where one who had contracted not to carry on business within certain limits afterwards went about, within those prescribed limits, soliciting orders for his stand, situated outside the limits. Lord Cranworth, in declaring the breach too doubtful to warrant an injunction, expressed the opinion that in the case of a business which consists of keeping a store, as distinguished, for instance, from a milk route, a man can only be said to carry it on at his stand or place of business. The distinction between that case and this is that here a new stand or place of business was selected within the prescribed limits, and the very thing that was wanting to warrant the injunction in that case is thus supplied here. Moreover, the agreement here extended to the indirect as well as direct carrying on of the business, which would seem to cover this method of selling the goods of the Front street store. Nor does the sale of the goods at the Sixth street store come within the waiver or exception allowed to the business of the Front street store. Consequently, the sale by sample constitutes, in the present case, a breach of the agreement. In the master's opinion, therefore, the essential allegations of the bill are substantiated by the evidence; and the injunction prayed for should issue against William Glassmire, to restrain him, for all time, from conducting the business carried on at the Sixth street residence, and elsewhere within the limits prescribed by the agreement, excepting at 2041 North Front street. In view of the finding of fact that the business is that of William Glassmire alone, it becomes unnecessary to examine and define the status of Alice Glassmire, the other defendant, under her covenant. The

Digitized by Google

injunction will lie against her, but only in her capacity as agent of the husband in the conduct of the particular business complained of. Hil. Inj. 715; Barret v. Blagrave, 5 Ves. 555.

"The bill likewise asks for an account of profits, and evidence was adduced for the purpose of showing that the plaintiff had suffered loss in consequence of defendants' act, as also that defendants had made a profit by the maintenance of their establishment within the prescribed limit. Courts of equity, under the old rule, refrained altogether from awarding pecuniary reparation for damage sustained. Sedg. Dam. § 3. This rule has been, however, modified from time to time, and is now abrogated by statute, in England, in all cases where chancery has jurisdiction to entertain applications for injunction against the breach of any contract. St. 21 & 22 Vict. c. 27. In this country it is now generally accepted that a court of equity has power to decree compensation, as incidental to other relief (Bisp. Eq. § 478; Story, Eq. Jur. § 794),—not, indeed, as damages, in the sense in which the law gives them, but as a substitute for damages (Root v. Railway Co., 105 U. S. 215). By some the power is based upon the necessity of preventing a multiplicity of suits (Allison's Appeal, 77 Pa. St. 227); by others, from the necessity of doing complete justice as between the parties (Nagle v. Newton, 22 Grat. 821). The course of proceeding is by reference to a master, or by a quantum damnificatus. Bird v. Railroad Co., 8 Rich. Eq. 56. But the reference to a master is now commonly adopted. Story, Eq. Jur. § 794. An injunction to restrain the breach of a contract, however, amounts practically to a decree for specific performance. Id. § 722a. And the rule above set forth is, of course, to be accepted with the qualification that a court of equity will not give both legal and equitable relief at the same time, or, in other words, decree the specific performance of a contract while at the same time giving damages such as would compensate for its permanent abrogation. High, Inj. 1182. The compensation in question, therefore, amounts merely to reparation for the damage sustained pending the temporary breach. See Head v. Meloney (Pa. Sup.) 2 Atl. 195. Inasmuch as agreements in restraint of trade usually provide a penalty as liquidated damages in case of breach (see Sedg. Dam. § 418), the books are wanting in authorities on the subject of compensation in equity cases, where such provisions do not exist. The master, however, is unable to perceive any distinction between the principles underlying this class of cases and those of the infringement of patents and copyrights, wherein the courts of equity apply as far as possible the ordinary rules for the measurement of damages to property rights (Sedg. Dam. § 1213); and certainly the good will which is to be protected in this instance would seem to be as much property as is the right to a patent or copyright. In such cases the plaintiff is held entitled to such reparation as will make up to him for the difference in the value of the rights as they are and as they would have been had there been no infringement. Id. That the courts do proceed upon this principle when the breach of the contract in restraint of trade is sought to be compensated at law is illustrated in the case of Peltz v. Eichele, 62 Mo. 171, where defendant broke his contract not to compete with plaintiff's business. It was held that plaintiff might recover compensation for the profit he had lost, to be ascertained by comparing the amount his business actually fell short of what he might have done with the business done by defendant. In the present case the circumstances are further complicated by the entrance of a third party into the field, whose presence very probably contributed to plaintiffs' loss, but in what measure cannot be determined. The amount by which the plaintiffs' income fell short would accordingly be no measure of their damages; and in such case, it would seem, recourse must be had to estimating defendants' profits. Kerr, Inj. 49. This method is well recognized in equity, being based on the principle that a wrongdoer shall never profit by his own wrong; and the compensation is computed by the same rule that courts of equity apply to the case of a trustee who has wrongfully used the trust property for his own advantage. Root v. Railway Co., 105 U. S. 189; Suth. Dam. § 2543. As was said by Vice Chancellor Wigram in a copyright case (Colburn v. Simms, 2 Hare, 543), 'The court does not, by an account, accurately measure the damages sustained, * * * but, as the nearest approximation which it can make to justice, takes from the wrongdoer all the profits he has made by his piracy, and gives them to the party who has been wronged.' In Hogg v. Kirby, 8 Ves. 222, a man whose name was used as publisher of a magazine, under an agreement whereby he profited, made a settlement with the owner, and withdrew from the undertaking, but afterwards started a new magazine, bearing such resemblance as to lead the public to believe it was a continuance of the other, and sold many copies to people who so believed. Lord Eldon held that, it being nearly impossible to ascertain the extent of the damage, the remedy was by injunction, and account of profits. It is true that in Scott v. Macintosh, 1 Ves. & B. 505, decided in 1813 (the only dictum which the master has been able to find upon the exact question of procedure involved in this case), the same Lord Eldon says: 'I do not recollect an instance of a bill for an account upon a covenant not to carry on a particular trade. The usual course is a bill of discovery for the purpose of an action.' But in view of the changes in the course of procedure in equity since Lord Eldon's day, and the present disposition, as enunciated in all the decisions, to determine by the same proceeding all the rights in the cause, the master

Digitized by Google

apprehends that a bill for an account would now substitute the method laid down by Lord Eldon as the usual course. 'When a court of equity has once acquired jurisdiction, it will retain it, in order to satisfy all the just requirements of the case between the parties in respect to the subject-matter.' Wat. Spec. Perf. § 514. In Richardson v. Peacock, 26 N. J. Eq. 40, under an agreement in restraint of trade, the bill prayed for an account of damages and injunction, but there was no decision on the question whether the account would lie. But the evidence in this case is silent on points essential to the determination of defendants' profits. The mere sum total of their receipts of the Sixth street store would not be the measure, inasmuch as all the items of cost should be deducted. The receipts, also, are only given up to the date of Mrs. Glassmire's testimony. For the purpose of ascertaining the profits, therefore, reference must be had to a master after decree entered herein.

"One other point remains to be considered. It was claimed by counsel for defendants that the answer having been sworn to, and no traverse having been filed, the facts well pleaded in the answer are to be taken as admitted. The rule of equity on the subject, as declared by the authorities, is that the answer, if responsive to the bill, is conclusive, unless overcome by the testimony of two credible witnesses, or the testimony of one witness and such corroborative facts or circumstances as are equal to the testimony of a witness. Appeal of Rowley, 115 Pa. St. 150, 9 Atl. 329. Rule 9 of the Pennsylvania equity rules provides that 'if the plaintiff omits to file a general replication within the prescribed period, defendant shall be entitled to a rule upon him to reply within ten days after notice of such rule; on failure to file such replication with notice to the defendant's counsel, the plaintiff shall be deemed to have abandoned his right to traverse the matters alleged in the answer.' It does not appear, however, in the present case, that defendants took any such rule upon plaintiffs to reply; and, on the other hand, the application for an examiner having been made by plaintiffs, it would seem that the case was heard at their instance on bill, answer, and proofs. Under such circumstances, the only question appears to be whether the facts set forth in the answer, responsive to the bill, are overcome by the testimony of two credible witnesses, or the testimony of one witness and corroborative circumstances. Upon this point the averments that the business of ladies' hair dressing was not a branch of Glassmire's business, or included in the sale or the covenant, and that it was understood that Glassmire and his wife might, notwithstanding the covenant, continue in the dressing of hair within the prescribed limits, have, in the master's opinion, been overcome by the evidence in the manner prescribed by the rule. And, inasmuch as the answer does not explicitly deny that William Glassmire is engaged in the prohibited business at 1931 North Sixth street, but, on the contrary, leaves it to be inferred that he, as well as his wife, is engaged in it, leaving it to be determined as a question of law as to whose business it really is, under all the facts of the case, the master is of opinion that there is nothing in defendants' contention which conflicts with the findings of fact as above set forth."

M. J. O'Callaghan, for appellants. Charles L. Symth, for appellees.

PER CURIAM. Each of the first 45 specifications of error complains of the dismissal of the exception, etc., quoted therein. The first 27 of these exceptions to the learned master's report were filed by William Glassmire, one of the defendants, and the remaining 18 by the other defendant. The exceptions having been considered and dismissed by the court, the master's report was approved, and the decree recommended by him was entered. This last act is the subject of complaint in the forty-sixth specification. It cannot be doubted that the decree in question is the logical result of the facts found by the master and approved by the court. It is therefore incumbent on the appellants to convict the court below of error in dismissing one or more of their 45 exceptions to the master's report. Failing in that, the decree must stand. It is not our purpose, nor do we think it necessary, to consider the specifications in detail. To do so would consume time without any useful result. Our examination of the record and consideration of the proofs have satisfied us that the master's findings of fact are sustained by the evidence, that his conclusions drawn from the facts thus established are correct, and that he committed no error in not finding certain alleged facts referred to in some of the exceptions. It therefore follows that there was no error in dismissing the exceptions, or in entering the decree. The facts on which the latter rests, together with the reasons in support of it, are so fully set forth in the master's report that further elaboration is unnecessary. In view of the properly established facts and the reasons presented in said report, we think the decree should not be disturbed. Decree affirmed and appeal dismissed, with costs to be paid by the appellants.

In re MARSDEN'S ESTATE.

(Supreme Court of Pennsylvania. Jan. 21, 1895.)

TRUSTEES—REMOVAL.

Under Act April 9, 1868 (Purd. Dig. p. 1658, pl. 64), which authorizes the court of common pleas or orphans' court in and for the city of Philadelphia to remove a trustee on the application of the cestui que trust, the power of the court, while it is not to be exercised capriciously, or at the mere whim of the cestui

Digitized by Google

que trust, is not dependent upon the misconduct of the trustee sought to be superseded; and the fact that there has been no intercourse or communication between the trustee and cestui que trust for several years, and that the trustee has not consulted with the cestui que trust, or any one on her behalf, with regard to the repairs of the trust estate, is a sufficient ground for granting the cestui que trust's application for removal.

Appeal from orphans' court, Philadelphia county.

Petition by Hannah Marsden for the removal of William C. Marsden from his office as trustee under the will of John Marsden, deceased. From a decree for petitioner, the trustee appeals. Affirmed.

The opinion of the court below is as follows (Penrose, J.):

"The power of the court under the act of April 9, 1868,[1] to appoint a new trustee, while it is not to be exercised capriciously, or at the mere whim of the cestui que trust (Stevenson's Appeal, 68 Pa. St. 101), is not dependent upon the misconduct of the trustee sought to be superseded; and it is enough to show that his retention, by reason of the existence of hostile relations between him and the cestui que trust, would naturally work disadvantage, inconvenience, or great discomfort to the latter (Hilles' Estate, 9 Wkly. Notes Cas. 421). See, also, Kellberg's Appeal, 86 Pa. St. 129; Seyfert's Estate, 3 Wkly. Notes Cas. 565; Gaul's Estate, 12 Phila. 13. That such has been and is the character of the relations in the present case is clear from the testimony of the respondent himself, and from the admitted fact that since 1877 to the present time, though the cestui que trust is his sister, there has been no intercourse or communication between them, while during the year or more in which he has been acting as trustee he did not consult her, or any one on her behalf, with regard to his repairs of real estate, though the amount thus expended was more than one-half of the entire gross income debited in his account; and there is the further fact that the respondent now lives in Towanda, and, apart from the question of the additional expense occasioned by visits for the purpose of attending to the trust, it may be better for the interests of all concerned that its management should devolve upon a resident trustee. The prayer of the petition is granted, counsel to prepare the necessary decree."

Joseph De F. Junkin and George Junkin, for appellant. David W. Sellers, for appellee.

PER CURIAM. All that is necessary to be said in defense of the decree dismissing appellant from his office of trustee under the will of his father, etc., will be found in the opinion of the learned judge of the orphans' court. On that opinion we affirm the decree, and dismiss the appeal, with costs to be paid by the appellant.

[1] This act (Purd. Dig. p. 1658, pl. 64) is as follows: "Where any trust now exists or is hereafter created, the cestui que trusts, or a majority of them having the life estate, shall have the right to elect or choose trustees to execute said trust; and upon petition of the cestui que trusts or parties in interest as aforesaid, having such life estate, the court of common pleas or orphans' court in and for the city of Philadelphia, having jurisdiction, shall remove the acting trustee or trustees, and appoint other, or others as chosen or elected by said parties, who shall have all the powers to execute said trusts, upon security being approved and entered by said appointees, as directed by said court appointing them."

CITY OF PHILADELPHIA v. KELLY.

(Supreme Court of Pennsylvania. Jan. 21, 1895.)

USURY—APPROPRIATION OF PAYMENTS.

1. Where a loan is made for an indefinite period, the mere fact that the money agreed to be paid for the loan exceeds 6 per cent. per annum, the lawful rate of interest, does not render the transaction usurious.

2. A debtor, in making the payment, has the right to appropriate it to any claim due his creditor, and if he makes no appropriation the creditor may make it.

Appeal from court of common pleas, Philadelphia county.

Scire facias on a municipal claim by the city of Philadelphia, to the use of the Pennsylvania Granite Company, to the use of Charles Mayhew, trustee, against William J. Kelly. From a judgment for defendant, plaintiff appeals. Affirmed.

William J. Kelly, the defendant, owned 11 lots of ground on Ontario street. J. O'Rourke, plaintiff's assignor, had a contract with the city of Philadelphia to pave Ontario street in front of the lots belonging to Kelly and others. O'Rourke did not have sufficient money to carry out his contract, and asked Kelly to make him a loan. Kelly accordingly agreed to advance $3,500, and the following contract was entered into between the parties: "Whereas, John O'Rourke has entered into a contract with the city of Philadelphia to pave Ontario street between Frankford road and Tulip street with Belgian blocks, as a reference to said contract will more fully show; and whereas, he is desirous of borrowing from William J. Kelly the sum of three thousand five hundred dollars, so as to complete said contract: Now, this agreement witnesseth that the said John O'Rourke, in consideration of the premises, and the loaning of the money aforesaid by the said William J. Kelly, agrees to and with the said William J. Kelly to allow him a reduction of ten (10) per cent. on all bills that he, the said William J. Kelly, may have to pay by reason of his being an owner of real estate upon the line of said street, to the extent of $3,500. Said money to be loaned as follows: Five

Digitized by Google

hundred and seventy-five dollars thereof to be paid to the said O'Rourke one week after he has commenced grading the said street, and the balance, twenty-nine hundred and twenty-five dollars, to be paid him at the rate of sixty-nine (69) cents per square yard, weekly, as the contract progresses, excluding intersections, for which the city is to pay. It being particularly understood and agreed, however, that in the grading of the said street all dirt removed therefrom shall be placed on other ground of the said William J. Kelly, as the said William J. Kelly may direct, without expense for so doing to the said William J. Kelly. In witness whereof, the parties hereto have set their hands and seals this 15th day of May, 1888."

The other facts sufficiently appear in the following charge of the court (Pennypacker, J.):

"The suit is brought to recover upon six liens for paving upon Ontario street, between Amber street and Tulip street. We have nothing to do with any other claim which the plaintiff may have against the defendant. If the defendant owes money upon transactions outside of these liens, they cannot be considered here, and there can be no recovery for them. We have to do solely with what is owed upon the liens in suit. The amount of those liens, as presented by the plaintiff, is $4,142.48. It seems there was a written agreement made between Mr. O'Rourke, the contractor, and the defendant, dated the 15th of May, 1888. This agreement shows the importance, where men have serious transactions, of having proper advice, —of having their agreements drawn by counsel who are skilled in the law,—because, undoubtedly, in one aspect of it, it does not express what the parties must have intended. It is, in effect, an agreement which sets out that Mr. O'Rourke had a contract to pave Ontario street, and was desirous of borrowing money from Mr. Kelly,—the sum of $3,500,—so as to complete the contract; and then it provides for an allowance to Mr. Kelly of ten per cent. upon all bills that Mr. Kelly may have to pay, by reason of his being the owner of real estate upon the line of the street, to the extent of $3,500, and there it ends. It has the form, apparently, of a loan. A loan is where one man hands his money over to another for a definite time, generally for interest, but with the expectation that it is to be returned. There is no provision in this agreement as to what is to be done with respect to paying back the $3,500. Mr. Kelly, however, in his testimony, supplements the written agreement by testifying to you that it was understood that this $3,500 which Mr. Kelly handed over to Mr. O'Rourke was to go as against the claim of Mr. O'Rourke for paving. This, in substance, is his testimony in respect to what is omitted in the agreement. Now, there is no contradiction of that testimony. He says that was agreed between the parties, and there is a certain probability that that is correct, apart from his testimony, because the contract evidently refers to the paving which was being done,—is looking toward the completion of that paving,—and then there is a gap left which the parties must have intended to supply in some way. There is a certain probability that this money was to go on account of that paving. At all events, Mr. Kelly so testifies, and there is no contradiction of his testimony. I do not see, therefore, how you can escape from treating it as a fact, in this case, that that was the understanding between the parties, and the agreement made between them. The total amount so paid by Mr. Kelly is $4,340.99. Included in that amount, there is one sum of $300. It appears that the provision of this agreement by which Mr. Kelly was to have ten per cent. upon the amount of his bills for paving on $3,500 was not carried out. The parties met, and determined that it should be $300, instead of $350.

"It is contended on the part of the plaintiff that that allowance ought not to be made because the $300 is contrary to law, as being usurious. In money transactions the law permits interest to the extent of six per cent. per annum, and any amount beyond that is usurious. It is alleged that this provision of the agreement is, in this instance, usurious, and therefore unlawful. You will see, however, that, in order to fix on the sum to be paid as usury, it must appear that it is an amount over six per cent. per annum. This agreement provides for the loan of money, it is true, but the rest of it in no way appears. Whether it was to be for six months or a year or two years or three years, there is nothing to determine. According to the testimony of Mr. Kelly, it would be determined by the time when the contract was completed, but there is no provision in the contract for the completion of the work upon Ontario street; and if, perchance, the work extended over two years, Mr. Kelly would not be getting, as you see, even six per cent. upon the amount advanced. There is therefore nothing in the arrangement which fixes the other item,—that is, the length of time; and I instruct you, therefore, that it cannot be regarded as an amount which is usurious. It is a sum which was to be paid by a deduction from the amount of the claims for the use of the money, it is true, but for the use of the money for a time which was not fixed. Under the instructions of the court, therefore, you will have to regard the payments made under this agreement by the defendant as amounting to $4,340.99. Now, according to that testimony and to the agreement, the sums advanced were to be treated as sums paid on account of the paving. This amount of $4,340.99 is in excess of the amount of the liens; that amount being, as I have said to you, $4,142.48. It seems, however, that in addition to the paving between Amber street and Tulip street there was also paving done

Digitized by Google

upon the other side of Tulip street, between Amber street and Arcadia street; and, in this aspect of it, you would have to look at the question of that paving, because, as the defendant testifies, these payments which he made were to go against the claims for all the paving. The total amount of the paving bills, as shown by the surveyor's certificates, and testified to by Mr. Kelly, amounted to $4.492.73; so that there is a balance between the $4.340.09 paid and the $4,492.73, of $151.-74, as I make the calculation. The calculation is one for you to make, however, and not for me. This sum would be increased to some extent by an item of interest. Both parties, I believe, agree that interest ought to be charged up to the time of a continuance of the suit in No. 1 court,—the continuance of an attachment suit, which, as I recall the testimony, was about September, 1890. Mr. Zane and Mr. Kelly have testified that at that time there was an agreement between the parties that no further interest should be charged. Mr. Sparhawk, on the other hand, says that the agreement was that there was no interest to be charged until after the settlement of the attachment suit, which was settled on the 31st of March, 1891. In other words, he contends that the interest would be lessened to the extent of about six months' interest. That is a question for you to determine. Now, there being a balance upon the claim of the paving of $151.74, with the interest in addition, it is a question for you to determine as to whether that amount, or in what way that amount, is to be recovered. A man paying on account of various claims under the law may appropriate the sums which he paid to any one or either of them. That is within his power. If at the time he makes a payment he wants it to be appropriated to one of several of the claims which are held against him, he may make such appropriation. If there was such an appropriation made at the time by the defendant, then it would go, as against the claim to which the appropriation was made, in settlement of that claim. If he does not make the appropriation, it is within the power of the other party to appropriate the money to any one of those claims. In this aspect of it, if there was an appropriation made by either of them, it is difficult to see how there can be a recovery on the part of the plaintiff upon more than one of these suits, because at whichever end you begin to make the appropriation of payments, there would be a payment of all of them, with the exception of the last one. If there was no appropriation by the parties, the law would appropriate the sums to the first bills which came due. If these bills came due at the same time,—if there was no difference in the dates at which they accrued,—then you would have to distribute the amount which is due pro rata among all of the claims, including those for paving, as I said, beyond Amber street and Arcadia street."

John Sparhawk, Jr., and N. Dubois Miller, for appellant. Alexander & Magill, for appellee.

PER CURIAM. An examination of the record with special reference to the several specifications has failed to convince us that there is any substantial error in the rulings of the learned trial judge. Neither of the specifications is sustained. Judgment affirmed.

CITY OF McKEESPORT v. BUSCH et al.

(Supreme Court of Pennsylvania. Jan. 7, 1895.)

STREET IMPROVEMENTS—ENFORCEMENT OF LIEN—FOOT-FRONT RULE.

1. Under Act April 3, 1867 (P. L. 732), relating to street improvements in the borough of McKeesport, which provides that no error in names, or misdescription of the property, shall vitiate the statement of claim, and that the same may be amended on application to the court, an amendment may be allowed at any time before the statute of limitations has run on the claim; and hence a claim which is defective, in not defining the depth of the lot, may be amended after verdict.

2. Where a petition for a street improvement, the ordinance passed in pursuance thereof, and the claim of lien expressly purport to conform to the special act of 1867, the fact that the lien was filed in accordance with the general act of May 16, 1891 (P. L. 69), does not vitiate the proceedings, since the act of 1891 does not repeal or change the provisions of the act of 1867, but provides somewhat more specifically for the practice in cases where final assessments have been made.

3. Inequality in the surface of land abutting on a street does not authorize any departure from the front-foot rule in assessments for street improvements, when that rule is expressly enjoined by the statute under which the improvements were made.

Appeal from court of common pleas, Allegheny county.

Municipal claim by the borough of McKeesport, for use of the city of McKeesport, against Frank K. Busch and William Busch, for grading, curbing, and paving Cliff street. From a judgment for plaintiff, defendants appeal. Affirmed.

On the 12th day of July, 1890, the council of McKeesport passed an ordinance for the grading and paving of Cliff street between Fifth avenue and Elm street, as authorized by Act April 3, 1867, relative to the improvement of streets in that borough; and the work was done, and assessment made by the frontage, as provided in that act. Defendants having failed to pay, a lien was filed which conformed substantially to the provisions of the special act of 1867, and the general act in relation to municipal liens and proceedings thereunder, approved May 16, 1891 (P. L. 69). After verdict the court made an order for amendment of lien, which did not state the depth of the property.

Magnus Pflaum, for appellants. R. C. Rankin and W. B. Rodgers, for appellee.

Digitized by Google

GREEN, J. The learned court below instructed the jury that if "there never was, nor now legally is, a Cliff street," this is a good defense, "if it be established that the improvement made was not of a public highway or street, known and recognized as such, and identified as Cliff street." The petition and ordinance were for the improvement of Cliff street between Fifth avenue and Elm street, and it was not disputed that there was originally a township road between those points, on which the defendants' property abutted. As to whether this was a part of Cliff street, there was conflicting testimony, and the question was necessarily for the jury. They have decided that question in favor of the city, and we cannot reverse their verdict. The fact that it was a public highway was not disputed, and whether it was known as "Cliff street" was a pure question of fact.

There was affirmative testimony that the petition was signed by a majority of the property owners along the line of the improvement, and we are not referred to any testimony which denied the fact. Of course, it was a question for the jury, and, as such, was referred to them by the court.

The lien is certainly lacking in not defining in some way the depth of the lot. But the frontage is given, and the boundaries on either side, and a petition to amend the description was presented to the court after verdict, and allowed. This petition is not printed by the appellants, and the inference therefore arises that the defect in the description was cured by the amendment. The act of 1867 (P. L. 732), under which the proceeding was had, expressly provides that no error in the names, or misdescription of the property, shall vitiate the statement of claim, and that the same may be amended on application to the court. As no limit of time is prescribed, within which the petition to amend must be filed, it may be presented at any time before the statute of limitations has closed on the claim.

The appellants contend that the lien was not filed in accordance with the act of 1867. An examination of the record in relation to this subject shows that the petition for the passage of the ordinance asks that it be granted under the provisions of the act of 1867 and its supplements. The ordinance declares that it is enacted under the provisions of the same act and its supplements. The claim of lien declares that the work was done and the assessment made under the provisions of the act of 1867, and that the claim is filed in accordance with that act. The affidavit of claim alleges that the ordinance was passed, the grading and paving done, the amount assessed, and demand made in accordance with the same act and its supplements, and that a lien was filed in accordance with the act of 1891 (P. L. 69). The latter act does not repeal or change the provisions of the act of 1867, but is rather intended to provide somewhat more specifically for the practice in cases where any final assessments have been made. It is true, it says the lien shall date from the time of the final confirmation of the report under which the assessment may have been made, but it does not invalidate assessments which have not been made in that way. It, of course, would be applicable to all such assessments as require a final confirmation of a report under which they were made, or a final decree of the court fixing such assessments. The requirements of a valid lien, fixed by the second section of the act, appear to have been complied with in the lien filed in this case. The claim of lien contains the names of the owners or reputed owners; a reasonable description of the property, as amended; the amount claimed to be due; for what improvement the claim is made; and the time when the final assessment was made, and the authority by which it was made. These are all the requisites of the act of 1891, and, as these were valid under the special law of 1867, we discover no reason for holding them invalid under the act of 1891.

We can discover no good reason for holding that the foot-front rule does not apply. The act of 1867 especially enjoins it, and objections to its application, growing out of inequalities of the surface, which seem to make some cases harder than others, are not fundamental, so as to make the rule inapplicable on that account. It may well be that the improvement is less valuable to some owners than to others, and that the burden of payment is more oppressive to some than to others, but that consideration cannot suffice to change the application of the rule. In City of Harrisburg v. McCormick, 129 Pa. St. 213, 18 Atl. 126, speaking upon this subject, we said: "It is perhaps impossible to frame any general rule that would produce exact uniformity, and do equal justice in all cases. This arises from the fact that a rule, to be valid, must be general, and the further conceded fact that in the application of all general rules there will be cases of individual hardships." In Michener v. Philadelphia, 118 Pa. St. 535, 12 Atl. 174, we said: "The plaintiff alleges, however, that his property is not benefited by the sewer. He may or may not be mistaken in this. We cannot say. But this is a species of taxation, and all taxation is presumed to be for the benefit, directly or indirectly, of the taxpayer or his property. Laid as taxes are, under general laws, there will always be cases of apparent individual hardship. * * * And it would be intolerable if, in every instance of a special taxation, the question of benefits could be thrown into the jury box." In Hammett v. Philadelphia, 65 Pa. St. 155, Sharswood, J., delivering the opinion, said: "Perhaps no fairer rule can be adopted than the proposition of feet front, although there must be some inequalities, if the lots differ in situation and depth. No system of taxation which

Digitized by Google

the wit of man ever devised has been found perfectly equal." The appellants are doubtless unfortunately circumstanced in respect of the character of their surface, but that fact cannot change the application of the rule. We see no error in the record, and the assignments of error are all dismissed. Judgment affirmed.

LAIRD v. PITTSBURGH TRACTION CO.

(Supreme Court of Pennsylvania. Jan. 7, 1895.)

EJECTION OF PASSENGER FROM STREET CAR—TRANSFER.

1. A passenger who leaves a street car in obedience to an order of a policeman called by the conductor to remove him is not restricted to damages for the trouble in being put off the car, and the additional expense necessary to complete his journey.

2. Where a transfer check given to a passenger on leaving a street car has two punches,—one correctly indicating the hour when issued, and the other showing it to be two hours old,—and the passenger takes the proper car immediately after receiving the check, the conductor has no right to treat the check as old, and ignore the correct time punched thereon, and the company is liable for the passenger's ejection.

3. Where a passenger on a street car makes a timely request for a transfer check, but it is not issued to him until just as he is leaving the car, he is not bound by a condition therein making it his duty to examine the date, etc., and see that the same are correct.

Appeal from court of common pleas, Allegheny county.

Trespass by William M. Laird against the Pittsburgh Traction Company, for ejection from a street car. There was a verdict for plaintiff for $143, and from a judgment thereon defendant appeals. Affirmed.

Geo. C. Wilson and Wm. D. Evans, for appellant. Willis F. McCook, for appellee.

STERRETT, C. J. In view of the undisputed facts and circumstances of this case, the ejection of plaintiff from defendant company's car was an inexcusable trespass. There was therefore no error in refusing to withdraw the case from the jury and direct a verdict for the defendant. Nor was there any error in refusing to charge "that, if plaintiff is entitled to recover at all in this action, he is only entitled to recover damages for the trouble and inconvenience caused him by the delay in being put off the cable car at Craig street, and the additional expense necessary to complete his journey into the city of Pittsburgh." To sanction such a measure of damages as is suggested in this point would tend to encourage, rather than prevent, the commission of indignities to which no well-behaved passenger in a public conveyance should be subjected.

Having paid his fare on the electric car, plaintiff, on leaving the same at the corner of Penn and Highland avenues, within two or three minutes of 9 o'clock on the morning in question, received from the conductor a transfer check so punched that it clearly entitled him to ride thence, in defendant company's car, to the western terminus of its road in the city of Pittsburgh. He thereupon entered a car that was about leaving, and three or four minutes later he handed his transfer check to the conductor, who shortly afterwards returned it, saying he could not receive it; that it was "two hours old,"—and then demanded payment of the usual fare. Plaintiff assured him that he had received the check from the conductor of the electric car at 9 o'clock a. m., immediately before entering defendant company's car, and refused to pay additional fare. This demand was repeated and refused several times. During one of the interviews the conductor's attention was called to the fact that the 9 o'clock a. m. hour was punched, but he obstinately insisted that the 7:30 o'clock a. m. punch must govern, and that plaintiff must leave the car unless he paid his fare. When Craig street was reached, he called a police officer, and directed him to remove plaintiff from the car. Not wishing to create any disturbance, plaintiff, in obedience to the officer's order, withdrew without offering any resistance. On the margin of the check were figures indicating the hours, as well as every 10 minutes, of both forenoon and afternoon. The 7 o'clock a. m. hour had two punches, one of which was partly in the square containing the figures "30," indicating minutes. This punching was manifestly intended for 7:30 o'clock a. m. As already stated, the 9 o'clock a. m. hour was also punched. All these punches were identical in character,—evidently made by the same conductor. For these double punchings, plaintiff was in no way responsible. The check in question was undoubtedly issued to him, at the time it was punched, for 9 o'clock a. m. If he had carefully read and examined it, there is nothing on it to indicate that he could not use it on the car leaving at 9 o'clock a. m. How or when the other figures, "7:30," were punched, he, of course, did not know, and was not bound to inquire. The right hour for him (9 o'clock a. m.) was correctly and properly punched, and that was sufficient for his purpose. Why the conductor so obstinately insisted on ignoring the 9 o'clock a. m. punch, and recognizing only the 7:30 o'clock a. m. punch, it is impossible to understand. If it was pursuant to instructions from any of his superiors, so much the worse for the defendant company. It is very evident that the exercise of ordinary common sense would have obviated all trouble. Assuming that the double punching created a doubt in the conductor's mind, he had no right, in the circumstances, to resolve that doubt against the plaintiff, and eject or cause him to be ejected from the car. There is no doubt as to the genuineness of the 9 o'clock a. m. punch, and that just as clearly entitled plaintiff to remain in the car until he reached his destination. The conductor owed no duty

Digitized by Google

to his employer or to himself that justified him in doing what he did.

Undue importance was attached by the defendant to the so-called "contract" or "condition" by which it is sought to make it the duty of passengers to examine date, etc., of the transfer check, "and see that the same are correct." If that is intended to be regarded as a reasonable regulation, the check should be given to the passenger, before he leaves the car, a sufficient length of time to afford him at least an opportunity of reading it, and, if wrong, having it corrected. In this case a timely request for the transfer check was made by plaintiff, but it was not given to him until he was in the act of leaving the car. But, as has already been said, if he had read and examined the check ever so carefully he would have found nothing on it to admonish him that it was not good for passage on the 9 o'clock a. m. car. On the contrary, he would have seen that it was correctly punched for that hour, and bore the proper date. Why or when the other punches were made was not his affair. There appears to be no error in the record of which the defendant has any reason to complain. Judgment affirmed.

DENNIS v. PITTSBURGH & C. S. R. CO.

(Supreme Court of Pennsylvania. Jan. 7, 1895.)

INJURY TO PASSENGERS—NEGLIGENCE.

1. Where an injury to a passenger results solely because the car is so crowded that he cannot get inside, and he either falls or is pushed off the platform, also crowded, shortly after the train was started, the burden of proof is throughout on the passenger to show that his injury is due solely to defendant's negligence.

2. In an action against a railroad company by a passenger pushed off a crowded platform, evidence that he got on the car in reliance on the conductor's statement that there was room inside, that on getting to the door he found the car so crowded as to prevent his pushing his way in, and that he was prevented from leaving the platform, before the train started, by other passengers crowding up behind him, is sufficient to warrant the jury in finding defendant guilty of negligence.

Appeal from court of common pleas, Allegheny county.

Trespass by Peter J. Dennis against the Pittsburgh & Castle Shannon Railroad Company for personal injuries. There was a verdict of $800 in plaintiff's favor, and from a judgment thereon defendant appeals. Affirmed.

S. Schoyer, Jr., S. B. Schoyer, and J. M. Cook, for appellant. James S. Young and S. U. Trent, for appellee.

DEAN, J. The defendant operates a narrow-gauge railroad running about seven miles out of Pittsburgh. On the 18th June, 1893, defendant, to accommodate a German society in an excursion to West Liberty, on the line of its road, ran excursion trains to that point from Carson street in Pittsburgh. The route was up an incline railway from Carson street to summit of a hill, then down an incline operated by a cable, 1,300 feet, to foot of hill on the other side, where the cars were attached to a locomotive, which took them to West Liberty. The plaintiff, with his son and a friend, took passage at Carson street, ascended the incline, and then got off to enter the cable cars to descend to the level. Here there was a large crowd of people, all, as usual on such occasions, eager to enter the cars. There were two trains, scheduled to start ten minutes apart, of four or five cars each, standing ready. Plaintiff and his son and friend got upon the rear platform of the first train. The car was very full of passengers. The train started, and had moved but two or three hundred feet, when plaintiff was pushed, and fell to the ground, dislocated his elbow, and sustained other injuries, which have seriously disabled him. He brought suit against defendant for damages, alleging the fall from the car was in consequence of its negligence in so crowding the body of the car with passengers that he could not get inside, and crowding the platform after he was upon it so that he could not get off before starting, or maintain his place upon it afterwards. There was a verdict and judgment for plaintiff, from which defendant appeals, assigning for error the refusal of the court on all the evidence to direct a verdict for defendant.

The court instructed the jury that if plaintiff got on the platform when he saw the car was so crowded he could not get in; or if having got on, and then, before the car started, saw its crowded condition, but did not get off; or, without any necessity for so doing, remained on the platform after the car started,—he could not recover. But appellant alleges there was not sufficient proof of any negligence of defendant, while the proof was undisputed of contributory negligence on part of plaintiff. Undoubtedly, as the injury did not result from any accident to the train, nor from any defect in the means of transportation, the burden of proof throughout was on plaintiff to show his injury was the result wholly of defendant's negligence. He was standing in a known place of danger, one not intended for passengers, after the car started, and then fell or was pushed off. In other words, there are no presumptions in his favor or against the defendant. How came he to be in a place of danger, where he had no business to be? His place was inside the car, not on a crowded platform. The plaintiff, his son, and his friend Schantz undertake to account for this otherwise manifest negligence in substance thus: He got off the car when it reached the summit of the incline. The two trains were standing there, and about them was a large crowd. In looking for a car to enter, the three passengers

Digitized by Google

were separated. The son got to the rear car of the first train. The conductor was standing by it, and said: "There's lots of room inside here; this train is going out right away." He immediately found his father and Schantz, repeated what the conductor had told him, and they all got on the platform to get in the car, but at the door found it was so crowded they could not push their way in. Then others so crowded up behind them that they could not get down from the platform. The car started, and the conductor, who was on the platform, immediately began taking up the tickets. One passenger, by his ticket, was on the wrong car, and the conductor commanded him to get off, and commenced pushing the passengers on the platform aside to enable this man to get down the steps, when plaintiff was pushed off backwards, through the opening in the platform railing, and injured. There was much evidence to contradict this statement of the facts, but still there was sufficient testimony to warrant the jury in finding it to be true. If true, the plaintiff, through the invitation of defendant, was in a place of danger from which he could not extricate himself without risk of greater danger; then, by the rude manner of defendant's agent, he was jostled or pushed from the car. He was on the platform of a crowded car by fault of defendant, and was pushed therefrom by fault of defendant. The testimony of defendant that the car was not crowded; that, if crowded, it must have been obvious to plaintiff before he got on the platform; that the conductor did not invite passengers to get on after it was reasonably filled; that he did not rudely push or jostle those on the platform,—was all submitted to the jury by the learned judge of the court below in a charge which, while just, was quite favorable to defendant. That was the end of the court's duty, and is the end of ours. The judgment is affirmed, and the appeal is dismissed.

CITY OF PHILADELPHIA v. RUDDEROW.

(Supreme Court of Pennsylvania. Jan. 21, 1895.)

CHANGE OF STREET GRADE—DAMAGES—SET-OFFS.

1. The fact that a change of street grade was ordered by a city to enable it to construct a system of sewers calculated to abate a nuisance does not relieve it from the duty imposed by Const. art. 16, § 8, of making compensation to an abutting owner for the depreciation in the market value of his property consequent on the change in grade.

2. A city cannot set off, against the special damages to an abutting owner caused by a change in street grade, a subsequent increase of value common to the entire neighborhood because of the abatement of a nuisance as a result of the completion of the improvements.

Appeal from court of common pleas, Philadelphia county.

The city of Philadelphia ordered a change of grade of Weikel street. The viewers appointed to assess damages awarded August J. Rudderow, trustee, $1,221. The city excepted to the viewers' report, and the matter was referred to a referee, who also found in favor of the trustee in the same amount. From a judgment dismissing exceptions to the referee's report, and confirming the same, the city appeals. Affirmed.

The following is the report of the referee (R. C. Dale):

"Findings of Fact.

"(1) That in 1845 Benjamin S. Janney became seised of a tract of land in the county of Philadelphia, of which the two lots for which damages (caused by change of grade) are claimed were part.

"(2) That in the year 1847 the district of Richmond was incorporated, including within its limits the lots in question.

"(3) That in the year 1850 the said Benjamin S. Janney sold lots described as on Janney street, running through to Weikel street, which is the Weikel street in question.

"(4) That since 1850 to the present day said Weikel street has existed as a street laid out by Benjamin S. Janney, and a public highway, and that lots have been sold as bounded thereby.

"(5) No confirmed grade of Weikel street had been established prior to that under which the grading complained of was done, and no street pavement had been made thereon or other construction effected by the public authorities prior to the grading which is the present cause of action.

"(6) No improvements have at any time been placed upon the premises of plaintiff.

"(7) That in 1847 (P. L. 389) an act was approved, on the 15th day of March, to incorporate the Gunner's Run Improvement Company, authorizing said company to construct a canal one hundred feet wide, commencing at the northwest side of Queen street (now Richmond street), in the district of Kensington, and to terminate at a point at or near where the Philadelphia & Reading Railroad crosses Gunner's Run.

"(8) That a supplement to said act was passed on the 10th day of March, 1848, authorizing said company to construct said canal to the River Delaware, by the best practical route, in the district of Richmond.

"(9) Said canal was never constructed north of Huntingdon street, although ditched further north, and the part south of the said street has been long since abandoned by the company.

"(10) That the following ordinance (applying to the district in question) was duly passed February 25, 1884: 'That the department of surveys be, and they are hereby authorized to make a resurvey of the streets in the Sixth survey district and to secure the same

Digitized by Google

by suitable landmarks, and to revise the lines and grades thereof.'

"(11) On September 2, 1886, the following action was held by the board of health: 'The special committee to which was referred a complaint in regard to the condition of Gunner's Run made a report in connection thereto, setting forth its filthy condition, and that there can be no doubt that high mortality for which that section of the city is noted, is due, in a large measure, to this shallow and open latrine, as it may be called, the poisonous emanations from which escape unhindered into the surrounding air. The nuisance seems to be one so prejudicial to the public health that the committee recommends the board to call the special attention of the city councils to it, by submitting to councils a copy of this report, with the suggestion that a brick culvert take the place of the open stream, or, if that is impracticable at this time, that the canal be dredged of its disgusting contents. R. A. Cleeman, M. A. Davis, H. G. Sickel, Committee. Resolution adopted.' The subject-matter of this resolution was by councils referred to the board of surveyors, who appointed a committee of their number to examine the locality.

"(12) On January 11 and June 27, 1887, a committee of councils stated the condition in reports to the select and common councils. * * *

"(13) That the following ordinance, one of the above referred to, was duly passed February 25, 1887: 'That the department of surveys be, and is hereby authorized to strike from the city plan, Aramingo canal, from Huntingdon street to Frankford creek, and in lieu thereof to substitute a street of the same width, and to revise the lines and grades of all streets in the vicinity that may be affected by such change.'

"(14) That in pursuance of said ordinances the board of surveys struck Aramingo canal off the plans, and revised and changed the said lines and grades by certain plans which were confirmed by said board of surveys, on the 2d day of December, 1889, and on other dates at or about the same time.

"(15) All the plans thus confirmed, and particularly the plan which includes Weikel street, prescribed grades upon streets crossing the former line of Aramingo canal, of such a nature as to afford continuous slopes for the sewage system in its course from the upper side of Gunner's Run and Aramingo canal to the Delaware river. The slope of the surface of Westmoreland street was also continuous from the upper side of former Aramingo canal, all the way to the river. Southwest of Westmoreland street the transverse streets are not continuous in the slope of their surface to the river. Below Aramingo canal they show a slight hollow, running parallel with its line; below this hollow they rise to a summit, beyond which the slope continues to the river. The sewers on these streets preserve their continuous slope to the river by plunging some ten feet or more below the street surface after passing the hollow referred to. The grade of the sewers is the least practicable to admit of the necessary height above the canal to enable them to discharge at low tide.

"(16) All of these plans had place in a general scheme of grade regulation, then adopted and since pursued, calculated to eliminate from the system of street levels in the locality the watershed and general depression of Gunner's Run and Aramingo canal.

"(17) That by said revised plan the lines and grades of the streets in said portion of Sixth survey district, in which the property in question is situate, have been exchanged and are raised and made higher than the grades which had been theretofore established or existed naturally upon such streets where there was no confirmed plan.

"(18) That by an ordinance approved April 7, 1890, the director of the department of public works was authorized and directed (inter alia) to grade Weikel street from Allegheny avenue to Clearfield street. Ordinances 1890, p. 112.

"(19) That pursuant to said ordinance of April 7, 1890, said Weikel street was graded from Allegheny avenue to Clearfield street.

"(20) That the depreciation in market value of the plaintiff's property, consequent upon the change of grade, was $1,221.

"(21) That the territory adjacent to and within the watershed of Gunner's Run, including the plaintiff's lots and an area of several square miles, lies low, and with the growth of the city Gunner's Run became a nuisance prejudicial to the health of that portion of the city.

"(22) The nuisance referred to as existing in the locality whereof the street grades were thus established was occasioned by the sluggish nature of Gunner's Run, and of the same stream in its passage through the canal; by the depression of the entire locality; and by the general confluence of all drainage along streets and over ground surface into the stream.

"(23) The object of the general rearrangement of grades referred to was the abatement of this nuisance by such alteration of street slopes as to make them cease carrying fluid and other refuse where the presence of such discharge was constantly stimulating the noxious influences.

"(24) The foregoing findings of fact were accepted as correct by counsel for both plaintiff and defendant. Counsel for the city also asked the referee to make the following finding: 'That, according to the weight of evidence, the action taken by the municipal authorities was that directly adapted to relieve the evil, was the expedient towards such end least injurious to private property, and, in fact, the only practicable course for readjusting slopes in general, so as to abate the nuisance in question.'

Digitized by Google

"(25) The referee cannot affirm this proposition in the language in which it is framed, but does find that the municipal action taken was calculated to abate the nuisance, and was adopted for that purpose, as shown by the report of the committee of councils hereto appended.

"The counsel for the city asked the referee to affirm the following proposition of law: 'The effect of article 16, § 8, of the state constitution, is merely to withdraw the prerogative immunity of the commonwealth and its agencies against redress for injuries recognized independently of that provision, but irremediable save under it. Its terms cannot be held to impose a liability for such a measure as that here in question, if coming under the police power.' The referee declines to affirm this proposition, so far as he is asked to apply it to the circumstances of this case.

"Opinion.

"Upon the foregoing statements of fact, which are not the subject of dispute, the city contended that it was not liable for the injury done to plaintiff's lots, because the change of grade was a step in a great public improvement designed by the municipal authorities to abate a nuisance prejudical to the health of the neighborhood, and the removal of which would tend eventually to enhance the value of all the property in the district affected by the change. The rights of property owners to damages for injury to property consequent upon a change of grade are derived from article 16, § 8 of the constitution, which provides: 'Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by the construction and enlargement of the works, highways or improvements.' This constitutional provision was adopted to relieve property owners from the hardship which the court sought, but was unable to allow, compensation for in O'Connor v. Pittsburgh, 18 Pa. St. 187, where Mr. Chief Justice Gibson said: 'We have had this cause reargued in order to discover, if possible, some way to relieve the plaintiff consistently with law, but I grieve to say we have discovered none. The modification of the remedy would be for the legislature, which can turn compensation for a permanent detriment into the price of a prospective license; but, to obtain complete justice, every damage to private property ought to be compensated by the state or corporation that occasioned it, and a general statutory remedy ought to be provided to assess the value.' The duty of the court to afford the protection thus given by the constitution to the rights of property holders is thus recognized by Mr. Chief Justice Sterrett in O'Brien v. Philadelphia, 150 Pa. St. 589, 24 Atl. 1047, a case where the city sought to escape responsibility for damages to a house built in uniformity with the then existing grade of an old and open public highway, and where the grade was subsequently changed to conform to a plan confirmed after the building of the house, the plan being the first official regulation of the grade of the highway. The court said: 'If any regard is to be had for the constitutional mandate that "municipal and other corporations * * * shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements," we are at a loss to see how the learned judge could do otherwise than decide the reserved question as he did. Nobody conversant with the history of the constitutional provision above quoted can entertain any doubt that it was intended to provide, inter alia, for the class of cases of which O'Connor v. Pittsburgh, 18 Pa. St. 187, is a conspicuous example. It has uniformly been so regarded from the date of its adoption until the present time. It is a fact, conclusively established by the verdict, that, as a direct consequence of the elevation of grade immediately in front of plaintiff's property, its market value is lessened at least to the extent of $240; but it is gravely suggested that "such a damnum is not necessarily an injuria," and hence plaintiff is remediless. That principle has no application to the class of cases to which this belongs. To hold that it has, would defeat one of the objects of the constitutional mandate in question, and virtually overrule several well-considered cases. We do not propose to do either.'

"The referee was asked, however, in this case to hold that no damages were recoverable because the change of grade was made to enable sewers to be laid through the territory adjacent to Gunner's Run, which would relieve the district from the noisome influences which have prevailed ever since population had increased. The referee does not find any warrant in the authorities for the defense. In Plan 166, 143 Pa. St. 414, 22 Atl. 669, Mr. Justice Mitchell, in reviewing the legislation controlling rights of action for changes of grade, recognizes that the drainage problem is one of the principal factors included in changes of grade: 'Among these evils, not the least was the necessity for a uniform system of streets, street grades, sewers, etc., for a population already approximating half a million, located on a site where general level was so little above tide water as to make the problem of drainage one of difficulty as well as importance.' Our knowledge of the moving cause for change of grade in a very large proportion of instances is that the change is made to enable the laying of sewers which will carry off the increasing drainage of neighborhoods where the population is becoming more dense. The fact that the need in the vicinity of Gunner's Run was greater than in some other places does not change the rule.

Digitized by Google

"It was further contended on the part of the city that the removal of the noisome influences from this district by the completion of the improvements covered by the report of the committee of councils would eventually enhance the value of all property within these limits. This may be true, but the city is not entitled to set off against the special damage done to this particular property a subsequent increase of value, common to the entire neighborhood. The measure of damage is the difference in the market value of the lot consequent upon the change of grade. The attention of the referee was also called to the line of cases of which Fertilizer Co. v. Hyde Park, 97 U. S. 659, is a leading example. In that case an ordinance of the village of Hyde Park prohibited the conveyance of any offal or offensive matter through the village. The effect of the ordinance was to close the business of the plaintiff. It was held that the company had no right to recover damages for the construction of a business which was a nuisance, through the exercise of the police power of the state. There is no analogy between the case thus cited and that before the court. The plaintiff is seeking to recover damages for an injury the right to payment of which is guarantied by the constitution, and provision for which is made by statute. No such element existed in the Hyde Park Case or in the cases of similar character. The referee would therefore report that the plaintiff is entitled to judgment for the amount of damages shown, to wit, the sum of $1,221."

Chas. F. Warwick, City Sol., and E. Spencer Miller, Asst. City Sol., for appellant. Augustus J. Rudderow, for appellee.

PER CURIAM. The facts of this case are clearly set forth in the report of the learned referee, and all that need be said as to the law applicable thereto will be found in his opinion. There is nothing in the case that requires further comment. There was no error in dismissing the exceptions, and entering judgment for the damages found in favor of the appellee. The judgment is affirmed on the clear and convincing opinion of the referee.

COMMONWEALTH v. COOK.

(Supreme Court of Pennsylvania. Jan. 21, 1895.)

MURDER—DEGREES—PLEA OF GUILTY.

1. While the presumption is that one who has pleaded guilty to a charge of murder is guilty of murder in the second degree, and the burden is on the commonwealth to show beyond a reasonable doubt that he is guilty of murder in the first degree, it is sufficient if, from the nature and use of the weapon, and the acts of defendant, his intention to kill can be fully and justly inferred, with so much time used and opportunity for deliberation as to convince that his purpose was willful and premeditated.

2. A finding that defendant, who had pleaded guilty to a charge of murder, is guilty of murder in the first degree, is warranted by evidence that he had a grievance against deceased; that he threatened to kill her on the morning of the homicide; that he made preparations to leave the town during the day; that on meeting her in the evening he allowed her to walk a few feet past him, and then deliberately, at close range, fired a shot in her back; that on her crying out, "I am shot!" he deliberately fired a second shot, which also took effect; and that he then reloaded his pistol, remarked to a bystander, "I got her that time," and immediately left the town. And the court is justified in disregarding his evidence that he shot deceased intending only to do her bodily harm, and not to kill.

Appeal from court of oyer and terminer, Washington county.

John B. Cook pleaded guilty to a charge of murder. The court thereupon heard evidence to determine the degree of his crime. He was found guilty in the first degree, and was sentenced to hang. He appeals. Affirmed.

The findings, conclusion, and opinion of the court (McIlvaine, P. J.) are as follows:

"The momentous consequences of our decision, to the defendant, and a desire to put the case in the best possible shape for review, have prompted us to give in detail, and to reduce to writing, our finding of facts and the law applicable thereto:

"First. Facts. The testimony, in our opinion, establishes beyond a reasonable doubt the following facts:

"(1) At Jumbo Coal Mines, in this county, there is a row of miners' houses, divided into three blocks, of four houses each. There are open spaces between blocks 1 and 2 and between blocks 2 and 3, each of which is twenty-five feet wide and thirty-one feet deep,—the depth of the houses; the houses front to the east, and are numbered from 1 to 12, consecutively, commencing at the south end of the row. There is a path along both the front and rear of the row, and the kitchen doors open out onto the path in the rear. Back, and in the rear of the row, is a wood. The defendant in May, 1894, with a woman by the name of Blanche Butler, lived in house No. 11; Lizzie Smith, the deceased, and her husband, Luther Smith, lived in No. 8; Mary Allison lived in No. 3; Ella Strickler, in No. 5; and Moses Branham, in No. 1.

"(2) On Sunday, May 6, 1894, the defendant came up from No. 11 to in front of No. 8 or 9, where Lizzie Smith, the deceased, was standing, and charged her with 'bulldozing' his woman, Blanche Butler, and said he wanted it stopped; that he would 'kill for that woman.' And during the altercation between him and the deceased he pulled his pistol, pointed it in her face, then raised it, and fired over her head. Lizzie Smith threatened to sue him for what he had just done, and he said if she attempted to have him arrested he would give her something to sue for,—he would shoot her.

"(3) Monday, May 7, 1894, Lizzie Smith went to the office of a justice of the peace in McDonald borough, less than a mile distant,

Digitized by Google

and made complaint against the defendant; and a warrant was issued to the constable, who came to Jumbo to arrest him. He was apprised of the errand of the constable, and went into the wood back of the row to evade arrest. After the constable had left the row he returned, and was about the place until about five o'clock in the evening. During the day some mutual friends made an effort to have the difficulty between the defendant and the deceased compromised. Mrs. Smith offered to take one dollar and drop the prosecution, if the defendant would pay the costs ($3.60). This he refused to do. During the afternoon he and Blanche Butler were arranging to leave the place, and one reason he gave for not compromising was that he had fixed to leave. During the day the defendant, on seeing the deceased leave the row and start toward McDonald, said to Mary Allison (the witness whom he afterward met just after the shooting): 'There she goes to sue me, I will get her when she comes back. You watch me, and see if I don't get her.'

"(4) About five o'clock on Monday evening, May 7, 1894, Mary Allison and Lizzie Smith were in the house of A. P. Christian, No. 4, having their hair curled for a dance which they expected to attend that night. While they were in there the defendant was standing in the space between houses No. 4 and No. 5, not far from a clothesline that was stretched between the houses at the rear, and in such a position that he could hear what was going on or being said in the house of Mr. Christian. Moses Branham about this time came from his house, No. 1, to the defendant, and entered into a conversation with him; and Blanche Butler was standing at the front corner of house No. 5, some thirty-five or forty feet away. Branham, in the conversation, asked the defendant if he had compromised, or would compromise, with Mrs. Smith. He said that he would not, that he had fixed to go away, and that he would not do anything. He said, further, that he guessed Mrs. Smith had out spies for him. About this time, Lizzie Smith and Mary Allison came out of the kitchen door of No. 4, and started down the rear, along the path towards No. 5, which took them past and near to Cook, the defendant. They were talking and laughing as they passed down the path. They passed the defendant, and when past, and still within ten or twelve feet of him, he raised his pistol,—a 38-caliber Smith & Wesson,—and willfully and deliberately, without a word having passed between the parties, fired two balls into Lizzie Smith's back. One bullet struck the back at a point about one-half inch to the right of the spine, and about four and one-half inches above the lower end of the backbone, and passed through the body, and lodged in front, just above the pubic bone; searing, in its course, the lower part of the bowels, and passing through the peritoneum in two places,—rear and front. The other bullet struck the back about an inch from where the first struck, and passed inward, and, by deflecting, downward to the thigh, lodged on the inside of the right leg, about two inches above the knee. When the first shot struck the deceased, she threw her hand back on her hip, and cried, 'I am shot!' The second shot was fired immediately after this outcry. Mary Allison, who was with Lizzie Smith, when she heard the first shot, ran down the path to the rear of No. 8, through No. 8 to the front, and up the front towards No. 5. On the front she met the defendant, who was reloading his pistol, or taking out the exploded cartridges. He said to her, as they met, 'I got her that time.' That night he left Jumbo, and some time afterwards was arrested in West Virginia, where he lived before he came to Jumbo, in 1892. While in West Virginia he wrote to a friend in Jumbo, inquiring if Mrs. Smith was dead.

"(5) Mrs. Smith, when shot, ran into the house No. 5, to Ella Strickler, passing through the kitchen door in the rear. From No. 5 she was carried home, to No. 8, where she died on May 14, 1894, from inflammation caused by the wounds inflicted by the defendant. The natural and probable result of the inflicting of the wounds found on the deceased considering their character and location, was peritonitis and death.

"(6) The defendant, being examined as a witness in his own behalf, admitted that he purposely fired at the back of the deceased; but he said that he intended to shoot her in the legs, and did not intend to kill her. He denied that he heard her scream, 'I am shot!' immediately after the first shot was fired, and said that he shot the second time because he thought the first shot had not hit her.

"Second. Law. In considering the bearing these facts have on the question for determination, we have given due consideration, and been guided by the following legal principles:

"(1) The presumption of the law is that the defendant, under his plea, is guilty of murder in the second degree; and the burden is on the commonwealth to show beyond a reasonable doubt that he is guilty of murder of the first degree.

"(2) Notwithstanding the burden of this proof is on the commonwealth, yet 'it is not necessary that the evidence should be express. It is sufficient if, from the nature and use of the weapon, and the acts and conduct of the defendant, his intention to kill can be fully, fairly, and justly inferred, with so much time used, and opportunity for deliberation, as to convince that his purpose was willful and premeditated.'

"(3) Not only malice, but an intent to kill, may, in the absence of qualifying facts, be inferred from the use of a deadly weapon, such as a 38-caliber Smith & Wesson pistol, upon the body of another, at some vital part, where the intention to use such a weapon in

Digitized by Google

such a way is manifest, and where the shot is fired willfully, deliberately, and premeditately.

"(4) If the shooting of Lizzie Smith by the defendant was intentional, and not accidental, then malice and a design to kill may be presumed from the repeated use of his pistol,—a deadly weapon,—and the infliction of a mortal wound; for the law adopts the common and rational belief that a man intends the usual, immediate, and natural consequences of his voluntary act. Human reason will not tolerate the denial that a man who intentionally, not accidentally, fires a pistol ball through the body of another, has a heart fatally bent on mischief, and intends to kill.

"Conclusion: After a very careful consideration of the facts in this case, as they appear in the evidence, we are very reluctantly forced to the conclusion that the defendant intended to kill the deceased, and that he fired the shots, which proved fatal, willfully, deliberately, and premeditately. His declaration on the witness stand that he purposely shot the deceased, intending only to do her bodily harm, and not to kill, is not to be credited. It is inconsistent with all the other facts in the case, and is evidently an afterthought, born of the exigencies of his case. He might as well have said he shot to scare, and did not intend to hit her, and that the injury was the result of a mistaken aim, or that the difference between the line of fire and the line of sight in his pistol was responsible for the death of Lizzie Smith, and that he should therefore be relieved from the natural and probable consequences of his own voluntary act. The killing was not on a sudden impulse, but evidently was preconceived. Having made all things ready to leave Jumbo, and the time of his departure having arrived, he armed himself, and then selected his position to await the appearance of her against whom, according to his own declarations, he had a grievance, and with whom he wished to square accounts before he left. She appeared. He allowed her to walk a few feet past him. Then he deliberately, at close range, fired a shot into her back. She cried, 'I am shot!' Notwithstanding this cry, he, as deliberately, fired a second shot, when she passed out of the range of his pistol. Then he walks away, coolly reloading his pistol; and to one, to whom in the morning he had said: 'I will get her when she comes back. You watch me, and see if I don't get her,'—he says, 'I got her that time.' He then immediately carries into execution his previously declared purpose to leave the place, and is not heard of until his presence is discovered in West Virginia, where he was arrested. What must we say of an act so plainly directed at the life of another, so unprovoked, cruel, and cowardly, done with a deadly weapon, under no circumstances of rage or passion produced by a reasonable provocation? Clearly, there was sufficient time to think, deliberate, and premeditate the act. As clearly, the act was willful and intentional, and the instrument a deadly one, aimed to inflict a wound which naturally and probably would result in death. What other intention than an intention to kill could be rationally inferred from the whole conduct of the defendant? It is only because there is no escape from it that we find the crime which the defendant has confessed is murder in the first degree."

T. B. H. Brownlee, J. E. Barnett, and Wm. M. Randolph, for appellant. W. S. Parker, Dist. Atty., for the Commonwealth.

PER CURIAM. As appears by the record, the prisoner was duly arraigned, and pleaded guilty to the indictment charging him with the murder of Lizzie Smith. It thereupon became the duty of the court to "proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly." Witnesses were examined, and, upon due consideration of their testimony, it was adjudged and determined by the court that the degree of the crime whereof the prisoner, by his own confession, stands convicted, is murder of the first degree, and thereupon the sentence of the law was pronounced upon him. In the record before us we have the testimony of the witnesses who were examined, the learned judge's findings of fact, and his conclusions of law. A careful consideration of the former has convinced us that there is no error in the findings of fact. They are each and all fully warranted by the testimony. The only conclusion that can be rationally drawn from the facts thus established is that the murder confessed by the prisoner's plea of guilty was "willful, deliberate, and premeditated," and therefore murder of the first degree. All the facts and circumstances connected with the shooting point clearly and satisfactorily to a specific intent to kill, and are wholly inconsistent with any other reasonable hypothesis arising out of the evidence. In view of the clear and satisfactory opinion of the court below, in which the questions involved are fully considered and correctly disposed of, further comment is unnecessary. For reasons there given, we are of opinion that neither of the assignments of error should be sustained. The judgment of the court of oyer and terminer is therefore affirmed, and it is ordered that the record be rem'tted for the purpose of execution.

In re MILLER'S ESTATE.

(Supreme Court of Pennsylvania. Jan. 7, 1895.)

CONTEST OF WILL—APPEAL—PARTIES—ESTOPPEL

1. Under the act of 1832, prescribing the issue to be framed on the contest of a will, and that the judge shall cause all parties interested to be warned that they may become parties to said action, the application for an appeal cannot

Digitized by Google

be dismissed for want of parties, all that is necessary being a notice to the parties who have not appeared of the pending issue.

2. The appeal provided for in the act of 1856 by one desiring to contest the validity of a will may be taken at any time within five years after probate, and a notice to a party interested is sufficient without making such person a party to the proceedings.

3. The receipt by a legatee of a pecuniary legacy does not estop him from contesting the will, where it is returned before he proceeds beyond the entry of an appeal from a decree refusing his petition for leave to appeal.

Appeal from orphans' court, Allegheny county; McIlvaine, Judge.

Petition by Alexander H. Miller for leave to appeal from the decision of the register admitting the will of Alexander H. Miller, deceased, to probate. From an order dismissing the petition, petitioner appeals. Reversed.

The following is the opinion of the lower court:

"Alexander H. Miller died September 4, 1887. He left a will, which was duly probated September 10, 1887. Among other things, the testator provided that $500 should be paid annually to his son Alexander H. Miller, Jr., during his natural life; that $200 should be paid annually to his brother George W. Miller; and that 'all the rest and residue' of his estate, real and personal (after making some other bequests), should go to his son Florence C. Miller. He died seised of both real and personal property. A final decree of distribution of personalty was made July 12, 1890, and the annuities of Alexander H. Miller, Jr., and George W. Miller (as well as those of some other beneficiaries under the will), which were a lien on all the real estate of the testator, the personal and real estate being blended in the residuary clause of his will, were, by an order of this court, after notice to the annuitants, specially charged on the property in Pittsburgh, known as the 'Monongahela House,' to the relief of other real estate. The executors paid to Alexander H. Miller, Jr., his annuity up until June, 1892. On June 27, 1892, Alexander H. Miller, Jr., presented his petition to this court stating that on June 17, 1892, he had appealed from the probate of his father's will, and that he desired to controvert said probate, on the ground that the decedent 'was incapable of making a will by reason of mental incapacity,' etc., and prayed that 'a process' might be awarded directing and commanding the executors, Florence C. Miller and James J. Donnell, and Zant McD. Miller, Hampton J. Miller, Florence C. Miller, Thomas Holmes Miller, and Mrs. Virginia B. Winston, and Alexander M., Virginia, Maria E., Joseph B., Crossan C., George H., Sallie, Lizzie, and Robert Winston, who, under the said will, are devisees, sharing equally in a legacy of $25,000 upon the decease of their mother, to answer this petition. On June 27, 1892, the court granted 'a citation, in accordance with the prayer of said petition, to be served upon Florence C. Miller, James J. Donnell, Zant McD. Miller, and all others named as parties therein.' The name of George W. Miller, the legatee entitled to receive an annuity of $200, which was charged on the Monongahela House, was not named either in the petition or the citation which issued thereon. Zant McD. Miller and Hampton J. Miller were never served, but on September 27, 1894 (the day the present motion was argued), voluntarily appeared. On April 13, 1894, Alexander H. Miller, Jr., presented to this court, without notice to the proponents of the said will, his petition, setting forth under oath that George W. Miller did not appear as a party to the proceeding instituted by him in 1892; that his name had been omitted inadvertently; and praying that the record might be amended by adding the name of George W. Miller as a respondent, and that a citation issue, which was duly served. George W. Miller, on the 8th of September, 1894, appeared and filed his petition asking for a citation on Alexander H. Miller, Jr., to show cause why his appeal should not be dismissed; and on the same day Florence C. Miller filed a similar petition, citations issued, and Alexander H. Miller, Jr., filed answers. In October, 1892, Florence C. Miller, by his attorneys, moved to dismiss this same appeal, for the reason that Hampton J. Miller had unsuccessfully contested the will, and he was bound by the decree entered in that proceeding, and that, having received his annuities up to June, 1892, he was estopped from denying the validity of the will. This court sustained the motion, and dismissed the appeal. Alexander H. Miller, Jr., took an appeal to the supreme court, and the decree of dismissal was reversed; the supreme court holding that as Alexander H. Miller, Jr., was not a party to the Hampton J. Miller contest, he was not bound by it, and that the decree, so far as the merits of the contest were concerned, was of no effect, as the court also held that the simple receipt by Alexander H. Miller, Jr., of his annuity prior to June, 1892, when he filed his petition, was not sufficient evidence to establish an election to take under the will. This appeal was argued in the supreme court in October, 1892, and was taken and held under advisement until February 12, 1894. 28 Atl. 441. On January 11, 1894, Alexander H. Miller, Jr., filed his petition in this court setting out, among other things, 'that a certain writing with the form and contents of a will and testament' of Alexander H. Miller, deceased, had been probated on September 10, 1887; that in item two of the second codicil of this will he is named as entitled to receive of his father's estate the sum of $500 annually; 'that Florence C. Miller, the executor, had not refused to pay said annuity until June 5, 1892, since which date he has received nothing on account of said annuity.' The petition then recites the proceedings in which the annui-

Digitized by Google

ties were charged on the Monongahela House, and prays the court by citation to call upon the said Florence C. Miller to show cause why he has not paid to him the said annuity, according to the said order heretofore made by the court. This proceeding is still pending. No part of the annuities received by Alexander H. Miller, Jr., have been paid back to the executors. The petitioners George W. Miller and Florence C. Miller claim that their motion to dismiss this appeal should prevail, for three reasons: (1) For want of proper parties; (2) that on April 13, 1894, it was too late to amend, the will having been probated on September 10, 1887; (3) because the appellant, by instituting his proceeding on January 11, 1894, to collect his annuity, made an unequivocal election to take under the will.

"1. At the time the petitioners made their motion to dismiss that appeal (September 8, 1894), Hampton J. Miller and Zant McD. Miller had not been served with the citation issued on June 27, 1892, and, so far as the record shows, had no knowledge of the proceeding; but on September 27, 1894, the day of the argument, they voluntarily appeared by writing filed with the clerk of the court. This appearance and the service of the alias citation on George W. Miller on April 26, 1894, brought all the parties in interest before the court,—the heirs at law, the executors, and the legatees and devisees under the will,—and there is now no want of proper parties.

"2. But granting that the proper parties are now in court, seven years after the probate of the will, the question arises, were they in court in time? This brings us to the consideration of the act of 1856, which provides 'that the probate by the register of the proper county of any will devising real estate shall be conclusive as to such realty, unless within five years from the date of such probate those interested to controvert it shall, by caveat and action at law duly pursued, contest the validity of such will as to such realty.' It may now be considered as well settled that this act 'is not to be regarded simply as a statute of limitation; it is a provision for the greater certainty of title.' 'A will can now only be contested by caveat and action at law duly pursued,' and the contestant is restricted to the proceeding before the register, and an issue devisavit vel non directed by the orphans' court, and the contest 'by caveat and action at law duly pursued' must be within five years. What, then, must be done within the five years by one interested, to save the probate from becoming conclusive? What do the words 'by caveat and action at law duly pursued' mean? Evidently the act does not mean that a final decree or judgment against the validity of the will must be entered within five years of the date of the register's probate; otherwise his probate will become conclusive. Nor do we believe that it is necessary that all the parties interested should have notice of the contest or appeal within the five years. The speed of litigation and the time within which the process of the court may be served on a large number of persons scattered over our country are not matters within the control of a contestant, and it would be unreasonable to hold him responsible for delay which he is unable to prevent. But the filing of a caveat with the register, and the presentation of a petition in the orphans' court, and the procuring of the issuance of a citation, are matters within the control of one who wishes to contest the register's probate of a will; and, in our opinion, not only must the caveat and the accompanying recognizance, required by the act of 1887, be filed with the register, but the petition of the contestant must be presented, and a citation awarded and issued, within the five years; otherwise the register's probate becomes conclusive. Filing a notice of contest and recognizance with the register is not enough. This is merely the preliminary step to the essential act in the commencement of a contest, which is the issuance of a citation by the orphans' court upon a petition in due form of law presented by one interested, to controvert the probate. One of the requisites of that petition and citation is that all the persons interested—the heirs at law, executors, and legatees and devisees—be made parties to the proceedings. Without this the court has no jurisdiction for want of proper parties; and it is incumbent upon one who starts a contest, and not on the courts, to see that persons interested are, by name or description, included in his petition, and the citation awarded. If he fails to do this, he fails to effectually commence his contest. In re Miller's Estate, 159 Pa. St. 562, 28 Atl. 441; Rules of Court; Church v. Nelson, 35 Ohio St. 638; Atkins v. Billings, 72 Ill. 597–599; Mayer v. Adams, 27 W. Va. 244; Chambers' Estate, 3 Wkly. Notes Cas. 188.

"The question, then, arises, can he amend his petition by adding the names of those interested which may have been inadvertently omitted, and have an alias citation issued? We think he can, but this cannot be done to the prejudice of the rights of the proponents of the will, or any rights they may have acquired under the act of 1856, by the lapse of time; and, to avoid this, the date at which the court gets jurisdiction, the date of the amendment and the issuance of the alias citation, is the date to which we must count to ascertain whether within five years, by caveat and action at law duly pursued, a contest has been made. George W. Miller, a brother of the deceased, under the will, is entitled to receive an annuity of $200, and its payment is secured by the legacy being made a charge on the Monongahela House. Real estate, under the will, is devised to Florence C. Miller. On September 10, 1892, the five years from the date of the probate of the will expired, and that probate, without an appeal effectively taken, became conclusive, and their rights under the will were beyond question.

Digitized by Google

As we have seen, at that date the court was without jurisdiction for want of proper parties. The contestant had failed to state in his petition that which should have been stated. He failed to bring into court as a party one of the legatees,—one who, above all others, was interested in having the register's probate sustained, as he would get nothing from the decedent's estate under the intestate law. No effort was made to amend and make this legatee a party until April 13, 1894, over six years and a half after the date of the probate of the will. A contest for the first time started at that date would surely be too late under the act of 1856; and we are of the opinion, where an amendment is asked for and made by bringing in a new party, and which is necessary to give jurisdiction, that then to the date of amendment must we count in ascertaining whether or not the statute of limitation can be successfully pleaded. Furst v. Association, 128 Pa. St. 183, 18 Atl. 341; Miller v. Bealer, 100 Pa. St. 583; Seipel v. Railroad Co., 129 Pa. St. 425, 18 Atl. 568; Kaul v. Lawrence, 73 Pa. St. 410; Leeds v. Lockwood, 84 Pa. St. 73; Kille v. Ege, 82 Pa. St. 110.

"3. It will not be denied that the general rule is that one who accepts a benefit under a will cannot deny the validity of that instrument. He cannot affirm the will so far as it is beneficial to himself, and deny its validity as to others who are named as beneficiaries. Let it be once established by unambiguous and positive acts or declarations of the legatee that he elected to take under the will, and that an election has been intelligently made; then his right to contest the will is gone. The receipt of a legacy by a legatee will not of itself estop him from contesting the will. He may have taken the legacy offered him by the executor because, as heir at law, he believes himself entitled to the amount paid. The act of receiving under such circumstances is an equivocal act, or if a legacy has ever been received as such, and the legatee concludes, after such receipt, to contest, he can return the legacy, or, by permission, pay it into court, and then enter or proceed with his contest; but where a legatee has received installments of his legacy, and refuses to return the money unless ordered to do so, and because the executor stops further payment of the installments, institutes legal proceedings to compel the payment to him of his legacy, and can only obtain the decree of the court which he asks by affirming the validity of the will, we take it that this would be sufficient evidence to establish an unequivocal and positive election to take under the will, and that any contest that had been previously attempted had been abandoned; and we hold that Alexander H. Miller, Jr., by the receipt of his annuity prior to June 5, 1892, followed up by his failure voluntarily to return the money when his right to hold it and maintain his contest is questioned, and by his instituting legal proceedings to enforce the further payment of his annuity, and his failure to discontinue said proceedings when his right to maintain it and his contest is questioned, has elected to treat his father's will as valid so far as it is beneficial to himself, and, having done this, he cannot contest it wherein it is beneficial to others. Anderson's Appeal, 36 Pa. St. 488; Preston v. Jones, 9 Pa. St. 460; Fenstermacher v. Moyer, 35 Pa. St. 354; Hamblett v. Hamblett, 6 N. H. 333. But it is argued that as the supreme court in Re Miller's Estate, 159 Pa. St. 562, 28 Atl. 441, reversed the former decree of this court dismissing this appeal, and remitted the record, with directions 'to proceed in accordance with the opinion filed,' therefore this court can do nothing but proceed to take testimony, and determine whether an issue should be granted or not, and that to sustain the present motion would be to reverse the supreme court, or disobey its mandate. Nothing is further from our thoughts than the perpetration of an act of insubordination. If we were of the opinion that the supreme court had either directly or indirectly passed on the questions now raised by the proponents of this will, we would certainly overrule their motion; but we think the language of Mr. Justice Williams clearly shows what that court passed upon. On page 571 of the report to which I have referred (159 Pa. St., and page 441, 28 Atl.), he says: 'It is not denied that the petition was sufficient in form and substance, nor that it was presented within the time allowed by law, nor that proper parties were before the court to enable it to make a decree that should include all parties entitled to be heard. But the executors contended, and the orphans' court held, that the appellant was estopped from contesting his father's will, on two grounds. These were: First. That his brother H. J. Miller had presented a similar petition a year or more before, which had been heard and dismissed by the orphans' court; and that, upon the hearing in that case, A. H. Miller had been examined as a witness. For this reason the orphans' court held him to be bound by the decree made in that case, although he had not been a party to it. And, second, that having received some small sums from the executors, which the testator had directed should be paid to him, he had affirmed the will, and was estopped for that reason from contesting it.' Since this was delivered, the contestant himself has had his proceeding amended by bringing in, for the first time, a necessary party, and has done an act which not only throws light on his intention in receiving 'the small sums of money' referred to, but which in itself was an unequivocal affirmance of the validity of the will.

"On the whole case, we are of the opinion (1) that this court did not have jurisdiction of the persons interested and of the matter in dispute after five years from the date of the probate of Alexander H. Miller's will; (2) that the amendment of the contestant's petition,

Digitized by Google

and the record which gave the court jurisdiction, and which was made without the consent of or notice to George W. Miller and the other proponents of the will, could not be made to the prejudice of their rights, under the act of 1856, and under the provisions of that act the contestant was too late in having the record amended; (3) that the proceeding instituted by Alexander H. Miller, Jr., to enforce the payment of his annuity while his appeal from the decree of this court dismissing his contest was pending in the supreme court, was an election to take under the will, and an abandonment of his contest, that cannot, after the five years from the probate of the will has expired, be retracted."

Charles E. Hogg, W. H. Tomlinson, Lazear & Orr, and Edward Campbell, for appellant. Clarence Burleigh, for appellee George W. Miller. Knox & Reed and Edwin W. Smith, for appellee F. C. Miller.

WILLIAMS, J. The questions now brought to our attention were substantially involved in the former appeal to this court by the same appellant, which will be found reported in 159 Pa. St. 562, 575, and 28 Atl. 441, 443. There seems, however, to be some uncertainty about the proper practice in contests over the probate of alleged testamentary writings, and it is to this circumstance, as we have no doubt, that the necessity for the present appeal must be charged. Prior to the act of 1712 the register general of the province seems to have had charge of the probate of wills and the granting of letters of administration. The act of 1705 did little more than to give the same effect to the probate of wills made in the courts of Great Britain that was given to such probate made before the register general. The act of 1712 directed the register and his deputies to call to their assistance, in deciding objections or caveats entered against the probate of wills, at least two of the justices of the court of common pleas of the proper county; but the method of procedure was not prescribed. The constitution of 1790 provided for a register and a register's court in each county. The act of 1791 provided for the sending of issues of fact from the register's court to the court of common pleas for trial, fixed the time within which appeals from a decree of the register or the register's court might be taken, and made an exception in favor of all persons under disability, giving them five years after the end of their disability within which to take their appeal; but the methods of procedure were left largely to the discretion of the register or the register's court. The first serious effort to lay down some general outlines of procedure seems to have been made by the act of 1832. By that act it is made the duty of the register of wills, whenever a caveat is entered against the admission of any testamentary paper to probate, and any matter affecting the validity of such writing is alleged, to issue a precept to the court of common pleas of the county directing the preparation of an issue for trial before a jury, in order to determine the truth of the fact or facts so alleged. The office of the caveat is to arrest the proceedings until the truth of the facts alleged or affecting the validity of the will can be determined, and it inures to the benefit of all parties interested in the subject (Ottinger v. Ottinger, 17 Serg. & R. 143); and a caveat separately filed by each heir at law or other person interested is unnecessary. Each heir at law has the right to an issue if he can show facts that would sustain a verdict against the will. Schwilke's Appeal, 100 Pa. St. 628. This right is saved to all, however, by the caveat of any one of these persons filed within the proper time, since all the others may be and must be joined, or afforded an opportunity to join, in the contest. The act of 1832 prescribes the form of the precept to be issued by the register to the judges of the court of common pleas, in which is the direction that an issue be framed between the proponent and the caveator upon the merits of the controversy between them, and that the said judges cause all other persons who may be interested in the estate of the alleged testator, "as heirs, relations, or next of kin, devisees, legatees, or executors, to be warned that they may come into our said court and become parties to the said action if they shall see cause."

If no caveat has been filed with the register before probate made, the remedy of one desiring to contest the validity of the will is by an appeal from the decree of probate to the orphans' court. After an appeal the further proceedings are before the orphans' court until the precept is lodged in the common pleas. The orphans' court has the power to amend or to issue citations to other persons interested until the issue goes to the common pleas. From that time on until trial and verdict the power and the duty to call in any omitted persons interested passes to the trial court. If the record does not disclose the names of the several persons interested in the estate, and the appellant does not supply the necessary information, the application may be dismissed for that reason. In re Miller's Estate, 159 Pa. St. 575, 28 Atl. 443. If the record does disclose the names of all necessary parties, or if the applicant offers, when an omission appears, to supply it by amendment or in any other proper way, the application cannot be dismissed for want of parties, for all that is needed in such a case is the process of the court to warn the persons who have not appeared of the pending application or issue, as the case may be. But the caveat or the appeal of any one of the persons interested is directed against the will, and not against the fractional interest of the caveator in the property devised. The proceeding is in the

Digitized by Google

nature of a proceeding in rem, and, when a final decree is reached, it is conclusive on all the world. Ottinger v. Ottinger, 17 Serg. & R. 142; Folmar's Appeal, 68 Pa. St. 482; Warfield v. Fox, 53 Pa. St. 382; In re Miller's Estate, 159 Pa. St. 562, 28 Atl. 441. If, by any neglect, an issue goes to trial, and a verdict is taken in favor of the will by agreement, without the knowledge of one or more of the persons interested, the verdict is not binding on such persons, but will be set aside at his request (Hambleton v. Yocum, 108 Pa. St. 304); or the omitted party will be allowed to take another appeal, if the time for so doing has not elapsed (In re Miller's Estate, supra). Nor does it matter on which side of the contest the name of any one interested appears, for, if the verdict is adverse to the will, it falls. The paper is then adjudged not to be the last will and testament of the alleged testator, and probate is refused, or set aside if already made, so that the maker of it becomes intestate. Appeal of Probst (not yet officially reported) 30 Atl. 226. His estate would then go into distribution under the intestate laws. In that event the heirs at law would stand on the same plane, and their shares in the estate of their ancestor would not depend on their relation to the issue in which the validity of the will was determined, but on their relation to the intestate.

In the light of the principles to which we have now referred, we must consider briefly the questions raised by the assignments of error in this case. They are three in number.

First, were the proper parties before the court when the order complained of was made? It seems to be conceded that all were on the record except George W. Miller, and that the appellant was endeavoring to put him there. The court was clearly wrong, therefore, in holding that the proper parties were not before it. It was not necessary to make George W. Miller a party to the issue against his will. He had a right to say, "I wish to sustain the will, and be joined with the proponents;" or to say, "I am not interested in the controversy, and will have nothing to do with it." But it was the duty of the court to warn him of the pendency of the proceeding, so that he might be able to act intelligently, and to take such position in regard to it as would best protect his own interests in the estate of the alleged testator.

The second question is whether the lapse of five years after the decree of probate appealed from, without any appeal taken by George W. Miller, made notice to him of the pending appeal either unnecessary or illegal? His interest may have been in favor of the proponents. He may have known facts and circumstances sufficient to defeat the appellant, and establish the validity of the will. It is for this reason, and because he is to be affected by the decree sustaining or overturning the probate, that the statute makes it obligatory on the appellant and the court to see that all persons interested in the estate of the alleged testator have notice of the appeal from the register. A person whose interests are in favor of the will could not be expected to appeal from the decree of probate, but he would be expected to resist such appeal, by whomsoever taken. He is entitled, therefore, upon general principles, as well as upon the express provisions of the statute, to notice of any appeal that may be taken, in order that he may protect himself or others in whom he is interested. It is sufficient if the notice comes at such time before the trial as shall enable him to make the necessary preparation. The appeal may be taken at any time within five years after probate. The appeal brings the rem—the will—within the jurisdiction of the orphans' court. The court then proceeds by its process to bring the persons interested in the rem before it, so that all may be heard before the final decree is made, and be bound by it when made. The order of the court below incorporated into the statute a condition that the legislature did not put there, and one that in many cases would defeat the purpose of the law and the ends of justice.

The third and last question is whether the appellant is estopped from contesting the validity of his father's will by the receipt of some small sums of money from the executor, paid him as an annuity, or by his petition in the orphans' court asking further payment, on which no action has yet been taken. This question is decided in 159 Pa. St. 562, 28 Atl. 441; and it is not necessary to do more than refer to what is there said. The only additional circumstance set up at this time is the undisposed of petition in the orphans' court, which has changed the position of no person or thing, and which affords no ground for an estoppel.

The order striking off the name of George W. Miller is reversed, with the direction that he be allowed to elect what position he will occupy towards the pending petition. The order dismissing the petition of A. H. Miller is reversed, the record remitted, and the court below directed to proceed to hear and determine the same on its merits.

MITCHELL, J. I would affirm this judgment for the reasons given by the learned judge below.

THEISS v. WEISS.

(Supreme Court of Pennsylvania. Jan. 7, 1895.)

SALE—FAILURE TO DELIVER—QUESTION FOR JURY.

1. In an action for breach of contract to deliver goods sold, defendant can show the actual cost to the plaintiff of the goods which plaintiff bought from other parties to fill his orders for the goods purchased.

Digitized by Google

2. Whether a contract for the sale of goods was intended as such, or was a mere banter, and so understood by the parties, is for the jury.

Appeal from court of common pleas, Allegheny county.

Action by Peter Theiss against Theodore Weiss to recover for breach of contract to deliver certain flour sold. Judgment for plaintiff, and defendant appeals. Reversed.

The following are the assignments of error referred to in the opinion: "(6) The court erred in refusing the defendant's eleventh point, which was as follows: 'That if the jury believe that the plaintiff did make a demand on the defendant for the fulfillment of the alleged contract, and that defendant at the time of the execution of the contract was sober enough to know what he was doing, then the measure of the damages is the difference between the contract price of the flour and the market price; and the market price to Theiss was the price he actually paid for flour with which to complete this contract, no matter where he procured the flour. Answer. The rule as to the measure of damages is the difference between the contract price and the regular market price at the time and place of the delivery; but, if the plaintiff bought flour at less than the regular market price, he can recover no more than the difference he had to pay.' (7) The court erred in its refusing the defendant's twelfth point, which was as follows: 'That as Theiss has not shown what he actually paid Theiss, Kuegle & Company for the flour which he expected to get under the contract from Weiss, he has set up no measure of damages, and cannot recover. Answer. Refused.' (10) The court erred in its ruling on the questions asked by the defendant, which questions, objection, and ruling thereon were as follows: 'Q. You filled these orders of flour which you expected to get from Mr. Weiss with flour which you were obliged to obtain from other sources? You filled this contract from other sources? A. Yes, sir. Q. Did you make or lose money on it? (Objected to as incompetent.) By the Court: It is wholly immaterial whether he made money off of the sale or not. He has testified what he sold the flour at. If he did get the flour from the defendant at $4, he would have gotten a certain profit. If he had to pay $4.40 to meet his contract, and still made 10 to 15 cents per barrel, his actual loss would be more than that, in consequence of not getting the flour from the defendant, and therefore this question is irrelevant. Objection sustained. (Exception.)' (11) The court erred in its ruling on the question asked by the defendant, which question, objection, and ruling were as follows: 'Q. Now, I ask you what did that flour cost you? (Objection. Objection sustained.) By the Court: No difference what it cost them. (Exception taken by defendant.)' (13) The court erred in its charge to the jury, and particularly in charging as follows: 'That paper was signed by F. Weiss, and, according to the evidence, handed over to Mr. Theiss, and that made the contract between these two parties. It was not necessary for Mr. Weiss to sign the paper. It was signed by the defendant, and handed over to the plaintiff as a contract between them, and accepted by the plaintiff, and that made it a contract between the parties, and binding upon both. * * * The contract was mutual, and mutually binding upon both parties responsible under this contract. * * * I may here state the rule of damages in a case of this kind. Where there is a contract of this sort to deliver goods, flour, or any other commodity in the market, where the vendor fails to complete his contract,—fails to deliver goods according to his contract,—the purchaser can hold him for the difference between the price he was to pay and the market price of the same article at the time and place of delivery. Now, I believe the letter in evidence would require the flour to be delivered in Pittsburgh. Take this, then, as the place of delivery. The time would be every day after the day of notice to begin shipment, and that would take, say, fifty days,—that is, week days,—or very nearly two months altogether; and that would run until the middle of October. Now, during that time, from the middle of August to the middle of October, flour fluctuated, sometimes selling at $4.45, sometimes at $4.60, and sometimes at $4.65, and some said at $4.70. The regular rule of damages would be, on flour that was to be delivered here, say, the first of September: If the price of flour on that date was $4.50, the difference between that and the contract price would be fifty cents a barrel; if, at other times, the regular market price was sixty cents a barrel, there would be a difference of sixty cents on every barrel, and so if the price was 35, 50, or 15 cents; at any date when the shipment should be delivered, the difference there would be either 15 or 30 cents, and whatever the market price was at that time above $4 a barrel. Perhaps the better way would be to average, as some of the witnesses have done, and say what would be the average price of flour, from the time this flour should have commenced to be shipped, and the time the shipment should have been completed. * * * Now, the rule in cases of this kind is that where a letter has been written to a party doing business, whose place of business is known, and that letter is properly addressed in name of the party and to the address of the party, and put into the post office, the presumption of law is that the letter has reached the party; * * * the presumption of law is that he received these letters. * * * Now, a man may make a bluff or banter, and if the other side takes it up seriously, and they make a contract on that basis, it is binding. * * * I repeat what I have to say on that point. If

Digitized by Google

the defendant, in a bantering and bluffing spirit, proposed to sell the plaintiff the number of barrels of flour, and at the price set forth in this contract, yet, if the plaintiff accepts his banter, and the defendant, knowing the plaintiff had seriously accepted it, deliberately signed the contract, it is binding upon him. If, however, it was understood by both parties as a mere bluff or banter, then it amounts to nothing. * * * It is no defense in this case that the defendant was considerably under the influence of liquor when he signed the contract, provided he clearly understood what he was doing, and the nature and effects of the contract he signed, and deliberately signed it. But if the plaintiff either induced the defendant to drink to excess, or, knowing he was under the influence of liquor, got him to sign the contract, * * * it would be such an unfair advantage as to be a fraud upon the defendant, and would make the contract null and void. * * * The question is, was he so much under the influence of liquor, if under the influence of liquor at all, that he did not know what he was doing, did not clearly and fully comprehend what he was doing, or was he imposed on? Was there any trick practiced by the plaintiff either to get him under the influence of liquor or otherwise to get him to sign the contract? That is a question for you. * * * It is for you to say, gentlemen, whether the defendant did not deliberately, knowing what he was doing, sign this contract, and, if so, although it commenced in a bluffing, bantering way, yet, if it ended in a serious manner, the plaintiff wanting him to put it in writing and sign it, and so understood it, and he deliberately signed it, knowing what he was doing, although he may have been somewhat under the influence of liquor, it would not be a defense in this action.'"

J. J. Miller and John Wilson, for appellant. Willis F. McCook, for appellee.

GREEN, J. The plaintiff testified on the trial, very positively and directly, that he sold all the flour he bought from the defendant, to various firms and individuals, immediately after the contract in suit was made. He also said he was obliged to purchase the flour to fill those orders. He was permitted to prove, and did prove, the market price of flour during the time he was making the sales. He admitted, however, that he got most of the flour with which to fill these orders from his own firm. The defendant asked the plaintiff what the flour he thus obtained cost him, and whether he made or lost money on the flour he obtained to fill these orders. The court rejected these offers of proof, and the assignments of error to the rejection of the offers, and what the court below said on the question of the measure of damages gave rise to the question, what is the true measure of damages applicable to the facts of this case? The court charged that it was the difference between the contract price named in the contract in suit and the market price of the same grade of flour at the time and place of delivery. There is no doubt that this is the general rule in cases where the vendor of goods refuses to deliver, and no part of the price has been paid. But the defendant contends that the rule is different where the vendee supplies himself with other goods in order to fill orders which he has taken for the resale of the goods which he contracted to receive from the vendor. In 2 Benj. Sales, § 1327. the writer says: "It is submitted that these decisions establish the following rules in cases where goods have been bought for the purpose of resale, and there is no market in which the buyer can readily obtain them: 1. If, at the time of the sale, the existence of a subcontract is made known to the seller, the buyer, on the seller's default in delivering the goods, has two courses open to him: (1) He may elect to fulfil his subcontract, and for that purpose go into the market and purchase the best substitute obtainable, charging the seller with the difference between the contract price of the goods and the price of the goods substituted; (2) he may elect to abandon his subcontract, and in that case he may recover as damages, against the seller, his loss of profits on the subsale, and any penalties he may be liable to pay for breach of his subcontract. * * * If, at the time of the sale, the existence of a subcontract is not made known to the seller, a knowledge on his part that the buyer is purchasing with the general intention to resell, or notice of the subcontract given to him subsequent to the date of the contract, will not render him liable for the buyer's loss of profits on such subcontract. The buyer may either procure the best substitute for the goods, as before, and fulfill his subcontract, charging the seller with the difference in price, or abandon his subcontract, and bring his action for damages, when the ordinary rule, it would seem, will apply, and the jury must estimate, as well as they can, the difference between the contract price and the market value of the goods, although there is no market price, in the sense that there is no place where the buyer can readily procure the goods contracted for. In every case, the buyer, to entitle him to recover the full amount of damages, must have acted throughout as a reasonable man of business, and done all in his power to mitigate the loss." In the case of Kountz v. Kirkpatrick, 72 Pa. St. 376, the opinion, delivered by Mr. Justice Agnew, contains a very able and exhaustive discussion of the subject of the measure of damages in actions by the vendee of goods against the vendor, where delivery has been refused. The case turned upon the question of the effect of a combination, after the sale, and before delivery, by the buyer with oth-

Digitized by Google

ers to put up the price of the commodity sold, oil, the buyer having in the meantime assigned his contract to a stranger. It was held that the assignee was not bound by the acts of his assignor, but, nevertheless, the rule as to the measure of the seller's liability was shown not to be the current market price. After stating the general rule that the true measure is the difference between the contract price and the market value (not price) at the time and place of delivery, the opinion proceeds: "Ordinarily, when an article of sale is in the market, and has a market value, there is no difference between its value and the market price, and the law adopts the latter as the proper evidence of the value. * * * Value and price are, therefore, not synonymous, or the necessary equivalents of each other, though commonly market value and market price are legal equivalents." Citing the rule, as stated in Sedg. Dam. (4th Ed.) 260, that the true measure of damages in such cases is the difference between the contract price and the market value, and "that this is the plaintiff's real loss, and that, with this sum, he can go into the market and supply himself with the same article from another vendor," the opinion further proceeds, quoting from Smethurst v. Woolston, 5 Watts & S. 109: "The value of the article at or about the time it is to be delivered is the measure of damages, in a suit by the vendee against the vendor for a breach of the contract." "It is therefore proper to inquire into the true legal idea of damages, in order to determine the proper definition of the term 'value.' Except in those cases where oppression, fraud, malice, or negligence enter into the question, 'the declared object (says Mr. Sedgwick in his work on Damages) is to give compensation to the party injured for the actual loss sustained.' (4th Ed.) pp. 28, 29; also, pp. 36, 37. Among the many authorities he gives, he quotes the language of C. J. Shippen, in Bussy v. Donaldson, 4 Dall. 206: 'As to the assessment of damages [said he], it is a rational and legal principle that the compensation should be equivalent to the injury.' 'The rule,' said C. J. Gibson, 'is to give actual compensation, by graduating the amount of the damages, exactly to the extent of the loss.' Forsyth v. Palmer, 14 Pa. St. 97. Thus, compensation being the true purpose of the law, it is obvious that the means employed,—in other words, the evidence to ascertain compensation,—must be such as truly reaches this end. It is equally obvious, when we consider its true nature, that, as evidence, the market price of an article is only a means of arriving at compensation; it is not itself the value of the article, but is the evidence of value. The law adopts it as a natural inference of fact, but not as a conclusive legal presumption. * * * But to assert that the price asked in the market is the true and only test of value is to abandon the proper object of damages, viz. compensation, in all those cases where the market evidently does not afford the true measure of value." In Seely v. Alden, 61 Pa. St. 302, we said: "If there be different modes of measuring the damages, depending on the circumstances, the proper way is to hear the evidence, and to instruct the jury afterwards according to the nature of the case." In Wehle v. Haviland, 69 N. Y. 448, it was held that the "market price," within the meaning of the rule, is the price at which the goods can be replaced, and not their retail value. In Haskell v. Hunter, 23 Mich. 305, it was held that in an action for the nondelivery of lumber the true measure of damages is the difference between the contract price and what it would have cost the plaintiffs to procure it at the place of delivery, and at the time or times when it was reasonably proper for them to supply themselves with lumber of the kind and quality they were to receive under the contract.

In the case of Arnold v. Blabon, 147 Pa. St. 372, 23 Atl. 575, which was an action by the vendor of a quantity of cork to recover the contract price of cork delivered, the defense was that the plaintiffs were bound by the contract to deliver a much larger quantity than they did, and refused to deliver the residue; and the defendant claimed that he had been obliged to procure cork to supply the deficiency at a higher price than the contract called for, and asked for a certificate of damages against the plaintiff. The court below charged as follows: "Undoubtedly, if you find there was this contract as claimed here by the defendant, and if you find that the plaintiffs broke it, the defendant would have the right, then, to his damages, which damages are fixed; but, if the defendant was able by any acts on his part to lessen his damage, he could not, of course, recover more than his actual damage. * * * Then comes the question whether this defendant, in obtaining these goods from other people, did lessen his damages; whether he made them any less than the difference between the price agreed upon in the contract and the market price at the date of the breach. * * * If you find for the plaintiffs, you will find for this amount, $151. If, on the other hand, you find for the defendant, you will give him a certificate of the amount that he actually paid out; that is, the difference between the alleged contract price and the market value of that amount, 34 tons of cork, on the day of the breach of the contract, unless you find from the evidence that what he bought cost him less than that, in which case you will find for the lesser sum." This ruling was affirmed by this court in a per curiam opinion, in which we said we found no error on the part of the court. And the ruling was manifestly correct, because, while it is true that the ordinary rule of damages in such cases would have entitled the defendant to recover the entire difference between the mar-

Digitized by Google

ket value of the cork and the contract price, yet, as the proof was that he had supplied himself with cork at a less cost than the market price, he could recover only for his actual loss. This is in accord with all the authorities above cited, and is perfectly sound law. The rule of actual compensation for the loss of the goods to be delivered requires that the actual loss only should be allowed to be recovered. We are therefore of opinion that the defendant should have been allowed to prove what was the actual cost to the plaintiff of the flour which the plaintiff said he bought from other parties to fill his orders. We sustain the 6th, 7th, 10th, 11th, and 13th assignments of error.

We do not feel that we can sustain any of the other assignments. The case necessarily had to go to the jury on the main questions of the condition of the defendant at the time he signed the contract in suit, and whether it was a mere bantering proposition, never intended to be carried into execution; and the learned court below fairly and correctly left these questions to the jury. The verdict was against the defendant, and, after reading carefully the whole of the testimony, we feel constrained to say that we regard the verdict as against the weight of the evidence on this latter question. The case, in its circumstances, is very much like the case of Brown v. Finney, 53 Pa. St. 373, which received the condemnation and reversal of this court after a verdict of $2,000 had been recovered in the court below. The defendant in this case, unfortunately and most unwisely, put his name to a written proposition, and, while it is manifest that he did so while considerably under the influence of liquor, it is very plain that he knew perfectly well what he was doing, and that he was not impelled to affix his signature by any act of fraud, deceit, imposition, mistake, or undue influence. On the contrary, his partner, who was present, refused to become a party to such an act of drunken folly, but, after that refusal, the defendant did consciously and knowingly put his name to the paper, with a recklessness and a silly disregard of consequences which, no doubt, he has bitterly regretted ever since. Nevertheless, a calm review of the circumstances indicates clearly, as we think, that the making of the offer to sell 20,000 barrels of flour at $4 a barrel, at the same time when he actually bought 400 barrels, in good business earnest, at $4.45 a barrel, and the signing of a memorandum in writing of such a sale, were never regarded or intended by either party as more than a mere bluff or banter, without any serious intention that it should be performed as a real, bona fide contract. It was perfectly evident, and was abundantly proved, that the defendant, who was a small retail dealer, with limited means, was utterly unable to carry out such a contract, even if the flour could have been obtained in sufficient quantity, and was also unable, without a large advance in the price, to make deliveries at the rate of 400 barrels daily for 50 consecutive days. There is very grave reason to doubt the correctness of the plaintiff's statement that he immediately called upon the defendant to perform the contract, in view of the defendant's positive denial, and, what is more important, the continuance of their ordinary business relations, and the customary purchases by the defendant from the plaintiff of flour at the regular market rates, which were considerably above $4 per barrel. One of the witnesses present, and entirely disinterested, testified that he heard and saw the whole transaction, that the defendant's statement to the plaintiff that he would sell him the flour was made in a bantering, joking way, and that his understanding was that the plaintiff regarded it as a joke. But, of course, all of these things were matters for the consideration of the jury, and it is out of our power to change the verdict, no matter what we may think of the effect of the testimony. We do not think the court committed error in the instructions given to the jury upon these subjects, and therefore, as to all the assignments of error except those which relate to the measure of damages, we dismiss them as not being sustained. Judgment reversed, and new venire awarded.

MITCHELL v. PITTSBURGH, FT. W. & C. RY. CO. et al.

(Supreme Court of Pennsylvania. Jan. 7, 1895.)

WILLS—NATURE OF ESTATE.

Where testator devised to one A. certain land, and by a further clause provided that, in the event of her dying unmarried, or, if married, without offspring, the property should be sold, and the proceeds divided among others, on her surviving the testator she takes an absolute estate.

Appeal from court of common pleas, Allegheny county.

Ejectment by S. Duffield Mitchell, administrator of James S. Stevenson, deceased, against the Pittsburgh, Ft. Wayne & Chicago Railway Company and the Pennsylvania Company. Judgment for defendants, and plaintiff appeals. Affirmed.

By his will, testator devised to Amanda Stephens the property in dispute, in the following language: "I give and bequeath to Amanda Stephens, daughter of Margaret Stephens, lots 67, 68, 69, and 70 in the city of Pittsburgh, in their full extent, bounded by Penn street, Wayne street, the Allegheny river, and by lot 71. Said Amanda Stephens is now five years old (born April 7, 1826) —— Stephens and —— his wife, the parents of Amanda's mother, live near Connellsville, in Fayette county, Penna." "In the event of Amanda dying unmarried, or, if married, dying without offspring by her hus

Digitized by Google

band, then these lots are to be sold, and the proceeds to be divided equally amongst the heirs of John Barber, of Columbia, Penna." Amanda Stephens, the devisee, survived the testator, and afterwards married.

John S. Ferguson, S. Duffield Mitchell, and William T. Barber, for appellant. Scott & Gordon and Watson & McCleave, for appellees.

STERRETT, C. J. Although the devise to Amanda Stephens was made before the act of 1833, and without words of inheritance, yet, when read in connection with the introductory clause of James S. Stevenson's will, there is a plain intent manifested in the first instance to give her an absolute estate. In M'Cullough v. Gilmore, 11 Pa. St. 370, where substantially the same expression was used, this court said: "These words, and the like of them, are generally carried down into the corpus of the will, to show that the testator meant to dispose of his whole interest in a particular devise, unless words are used which plainly indicate an intent to limit it." Numerous cases to the same effect are cited in Schriver v. Meyer, 19 Pa. St. 87. The first taker is always the favorite object of testator's bounty, and as such entitled to the benefit of every implication. There are no words used in the second paragraph of the will, containing the devise to Amanda, which indicate any intent to limit her estate. Had the will stopped there, the devise would unquestionably have been absolute. The following paragraph was not intended to operate by way of limitation, but was manifestly substitutionary in its character. The thought would very naturally occur to testator to make an alternative devise for the contingency of Amanda's dying without issue (Biddle's Estate, 28 Pa. St. 59), and this was, in effect, what was done. "In the event," said testator, "of Amanda dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold, and the proceeds to be divided equally among the heirs of John Barber. * * *" The word "offspring," here used, is but a synonym for "issue," and "issue" cannot be lawful without marriage. The devise is, then, in the first instance, to Amanda, and, in the event of her dying without issue, over to alternative beneficiaries. Dying without issue was thus made the contingency upon which the substituted beneficiaries could take. Coles v. Ayres, 156 Pa. St. 197, 27 Atl. 375. But death when? Where, as here, there is nothing to indicate an adverse intent, additional limitations, dependent on no other contingency than is implied from the language, "if any of them die," or "in case of death," or the like, cannot be referred to the event whenever it may happen,—for that would be to give a forced construction to words,—but must be construed as referring to death in association with some additional circumstance which makes it actually contingent. That circumstance is said to be naturally in regard to the time of happening, and that time, where, as here, the gift is immediate, is necessarily the death of the testator, there being no other period to which the death can refer. Caldwell v. Skilton, 13 Pa. St. 152. This view is strengthened by the presumption that, in the absence of a fixed period, the power of sale was intended to be exercised at a near, rather than a remote, period after testator's death. Hill, Trustees, 474. The circumstances which gave rise to the creation of the power must necessarily change, and perhaps entirely disappear, in the lapse of time. "A power of sale without limit would doubtless," said Mr. Justice Clark in Wilkinson v. Buist, 124 Pa. St. 253, 261, 16 Atl. 856, "be bad under the rule against perpetuities, and a testator will not be presumed to have intended anything so absurd." The intended exercise of the power of sale given in this will is referable to the period either of (1) testator's death, or (2) a definite or (3) an indefinite failure of issue. The last may at once be dismissed as too remote; while, as between the other two periods, it is scarce within the range of probability that testator should have intended sale after a long life. The change of circumstances might be radical, whereas, at testator's death, the change would, in all probability, be relatively small.

Another consideration of weight is that testator had in view living persons as substituted beneficiaries,—the gift over is to the "heirs," and therefore the children, of John Barber, who was living,—and the natural inference is he intended them to take as such.

The suggestion that, because of Amanda Stephens' extreme youth, testator could not have had in contemplation the contingency of her marriage and death without issue in his lifetime, is without merit. No presumption could arise from the fact of making a will that testator expected to die before she should attain a marriageable age. So far as appears from the record, he may have had an expectation of long life. But, whatever his expectations, he expressly meets both aspects of the case by providing that, "in the event of her dying unmarried, or, if married, dying" without issue, the estate should go over. She might die in her infancy, unmarried, or marry and die leaving no issue in his lifetime; and the gift over to the substituted donees would prevent lapse. There is no reason for discrimination against her on account of age. She was the favorite object of the testator's bounty, and, having survived him, became thereupon seised of the absolute estate intended for her. The judgment of the court below should therefore be affirmed. Judgment affirmed.

Digitized by Google

PHILLIPS v. ST. CLAIR INCLINE-PLANE CO. (No. 263.)

(Supreme Court of Pennsylvania. Jan. 7, 1895.)

EMINENT DOMAIN—DAMAGES—PLATTED LAND.

A railroad was constructed on land which apparently formed part of an undivided and unimproved tract, but which, for the purposes of partition, had been platted into lots and blocks. The plat had never been recorded, and was subject to change at any time. *Held*, in proceedings by one of the cotenants for damages for the taking, that none could be claimed directly on account of any of the land which was not taken; that any indirect damage which might accrue to lots not taken was recoverable, if at all, only for interference with rights of way possessed by the owner over the land actually taken; and that it was error to try the case on the theory that the streets and lots laid down in the plat were actual streets and lots.

Appeal from court of common pleas, Allegheny county.

Statutory procedure by Sallie O. Phillips against the St. Clair Incline-Plane Company for the assessment of damages for right of way. Viewers were appointed, and both parties appealed from their report. On the trial on appeal, plaintiff had a verdict for $2,475.55½, and from a judgment thereon defendant appeals. Reversed.

The land, a portion of which was occupied by the railroad company, consists of 17½ acres in the Twenty-Seventh ward of the city of Pittsburgh, and is bounded by Josephine street on the north, by land late of Mrs. Breese on the south, and on the east and west by two narrow and deep gulches or ravines, extending up the hill southward from Josephine street. The land in question between those two ravines is steep, declivitous, and broken, rising from Josephine street southward in a succession of steep and abrupt benches, and rising still more abruptly from the bottom of the ravine on either side, and is without buildings or improvements of any kind, except two or three miners' shanties on the upper southwestern corner; and two or three buildings on leased ground or lots recently sold at the lower or northwestern corner near Twenty-First street, and no roads or streets or alleys have ever been actually located or opened or used over or upon the same. All passage over it consists of foot-paths at random, or an occasional vehicle making a short cut down the hill from the top, and selecting the safest or most convenient method of transit. It has been uninclosed and in common for a great number of years, and no one of the streets or alleys marked on the plan of lots into which it has been plotted has ever been improved or graded, or opened or used in any way, or sanctioned or adopted by the city or other constituted authority. Appellant's incline plane is 2,060 feet in length, and the right of way appropriated for it is 30 feet in width, extending from Josephine street, up the eastern ravine mentioned, to Salisbury street. Twelve hundred and fifty-one feet of it from Josephine street is located in the ravine over and along the eastern border of appellee's property, and comprises nearly one acre. From thence to Bousman street it passes over and through the Breese property, and throughout the whole length of 2,060 feet, from Salisbury, to Josephine, it crosses or interferes with no established or appointed or used street or road or alley, laid out or constituted as such by any municipal or public authority. The plane is concave, commencing at Josephine street on a grade of 12½ per cent., and continuing on that grade, with a very slight increase, a distance of about 600 feet; thence the grade increases more rapidly to the upper terminus, where it is about 30 per cent. It consists of a regular double-track railroad, constructed with wooden ties and iron rails throughout its length, laid on the surface of the ground, and not on trestlework in any part. The rolling stock consists of two open cars, constructed for the reception of passengers and vehicles, and operated by a stationary engine at the upper terminus by a wire rope attached to the bottom of each car, passing over rollers about 50 feet apart between the rails, the motorman being stationed in a cab at the upper terminus, with the cars and tracks under his view throughout the whole length. Both cars are at rest or in motion at the same time. The trip is made in five minutes, with five minutes or more between trips when the cars are not moving, and, as no momentum attends the motion, the motorman in the cab can stop the cars almost instantly anywhere. It has been in operation for six years. Besides the receipt and discharge of freight and passengers at the upper and lower termini, there is a midway station nearly opposite the east end of what is marked as "Latrobe Street" on appellees' plan of lots. This station has been in use for the receipt and discharge of passengers ever since the plane was opened, and is to be adjusted so as to receive and discharge vehicle traffic also, so soon as there is any call for it; but there being a steep bluff on the east side of the plane, and no streets or dwellings or occupancy on the west side on appellees' property, there has been no demand for vehicle traffic to that station as yet; and, as no streets have been laid out or located by the city across the plane between the upper and lower termini, the best point of location and approach to the midway station is, as yet, undetermined. It can be shifted one or two hundred feet up or down, as need be.

The appellant company located its plane by resolution of the board, and survey marked on the ground, June 4, 1886, and entered and commenced work thereon soon after. At that time there were no indications on appellees' land that it had been divided into building lots or otherwise, or that streets

Digitized by Google

were located upon or over it. The appellant company's attorney reported a good title in Mrs. Sarah M. Phillips from devisees, and no streets indicated on the city registry or county records which would be interfered with by the plane, but it has since transpired that on the 1st of January, 1886, Mr. H. C. Burgwin, the surviving executor in Mrs. Phillips' will, had procured a plan of lots to be made of the whole tract, dividing it into 206 building lots, in view of a partition contemplated between the appellees, and according to the history of the case by the appellees above referred to. This plan of lots was acknowledged by the executor, January 18, 1886, and was recorded on the 17th day of July, 1886, about a month after appellant had commenced work on the plane; and, "for the purpose of partition, lots were drawn among the devisees. By the drawing, certain lots in the plan were allotted to Joseph A. Phillips; certain other lots were drawn by Sallie O. Phillips; and on the 1st of January, 1886, a preliminary agreement was made and signed between the devisees agreeing to accept in partition the allotments so ascertained." This was followed by the preparation and execution of deeds between the parties, which were acknowledged, two of them on 13th of April following, and recorded July 30, 1886. The deeds to the other two were made and recorded in like manner and time, but nothing of the kind appeared until over a month after the appellant company had entered and was at work on the land. It further appears that when the appellant made its location, and went to work constructing its plane, no record of an amicable partition between the four parties, or any agreement or deeds between them indicating a partition, had been placed on the city registry or county records, nor had any valuation for tax purposes been made to the different parties as if divided into lots and streets for building purposes, and no acceptance or adoption of the plot in question, or the streets and alleys designated thereon, had been made by the city council or constituted authority, as provided by law and ordinance, or has ever been made since; and while the appellant, or some of its officers, may have known that proceedings or negotiations for partition were going on, they were not informed, and did not know or suppose, when they located their road and commenced work on it, that a partition had been consummated, and did not know of sole ownership in any one or more of the parties in any particular parts of it. No lots had been marked by pins on the ground. The whole tract was an uninclosed common, as it had been for many years. Before the appellant company located its plane, it agreed with and paid Mrs. Breese for an equal quantity of land for a power house and right of way through her property, and afterwards, before commencing work, applied to the appellees to procure an agreement in like manner with them, but failed; and finally the appellees entered ten cases in the two courts of common pleas. Six of the ten were under the statute; four of them in common pleas No. 1, the same four now before this court on appeal; the other two statutory cases in common pleas No. 2, by two of the parties claimant in two of the present cases, Miss Sallie O. Phillips and G. H. Burgwin et al. The two in the other court are still pending, and are said to be for lots overlooked when said parties filed their petition for viewers in their other cases. Besides the six statutory cases thus mentioned, the same four parties brought four suits at common law for damages alleged to have been sustained by reason of the taking or obstruction of streets and alleys on their plan of lots above mentioned. Two of these they brought in common pleas No. 1, and two in common pleas No. 2. While all ten cases were thus pending in the different courts, to wit, January 17, 1891, a board of viewers was appointed, the same board by consent in each of the six statutory cases; and on June 11, 1892, the board filed its report, assigning the damages so assessed to each of the four parties owners, in said six statutory cases in the two courts, as they deemed each entitled thereto. From these awards so made, however, the parties on both sides appealed; and in the meantime, April 12, 1892, the two common-law cases in court No. 2 came on and were tried together by the same jury, and a verdict rendered for the plaintiffs April 25, 1892, and judgment thereon afterwards by the court on a question of law reserved was entered in favor of the defendant non obstante veredicto, and appeal taken to this court, and the judgment of the lower court affirmed. Thereupon the appellees presented their several petitions to the court of common pleas No. 1, for leave to amend their statutory cases so as to include in them the consequential damage to other lots and streets throughout their plan for which the four common-law cases had been brought, and this they were allowed to do against objections. Finally four of the statutory cases in common pleas No. 1 came on to be tried, the same four cases now before this court, and were tried by the same jury by consent, and the damages distributed by a separate verdict to each of the four claimants. When the last-mentioned trial came on, the two common-law cases still pending in common pleas No. 1 were discontinued, but the two statutory cases in common pleas No. 2 are still pending. On the trial the court below admitted, not only evidence of damages for the property taken, but in addition thereto precisely the same line of evidence was admitted to prove damages to the property and alleged streets of the appellees not taken, the same as had been produced in common pleas No. 2, in the two common-law cases tried there. Defendant offered evidence to show that if these alleged streets or alleys should ever be adopted by

Digitized by Google

the city, or put to use for public or private purposes, the company could readily adjust its roadbed to give a crossing at grade to suit them, and afford every convenience for the passage of pedestrians and vehicles for ingress and egress to and from the streets contemplated; but this evidence was excluded, and so was evidence showing the benefits and advantages which were and would be conferred on appellees' property by increase of its market value by reason of the plane.

J. McF. Carpenter and T. Mellon, for appellant. A. P. Burgwin and Johns McCleave, for appellees.

MITCHELL, J. The complicated facts and proceedings in the cases included in this contest unfortunately led to the trial on an erroneous view. There were but two ways in which the claim of the owners of the land taken by the incline-plane company could be considered in estimating the damages: First, the land might be treated as in fact what it appeared to be when the appellant located its road, a single, undivided, and unimproved tract of 17 acres, and the damages for taking part of it assessed with reference to the whole. The joint owners, by virtue of the uncompleted partition, and the continuing joint interest in the proposed streets in the plan, might have maintained a joint proceeding for the assessment of damages, and it would probably have presented the simplest and most convenient method of reaching a just and legal result. The owners, however, having in fact agreed upon the partition according to the plan, though nothing was yet of record in regard to it, were not bound to unite, but might proceed separately. But if they did so, the right of each was as owner of a number of separate and disconnected pieces of land. There were no streets, nor, in the ordinary meaning of the word, were there any "lots." All these were inchoate, existing only in intention, and subject to change or destruction at any time, at the volition of the parties. Phillips v. Incline-Plane Co., 153 Pa. St. 230, 25 Atl. 735. No damages, therefore, could be claimed directly on account of any of the land which was not on the line of the appellant's road, and of which no part was taken. Any indirect damage that might accrue to such lots was recoverable, if at all, only for interference with rights of way possessed by the owner of them over the land actually taken. Whether such damages could be recovered at all, under the rule laid down in Pennsylvania Co. v. Pennsylvania S. V. R. Co., 151 Pa. St. 334, 25 Atl. 107, we do not decide at present, as it is not directly raised in the case, and apparently was not before the learned court below. We cannot say, therefore, that the amendment allowed to the appellees was erroneous as matter of law, but it is plain that the evidence under it must be very carefully guarded. The case appears to have been tried on the view that the streets laid down on the plan were to be treated as actual streets, and the separate pieces of land in each case as lots fronting on streets. This was erroneous. There were no streets, except potentially, as parts of a contemplated use of the land, interference with which was not the subject of damage per se. The plan was evidence of the capacity of the land for improvement in a certain way. Wilson v. Gas Co., 152 Pa. St. 566, 25 Atl. 635. And, on the other hand, it was competent for appellant to give evidence of equally advantageous use in a different way, with which the incline would not interfere, or which it might aid. Such evidence on both sides was admissible, because of its bearing on the damages to the plaintiff as owner of land taken, or of rights of way over such land, and not as owner of remote lots. It should be strictly confined to that aspect. Judgment reversed, and venire de novo awarded.

PHILLIPS v. ST. CLAIR INCLINE-PLANE CO.

BURGWIN v. SAME.

(Nos. 264, 265, and 266.)

(Supreme Court of Pennsylvania. Jan. 7, 1895.)

Appeal from court of common pleas, Allegheny county.

Statutory proceedings by J. B. Phillips, G. C. Burgwin, and Joseph A. Phillips against the St. Clair Incline-Plane Company for the assessment of damages for right of way. From a judgment for plaintiffs, defendant appeals. Reversed.

J. McF. Carpenter and T. Mellon, for appellant. A. P. Burgwin and Johns McCleave, for appellees.

MITCHELL, J. For reasons given in Phillips v. Plane Co. (No. 263; opinion filed herewith) 31 Atl. 69, these judgments are reversed, and venire de novo awarded.

ST. CLAIR SCHOOL DIST. et al. v. MONONGAHELA WATER CO.

(Supreme Court of Pennsylvania. Jan. 7, 1895.)

CONTRACTS—CONSTRUCTION—WATER COMPANIES.

1. A contract between a city and a water company supplying a portion of the city with water bound the company to furnish water within its territory at rates not higher than those charged by the city in territory supplied by it. *Held*, that further stipulations, requiring the water company to supply fire plugs with water free of charge, showed conclusively that the parties did not intend to create any exemption from water rates except the class mentioned, and that the exemption by the city of schoolhouses within its territory from the payment of water rates did not prevent the company from charging reasonable rates for water supplied to schoolhouses within its territory.

2. The fact that the company was charging schoolhouses when it entered into the contract

Digitized by Google

with the city, and continued to do so for eight years thereafter without dispute, is entitled to great weight in construing the contract.

Appeal from court of common pleas, Allegheny county.

Bill in equity by board of school directors of the St. Clair sub-school district, the Humboldt sub-school district, the Wickersham sub-school district, the Allen sub-school district, the Mt. Washington sub-school district, the Monongahela sub-school district, the Knox sub-school district, the Thaddeus Stephens sub-school district, the Riverside sub-school district, the Lucky sub-school district, the Morse sub-school district, the Birmingham sub-school district, and the Bedford sub-school district against the Monongahela Water Company to enjoin defendant from cutting off, stopping, or interfering with the free supply of water, through the pipes and conduits of the said defendant company, to the school buildings of the several sub-school districts of the city of Pittsburgh, plaintiffs in said bill. From a decree for plaintiffs, defendant appeals. Reversed.

The following is the opinion of the court below:

"The bill in this case is filed on behalf of thirteen sub-school districts of the city of Pittsburgh, in which they complain that the defendant company threatens to shut off the supply of water from the school buildings, and praying that it be restrained from so doing. These districts are all located in the city of Pittsburgh, on the south side of the Monongahela river. From the bill it appears that the defendant company is a corporation organized and authorized to supply water to that part of the city, and is the only company authorized so to do; that by ordinance of September 23, 1880, the councils of said city directed the assessor of water rents to omit from said assessment all buildings used as public schoolhouses; that by ordinance of December 22, 1885, the councils of said city authorized the mayor to enter into a contract with the defendant company whereby the city agreed not to extend its water system into the district south of the Monongahela river during a period of 21 years, upon certain conditions prescribed, and a contract was so made dated December 23, 1885. The clause of said contract upon which the controversy arises is as follows: 'The said Monongahela Water Company, its successors and assigns, shall hereafter, and for said term of twenty-one years, make its assessments of all water rents in the said wards at rates not higher than those in each class of water rents assessed by the said city of Pittsburgh in the wards lying between the Monongahela and Allegheny rivers.' The bill claims that under this contract the school districts are exempt from assessment for water used in their buildings, and, having refused to pay the assessments made for the year 1894, the company threatened to shut off the water. The defendant does not deny the facts alleged, but claims that it has the right to assess and collect a reasonable amount for such supply of water, and in support of its claim says that from the time of the making of said contract it has assessed, and the officers of the sub-school districts have paid, the amount claimed annually, as they had done before said contract was made, and that the city of Pittsburgh has also paid for water supplied to public buildings, and for all other purposes, except for fire plugs, which are specially excepted by the contract. Defendant contends: (1) That under this contract it is not bound to supply water to the school buildings free of charge; (2) that upon nonpayment of the charges it is justified in shutting off the supply of water; (3) that plaintiffs are not entitled to maintain this bill, because they are not parties to the contract.

"A serious objection to the bill might be found in the fact that a number of separate school districts have joined as plaintiffs. It is true that their rights arise under the same contract, and are identical in character, but they are not joint. This question was not raised; and the other question, as to their right to enforce the contract, was not pressed, both parties expressing a desire to have the main question settled,—that is, the right of the defendant company to charge and collect for water supplied to school buildings situated in the city of Pittsburgh south of the Monongahela river. This depends upon the construction and application of the clause of the contract above cited. The true meaning and effect of any instrument must be found in the words, illustrated by the context and the circumstances. The territory known as the 'South Side,' in which the school districts, plaintiffs, are located, was annexed to the city of Pittsburgh in 1872. Prior to that time the Monongahela Water Company was organized, and supplied the inhabitants with water. About 1885 the city of Pittsburgh proposed extending its system into the same district, and had, at an expense of over $100,000, extended a main pipe across the river, and for some distance on Carson street. This was done in order to give to all the citizens of Pittsburgh the benefits of the water system, which had been constructed at great expense at public cost. The execution of this intention would have greatly impaired, if it did not entirely destroy, the value of the water company's property. This was felt to be an injustice to the company, which had expended large sums of money in the erection of works before the city had acquired jurisdiction over that territory. Negotiations were entered into between the city and the water company, which resulted in the adoption of the ordinance of December 22, 1885, and the execution of the contract of December 23, 1885. The evident purpose of this action was to do justice to the water company, and secure to the citizens of Pittsburgh south of the

Digitized by Google

Monongahela the same rights and privileges as those residing in other parts of the city. With that in view, the clause in controversy was inserted. These motives and purposes are clearly shown by the recitals in the ordinance, to which the contract refers, and upon which it is based, and we are of the opinion that the language used is sufficient to effect this purpose. It recognizes the fact that the city has schedules of water rents in the wards lying between the Monongahela and Allegheny rivers, and makes these the basis for assessments in the wards lying south of the Monongahela river by the water company. If a certain class of property is not found in the schedules of the city of Pittsburgh, there would be no basis for assessment by the water company; and where such property is specifically exempted from assessment by the city, there is no reason why the water company should have the right to make an arbitrary rate for itself. This would seem to be the logical result of the transaction. It is not disputed that the city may make such assessment as it deems proper, and if it had placed a nominal assessment upon school buildings the water company could not complain, but would be bound by the contract to do the same. To hold that it would be bound by a nominal assessment, and not bound by an exemption, would be 'sticking in the bark.' On the other hand, to hold that the company was not bound by the city exemption, but that in such case it might make such charge as it deemed reasonable, would violate the clear purpose of the parties by destroying the equality between the sections of the city, and impose a burden upon one part of the city from which the other is free. We are therefore of the opinion that the exemption of school buildings by the city of Pittsburgh requires a like exemption by the water company in the wards of said city south of the Monongahela river, and that it should be restrained from shutting off the water because of the nonpayment of assessments made against them.

"We have given full consideration to the action of the officers of the school boards recognizing the right of the water company to make such assessments, and of the city officers in payment of rents assessed against property of the city, but do not think such action should prevent the enforcement of the contract as we understand it."

Watson & McCleave and Thos. D. Carnahan, for appellant. Wm. L. Monro and Thos. Patterson, for appellee.

MITCHELL, J. The third clause of the agreement between the city of Pittsburgh and the appellant provides that the appellant shall make its assessments of water rents in the stipulated territory "at rates not higher than those in each class of water rents assessed by the city of Pittsburgh in the wards between the rivers." This is the clause on which the bill is founded, and, if it were all that the agreement contained on the subject, it might fairly be held to apply to exemptions, although it speaks only of "assessments" and "rates" for different classes of rents, and does not, in terms, refer to exemptions at all. The next clause, however, provides that the city shall furnish water to her own mains then laid or being laid, for the purpose of supplying the fire plugs and watering the streets along the lines of said mains. The next, or fifth, clause then provides that the appellant shall supply all the other fire plugs then or thereafter put in by the city, without any charge. These two clauses show conclusively that the subject of exemptions was considered and provided for by the parties. If the construction contended for by the complainants is correct, then the city, making no assessment for its own fire plugs or street watering between the rivers, as it is agreed that it did not then or now, would have been entitled to have all its plugs on the south side supplied by the water company free, and clause 5 would have been superfluous, and clause 4 in conflict with the intent of the parties. These two clauses therefore show the construction put by the parties themselves on the contract, and they show also that the subject of exemptions was in their minds, and was disposed of by them. The specification of a limited class of exemptions—fire plugs not on the line of the city's pipes already laid or being laid—shows that no other class was to be exempt. "Expressio unius exclusio alterius." This inevitable deduction from the language of the agreement is strengthened, though it is not necessary, by the circumstances. The water company was then charging schoolhouses. If the intention was that thereafter it should not do so, it is to be presumed that their exemption would have been provided for as that of fire plugs was. And the conduct of the parties is in entire accord with this view, for the water rents were regularly charged by the appellant, and regularly paid by the school districts, for eight years, before the latter gave any sign of their present idea of their rights. Even if the contract were much more obscure or doubtful than it is, this conduct of the parties for such a period would have great weight in a court of equity against the present claim.

As to the suggestion that the city may place a nominal assessment on its schoolhouses, and, the water company being obliged to follow, there would result a superficial and unsubstantial distinction between being bound by a nominal assessment and not being bound by an exemption, it is only necessary to say that if the city should, by such a subterfuge, attempt to do indirectly what it has no power to do directly, a court of equity would have no difficulty in dealing promptly and effectually with such an effort. Decree reversed, and bill directed to be dismissed, with costs.

Digitized by Google

In re ROAD IN OHIO AND ROSS TOWNSHIPS.

(Supreme Court of Pennsylvania. Jan. 7, 1895.)

HIGHWAYS—ESTABLISHMENT—NECESSITY—VIEWERS.

1. The question of the necessity of a proposed public road must be determined in the duly-appointed mode of proceedings, by views, re-views, and, in the discretion of the court, re-reviews; and it is error for the court to determine the question on evidence given before it on appeal from the reports of viewers.

2. The appointment of one of the petitioners for a new road as one of the re-viewers to determine its necessity is an irregularity which vitiates all subsequent proceedings.

Appeal from court of quarter sessions, Allegheny county.

Petition by divers citizens and taxpayers for a new road in Ohio and Ross townships. Viewers, re-viewers, and re-reviewers were appointed by the court; and, on appeal to the court from their reports, the court heard testimony, and denied the petition on the ground that there was no necessity for the road. Petitioners appeal. Reversed.

N. W. Shafer, for appellants. R. B. Petty, for appellees.

STERRETT, C. J. Owing to illness of the county engineer, who by special law was both viewer and artist, the first order to view was duly extended, and made returnable to June sessions, 1892, at which a report in favor of the proposed road was made, approved, and the width of road fixed at 33 feet. At September sessions a petition in due form was presented, and re-viewers were appointed, one of whom, John English, is admitted to be a signer of the original petition. Before said re-viewers reported, the appointment of Mr. English was specifically excepted to, but it does not appear that any action was taken thereon. At December sessions, 1892, two of the re-viewers, one of whom was Mr. English, reported against the road, and their report was confirmed nisi. Re-reviewers, subsequently appointed, reported in favor of the road. Exceptions to reports of viewers and re-reviewers having been filed, a commissioner was appointed, and a mass of testimony, covering 22 pages of the paper book, was taken, mainly on the necessity of the proposed road. Finally the court sustained the exceptions, set aside the reports of the viewers and re-reviewers, and confirmed the report of the re-viewers, saying: "We think the evidence does not show a necessity for a public road." This remark would appear to indicate that the learned court's decision was based, not upon the report of either viewers, re-viewers, or re-reviewers, but upon the mass of testimony taken on a sort of general appeal from the reports of viewers, etc. Strictly speaking, that testimony is no part of the record before us; nor do we think it was properly before the court below on the question of necessity or nonnecessity of the proposed road. That question should be determined in the duly-appointed mode of proceeding, by views, re-views, and, in the discretion of the court, re-reviews. But, aside from all other considerations, the appointment of Mr. English, one of the original petitioners for the road, as a re-viewer was an irregularity that is fatal, at least to all proceedings subsequent to the presentation of the petition for appointment of re-viewers. In Road in Donegal, 4 Yeates, 479, this court reversed the proceedings, "as well because there had been no re-view, as that one of the petitioners for the road had been appointed a re-viewer," and said: "It is inconsistent with the first principles of justice that the same person should be both judge and party." To the same effect are In re Road in Radnor, 5 Bin. 612, and In re Road from McClaysburg, 4 Serg. & R. 200. In the former, the fact that a petitioner acted as a re-viewer was declared "fatal to the proceeding,"—"an irregularity that cannot be overlooked." In this case, as we have seen, the proceedings up to and including the presentation of the petition for appointment of re-viewers, are regular, and hence there appears to be no necessity for setting them aside. When the record is returned to the court below, proceedings may be resumed by appointing competent re-viewers on the petition duly presented for that purpose on September 8, 1892, and thence duly prosecuted to final decree. It is therefore adjudged and decreed that all proceedings subsequent to the presentation of the petition for appointment of re-viewers, including the appointment of re-viewers erroneously made thereon, be reversed and set aside, and it is ordered that the record be remitted to the court below for further proceedings in accordance with the foregoing opinion.

MATCHETTE v. COLBURN.

(Supreme Court of Pennsylvania. Jan. 28, 1895.)

CONTRACTS—CONSTRUCTION.

An assignee of a contract, giving him the exclusive right to sell soda water and soft drinks on a line of steamers, agreed to pay 60 per cent. of the gross receipts to the steamship company until the total percentage amounted to $5,000, and thereafter to pay the company 50 per cent of the gross receipts, "and to pay the [assignor], at the close of each day, 12½ per cent. of said gross receipts for such day." *Held*, that the assignor's right to his percentage was absolute at the close of each day, and did not depend on the question whether the steamship company's percentage of the gross receipts had reached $5,000.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by Frank J. Matchette against Arthur Colburn. Judgment was rendered for plaintiff, for want of a sufficient affidavit of defense, and defendant appeals. Affirmed.

Digitized by Google

The plaintiff, Matchette, on April 20, 1893, procured a written agreement from the World's Fair Steamship Supply Company, entitling him to sell soda water, etc., on the boats and docks of said company, at and near Chicago, for which he agreed to pay the company, at the close of each day's sales, 50 per cent. of the gross receipts of such sales, and a further sum of 10 per cent. of each day's sales at the close of each day, until the total percentage thus paid should amount to $5,000. The extra 10 per cent. was to be refunded to Matchette when the company had received $5,000. On April 27, 1893, Matchette executed an assignment in writing of all his rights in the contract of April 20, 1893, to J. H. Dilworth & Co. In consideration of this assignment, J. H. Dilworth & Co. agreed to pay to the World's Fair Steamship Supply Company 60 per cent. of the gross receipts of sales, at the close of each day, until the total percentage so paid should amount to $5,000, and thereafter they should pay to the World's Fair Steamship Supply Company 50 per cent. of such gross receipts, and to pay to Matchette (appellee) 12½ per cent. of the gross receipts of each day at the close of each day. The assignment of April 27th, by which J. H. Dilworth & Co. acquired the rights of Matchette under the contract of April 20, 1893, required J. H. Dilworth & Co. to give to Matchette a bond in $5,000 for the performance of the agreements on the part of J. H. Dilworth & Co. contained in the assignment. That bond was given, Colburn, the defendant, and J. H. Dilworth & Co. being the obligors, which bond was a joint and several one. The breach of the agreement consisted in the failure of Dilworth & Co. to pay to Matchette (appellee) 12½ per cent. of the gross receipts of each day's sales, at the close of each day, from July 1st to October 31st, as by the agreement of April 27, 1893, they were bound to do, which percentages amounted to $826.60.

The affidavit of defense is as follows: "Arthur Colburn, having been duly sworn according to law, says: I have a complete, just, and legal defense to the whole of the plaintiff's claim, and which defense is as follows, to wit: (1) I admit that on the 17th May, 1893, J. H. Dilworth & Co. and myself executed and delivered to Frank J. Matchette (the plaintiff herein) a bond in the sum of $5,000, the condition of which was that if J. H. Dilworth & Co. should perform a contract dated 27th April, 1893 (and which is Exhibit B to plaintiff's statement), between them and Frank J. Matchette, the bond should be void; otherwise, it should remain in full force. To the allegation in the plaintiff's statement filed, that J. H. Dilworth failed to pay twelve and one-half per centum of the gross receipts from the sales mentioned in said contract from 1st July to 31st October, 1893, and that these sales amounted to $6,613.56, I aver that, by the terms of the said contract of 27th April, 1893, J. H. Dilworth & Co. were not required to make the payments claimed to Frank J. Matchette until, from the receipts of such sales, they should first have paid to the World's Fair Steamship Supply Company sixty per centum thereof, and also until such payments to the supply company reached the sum of $5,000, as by reference to the said contract and the stipulation in that behalf will fully appear, and which stipulation is in the following words, to wit: 'Second parties [meaning J. H. Dilworth & Co.] agree to pay over to the World's Fair Steamship Supply Company, at the close of each day, sixty per cent. of the gross receipts from all sales of soda water or other soft drinks that they shall have made during each day, until the total percentage paid said World's Fair Steamship Supply Company shall amount to $5,000, and thereafter they shall pay to the World's Fair Steamship Supply Company fifty per cent. of said gross receipts, and to pay to first party [meaning Frank J. Matchette], at the close of each day, twelve and one-half per cent. of said gross receipts for such day.' And I further aver that although J. H. Dilworth & Co. began work pursuant to the said agreement of 27th April, 1893, and continued to work thereunder until 31st October, 1893, they did not obtain sufficient gross receipts from the said sales to enable them, by paying sixty per cent. thereof, to pay any more than $4,676 of the $5,000 to be paid to the said supply company. The said sum of $4,676 they did pay to the supply company in this behalf, and, to make up the sum of $5,000, I paid the said supply company, for J. H. Dilworth & Co., on the 4th November, 1893, $424 from my own resources, and in no manner from the moneys received by J. H. Dilworth & Co. from the sales above mentioned. And, by reason of the matter herein alleged, J. H. Dilworth & Co. did not fail to perform the agreement, as is alleged by the plaintiff's statement filed, and consequently the condition of the said bond was, in this behalf, duly performed. (2) In the statement filed of the plaintiff's claim, it is also alleged that the plaintiff and J. H. Dilworth & Co. settled for the dealings of the latter under the said contract for all transactions prior to July 1, 1893. Up to the filing of this affidavit, I have not been able to ascertain whether or not such or any settlement was had. I believe, however, it refers to payments made to Frank J. Matchette, as the agent of World's Fair Steamship Supply Company, by J. H. Dilworth & Co., of which I had, for the first time, information on or about 27th June, 1893. I was then informed (but not by J. H. Dilworth & Co.) that they were paying to the said agent sixty-two and one-half per cent. of the gross receipts of all of the said sales under the contract of 27th April, 1893, instead of sixty per cent. thereof. Thereafter, and about 1st July,

Digitized by Google

1893, I told J. H. Dilworth & Co. that such payments of sixty-two and one-half per cent. were not due to the supply company, and that no more than sixty per cent. were so due, by virtue of the said contract, and I insisted that their payments should conform strictly to the obligation of the contract. I am advised that such inaccurate payments, of which I was ignorant, not only do not affect me, but cannot be used as an interpretation of the contract by the parties to it in this suit. (3) And I am further advised that the plaintiff's alleged cause of action is based upon the bond of 17th May, 1893, made jointly by J. H. Dilworth & Co. and myself, and that as I alone am sued herein, the plaintiff ought not, on this ground, to be permitted to proceed until, by amendment or otherwise, he shall sue both obligors."

Charles Carver, for appellant. George E. Johnson, for appellee.

PER CURIAM. According to the terms of the agreement of April 27, 1893, J. H. Dilworth & Co. were bound to pay plaintiff, "at the close of each day, twelve and one-half (12½) per cent. of said gross receipts for such day." It appears to have been so understood by the parties thereto, and for more than two months settlements were accordingly made upon that basis. The construction now contended for by defendant was an afterthought, unwarranted by the language employed in the agreement. There was therefore no error in sustaining the construction contended for by plaintiff, and entering judgment in his favor for want of a sufficient affidavit of defense. Judgment affirmed.

In re ENGLES' ESTATE.

Appeal of PHILADELPHIA TRUST, SAFE-DEPOSIT & INSURANCE CO.

(Supreme Court of Pennsylvania. Jan. 28, 1895.)

WILLS—CONSTRUCTION—ANNUITIES.

Testatrix bequeathed one-eighth of the income of the estate, not exceeding $400 per annum, to a niece, "for and during the term of her natural life," to be applied by her to the maintenance of herself and her minor daughter until the daughter shall have attained the age of 21, "and thereupon, her interest in the annuity ceasing," $7,000 was directed to be paid to the daughter. *Held*, that the annuity to the niece, directed to be paid "during the term of her natural life," did not cease on the majority of her daughter, and the payment to the daughter of the legacy of $7,000, since the phrase, "and thereupon her interest in the annuity ceasing," referred to the daughter's interest, and not to that of her mother.

Appeal from orphans' court, Philadelphia county.

On account by the Philadelphia Trust, Safe-Deposit & Insurance Company, trustee under the will of Charlotte S. Engles, deceased. From the decree in favor of Mrs. Rebecca C. Schott, the trustee appeals. Affirmed.

The matter originally came on for hearing before the auditing judge, who delivered the following opinion:

"There was no objection to the account which was filed at this time in order to obtain an interpretation of the following clause of the will of testatrix: 'And to pay over another one-eighth part of the income thereof, not exceeding four hundred dollars per annum (everything in excess of that sum to go into the residue of the income of my estate), in equal quarterly installments to Rebecca C. Schott, daughter of my brother James, for and during the term of her natural life, to be applied by her, without the duty of filing any account, to the maintenance of herself and of Daisy R. Schott, until Daisy shall have attained the age of twenty-one years, and thereupon, her interest in this annuity ceasing, to pay out of the principal of my residuary estate seven thousand dollars to the said Daisy R. Schott; this legacy to lapse if she die before the age of twenty-one.' The question raised is whether this annuity still continues to be payable to Rebecca C. Schott during her life, Daisy R. having arrived at the age of twenty-one years, and been paid the legacy of $7,000. The testatrix divided the income of her residuary estate into eighths, five of which she gave to the accountants in trust for five persons, respectively, named by her, and the remaining three-eighths to the accountants in trust for Mary W. Schott, who appears to have been the principal object of her bounty. Each of the five persons was to have an eighth of the income, provided it did not exceed $400 per annum, and if there was any excess over that sum it was to fall into the residue. The contention in this case arises over the construction to be placed on the sentence, 'thereupon her interest in this annuity ceasing.' To whom does the pronoun 'her' refer? Rebecca or Daisy? It will be necessary to look at the words immediately preceding, which are, '* * * to the maintenance of herself and of Daisy R. Schott until Daisy shall have attained the age of twenty-one years, and thereupon her interest in this annuity ceasing,' etc. So that this pronoun 'her' might well be considered as referring to either herself (Rebecca) or Daisy, and, whichever of them it was intended to refer to, is to have no further interest in this annuity. The auditing judge thinks that the testatrix meant that the annuity should cease when the $7,000 was paid, and to this conclusion he is impelled by a number of considerations. If this annuity was intended to continue for the life of Mrs. Rebecca Schott, there is no bequest of the principal at her death, as in all the other cases, excepting the one to Mrs. Ridgely Schott,—which is similar to this one, being given for the maintenance of a minor,—and in both of

Digitized by Google

these cases the sum of seven thousand dollars is to be paid to the minor on her arrival at age, and in both it is provided that the annuity shall then cease. The testatrix no doubt thought that seven thousand dollars would be about one-eighth of the residuary estate, for on the termination of the annuities in each case by the death of the annuitant this is the sum she divides among the persons for whom she intends the same, excepting in the two cases where the seven thousand dollars was paid to minors on their arrival at age, where, it having been already disposed of, there is no further disposition made of it, and she makes none. If Daisy R. Schott has taken the fund which it was contemplated would produce this annuity, where is the annuity to come from? Certainly the testatrix did not mean that this should be paid by Mary W. Schott, the residuary legatee, who is the principal object of her bounty. In this case the auditing judge thinks that the bequest was really intended for Daisy R., but, she being a minor, it was given to her mother, for her use during minority, the principal to be paid to her on her arrival at full age; and this view is perhaps strengthened by the concluding words of the clause that the legacy was to lapse if Daisy died before the age of twenty-one. Upon the whole question the auditing judge thinks, as before stated by him, that this annuity ceased when the $7,000 was paid over to Daisy R. Schott; and he so finds."

Rebecca C. Schott excepted to the foregoing decision, and her exceptions were sustained by the orphans' court in banc, the following opinion being filed:

"The question here presented is again one of intention, and this can be best arrived at by a consideration of the entire will. Reinoehl v. Shirk, 119 Pa. St. 108, 12 Atl. 806; Baker's Appeal, 115 Pa. St. 590, 8 Atl. 630. And 'where there is no ambiguity in the terms of the will, a doubt suggested by extraneous circumstances cannot be permitted to affect its construction.' Gordon, J., in case last cited, following Sponsler's Appeal, 107 Pa. St. 95. Testatrix devised and bequeathed all the residue of her estate to trustees, to hold and pay the income, inter alia, as follows: 'To pay over another one-eighth part of the income thereof, not exceeding $400 per annum (everything in excess of that sum to go into the residue of the income of my estate), in equal quarterly payments, to Rebecca C. Schott, daughter of my brother James, for and during the term of her natural life, to be applied by her, without the duty of filing any account, to the maintenance of herself and of Daisy R. Schott, until Daisy shall have attained the age of twenty-one years, and thereupon, her interest in this annuity ceasing, to pay out of the principal of my residuary estate $7,000 to the said Daisy R. Schott; this legacy to lapse if she die before the age of twenty-one years.' At the death of testatrix, Daisy R. Schott was a minor. The annuity was paid to Mrs. Schott until Daisy attained her majority, since which time, it being recognized by the trustees that the latter's interest in the annuity ceased, she has been paid her legacy of $7,000. But it is now contended that Mrs. Schott's interest in the annuity also ceased upon Daisy reaching lawful age, and she is therefore no longer entitled to it, although it is expressly directed to be paid to her 'in equal quarterly payments * * * during the term of her natural life.' But we cannot agree with this construction of the language of the will; and, although the clause quoted is not skillfully prepared, we fail to discover that it admits of any ambiguity. In the first place, there is a clear and unequivocal gift of one-eighth of the income to the extent of four hundred dollars per annum; and, in the next place, in equally clear and express terms, it is directed to be paid to Mrs. Schott 'during the term of her natural life.' Again, the object of the gift is stated to be for her maintenance and that of Daisy R. Schott as long as she remained a minor. But it was to be applied in her discretion, and for which she was not called upon to account, unless she should be guilty of malversation. Biddle's Appeal, 80 Pa. St. 258. Now, while it cannot be disputed that Daisy R. Schott, having survived her minority, is entitled to her legacy, where is there any expression in the will showing the intention of testatrix to be in that event Mrs. Schott shall no longer continue to receive her annuity? After a careful consideration of the clause of the will above quoted, and all the provisions of the will, we are unable to ascertain any such intention. It is, however, thought to be shown by the expression used by testatrix in connection with the indication of her wish that Daisy be maintained also out of the annuity until she reached the age of 21 years, viz.: 'and thereupon, her interest in this annuity ceasing,' she shall be paid the sum of $7,000. And that the pronoun 'her' referred to Mrs. Schott, and not to Daisy. But this view is clearly in violation of the rule of grammatical construction; and the proper antecedent referred to is Daisy R. Schott, not Mrs. Rebecca Schott. The latter did not have any interest in the annuity. It was given to her absolutely for life. But Daisy had that which was recognized by testatrix as an 'interest therein, viz. maintenance during her minority,' and this interest in the annuity the testatrix undoubtedly intended to cease when Daisy reached her majority; the reason, no doubt, being that then she could be maintained by the income from her legacy, and would no longer need for this purpose, say any portion of the annuity. That this is the proper conclusion we think is shown by the clause in the will immediately preceding the one in question. There testatrix gives a similar annuity to Mrs. Ridgely Schott, to be applied by her, with-

Digitized by Google

out the duty of accounting, to the maintenance and education of Charlotte Engles Schott, until she shall have reached the age of 21, and thereupon (this annuity ceasing) to pay to Charlotte Engles Schott $7,000, and Mrs. Ridgely Schott $2,000. Here, it will be observed, she expressly declares the annuity shall cease upon Charlotte reaching the age of 21, and bequeaths a legacy to the former annuitant. Thus she was abundantly able to express her intention. And when, in the next item of her will, she gives an annuity, expressed in correct and technical language, for the life of the annuitant, charged with maintenance during minority only, and at the expiration of which bequeaths to the late minor a pecuniary legacy without in any way disturbing the annuity she had previously given, the natural conclusion is, such was her intention, and the annuitant was to receive her annuity during life, irrespective of the fact that the pecuniary legatee lived to be entitled to her legacy. And this construction is not to be affected by the fact that the income of the residuary legatee will be diminished. The latter cannot well complain, as by the will she is only given the income from that which is left after the payments previously directed. Both pecuniary legacies and annuities are clearly to be preferred. And, even should there be a doubt as to the meaning of testatrix, in view of the explicit and express gift of the annuity, as already shown, it will not be permitted to destroy the gift. It will 'not be cut down by any subsequent words or codicil, unless an equally clear intention is apparent; and, when a bequest is once made, it shall not be considered revoked, unless no other meaning can be put upon the language of the testator.' In re Watts' Estate, 3 Pa. Dist. R. 343; Wetter's Appeal (Pa. Sup.) 12 Atl. 260; Sheetz's Appeal, 82 Pa. St. 213; Reichard's Appeal, 116 Pa. St. 232, 9 Atl. 311. Much more might be said in support of the conclusion we have reached, but it is unnecessary. After a careful analysis of the other provisions of the will, with the clause in question, we are confirmed in the view that Mrs. Schott is entitled to the annuity during her natural life. We do not remember that it was suggested at the argument, but we may suppose the contingency foreseen and provided for by testatrix had occurred, viz. the death of Daisy in her minority. Would it then be doubted that Mrs. Schott is still entitled to the annuity? We think not. Then why, in the absence of any clear and explicit direction that it is to cease upon Daisy attaining the age of 21 years, should the annuitant be deprived of the contribution towards her maintenance, intended by testatrix? We cannot find that she contemplated any such result. The exceptions are accordingly sustained, and a final decree will be prepared by counsel in accordance herewith."

William W. Porter, Frederick J. Geiger, and George Q. Horwitz, for appellant. Henry Budd and Wm. A. Manderson, for appellee.

PER CURIAM. In the light of the clear and able argument of appellant's counsel in support of its contention, we have fully considered the questions presented by the specifications of error; but, for reasons given by the orphans' court, we think the will of Charlotte S. Engles was rightly construed, and hence there is no error in the decree. The reasons referred to are clearly and concisely stated by the learned president of that court, and on his opinion the decree is affirmed, and appeal dismissed, with costs to be paid by appellant.

WILSON et ux. v. BOUD.

(Supreme Court of Pennsylvania. Jan. 28, 1895.)

LIMITATION OF ACTIONS — CONTRACTS RELATING TO REAL ESTATE.

A contract to purchase real estate at sheriff's sale obligated the purchasers to reconvey to the owner on being repaid the amount bid at the sheriff's sale and incumbrances paid off by them, and provided that, if the owner was not able to redeem, the purchasers should pay her the difference between a fixed valuation and the amount paid out by the purchasers at the sheriff's sale, and to extinguish the incumbrances. *Held*, that an action by the owner to recover this difference was a suit for damages for noncompliance with a contract for the sale of real estate, within the meaning of Act April 22, 1856, § 6 (P. L. 1856, p. 532), which provides that no action shall be brought on such a contract but within five years after it is made.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by Robert Wilson and Lydia A. Wilson, his wife, in right of said wife, against James H. Boud and George S. Boud. From an order discharging a rule for judgment for want of a sufficient affidavit of defense, plaintiffs appeal. Affirmed.

The facts are stated substantially as follows in plaintiff's statement of claim: "On October 6, 1879, Lydia Ann Rogers, who was then a widow (now Lydia Ann Wilson), the appellant, entered into a written agreement, under seal, with her uncles James H. Boud and George S. Boud, trading as Boud & Bro., concerning a piece of real estate in Philadelphia which she owned in fee. This real estate was about to be sold by the sheriff for arrears of ground rent. Its value was considerably in excess of any incumbrances. The appellant was unable to attend the sheriff's sale, but was desirous to protect her interest in the property. Boud & Bro. then agreed to go that afternoon to the sheriff's sale, and try and buy the property, and, if they bought it, to hold it for appellant's benefit, or reconvey it to her upon the payment of the amount Boud & Bro. paid for it, together with the expenses. It was agreed, if appellant was either unable

Digitized by Google

or unwilling to take it back, that then Boud & Bro. should pay her for it at the price of $9,000. Boud & Bro. were to be allowed credit for the amount bid at sheriff's sale and the incumbrance against it. Boud & Bro. did buy as contemplated, and took the sheriff's deed in their own name, on November 22, 1879, and entered into possession, improved the premises, and, owing to appellant's inability to have a reconveyance, they have since remained the owners thereof. The price they bid and paid for it at the sheriff's sale was $3,400. The only incumbrance was a ground rent (principal), $4,800. Deducting the aggregate of these two amounts, viz. $8,200, from the price Boud & Bro. had agreed to allow appellant, viz. $9,000, there remained a balance due her of $800. To recover this balance of $800 from Boud & Bro., this suit was brought."

The affidavit of defense is as follows: "George S. Boud, one of the defendants in the above case, being duly sworn according to law, says, that he is advised, and therefore avers, that the plaintiff's statement filed does not make out for her a prima facie case, upon which judgment ought to be entered for her. Nevertheless, he says he has a good defense on the merits of this case, which defense is as follows: The plaintiff's property was advertised for sale by the sheriff on the day the said agreement was signed. She begged affiant and his brother James, now deceased, to bid it up, or buy it in for her, to save a sacrifice. Her counsel then drew up the contract sued on, which they signed without fully comprehending its legal effect. They did bid the property up to its full value, but she neglected to take her sheriff's deed, and at the last moment, to save her again, they were obliged to raise the whole of the consideration money at great sacrifice to themselves, and pay it in to the sheriff. She removed all the personal property that was worth taking away, she knowing full well that the property had already cost them more than it was worth, never made any claim or pretense that they owed her anything on account of said agreement, although she was living part of the time in my said brother's family, being a near relative, on friendly terms with both of us. On the contrary, I am informed, believe, and expect to be able to prove that she has acknowledged that she had been fully settled with by my brother and me. It is not true, as stated in said statement filed, that she, 'on December 1, 1879, notified the defendants that she had elected to allow the defendants to retain the said property, and to account to and pay her within one month after the delivery of the sheriff's deed.' On the contrary, though we have frequently met on the most friendly terms, she has never claimed, or pretended to claim, anything on account of said agreement. The first intimation we ever received was, shortly before suit brought, I got a letter from her counsel wishing me to compromise the claim. I never have, and I do not now, admit that they have any claim."

The defense principally relied on was Act April 22, 1856, § 6 (P. L. 1856, p. 532), which reads as follows: "No right of entry shall accrue or action be maintained for a specific performance of any contract for the sale of real estate or for damages for non-compliance with any such contract, or to enforce an equity of redemption after re-entry for any condition broken, or to enforce any implied or resulting trust as to realty, but within five years after such contract was made or such equity or trust accrued with the right of entry, unless such contract shall give a longer time for its performance, or there has been in part a substantial performance, or such contract, equity of redemption or trust shall have been acknowledged by writing to subsist by the party to be charged therewith within the same period: provided, that as to any one affected with a trust by reason of his fraud the said limitation shall begin to run only from the discovery thereof, or when, by reasonable diligence, the party defrauded might have discovered the same; but no bona fide purchaser from him shall be affected thereby or deprived of the protection of said limitation: and provided, that any person who would be sooner barred by this section shall not be thereby barred for two years from the date hereof."

William H. Peace and Theodore McFadden, for appellants. Lewis Stover, for appellee.

PER CURIAM. The rule for judgment for want of a sufficient affidavit of defense was rightly discharged. There is nothing in the case that requires discussion. Judgment affirmed.

RHOADS et al. v. CENTRAL COAL DEALERS' ASS'N et al.

(Supreme Court of Pennsylvania. Feb. 4, 1895.)

PLEADING—AFFIDAVIT OF DEFENSE.

In an action against the members of an unincorporated association for goods sold and delivered, an affidavit of defense which alleges that defendant had withdrawn from the association before the transaction in question took place, and that plaintiff knew of this fact, states a good defense.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by Samuel H. Rhoads and W. Durrell Shuster, partners, against Thomas Fitzpatrick and 28 others, doing business as the Central Coal Dealers' Association, for coal sold and delivered. A rule for judgment for want of a sufficient affidavit of defense was made absolute against Fitzpatrick, and he appeals. Reversed.

John W. Martin and Charles J. Sharkey, for appellant. William H. Shoemaker, for appellees.

Digitized by Google

STERRETT, C. J. This suit against the appellant, Thomas Fitzpatrick, and 28 others, "now or late doing business as the Central Coal Dealers' Association," was brought by Samuel H. Rhoads and W. Durrell Shuster, trading as Rhoads & Shuster, to recover $1,102.20, balance book account for coal alleged to have been sold and delivered by plaintiffs to the association defendant, between the 1st of January and the 6th of May, 1894, with interest, etc.

Assuming for the present that plaintiffs' statement is sufficiently specific, the sole question is whether appellant's affidavits do not present a good defense. After averring "that he has a full, just, and complete defense to the plaintiffs' claim," he further says, inter alia, that "he is not now, and has not been, connected in any way with the Central Coal Dealers' Association since December 13, 1892; that he is not indebted to plaintiffs in any sum whatever for coal sold and delivered, or for any other account whatsoever"; that plaintiffs never dealt with said association while deponent was a member, and W. Durrell Shuster, one of the above-named plaintiffs, knew that deponent was not a member of said association; and, in substance, he further says that he withdrew from said association in December, 1892, and has not since been connected therewith. Assuming, as we must, for the purposes of this appeal, that these and other averments contained in the affidavits of defense are true, it is very evident that the plaintiffs were not entitled to judgment for want of a sufficient defense, and hence the court erred in making the rule for judgment absolute. Appellant not only denies that he was a member of the defendant association during the period within which the coal was sold and delivered, but he positively avers that this fact was known to one of the plaintiffs. This was quite sufficient to put the plaintiffs to proof of the fact that appellant was a member of the defendant association, to which the coal was sold and delivered, or of such other facts as would make him jointly liable with those who then composed said association. Judgment reversed, and a procedendo awarded.

FRITZ v. JENNER.

(Supreme Court of Pennsylvania. Feb. 4, 1895.)

MASTER AND SERVANT — NEGLIGENCE — EVIDENCE.

In an action for personal injuries sustained while feeding a mangle, the court properly declined to direct a verdict for defendant, where three of plaintiff's witnesses testified that the accident was caused by broken cogs in the wheel which transmitted power to the mangle, and six of defendant's witnesses, who made such examination, testified that the machinery was in good repair.

Appeal from court of common pleas, Philadelphia county.

Trespass by Ella Fritz against Kate Jenner for personal injuries sustained by plaintiff while at work in defendant's laundry. There was a verdict in plaintiff's favor for $3,670, and from a judgment thereon plaintiff appeals. Affirmed.

The facts sufficiently appear in the following charge of the court (Pennypacker, J.):

"This is a case which will require your most careful consideration, because it is one where we are all of us more or less apt to be led away from the principles of law and the facts, which appear from the testimony, by considerations to which we ought not to give any attention. The suit is brought to recover damages for alleged negligence. The plaintiff was in the employ of the defendant, and on the 23d of July, 1889, had her hands burned to such an extent that they have since been of little practical value to her. The machine upon which she was at work is called a 'mangle,' and it was used for the purpose of ironing table cloths and napkins, and articles of that kind, about the laundry. It consisted of a large cylinder, which was some 16 inches in diameter, as I remember the testimony, smooth upon the surface, heated by steam and run by steam, the power being transmitted to it by large cogwheels. In connection with this cylinder were two smaller rollers covered with felt, two upon one side, and I believe two upon the other; but, at all events, there were four rollers altogether, and the article was inserted between these two rollers, and up over the smooth, heated cylinder, and out upon the other side, and in this way was ironed. Those who fed the machine presented the article to be ironed in front upon a table or some support of that kind. When this accident occurred the plaintiff was presenting a napkin, and as the napkin was drawn in between the rollers up over the cylinder her hands were also drawn along, and in this way she was badly burned. It is not enough, however, to show to you that an accident occurred. It must appear that there was some negligence on the part of the defendant. Negligence is a failure to perform some duty which the law imposes upon a person so charged. It is a failure to exercise due care under the circumstances of the case. The inquiry presented to you is not as to whether or not a machine is dangerous, or whether or not there was danger about the occupation in which the employe is engaged, but whether or not there was negligence on the part of the employer. The ordinary risks of the employment are assumed by the employe and this is true, even though it be a dangerous employment. All machinery, I take it, is accompanied with more or less of danger, and the law says that when an employe undertakes to do work upon a machine, the ordinary risks of that employment are assumed by the employe. The duty of an

Digitized by Google

employer is to furnish reasonably safe tools and machines looking to the requirements of the business in which he is engaged. He is not bound to furnish the best of machinery, but he is bound to take reasonable care in supplying ordinarily safe machines. He is also bound to take reasonable care in the supervision of them, and in seeing that they are kept in good order and condition. If he has done this much, he has done all that the law requires of him. If the ordinary risks of the employment result in an injury, there can be no recovery. The employé, the plaintiff, is bound, also, to exercise due care. If there is any negligence on the part of the plaintiff, she cannot recover. The law does not undertake to measure the extent or amount of negligence on the part of different parties, but if there has been any negligence at all on the side of the plaintiff there can be no recovery in the case. If an employe knows machinery to be in a dangerous condition, it is the duty of the employe to notify the employer to that effect, and if, instead of giving such notification, he or she undertakes to go ahead with the work with the machine in bad condition, that is contributory negligence upon her part, and it would prevent her recovery. In this case the plaintiff has testified to you that, upon this mangle upon which she was engaged, three or four pieces were out of the teeth on the large cogwheel, which transmitted the power, in different places; that when the wheel came to those places it would jerk. She tells you, further, that she complained to the defendant about this condition of the wheel; and that afterwards a machinist was sent for, and that then the defendant told her that the machine was in perfect order, and not to be afraid. Then, in describing the way in which the accident occurred, she says: 'The first napkin I took up, and went to run it through the machine, the machine stopped, and gave a jar, and pulled my hands in with the napkin.' To some extent, in her statement as to the fact that the defendant told her the machine was in good order, and that she need not be afraid, she is corroborated by one witness, Katie Brown, who says to you that she saw the engineer there, and that after that the defendant said that there was nothing the matter with the machine whatever. If the defendant did so tell her,—and you will remember it is denied by the defendant,—I instruct you that the plaintiff might rely upon the assertion of the defendant as to the condition of the machine. We have no evidence that the plaintiff was an expert with respect to the running of the machine and its construction. She had been employed about it, had been at work upon it, if we accept her story, in supplying the articles to be ironed in the front of it; but it would be difficult to infer from that that she was necessarily familiar with the construction of the machine itself, and, if the defendant so told her, then I think, and instruct you, that she was justified in going to the work. Katie Brown further says to you that portions of the teeth were broken out, and the machine would stop, jar, and go on; that two or three of the cogs were broken. Mary Morton, another witness, who says that she left the employment of the defendant on the morning of the accident, but had been there for some length of time before, and who says that she worked at the mangle, testifies that the teeth were broken out, that it would sometimes jar and jump, and that the things would have to be ironed over again. That is practically the testimony which has been presented to you to show to you that the machine was out of order, and that the plaintiff went to work upon it because of a statement made to her by the defendant. As I have already said to you, the defendant denies that she made any such statement.

"This case of the plaintiff is met by the defendant in three different ways. In the first place, evidence has been brought before you on the part of the defendant to show that the plaintiff was employed, not to work upon the mangle, but to work upon another machine in that laundry,—a body machine,—where she worked upon shirts. Mrs. Jenner tells you that she was never instructed to go to the mangle at all. In that she is corroborated by her son, who employed the plaintiff, and who says the employment was for her to work upon the other machine, and that she never received instructions to work upon the mangle, and that he never saw her at work upon it. Two witnesses for the plaintiff, the plaintiff herself and Katie Brown, however, testify that the defendant's son did instruct her upon that morning to go to work upon the mangle. Two other witnesses for the defense, Mary Ryan and Emma Devinney, both say that they heard the plaintiff say, upon that morning, when she went to work upon the mangle, that unless the defendant sent her to the mangle she would leave the place. If the plaintiff was employed to work upon the body machine, and went of her own accord, and without directions, to work upon the mangle, which was apart from her employment, she is not entitled to recover. She assumed the risks herself. A number of experts, persons who are familiar with machinery, and machinery of this character, have testified to you, in effect, that if the teeth were broken upon the large wheel, as contended for by the plaintiff, the result would be, not that there would be a jarring and jerking of the machinery, but that the machine would stop in its work. They are not identical in their expressions of opinion, but that is substantially the result of the testimony of a number of witnesses who were experts upon the subject. Mrs. Jenner, who, in the course of an extended business of this character, we may suppose to have become familiar with the working of the machinery,

Digitized by Google

testifies that if the cogs were broken it would be utterly impossible to make it jump forward. Mr. Kelly said if these cogs were broken out the machine would not run, and Mr. Forson testified that if the gear was broken it could not jump. Mr. Smith, who went into quite an intelligent description of the machine and its parts, and who apparently understood it, if we may rely upon his testimony to that effect, tells you that if one of the cogs was broken the machine would run on in the same manner,—it would not be interrupted; that if two of the cogs were broken out it would run for one turn only; and that if three of them were out it would come to a full stop. Now, on the other hand, there was an expert witness, Mr. Stinsman, called by the plaintiff, who gave his opinion that if the teeth were broken the rollers would jump forward as far as the space in the boxes, and he undertook to measure that by saying three-eighths of an inch, and more if worn more. The defendant, however, does not rely entirely upon either of these defenses. The main, if I may call it so, the main contention of the defendant is that the machine was not out of order at all. That, as you see, goes to the very foundation of the case. There has been no testimony produced by the plaintiff to show that there was anything the matter with the machine, except that these pieces were broken, as alleged, out of the cogs upon the main wheel. And Mrs. Jenner says that she examined that machinery every day; that she looked at this cogwheel after the accident, and that she found it in perfect order. Mary Ryan, another witness, who was standing alongside of the plaintiff at the time that the accident occurred, and also worked upon the mangle, says that she observed no defect about it, and she goes on further to say that after the plaintiff was hurt the machine was started to work again, and there was no trouble with it, and she saw no jarring of the cylinder and no jarring of the rollers. Mary Devinney was also at work upon this mangle, and she testifies to seeing the accident just as it occurred. She says, too, that after this accident occurred the mangle started to work, and worked all right, and there was no jarring or jumping of the rollers. Mr. Fogel, an employe about the establishment, went to look at the machine that night, and he testifies that he examined the cogs, and there was nothing broken about it. Mr. Cavanagh says that every day he oiled the machinery; that he oiled it that morning, and examined it, and there were no cogs broken. In addition to that, Mr. Newman, whose duty it was to distribute the articles after they had been washed and ironed, and whose work required him to come up to this machine in order to get those articles, says that when he came there about half past 11 o'clock in the morning he was told of the fact that the accident had occurred; that he examined the machine, and looked at the cogs; that it was in good order, and there were none of the cogs broken.

"You have therefore six witnesses who testify substantially the same way; witnesses who were there and about the machine, who say that there were none of the cogs upon it broken at all, and that the machine was in good order. About this question of fact it would appear that there ought not to be any dispute. As to whether or not the cogs on the wheel were broken was a fact very easily ascertainable, and if it is to be assumed that the persons about the machine supposed at the time that the accident was due to the fact that there was a break on the wheel, and that there were cogs out of it, or cogs broken, they would at once have definitely ascertained the fact. It would seem to be the most natural thing for those about at the time to look at it, and ascertain whether this condition of things existed. As I have pointed out to you, these six witnesses are confronted by three others on the part of the plaintiff, who testify to you that cogs were broken upon the wheel,—were more or less broken; but I do not know that any one of them has said to you that at the time of the accident, or immediately afterwards, they went to look at it to see whether or not that state of facts actually did exist. Now, this is the testimony in the case. As I have gone over it briefly, I have pointed out those things which have impressed me. I want you to understand that questions of fact you are solely to determine. You are to remember what is the evidence, and to find out what it is that the evidence points to in the way of results. If there was negligence on the part of the defendant, and if that negligence was the cause of the accident, and there was no contributory negligence on the part of the plaintiff, then your verdict will be for the plaintiff. If, on the contrary, this accident was not due to any want of care or attention on the part of the defendant, not due to any negligence upon her part, but some other cause,—if it was one of those accidents which occurred because of the ordinary use of a machine, the ordinary risk assumed,—or if there was any contributory negligence on the part of the plaintiff, then your verdict ought to be for the defendant. In case you find for the plaintiff, you will give her what will compensate her for the injury that she has sustained. The measure of damages will be such fair compensation as would be due to her because of the pain and suffering she has endured, and also what she has lost in the way of earnings, and what will compensate her for her loss of earning power hereafter. There is no dispute that she has been seriously injured. She was earning $5 a week, and she is now 24 years of age. In reaching a decision upon the questions submitted to you, you will endeavor to do justice according to the evidence and the principles of law which have been explained to you. We all of us sympathize with the plaintiff. We commiserate with her in her misfortune. If there was anything that we could do for her individually to alleviate that misfortune, no

Digitized by Google

doubt we would do it; but we do not intend, either as court or jury, because of sympathy with the plaintiff, to be led away from the determination of the real question involved, which is as to whether or not the defendant was negligent. I am asked on the part of the defendant to instruct you that under all the evidence in the case the verdict should be for the defendant. I decline that point. (Exception for the defendant.)"

Charles Davis, for appellant. Christopher L. Flood, for appellee.

PER CURIAM. It is not even alleged that there was any error either in the admission or rejection of testimony, or in the learned trial judge's instructions as to the law applicable to the facts which the evidence tended to prove. The sole complaint is his refusal to charge, as requested, "that, under all the evidence in the case, the verdict should be for the defendant." In view of the testimony tending to prove that plaintiff's injury was the result of defendant's negligence, it would have been manifest error to have thus withdrawn the case from the jury by giving binding instructions to find for defendant. The case was clearly for the jury, and it was submitted to them with instructions quite as favorable to the defendant as she could reasonably ask. Judgment affirmed.

GOWEN v. PIERSON.

(Supreme Court of Pennsylvania. Jan. 28, 1895.)

ACTION ON AWARD—DEFENSES.

Where the parties to an executory contract agree that all disputes in relation thereto shall be first submitted to the arbitrament of one or more named persons, one of the parties cannot, in a suit on the award, raise questions which he might have presented to the arbitrators, or reopen questions on which they were authorized to pass, and did in fact determine, making the award.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by Francis I. Gowen against Isaac K. Pierson on an award of arbitrators under a building contract between the parties. From an order discharging plaintiff's rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Reversed.

In March, 1888, defendant entered into a contract to build a dwelling house for plaintiff, according to plans and specifications prepared by Messrs. Cope & Stewardson, architects. The affidavit of defense is as follows: "Isaac K. Pierson, being duly sworn according to law, doth depose and say that he is the defendant in the above-entitled case, and that he has a just and true defense to the whole of the plaintiff's claim, of the following nature and character, to wit: (1) That the contract set forth in the statement of plaintiff's claim, as being made between the plaintiff and defendant, was fully performed and executed by the parties thereto, the defendant having performed all of the conditions thereof on his part, and the plaintiff on his part having paid him in full all the sums mentioned in said contract, to wit, the sum of twelve thousand one hundred and fifty-three ($12,153) dollars, for the several items mentioned therein. (2) That the said plaintiff, on or about the 28th day of March, A. D. 1888, employed the said defendant to do and perform certain extra work and labor, and furnish certain extra material to enter into the construction of said house, in addition to that theretofore furnished and done, amounting to the sum of four thousand four hundred and fifty-five dollars and thirteen and one-half cents ($4,455.13½), all of which work and labor was done and materials furnished as aforesaid by defendant to plaintiff; that of this sum the sum of four thousand one hundred and sixty-two and 36/100 dollars ($4,162.36) has been paid to defendant, leaving a balance of two hundred and ninety-two and 77/100 dollars ($292.77) still due and justly owing from the plaintiff to the defendant, and he will ask for a certificate therefor. (3) That the alleged award annexed to the statement of plaintiff's claim does not entitle plaintiff to recover thereon, because: (a) There is nothing to show that the arbitrators had jurisdiction of the matter submitted. (b) The payment of the entire contract price, together with the sum allowed for extra work, was in full performance of the contract, and a waiver of the arbitration clause on the part of the plaintiff. (c) The said award does not state that all matters in controversy were submitted or determined. (d) The award does not allege any specific cause of action, or any breach of any particular part or covenant of the contract which appears to have been the subject of said award. (e) The said award is otherwise vague, uncertain, indefinite, and is not in effect a statement under the act of 1887, requiring an affidavit of defense."

James E. Hood and Geo. Tucker Bispham, for appellant. Charles A. Chase and Charles C. Lister, for appellee.

STERRETT, C. J. This action is on an award of arbitrators, who were chosen by the parties to this suit in the concluding clause of a building contract executed by them on March 28, 1888. Said contract, and the award made in pursuance of the arbitration clause thereof, are fully recited in plaintiff's statement of claim. After providing for the erection of the house therein mentioned, etc., "according to and in all respects conforming with the plans and specifications prepared by Cope & Stewardson, architects," the contract expressly provides that any variations thereof, "made at the request of the party of the second part, will

Digitized by Google

be executed by the party of the first part without additional charge, unless there is a written agreement entered into by the parties hereto upon the subject of such variations"; and then concludes with the said arbitration clause, thus: "The above-named architects, Cope & Stewardson, are hereby made arbitrators to determine all questions arising under this contract, and no action shall be sustained by either party hereto for any alleged breach of the same until said arbitrators shall have certified that there is a cause of action; and if they shall certify the amount due, in respect of such breach, then no action shall be maintained except for the amount or sum so certified. And it is further agreed that, in case of the death of either of the architects above named, the survivor of them shall have and exercise all power and functions hereby given to them jointly." Disputes having arisen between the parties as to certain matters pertaining to the building contract, the action of said arbitrators was duly invoked by the plaintiff. After notifying the defendant of the time and place of meeting, etc., they proceeded to hear and consider the matters in dispute, and thereupon found that there existed a valid cause of action on the part of the plaintiff against the defendant, owing to a breach of said contract by the latter, and further found and certified that there was due by him to plaintiff, in respect of said breach, the sum of $1,320.55. This action of the arbitrators is fully set forth in their award. It is also stated therein that the defendant, although duly notified of the time and place of meeting, adjourned meeting, etc., failed to appear before them, in person or otherwise.

Plaintiff's statement, in clear, precise, and specific terms, presents a complete cause of action; and the only question is whether there is anything in defendant's affidavit that amounts to a valid defense. If there is, we have failed to discover it. Defendant does not deny that there were matters in dispute between himself and plaintiff in respect of the building contract; nor does he deny that, after being duly notified of the meetings of the arbitrators, he stood aloof, and refused to participate therein. No reason for this is even suggested, unless it be in the averment that he had received from plaintiff all that he was entitled to claim, except "a balance of $292.77, still due and justly owing from the plaintiff, to the defendant," etc. This is no excuse for refusing to appear before the arbitrators, and make such answer as he had to plaintiff's complaint. Having thus ignored the special tribunal which he assisted in creating and investing with full and exclusive authority, "to determine all questions arising under" the contract between plaintiff and himself, he is not in a position to raise questions which he might have presented to the arbitrators, or to reopen, in this action on their award, questions upon which they were authorized to pass, and did in fact determine, in making up their award. According to the terms of the submission, the arbitrators were to determine all questions arising under the building contract. No action could be maintained by either party for any alleged breach of the contract until a cause of action was certified by the arbitrators, and if, as was done in this case, they certified "the amount due in respect of such breach," then no action could be maintained except for the amount or sum so certified. The law applicable to such submissions and awards is well settled in a long line of cases, among which are Navigation Co. v. Fenlon, 4 Watts & S. 205; Reynolds v. Caldwell, 51 Pa. St. 298; Hartupee v. City of Pittsburgh, 97 Pa. St. 107; Hostetter v. City of Pittsburgh, 107 Pa. St. 419; Assurance Co. v. Hocking, 115 Pa. St. 407, 414, 8 Atl. 589; Kennedy v. Poor, 151 Pa. St. 474, 25 Atl. 119. In these, and other cases that might be cited, the law is definitively settled that, where parties to an executory contract agree that all disputes arising in relation thereto shall be first submitted to the arbitrament of one or more named persons, they are bound by the terms of submission, and cannot seek redress elsewhere until the person or persons so chosen have been discharged, by having made an award or otherwise; but where the agreement is to submit to one or more persons, to be afterwards agreed upon, the law is different. In Hartupee v. Pittsburgh, supra, the plaintiff was nonsuited, on the ground that his only remedy under the contract was on an award by the defendant's mechanical engineer, who was final arbiter of any dispute under the contract in question, and no such award had been made.

We are satisfied that the affidavit of the defendant discloses no available defense, and the rule for judgment should have been made absolute. It is therefore ordered that the record be remitted to the court below, with directions to enter judgment against the defendant for the sum claimed by plaintiff, unless other legal or equitable cause be shown why said judgment should not be so entered.

LANG v. FINCH.

(Supreme Court of Pennsylvania. Jan. 28, 1895.)

EXECUTION AGAINST THE PERSON—ACTION ON CONTRACT.

Ejectment by a landlord, grounded on breach of a covenant in the lease against subletting the demised premises, is an action for breach of contract, and not for a tort; and, no mesne profits being allowed, but only a judgment for costs rendered, defendant is within the protection of Act July 12, 1842, which provides that no person shall be imprisoned on any civil process in a suit for the recovery of damages for the nonperformance of a contract.

Digitized by Google

Appeal from court of common pleas, Philadelphia county.

Amicable ejectment by Amelia C. Lang, devisee, etc., of Jacob Lang, deceased, against George W. Finch. There was a judgment for plaintiff for the possession of the premises and for costs. An alias fi. fa. for costs was issued, and returned nulla bona; and a capias ad satisfaciendum was issued, under which defendant was arrested. He was discharged by the court. From an order discharging a rule to show cause why an alias capias should not issue, plaintiff appeals. Affirmed.

James A. Laws and A. F. Daix, Jr., for appellant. Joseph S. Goodbread, for appellee.

STERRETT, C. J. In this amicable action of ejectment, entered in pursuance of a clause in the lease between plaintiff's devisor and the defendant, judgment against the latter was confessed, and possession of the demised premises was delivered to plaintiff, but as to costs the return was "nulla bona." A capias ad satisfaciendum for the costs was then issued and executed, and thereupon the court quashed the writ, and discharged defendant from custody. Plaintiff then entered a rule for leave to issue an alias ca. sa. for costs, and the same was promptly discharged by the court; hence this appeal. The sole question is whether the defendant was liable to arrest and imprisonment for the costs in question. If he was not, the alias ca. sa. was rightly refused. It clearly appears from the record that the amicable action is grounded solely upon an alleged breach of the lease, above referred to, in this: that the defendant, as lessee, without the consent of his lessor, sublet the demised premises to a certain firm, and then removed therefrom, taking his goods with him. It is not even alleged that he committed any act, of a tortious nature, either in obtaining or holding possession of the premises, or in surrendering the same to his sublessee, or otherwise. All that is charged against him is, in substance, that as lessee he failed to keep and perform all his covenants with his landlord; and that, by reason thereof, the latter, under the terms of the lease, had a right to terminate the same, and repossess himself of the demised premises, in the manner specified in the lease. In other words, the plaintiff's right of action, as well as the speedy remedy of which he availed himself, sprang, not from a tort, but solely from a breach of contract, and hence the defendant is within the protection of the act of July 12, 1842. The judgment contains no element of damages in the nature of mesne profits; and, so far as the costs of suit may be regarded as a species of damages, they are in this case merely a debt arising, not from tort, but from a breach of contract. We are therefore of opinion that the court was right in discharging plaintiff's rule. Judgment affirmed.

MACK PAVING CO. v. YOUNG.

(Supreme Court of Pennsylvania. Jan. 28, 1895.)

AFFIDAVIT OF DEFENSE—SUFFICIENCY.

In assumpsit for work and labor and for material furnished in paving a footway on defendant's premises, as ordered by her husband, as her agent, an affidavit of defense which does not deny the husband's agency, or the necessity of a particular item, objected to by defendant, to complete the work ordered, is not sufficient to carry the case to the jury.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by the Mack Paving Company against Irene M. Young for paving. From a judgment for plaintiff, for want of a sufficient affidavit of defense, defendant appeals. Affirmed.

Plaintiff's statement of claim was as follows:

"Plaintiffs claim to recover the sum of $114.30 with interest from April 22, 1893, being the amount due by defendant to plaintiffs for work and labor done and performed, and material furnished, in repaving footway in front of premises 410 and 412 South Front street, and resetting curb in front of same, and which said work and material were as follows:

45.13 square yards of block pavement, with pebble and pitch cemented joints	$2 00	$90 26
38.4 square yards of repaving old block pavement	1 50	19 20
24 feet 2 inches of curb reset	20	4 84
		$114 30

"Plaintiffs aver that the said Irene M. Young is the owner of the said premises, 410 and 412 South Front street; that she authorized Charles W. Young, her husband, as her agent, to contract with the plaintiffs to do the said work and furnish the said materials as set forth; and that the said Charles W. Young, acting as agent for the said Irene M. Young, and by her authorized, and at her instance and request, did employ said plaintiffs to do the said work and furnish the said materials, and, at the time the said work was done and materials furnished, the said Charles W. Young did not disclose to plaintiffs that he was acting as the agent for the said Irene M. Young, his wife. Plaintiffs aver that the said work, as done, and the materials, as furnished, were necessary work and material done and furnished to and for the repair and improvement of the separate estate of the said Irene M. Young, and that the whole amount of the said claim, with interest from April 22, 1893, is justly due and payable to plaintiffs."

The affidavit of defense was as follows:

"Irene M. Young, the defendant above named, being duly sworn according to law, doth depose and say that she has a just and true defense to a part of the plaintiffs' claim in above case, of the following nature and character, to wit: That deponent never em-

Digitized by Google

ployed, or authorized any other person to employ, the plaintiff to do the work, 38.4 square yards repaving old block paving, $1.50=$19.20, mentioned in plaintiffs' statement, and is not indebted to the plaintiffs for the same; that the work done in the paving with pebble and pitch was not done in a proper way, nor in accordance with the directions given to the plaintiffs to do said work; that the plaintiffs, in doing this work, did more than twenty per cent. more work than they were ordered, directed, and employed to do, which was unnecessary, and for which the defendant claims a credit herein; that a part of the work done in the laying of said blocks was improperly done, not being laid according to the proper grade of the city regulations and the survey department of the city, and that part must be taken up and relaid, the cost of which the defendant is entitled to set off in this case. All of which deponent believes and expects to be able to prove upon trial."

De Forrest Ballou, for appellant.

E. O. Michener, for appellee.

The affidavit of defense is evasive, and so indefinite that the amount of alleged overcharge or overwork cannot be ascertained. In the first paragraph there is no denial that the agent, her husband, had not general authority to order all work for her, nor is there any denial that this work was necessary to complete the work ordered. The balance of the affidavit amounts to nothing. Defendant claims a set-off, but does not give any figures, so that it is impossible to fix accurately the amount claimed.

PER CURIAM. The court was quite right in holding that the affidavit of defense was insufficient to carry the case to the jury. Judgment was rightly entered in favor of the plaintiff company, and there appears to be no reason for disturbing it. Judgment affirmed.

In re GORGAS' ESTATE.

Appeal of ROBINSON.

(Supreme Court of Pennsylvania. Jan. 28, 1895.)

RESIDUARY LEGACIES—LAPSE—NEXT OF KIN.

1. If a specific legacy lapses, it falls into and becomes a part of the residuary estate, and is to be distributed under the provisions of that clause of testator's will; but if the lapse is of a devise or bequest contained in the residuary clause itself, then testator must, with reference thereto, be considered as having died intestate, unless there is a provision for survivorship among the residuary legatees, or a gift over in case of the death of any of them.

2. The fact that the person who will take under the intestate law is a niece, as to whom the will made no provision, on the ground that she was already in receipt of a large income, does not prevent the niece from taking the share of one of the residuary legatees, which lapsed by his death during testatrix's lifetime.

Appeal from court of common pleas, Philadelphia county.

On final distribution of the estate of Susan Gorgas, deceased. From a decree awarding the share of Elizabeth Lehman, a residuary legatee, who died in testatrix's lifetime, to Susan Gorgas, a niece of testatrix, Catharine Robinson, another residuary legatee, appeals. Affirmed.

The following opinion was delivered in the orphans' court (Ferguson, J.) on exceptions to the report of the auditing judge:

"It is no doubt settled as the law of this state that if a legacy, from any cause, lapses, it falls into and becomes a part of the residuary estate, and is to be distributed under the provisions of that clause of the testator's will; but, if the lapse is of a devise or bequest contained in the residuary clause itself, then the testator must, with reference thereto, be considered as having died intestate. To sustain this view of the law, it is only necessary to refer to the recent cases of Vaux's Appeal, 156 Pa. St. 194, 27 Atl. 57, and Gray's Estate, 147 Pa. St. 67, 23 Atl. 205, where this whole subject is fully considered. In the case now under consideration, the testatrix gave her residuary estate to four persons, to be equally divided between them. One of them died in her lifetime, and her share lapsed. There was no provision for survivorship among the residuary legatees or gift over in case of the death of any of them, and therefore, under the law as above stated, there was an intestacy as to this share. It happened, however, that the person who is entitled to take under the intestate laws is a niece, as to whom the testatrix said in her will: 'I entertain a feeling of love and affection for my niece, Susan Gorgas, of West Chester, and my sole reason for not making her a legatee under this will is the fact that she is already in receipt of a large income derived from her father's and uncle's estates.' It was contended that as the testatrix by this clause of her will manifested an intention to exclude her niece from any participation in her estate, and as she knew this niece would be entitled thereto under the intestate laws, and as it is presumed that a person who makes a will does not intend to die intestate as to any portion of his estate, it follows that the testatrix meant that the survivors of those named in her residuary clause were to take the share of any of them that died. But the testatrix does not say this in her will, and, in the absence of any declaration upon her part, we cannot so conclude. While it is no doubt the fact that for the reason which she states she did not intend that this niece should share in her estate, yet it is also a fact that by reason of the death of one of the residuary legatees there is an intestacy as to one share of the residue of her estate, and this niece is the person entitled thereto. The clause quoted gives the reason why the niece was not named as a legatee, but this does

Digitized by Google

not preclude her from taking any portion of this estate to which she would be entitled under the intestate laws. She certainly has no claim under the will, and does not make any, but this is no reason why she should be prohibited from taking what the law gives her. In Hancock's Appeal, 112 Pa. St. 532, 5 Atl. 56, we have a much stronger case presented. The testator gave and bequeathed 'to Thomas Hancock, son of my sister Jane Hancock, only one-sixth of such portion as the law would give to said Jane Hancock, and the remaining five-sixths to be divided among my other brothers and sisters or their heirs.' He died intestate as to the bulk of his estate, which passed under the residuary clause, and which amounted to nearly $300,000. In this case there was an apparent attempt in terms to limit Thomas Hancock's interest in this estate to one-sixth of what would have been his mother's share in case of intestacy, but, notwithstanding this, the supreme court held that, as the testator died intestate as to his residuary estate, Thomas was entitled to participate therein with the others interested, and take his full share thereof under the intestate laws."

William W. Porter, Frederick J. Geiger, and George Q. Horwitz, for appellant. J. B. Townsend, for appellee.

PER CURIAM. After making sundry bequests, etc., the testatrix gave "all the rest, residue, and remainder of" her estate to four persons, by name, "to be divided among them in equal shares absolutely." She made no provision for survivorship or gift over in case either of the residuary legatees should die in her lifetime. One of them did predecease her, and the court, rightly holding that there was a lapse as to that share, awarded the same to a niece who was entitled to take under the intestate law. This, as is clearly shown in the opinion of the orphans' court, is in accordance with the well-settled law of this state, that, as to a lapsed devise or bequest contained in a residuary clause, the testator must be regarded as having died intestate. There is nothing in the will under consideration to take this case out of the general rule. For reasons given in the opinion referred to the decree should not be disturbed. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

STAFFORD v. DEVEREUX.

(Supreme Court of Pennsylvania. Jan. 28, 1895.)

BROTHER AND SISTER—COMPENSATION FOR BOARD.

The relationship of brother and sister is not such as involves any duty of support, or negatives the implied contract to pay for board furnished; and a sister who furnishes board to her brother is entitled to recover therefor, unless there was some understanding between the parties to the contrary.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by Mary L. Stafford against Richard G. Devereux for board furnished defendant. There was a verdict for defendant, and from an order denying plaintiff's motion for a new trial she appeals. Affirmed.

Prior to 1879 the plaintiff and defendant, who were brother and sister, with their two other sisters, Helen and Annie Devereux, lived with their parents at 313 Pine street, Philadelphia. In 1879 the father died, and in 1881 the mother died. The four children then became entitled to this property, 313 Pine street. They continued to live in the house from the death of the mother, in 1881, until the last of March, 1888, when the plaintiff left the house, the defendant and the other two sisters remaining in it, and continuing to occupy it. On the 12th day of July, 1886, an agreement was made in which the plaintiff was to lease the house, and the defendant and the other two sisters were to pay board at the rate of $2.50 per week so long as they were at the house. This agreement was written by the defendant, and signed by him. The plaintiff claimed board under this written agreement, and also on a verbal understanding between plaintiff and defendant. Plaintiff claimed board from the time she took the house, at the death of her mother, until she left the house, in March, 1888. This suit was brought January 3, 1890. The defendant pleaded the statute of limitations, and the plaintiff was not allowed to claim for board for a longer period than six years preceding the bringing of suit.

The court (Jenkins, J.) charged the jury as follows:

"I have been asked by the counsel for the respective sides to charge on certain points, and I shall begin my charge by reading them to you. The plaintiff has asked me to charge: 'First. The relationship of brother and sister is not such as involves any duty of support or negatives the implied contract to pay for boarding furnished.' Answer of the court: I affirm that point. 'Second. If the jury believe that the plaintiff furnished the defendant with board during all or any part of the time for which her claim is made, and that she has not been paid therefor, the plaintiff is entitled to compensation, even though no express agreement as to the payment of board was made between the plaintiff and defendant.' Answer of the court: I affirm that point. 'Third. If the jury believe that the plaintiff furnished the defendant with board, the law implies a contract on the part of the defendant to pay the plaintiff therefor, and the burden of showing that nothing was to be paid for the board is upon the defendant.' Answer of the court: I affirm that point. ['Fourth. If the jury believe that the defendant's alleged services were rendered

Digitized by Google

to plaintiff without the expectation of compensation therefor at the time the services were rendered, the defendant cannot now legally claim compensation therefor.' Answer of the court: I affirm that point, and in affirming that point I may say it cuts both ways; that, if board was furnished under those terms, the plaintiff cannot claim board.] The defendant has asked me to charge you: ['Fifth. If the jury believe that the plaintiff and defendant lived with their sisters in the house left by their parents as a common home, and that it was understood between all parties that the agreement, so far as it related to the defendant, would be fully complied with by the performance of services about the house, and that he fully performed the services agreed to be performed by him, the plaintiff cannot recover.' Answer of the court: I affirm that point.] 'Second. If the jury believe that the plaintiff performed services for the defendant which were worth as much or more than the value of the board sued for, $2.50 per week, the defendant is entitled to offset those services against the claim for board.' Refused, because there was no plea of offset and notice of special matter, as required by the rules of court. 'Third. The verdict of the jury should be for the defendant.' Answer of the court: I refuse that point.

"It seems that all the children of common parents lived together in a house which apparently was owned by the parents prior to their decease. They made a family; they made a home. It also seems that Mary L. Stafford, who is the plaintiff here, was put in charge of that house practically by the other members of the family, and you have before you what is called an 'agreement of lease,' dated the 12th of July, 1886, and alleged to be between Richard G. Devereux, Helen Devereux, Anna F. Devereux, and Mary L. Devereux, coheirs of Mary Colts Devereux, deceased, of the one part, and Mary L. Devereux, on her own behalf, of the other part. It is a lease by the plaintiff to herself, as one of the coheirs, which only shows the informality with which the whole matter was done. Then it describes the property, and 'the yearly rental to be the sum of $365, payable as follows: The sum of $250 to be applied to the payment of the interest on the mortgage held by the Philadelphia Saving Fund Society, in semiannual payments, on the thirteenth days of January and July, and the balance to be applied to the payment of taxes and water rents.' So that you see that, while the lease says rent was to be paid, part of it was to be paid by the lessor to the lessee, the lessor and the lessee being the same person. The appropriation of the rent was provided for in the lease, so that you see that it is not by any means such a paper as would ordinarily be between a lessor and a lessee, or between a landlord and a tenant. 'The necessary repairs to be paid by the parties of the first part, share and share alike.' They are all of the parties, because all of the parties of the first part included the party of the second part, so that the repairs were to be made apparently by all of them. 'Any of the parties of the first part remaining on the premises agree to pay to the party of the second part such amount of board as may be mutually agreed upon, which is hereby fixed at the sum of $2.50.' It is over that last clause that the trouble in this case has arisen. [It is alleged upon the part of the plaintiff that her brother, who was living in the house, was to pay her $2.50 according to the contract. That is what the contract says; but all the other people to the contract agree that as to Richard he was not to pay the $2.50; that he did chores about the house.] [In fact there has not been a witness upon the stand but what admits that he did something. Even the plaintiff herself says so, and the washerwoman thought that she had a right or at least thought that she was not transcending her power when she suggested to him that he might bring up coal. These things are straws which show which way the wind blows, and are proper to be considered by you in coming to a conclusion. That same good woman said that he complained when he had to answer the bell, which would seem to my mind to carry the idea that it was somewhat incumbent upon him to answer the door bell. This washerwoman, who was there as general house cleaner, testifies as to many other things. She says that, when she went there in the mornings, she would find the fires made. She did not know who did it. The defendant says he did it, and the plaintiff herself says that sometimes he did it. The other sisters who were living in the house say that he always did it, and that he acted the part of, perhaps, waitress and chambermaid around that house. It is for you to determine whether he has shown to you that that is what he did do, and that, in consideration of those services, he was not to pay any board. If you find that that is true, your verdict ought to be for the defendant.] If you find it is not true, your verdict ought to be for the plaintiff. The plaintiff cannot claim any more than for six years prior to the commencement of this suit, which was in January, 1890, if you should find for her."

The first and second specifications of error relate to the answer of the court to the two requests to charge contained in brackets. The third and fourth relate to those portions of the charge contained in brackets. The other specifications are as follows: "(5) The learned judge erred in overruling plaintiff's objection to the following question, asked the plaintiff by defendant's counsel, as follows: 'XQ. Now, in point of fact, didn't your brother do a large share of the work in the house, which he did for you and for the rest of the family in lieu of paying any board? (Objected to. Objection overruled. Excep-

Digitized by Google

tion noted for plaintiff.) A. There never was anything done in lieu of paying board, nor any work done as such, nor anything said about it.' (6) The learned judge erred in overruling the plaintiff's objection to the following question, asked the plaintiff by the defendant's counsel: 'XQ. It [the agreement] says you were to pay the rent, and it was to be applied in that way, payable in that way. You didn't pay the interest due on January 13, 1888, did you, out of your money? (Objected to. Objection overruled. Exception noted for plaintiff.) A. I gave him part of the money. The balance was not paid to me; so I could not.' (7) The learned judge erred in overruling plaintiff's objection to the following question, asked the defendant by his counsel: 'Q. How many furnaces were in the house? (Objected to. Objection overruled. Exception noted for plaintiff.) A. One furnace and about half a dozen fires.' (8) The learned judge erred in overruling the objection of plaintiff to the admission of the following evidence: 'Q. Now, do you know anything about the payment of the interest upon the mortgage between 1886 and 1888? A. Mrs. Stafford, when she left the house, the first I knew of there was a notice from the Philadelphia Saving Fund saying that there was two hundred and some odd dollars back interest which had not been paid, and Mr. Pierson wrote me a very crisp note saying that, if it was not paid within a few days, he would foreclose the mortgage. My sister Helen and I went to work between us. I went to see him, and got an extension of time on it, and my sister Helen and I went to work and gathered the money together as well as we could, and where we could, and between us paid it. Those are the receipts. Those receipts never were in Mrs. Stafford's possession, and never saw them, and never had one cent of the money. Q. Those are the four receipts? A. Four receipts. I think there was $200 altogether. My sister gave me some of her salary to pay it. (Mr. Miller offers in evidence the receipts of February 6, 28, and April 2 and 30, 1888. Objected to. Objection overruled. Exception noted for plaintiff.)' (9) The learned judge erred in overruling plaintiff's objection to the following question, asked Helen Devereux, one of defendant's witnesses, by defendant's counsel: 'Q State whether you have ever seen him [the defendant] performing any work, and, if so, what? (Objected to. Objection overruled. Exception for plaintiff.) A. He got up in the morning, and made the fire. He started the fire, and saw that it was ready that the breakfast could be made when she [the servant] came in, for no servants ever slept in the house, and generally she didn't come until seven or half-past seven, and many breakfasts had to be ready by seven; and, when I was in the house, I always got up with Mrs. Stafford and helped her. I have been waitress, chambermaid, and cook all in time, and paid my money into the house as well.' (10) The learned judge erred in overruling plaintiff's objection to the following question, asked Helen Devereux, one of the defendant's witnesses, by defendant's counsel: 'How did you make payments? Did you pay so much down for any particular time, or did you pay whenever money was needed? (Objected to.) A. I paid $2.50 a week, except when I was out of the city, and then I sent home $100 at a time, or $50. I sent my salary, $50 and $100 at a time, when I happened to get it. Q. When you were living elsewhere, and didn't receive any board, and had any money? A. When I was away. I wasn't in the house for five years. Q. And it was a contribution to the family fund? (Objected to. Objection overruled. Exception noted for plaintiff.) A. Exactly.'"

A. E. Stockwell, for appellant. N. Dubois Miller, for appellee.

PER CURIAM. There is nothing in either of the 10 specifications of error that requires a reversal of the judgment. Plaintiff's case depended on questions of fact, as to which there was such conflict of testimony as necessarily carried the case to the jury. Their verdict in favor of the defendant implies a finding of controlling facts against the plaintiff. Judgment affirmed.

PENNYPACKER v. DEAR.

(Supreme Court of Pennsylvania. Jan. 28, 1895.)

APPEAL FOR DELAY—DAMAGES.

Where an appeal is taken merely for delay, damages at the rate of 6 per cent. per annum on the judgment, together with an attorney's fee of $20, and the costs of printing the paper book of appellee, will be awarded against appellant, as provided by Act May 25, 1874 (P. L. 277).

Appeal from court of common pleas, Philadelphia county.

On petition to the supreme court by Frederick Pennypacker to tax up damages for taking an appeal merely for delay. A rule was granted on appellant, John Dear, to show cause why such damages should not be taxed. Rule made absolute.

The petition stated that Pennypacker had sued Dear for work and labor in a magistrate's court, and had recovered judgment for $96.03. Thereupon defendant appealed to the court of common pleas of Philadelphia county, where plaintiff again recovered judgment for the same amount. Defendant's motion for new trial was refused, and then he offered plaintiff $55 in settlement of the claim. Plaintiff refused this offer, and defendant then appealed to the supreme court. The record was never filed in the supreme court, nor did defendant ever print any paper book.

Digitized by Google

The appeal was subsequently dismissed for want of prosecution.

H. B. & H. W. Amerling, for appellant. Frank A. Hartranft, for appellee.

PER CURIAM. The act of May 25, 1874 (Purd. Dig. 707; P. L. 277), provides that "in all cases in which a writ of error or an appeal from a decree in equity shall delay the proceedings on the judgment of the inferior court, and in the opinion of the supreme court the same shall have been sued out merely for delay, damages at the rate of six per cent. per annum shall be awarded upon the amount of said judgment or decree by the supreme court; and an attorney fee of twenty dollars and the cost of printing the paper-book, of the defendant in error or appellee, shall be taxed and collected as part of the costs of suit." Proceedings on the judgment of the court below were undoubtedly delayed by the defendant's appeal to this court, and we are clearly of opinion that said appeal was taken "merely for delay." No other inference can be fairly drawn from the facts before us. The plaintiff is therefore clearly entitled to the damages, etc., specified in the act. Rule absolute, and damages at the rate of 6 per centum per annum on the amount of the judgment are hereby awarded in favor of the plaintiff, and against the defendant, together with a docket fee of $20, and costs of printing appellee's paper book, if any, to be taxed and collected as part of the costs.

AMERICAN FORCITE POWDER MANUF'G CO v. LOCUST MOUNTAIN COAL & IRON CO. et al.

(Supreme Court of Pennsylvania. Feb. 4, 1895.)

PROPERTY SUBJECT TO GARNISHMENT — PERCENTAGE RETAINED UNDER CONSTRUCTION CONTRACT.

Where a contract for the construction of a drainage tunnel provides for monthly payments to the contractor as the work progresses, less 10 per cent., to be retained by the owner to insure the faithful performance of the contract, and for the payment of this percentage on the final completion of the work, the retained percentages are not subject to garnishment at suit of the contractor's creditors, unless it appears that the contract was faithfully performed by the contractor.

Appeal from court of common pleas, Philadelphia county.

Foreign attachment by the American Forcite Powder Manufacturing Company against R. J. Malone and A. C. Douglass, trading as R. J. Malone & Co., defendants, and the Locust Mountain Coal & Iron Company, and Lewis A. Riley and others, trading as Riley & Co., garnishees. From a judgment of nonsuit as against the garnishees, plaintiff appeals. Affirmed.

By a contract between the garnishees and the defendants below, R. J. Malone and A. C. Douglass, trading as R. J. Malone & Co., the latter had undertaken to construct for the former a drainage tunnel, designated as the "Centralia Drainage Tunnel," "in a faithful, skillful, and workmanlike manner, and wholly at their own cost and expense." The garnishees contracted to pay for this tunnel in the following manner: "On or about the first day of each month during the continuance of this contract, the said engineer and the said superintendent shall make an estimate of the quantity and value of the work satisfactorily executed during the preceding month; and, upon their certificate of the same, the amount which appears due the party of the first part on said estimate, less ten per cent., shall be paid them by the parties of the second part between the tenth and twentieth of each month; and when all the work embraced in this contract shall have been completed agreeably to the specifications, and in accordance with the direction and to the satisfaction and acceptance of the said superintendent and of the said engineer, there shall be a final estimate made of the quantity, character, and value of the said work agreeably to the terms of this agreement, when the balance appearing due to the said party of the first part shall be paid to them, upon their giving a release under seal to the said parties of the second part from all claims and demands whatsoever growing in any manner out of this agreement." The engineer and superintendent referred to were those of the garnishees. The agreement contained the following provision as to the time allowed for the completion of the work and the effect of any delay: "The said work shall be commenced on or about the twentieth day of April, A. D. 1889, and completed on or before the fourteenth day of June, A. D. 1890." "It is further covenanted and agreed between the said parties that in the event of the failure of the said party of the first part to complete said tunnel by the aforesaid time, to wit, the fourteenth day of June, A. D. 1890, then and in that case the said party of the first part shall pay a penalty of fifty dollars for each and every day beyond the time above necessary for completion of said tunnel, the amount due as penalty is to be retained by the parties of the second part out of the ten per cent. retained on each monthly estimate as before provided." The defendants had commenced work under the contract, and had prosecuted it for some months prior to the service of the writ of attachment at the suit of the appellants, and the state of the accounts between the defendants and the appellees at that time was concededly as follows: "At the time of the service of the writ of attachment, the value of the work which had been theretofore performed by the said defendants, and for which payment had not been made to them, being ten per cent. of the value of the

Digitized by Google

whole work done by them at that time, was the sum of $8,243.51, which sum respondents aver was not due and payable to the said defendants at the time of the service of the writ, and, by reason of the failure of said defendants to fully perform and complete their contract, did not at any time thereafter become due. Other than the above, the respondents had in their hands at the time of the service of the writ of attachment no retained percentages." There was also evidence showing that the penalties for failure to complete the work within the required time had been waived. At about the time of the service of this writ of attachment, the defendants advised the appellees of their inability, due to financial embarrassment, to continue work under the contract, and of their intention to abandon it, and thereupon, at an interview between the parties, the appellees themselves undertook the completion of the work, A. C. Douglass, one of the defendants, agreeing to superintend it, and this arrangement was carried out. The appellees expended upon the work of completion the sum of $8,133.66, or about $100 less than the retained percentage in their hands at the date of the service of the writ. Upon the completion of the work, the defendants did not ask for a final estimate, and none was ever given to them. The work was completed November 1, 1890, 138 days after the date named in the contract. Had the defendants complied with their contract, and completed the tunnel "wholly at their own cost and expense," and within the period designated, they would have been entitled, in addition to the sums paid to them on account from time to time, prior to the service of the writ of attachment, but inclusive of the percentages already mentioned, to the sum of $12,649.32. Prior to the service of the writ of attachment upon the appellees, the latter had been served with notice of an assignment by the defendants to the Ingersoll-Sergeant Drill Company of the retained percentage then due said defendants under the contract.

Thomas Diehl, for appellant. Francis I Gowen, for appellees.

PER CURIAM. As we understand the contract between R. J. Malone & Co. and the garnishees, the retained percentages therein provided for were payable only upon complete performance of the contract by the former at their own cost and expense. The testimony that was submitted is not only insufficient to show such performance by the contractors, R. J. Malone & Co., but we think it tends to prove the contrary. As the contract was carried out by the parties thereto, there was nothing due the contractors, and therefore nothing to attach in the hands of the garnishees. It follows that there was no error in refusing to take off the judgment of nonsuit. Judgment affirmed.

In re GOODWIN GAS-STOVE & METER CO.'S ESTATE.

Appeal of NATIONAL BANK OF THE REPUBLIC.

(Supreme Court of Pennsylvania. Feb. 4, 1895.)

TAXES—LIEN—LOSS OF.

The lien of the commonwealth for taxes due and unpaid on real estate, given by Act June 7, 1879, and Act June 1, 1889, is not lost, as against the delinquent taxpayer, and his general creditors not secured by any lien on the land, by the failure of the auditor general to transmit to the proper county a certified copy of the lien, as required by Act April 14, 1827 (Purd. Dig. p. 1386).

Appeal from court of common pleas, Philadelphia county.

Audit of the first account of Hector T. Fenton, assignee for the benefit of creditors of the Goodwin Gas-Stove & Meter Company. The claim of the commonwealth for taxes for the years 1882 to 1885, with interest, was allowed as a preferred creditor, and the National Bank of the Republic, another creditor, appeals. Affirmed.

By deed dated June 23, 1892, the Goodwin Gas-Stove & Meter Company assigned its property to Hector T. Fenton, for benefit of creditors. At the audit, the commonwealth of Pennsylvania claimed a lien on the assigned estate for taxes for the years 1882 to 1885, with interest at 12 per cent. thereon. The auditor awarded the commonwealth its claim, without interest, penalty, or preference; the dividend to creditors, including the commonwealth and the appellant, being 15.44 per centum. Exceptions were filed by the commonwealth, and, on reconsideration, sustained by the auditor so far as to allow the claim with interest. The court below reversed the auditor, and entered a decree awarding the commonwealth the full amount of its claim as a preferred creditor. From this decree the present appeal is taken.

The opinion of the court below (Thayer, P. J.) was as follows:

"The question argued in this case was whether the claim of the commonwealth for taxes, which, by the fourteenth section of the act of June 7, 1879, and the thirty-first section of the act of June 1, 1889, is a preferred claim, 'to be first allowed before any other claims are paid,' has lost its preference by reason of noncompliance with the provision of the fourth section of the act of April 14, 1827 (Purd. Dig. p. 1386), requiring the auditor general 'to transmit to the respective counties, to be by them entered of record, certified copies of the liens which may hereafter rise by virtue of the twelfth section of the act of March 30, 1811, as soon as the same are settled and entered in the books of the accounting officers.' By the twelfth section of the act of 1811 the balance found in the account is to be 'a lien on all the real estate of the person indebted throughout the commonwealth.' By

Digitized by Google

the act of June 7, 1879, it is a lien 'upon the franchise and property, both real and personal, of corporations and limited partnerships.' In Commonwealth's Appeal, 4 Pa. St. 164, it was held that, in default of the filing of a certified copy in pursuance of the provisions of the act of 1827, the commonwealth's claim was entitled to no preference over other lien claimants. The case was a contest between rival liens against real estate. Arnold's Estate, 46 Pa. St. 277, was to the same effect, but that also was a controversy between lien claimants, and the commonwealth was postponed to judgment creditors, because no certificate had been filed. The proceeds distributed, as in Commonwealth's Appeal, 4 Pa. St. 164, were derived from a sheriff's sale of real estate. In his opinion in Arnold's Estate, Judge Strong treats the question entirely as one of priority of lien, and, while postponing the commonwealth to other lien claimants on account of the neglect to file a certificate, adds distinctly: 'Without the notice given by filing a copy of the balance of the account, and having it entered on record, the debt ascertained to be due to the commonwealth may be a lien as against the debtor, but is inoperative against other lien creditors.' In Re William Wilson & Son Silversmith Co.'s Estate, 150 Pa. St. 235, 24 Atl. 636, the case was again a contest between lien creditors, and the opinion of Justice Green proceeds upon the ground that, as between other lien creditors and the commonwealth, the latter must be postponed when a certificate has not been filed in pursuance of the act of 1827. 'Other lien creditors,' says he, 'have the same right to notice under the act of 1879 as under the acts of 1811 and 1827.' The present case, it is to be observed, is entirely different from the cases already referred to, which were relied upon by the auditor in his report against the commonwealth as a preferred creditor. In the present case none of the claimants are lien creditors except the commonwealth. That fact is expressly found by the auditor, and the fund was derived from the sale of personal estate exclusively. The creditors here were all general creditors, claiming under the assignment. Is the commonwealth's preference, secured by the strong language of the acts of 1879 and 1889, lost as against creditors who are not lien creditors at all, but general creditors, claiming under an assignment made by the debtor seven years after the commonwealth's lien attached? We think not. The commonwealth's claim was for taxes for the years 1882, 1883, 1884, and part of the year 1885. The assignment was not made until June 23, 1892. It cannot be doubted that the personal property in the hands of the debtor was subject to the lien of the commonwealth's taxes for all those years; for, by the express words of the act of 1879, the commonwealth's taxes were 'a lien upon the franchises and property, both real and personal, of corporations and limited partnerships,' from the time the said taxes are due and payable. It has never been asserted by any decision, and cannot be pretended with any show of reason, that the commonwealth's lien against the debtor's property, while it is still his property, is lost by not filing the certificate referred to in the act of 1827. Such a construction would be unreasonable, and a total perversion of the meaning of the legislature. We entertain no doubt that Judge Strong was right in saying, as he did in Arnold's Estate, that, although the failure to file the certificate postponed the commonwealth's claim to other lien claimants, it was nevertheless a lien against the debtor himself. If this be so, nothing can be plainer than that the rights of the general creditors of the gas company could rise no higher than those of the debtor himself. If the commonwealth's claim attached to the property in his possession, as it undoubtedly did, he could not divest it by making an assignment for the benefit of creditors. That an assignee for the benefit of creditors is not a 'purchaser,' within the meaning of the word which protects lien creditors or vendees for value, is familiar law. Neither the rights of the assignee, nor those of the general creditors, could rise higher than those of the assignor, and, as the property was subject to the commonwealth's lien in his hands, it remained subject to it in the hands of the assignee; and, inasmuch as the fund distributed arises from the sale of that property, the lien attaches to the proceeds as firmly as it did to the property itself in the hands of the debtor. It is ordered that the exceptions filed by the commonwealth be sustained, that the report be referred back to the auditor, with instructions to readjust the distribution in accordance with these views, and to award to the commonwealth the full amount of its claim, with interest thereon."

Charles E. Pancoast, for appellant. Jas. A. Stranahan, Jno. P. Elkin, Dep. Atty. Gen., and Henry C. McCormick, Atty. Gen., for the Commonwealth.

PER CURIAM. There was no error in sustaining the exceptions recited in the first and second specifications, or in awarding to the commonwealth the full amount of its claim, with interest. The rulings complained of are so fully vindicated in what has been said by the learned president of the common pleas that we think the decree should be affirmed on his opinion. Decree affirmed and appeal dismissed, with costs to be paid by appellant.

Digitized by Google

CULP v. ALLEN.

(Supreme Court of Pennsylvania. Feb. 4, 1895.)

PATENTS FOR INVENTION—APPLICATION FOR REISSUE—EFFECT.

The surrender of a patent by the joint owner thereof, and an application for a reissue, do not amount to a cancellation of the patent, where the reissue is refused by the patent office; since Rev. St. U. S. § 4916, provides that the surrender shall take effect, only on the issue of the amended patent.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by Andrew J. Culp against Alonzo W. Allen to recover one-half the profits made by defendant out of the manufacture and sale of a patented device. There was a verdict for plaintiff for $225. Defendant's motion for a new trial was denied, and judgment entered on the verdict. Defendant appeals. Affirmed.

The facts sufficiently appear in the charge of the court (Thayer, P. J.):

"It appears by the evidence that the plaintiff and defendant were the joint owners and patentees of a certain invention, which is described in the patent as being an improvement in winding machines. The plaintiff made an assignment of his half interest in that patent to the defendant. The alleged consideration for that transfer of his half interest was, according to the testimony which the plaintiff has produced, a promise on the part of the defendant that he would divide with him all profits made by the sale of that device of which they were the joint owners, and also all damages which might be recovered against people who infringed that patent. That is the contract now sued upon. The plaintiff, in his statement of his cause of action, declares that the defendant promised to pay him one-half of all that he (the defendant) had made 'out of said patent' in the past, and also one-half of all that he should make in the future, whether profits of manufacture or damages from infringers. That is the plaintiff's statement of his case against the defendant. Then he goes on to charge that the defendant has neglected and failed to account to him for one-half of the profits made from the patent before and since the assignment. With regard to the damages for infringement, there is no evidence which would justify you in finding anything on that score at all, because it does not appear that the defendant ever made any profit out of suits against infringers. The question is whether the defendant has made any, and, if so, what, profit out of the patent of which he was the joint owner with the plaintiff; that is, the improved winder for which they held a patent. If the defendant has made any profit out of the manufacture and sale of that device patented, he must account for one-half of the net profits to the plaintiff. If he has made nothing, he has to account for nothing. You are to decide whether he has made anything out of that device or not, and, if he has made anything, what; and, if you find that he has made anything, you are to divide it by two, and give one-half of it to the plaintiff. Thus far the case is free from all difficulty. The embarrassment, if there be one in the case, arises out of the allegation that the device which was really manufactured and sold by the defendant was a totally different one from that which was patented by the plaintiff and the defendant; that it was different in its parts and in its arrangements; and that it was a distinct and independent invention. If that is so, of course the plaintiff cannot recover anything from the defendant for the sale of such a device. So that you will have to enter into the question whether these two machines which have been exhibited to you are essentially the same or not. If they are not essentially the same, then you are to return a verdict for the defendant in this case, unless you should find that he made some profit before the assignment. Whether there is any evidence upon that subject I do not recall, but perhaps your memory will be better upon that subject than mine. If there is any such evidence, you will consider it. If there is not, you will not be troubled by considering it. If these two machines are essentially the same, then the defendant is to account to the plaintiff for one-half of what he made by the invention. If they are essentially different, he is to account for nothing. What is he to account for if you should find, perchance, that they are essentially the same? Is he to account for one-half of profits of the whole winding machine, calculating its cost, and then subtracting that from the selling price of the machine, or is he entitled only to the profits of that portion of the machine which contained the device which was the subject of the joint patent? There is a principle in the patent law which has been applied in the case of infringement (I do not know whether it has ever been applied in a case like this. I suppose it could be properly applied to a case like this, if you should find the facts which would justify you in applying it), viz. that where a device which is patented is so essential to the machine that it could not exist without it, could not be worked without it in any way,—in other words, is so practically useless without it that the whole value of the machine consists in the patented device,—there it is the difference between the cost and selling price of the whole machine which is to be made the criterion of damages for an infringement; and I suppose it would also be a criterion for measuring the damages to be awarded in such a case as this. But where the device is a device in which the usefulness of the machine does not wholly depend upon it, where it is not the machine itself,—that is to say, where a winding machine could be made perfectly good without such a device as this,—there

Digitized by Google

you could not, with any propriety, in settling this matter between the plaintiff and the defendant, if you should find a verdict for the plaintiff, award him one-half the profits of the entire machine; but you would be confined to awarding him, so far as you could get at it, one-half the profits made on the particular device which was the subject of his patent, ascertaining the cost of what is called the 'tension' and the selling price of the tension if you can do so from the evidence, and giving the plaintiff one-half of the profit made upon all sales. Whether you are to award the plaintiff anything at all depends, it seems to me, mainly upon whether you shall consider that these two things are one and the same invention or not. There are witnesses who have been examined who are familiar with such machines, who say they are totally distinct and different; that the elements of the two devices are not the same. If you should agree with them, and find that this is a totally distinct invention, which the defendant has been selling, from the one which was patented, then you ought to find a verdict for the defendant.

"I have been requested by the plaintiff to instruct you: '(1) If the jury find from the evidence that the defendant promised to pay the plaintiff half of what he had made out of patent No. 334,569, and half of what he should make out of it in the future, in consideration of the plaintiff's assigning to him his half interest in this patent, and, moreover, that the defendant has made some profit therefrom, they cannot consider the adequacy of the consideration, but must render a verdict for the plaintiff.' I substantially affirm this point. I instruct you that the consideration of the contract is proven in this case to have been the transfer of the half ownership of the plaintiff in the patent, and I will say to you that that was a good and valid consideration for the promise which the defendant made, if he did make it. ['(2) Where the reissue of letters patent of the United States is applied for, the surrender takes effect only upon the issue of the amended patent, and, if the reissue be refused, the original patent is returned to its owners.' I cannot say about 'returning to the owners.' I do not know what the practice of the patent office is in relation to that, but I affirm this point so far as to say that the refusal of the reissue does not by law necessarily invalidate the old patent.] '(3) The action of the patent office of the United States, in refusing to reissue a patent is not final, as the applicant has the right to appeal to the supreme court of the District of Columbia.' I believe the law to be so. ['(4) The action of the patent office in refusing to reissue the patent in suit did not affect its validity, and the contract between the plaintiff and defendant in reference thereto was not rendered invalid by such action.' I have already so instructed you. I affirm that point.] '(5) As the defendant has admitted in his affidavit of defense that he has manufactured some machines covered by the patent in suit since November, 1886, he is estopped from denying that fact; and, if the jury find from the evidence that all the cop winders sold by the defendant since that date were practically identical, the plaintiff is entitled to recover on all such machines.' If you find as assumed in this point, then the plaintiff would be entitled to recover half of all profits made by the defendant out of the patent of which they were, previous to the assignment, joint owners. '(6) If the jury find that the defendant has marked, advertised, and sold his cop winders to the public as covered by the patent of January 19, 1886; that he has used the name of this patent to keep off competitors, and has derived all the advantages therefrom, he cannot now deny that these machines came within the claims of the patent, and the plaintiff is entitled to recover on all such machines.' I refuse that point. '(7) If the jury find that the entire value of these machines as marketable articles was properly attributable to the tension device used upon them, and that they would not have been salable without this tension, the plaintiff is entitled to recover one-half of the profits made on these machines.' As I have already stated, that is so if the tension referred to was the device described in the original patent of which the plaintiff was half owner: but if the tension sold was a totally different invention, a different machine, and not essentially the same, then your verdict ought to be for the defendant on that point. '(8) If the jury find that the defendant, by marking the machine itself, and not the tension, as patented January 19, 1886, and by advertising the machine itself as a patented cop winder, sought to induce his customers to believe that the whole cop winder purchased by them was covered by this patent, the plaintiff is entitled to recover half the profits made upon the whole machine.' I refuse that point. '(9) The profit on each machine is the difference between the selling price and the cost of its manufacture.' As a question of law I affirm that point. '(10) If the jury find from the evidence that the defendant's cop winder did not derive its entire market value from the patented tension, but would have been salable without it, the plaintiff is entitled to recover such proportion of the profits as were derived from the tension devices, as distinct from the rest of the machine. In such cases the selling price of the tensions is the price received for the cop winder, less what it would have brought in open market with the tensions. Their cost is the difference in the expense of making the cop winder with them and without them, the profit being the difference between the price and cost thus ascertained.' I think I have already sufficiently instructed you upon that subject. I have told you that, if the machine which the defendant made is a machine which could have been operated without this invention, then you are not, in any event, to award dam-

Digitized by Google

ages upon the basis of the difference between the cost of the entire machine and the selling price. But if you should be of the opinion that the machine that the defendant sold was this machine which was patented, even if it was not essential to the whole machine, then the plaintiff would be entitled to such profit as would be represented by the difference between the cost and the selling price of the tension, which is the subject of the first patent. If the second is a different thing, and if that is what the defendant made, then, of course, your verdict should be for the defendant.

"The defendant has asked me to instruct you: '(1) There is no liability on the part of owners of undivided interests in a patent to account to each other for the use by either of the patented invention, and any promise by one to account to the other for such use, unless supported by some consideration other than that arising merely out of their relations as joint owners of the patent, is without consideration and void.' There is a general principle of the law of patents that, where there are joint owners in the patent, either of them can use it to any extent he pleases, without being obliged to account to any other for what he has received for the use or sale of it. Nevertheless, I instruct you that if you find the defendant made the promises alleged in the plaintiff's statement, to account to him for one-half of the profit, in consideration of the former transfer of the plaintiff's interest in the patent to the defendant, that is a good consideration to maintain this action. '(2) The contract sued upon relates only to tension devices covered by the patent in question; hence, if the devices made and sold by defendant did not come within the purview of the claims of that patent, they are not to be accounted for by him.' I affirm that point. I have already so instructed you. '(3) The patent in question was for a tension device, consisting of several specified elements in combination; and, if the tension devices made and sold by defendant did not include an essential element of the described combination, then they are to be considered as substantially different from the patented device, and not within the patent.' I affirm that point. If it is a different device it is not the same device. '(4) If you believe that the tension devices made and sold by the defendant after November 1, 1886, were substantially different from the tension device described and claimed in the patent in question, the plaintiff cannot recover, even though the parties, at the time of the making of the alleged contract, supposed that the devices in question previously made and sold by defendant were covered by the patent.' I affirm that point. ['(5) If, after the alleged making by the defendant of a promise to account to the plaintiff for past profits on the patented machines previously manufactured by the defendant, the parties joined in a surrender of the patent and an application for a reissue thereof, such act amounts in law to an extinguishment of the patent, and to a legal cancellation of any claim based thereon for profits on the patented machine made prior to that date.' I refuse that point. '(6) The joint act of the parties in surrendering the patent in question, and applying for a reissue thereof, on November 18, 1892, amounted to a cancellation of the patent, and, being followed by a refusal on the part of the government to grant the reissue, operated to end and determine the contract sued upon as to any of the patented machines made after such surrender.' I refuse that point.]"

Defendant's assignments of error relate to the affirmance, and the refusals to affirm, of the requests contained in brackets.

Joseph W. Shannon and Hector T. Fenton, for appellant. Conway Dillingham and George Bradford Carr, for appellee.

PER CURIAM. This case depended mainly on questions of fact, which were fairly submitted to the jury, with instructions which appear to have been substantially correct and adequate. The only subjects of complaint are the affirmance of plaintiff's second and fourth points for charge, recited in the first two specifications, and the refusal of the court to affirm defendant's fifth and sixth points, recited in the two remaining specifications. There is nothing in the record that would justify us in sustaining either of the specifications of error. The points recited therein were each correctly answered. As embodied in his sixth point, the contention of defendant that "the joint action of the parties in surrendering the patent in question, and applying for a reissue thereof, * * * amounted to a cancellation of the patent," etc., is untenable. Section 4916, Rev. St. U. S., provides that "such surrender shall take effect upon the issue of the amended patent." The alleged surrender, therefore, never became effective, because the reissue which the parties applied for was refused. The case appears to have been carefully and correctly tried, and we think the judgment should be affirmed. Judgment affirmed.

In re BECKER'S ESTATE.

Appeal of KUEHNE.

(Supreme Court of Pennsylvania. Feb. 4, 1895.)

TRANSFER OF CORPORATE STOCK—CONDITIONS.

Under a contract to deliver 50 shares of railway stock on completion of certain subscriptions to the securities of the company, the shares are not demandable if the subscriptions are not completed.

Appeal from orphans' court, Philadelphia county.

On presentation of claims against the estate of George Becker, deceased. From a

Digitized by Google

decree awarding Edward R. Wood the sum of $450, Otto G. Kuehne, the administrator, appeals. Affirmed.

Wood's claim was based on the following duebill: "Philadelphia, Aug. 8, 1890. Due E. R. Wood four hundred and fifty dollars on the 10th of September, 1890, without defalcation. Value received. ($450.) George H. Becker, 242 Franklin street, Philadelphia."

The following is the opinion of the auditing judge (Penrose, J.): "The duebill held by Mr. Wood was admitted to have been given by the decedent, but in defense there was offered on the part of the estate a paper, of which the following is a copy: 'Philadelphia and Sea Shore Railway Company, Short Line. To Sea Isle City and Cape May. Room 21, No. 400 Chestnut Street, Philadelphia, Aug. 8, 1890. Due George H. Becker fifty shares capital stock of Phila. & Sea Shore Railway Co., on completion of the subscription to securities of the Co., now being paid by Syndicate Nos. 3 & 4. [Signed] E. R. Wood.' This instrument was given to the decedent in consideration of his services in procuring the subscriptions referred to. The par value of the stock was $50 per share, and it was contended by Mr. Gorman that there was thus created a liability on the part of Mr. Wood to the decedent for $2,500, which was available as a set-off against his claim upon the duebill for $450. There were several objections to this, however. First, it appeared that the subscriptions by the syndicates mentioned, or by one of them at least, had not been completed, and the stock, therefore, has not yet become demandable; second, the obligation is to deliver certain shares of stock, the value of which was not shown, and there is nothing, therefore, by which to measure the damages even had performance by the decedent been fully established. It is true that it was alleged by Mr. Gorman that the subscription was not completed because Mr. Wood, having a contract with the railway company to complete the road by a certain time, failed so to complete it, and, as a result, the company became unable to meet its obligations, and thus passed into the hands of a receiver. But there was no proof of these assertions; the contract was not produced; and there was no evidence that, as between the company and himself, Mr. Wood was in any default. But, if this had been shown, it would by no means follow that the syndicates referred to in the paper of August 8, 1890, were relieved of the obligation to complete their subscriptions. On the contrary, it may well be that the inability to finish the road was occasioned by the fact that the subscriptions were not paid. Moreover, the contract of Mr. Wood with the decedent called for the delivery of 50 shares of the stock to the decedent when the subscriptions of the syndicates were completed, and certainly the whole number of shares could not be demanded if the subscriptions were not completed, whether the course of the syndicates was or was not justifiable in stopping when they did."

William Gorman, for appellant. Theodore A. Tack and Wm. W. Wiltbank, for appellee.

PER CURIAM. All the questions presented by this record were fully considered and correctly disposed of in the court below, first, by the learned auditing judge, and afterwards by the court in banc. Nothing can be profitably added to what has been said by the former in the clear and concise opinion that has been sent up with the record. The decree is therefore affirmed on his opinion, and the appeal is dismissed, with costs to be paid by appellant.

In re BRADLEY'S ESTATE.

(Supreme Court of Pennsylvania. Feb. 4, 1895.)

LEGACY TO GRANDCHILDREN—LAPSE.

Where a will gives the income of property to testator's daughter for life, and, on her death, the principal to "all my grandchildren," the death of grandchildren during testator's lifetime, or during that of the life tenant, will not cause their shares in the legacy to lapse and fall to the other grandchildren; but the same will pass to their issue, under Act April 8, 1833, which provides that "no devise or legacy in favor of a child or other lineal descendant of any testator shall be deemed or held to lapse or become void by reason of the death of said devisee or legatee in the lifetime of the testator, if such devisee or legatee shall leave issue."

Appeal from orphans' court, Philadelphia county.

On account by trustees of the will of Patrick Bradley, deceased, and the distribution of a legacy of $10,000. From a decree permitting the issue of deceased grandchildren of testator to share in the distribution, Charles P. Bradley, Mary J. Bradley, and Ellen A. Bradley appeal. Affirmed.

The legacy in question was given to executors in trust to pay the income to his daughter, Annie E. Deehan, free from her debts, and for her separate use for her life. He provided further: "Should the said Annie E. Deehan die, leaving lawful issue surviving, then the said principal sum of $10,000 shall be divided, from and immediately after her decease, as follows: $3,000 to such child or children or issue of deceased child or children of the said Annie E. Deehan as shall survive her, share and share alike. All the rest, residue, and remainder of said principal sum of $10,000 shall be equally divided among all my grandchildren, including the children of the said Annie E. Deehan, share and share alike. Should, however, the said Annie E. Deehan die, leaving no lawful issue surviving, then and in such case the said principal sum of $10,000, shall, from and immediately after the decease of the said Annie E. Deehan, be equally divided among

Digitized by Google

all my grandchildren, share and share alike." The testator died February 26, 1881. Annie E. Deehan, the daughter and life tenant, died March 6, 1894, leaving one child, Annie Haley. She left no issue of any deceased child.

The opinion of the orphans' court was as follows:

"The testator bequeathed to his executors $10,000 in trust to pay the income to his daughter, Annie E. Deehan, free from her debts and for her separate use for life, and he further provided that 'should the said Annie E. Deehan die, leaving lawful issue surviving, then the said principal sum of $10,000 shall be divided, from and immediately after her decease, as follows: $3,000 to such child or children or issue of deceased child or children of the said Annie E. Deehan as shall survive her, share and share alike. All the rest, residue, and remainder of the said principal sum of $10,000 shall be equally divided among all my grandchildren, including the children of the said Annie E. Deehan, share and share alike. Should, however, the said Annie E. Deehan die, leaving no lawful issue surviving, then and in such case the said principal sum of $10,000 shall, from and immediately after the decease of the said Annie E. Deehan, be equally divided among all my grandchildren, share and share alike.' We fully agree with the auditing judge that the grandchildren took a vested estate from the time of the death of the testator, subject to being opened to let in after-born grandchildren, and, if this were the only question raised by the exceptions, they might well be dismissed; but it appears that one of the testator's grandchildren died in his lifetime, leaving a child, and the question was raised whether this child took its parent's share.

"After the death of the life tenant, the bequest was to 'all' the grandchildren. In Gross' Estate, 10 Pa. St. 360, it was held that, under a bequest to children as a class, only those who are in being at the time of testator's death can take; and this decision was followed (apparently reluctantly) in Guenther's Appeal, 4 Wkly. Notes Cas. 41, where the supreme court say that Gross' Estate had been a rule of property for so many years that they did not like to disturb it, and that if it operated unjustly, and disappointed the intention of testator, the remedy must be found in the legislature. In Re Deimer's Estate, 2 Pa. Dist. R. 543, and in other cases, the doctrine of Gross' Estate has been applied by this court; but it will be observed that in all these cases the bequest was to collaterals, and not to lineals,—to brother's or sister's children,—and not to the children or grandchildren of the testator, and therefore the question was not considered or passed upon whether the rights of lineals, notwithstanding the bequest may be to them as a class, are not preserved by the act of April 8, 1833. This act provides that 'no devise or legacy in favor of a child or other lineal descendant of any testator shall be deemed or held to lapse or become void by reason of the death of such devisee or legatee in the lifetime of the testator if such devisee or legatee shall leave issue,' etc., but shall be good and available for the issue of such devisee or legatee. And the act of May 6, 1844, which extended the provisions of this act to brothers and sisters and their children, expressly provided that it was to apply only in cases where the testator left no lineal descendants. Thus is shown a clear intention to preserve the rights of lineal descendants to their ancestor's property, whether the bequest was to them as a class or by name. Why should there be a difference in the result because one testator gives his estate to be divided equally among all his children, and another gives it to them by name? Or why should a grandchild be excluded from participation in its grandfather's estate because its father happened to die in his grandfather's lifetime, while all the other grandchildren take their shares? In a recent case in this court the testator left his whole estate to his wife, for life, and after her death to be equally divided among his children. One of the children died in his lifetime, and another during the life tenancy, both leaving children. If Gross' Estate is to be followed in a case like this, one set of grandchildren take their parent's share, and the others take nothing, simply because their father happened to die a few months sooner than the father of their cousins. Such a result is manifestly unjust and inequitable, and while we must follow Gross' Estate, in cases like it, we do not feel obliged to do so in cases from which it can be distinguished. The act of legislature before referred to provides that 'no' devise or legacy to a lineal descendant in the case mentioned shall lapse, and makes no exception even where the gift is to a class. The case, as presented to us, does not appear to have ever been passed upon by the supreme court. It was fully considered by Judge Gibson, of York county, in Re Shetter's Estate, 2 Pa. Dist. R. 284; and, in an able opinion, he concludes that the doctrine laid down in Gross' Estate and Guenther's Appeal has no application in a devise or bequest 'in favor of a child or other lineal descendant,'—a conclusion which ought to receive general approval. But it is to be observed in the present case that the gift is not simply to a class composed of grandchildren, but to 'all my grandchildren'; thus individualizing them quite as much as if each had been named, and taking the case altogether out of the principle of Gross' Estate. The exception to the decision of the auditing judge excluding Mary Ritchie from her mother's share is sustained. All others are dismissed.

"Note. In May's Appeal, 41 Pa. St. 512, although the decision is not directly in point, there will be found an elaborate discussion

Digitized by Google

of 'legacies to a class,' by counsel, and a careful and able opinion, by Strong, J."

Pierce Archer, for appellants. John T. Greene, for appellees.

PER CURIAM. An examination of this record has satisfied us that neither of the specifications of error should be sustained. All that is necessary to be said in relation to the questions involved will be found in the clear and satisfactory opinion of the court below; and on it the decree is affirmed, and appeal dismissed, with costs to be paid by appellants.

KENNEDY v. BORIE et al.

(Supreme Court of Pennsylvania. Feb. 19, 1895.)

MORTGAGES—FORECLOSURE OF FIRST MORTGAGE—LIABILITY OF PURCHASER FOR SECOND MORTGAGE.

Where one buys land subject, in express terms, to two mortgages, and, on foreclosure of the first mortgage, again becomes the purchaser, he takes subject to the second mortgage.

Appeal from court of common pleas, Philadelphia county.

Suit by Clarence Kennedy, assignee of the order of Vesta against Beauveau Borie and others, trading as C. & H. Borie, and others, to have certain land declared subject to plaintiff's mortgage. A demurrer to the bill was sustained, and plaintiff appeals. Reversed.

The bill alleged that plaintiff was the assignee of the order of Vesta; that among the assets assigned was a bond secured by second mortgage given by defendants Groome and wife on certain land; that, after the assignment to plaintiff, said Groome and wife conveyed the land to defendant Martin, the conveyance being expressly subject to both mortgages; that Martin was a clerk of defendants C. & H. Borie, and took title merely for them, they furnishing the money; that thereafter a scire facias issued on the first mortgage, a judgment was obtained, and the property sold by the sheriff, the purchaser being defendant Martin, who again took title for C. & H. Borie, who furnished the purchase money; that plaintiff had no knowledge of the sale; and that, though defendants Martin and Borie were, at and prior to the time of the sale, negotiating with plaintiff respecting his debt, they did not mention the proposed sale, but intentionally avoided reference to it.

J. Howard Gendell and John G. Johnson, for appellant. G. Heide Norris and George Tucker Bispham, for appellees.

GREEN, J. We do not think that the rulings in Rauch v. Dech, 116 Pa. St. 157, 9 Atl. 180, and Rushton v. Lippincott, 119 Pa. St. 12, 12 Atl. 761, control the decision of this case. In both of those cases the purchaser at the judicial sale was a total stranger to the title, and under no obligation to protect the title against any incumbrances. He therefore took the lands divested of the liens which were sought to be enforced, and, when he subsequently conveyed to the former owner, the purchaser took the same title which he held. In this case the allegation of the bill is that Martin bought the property from Groome and wife, subject, in express terms, to both the mortgages described in the bill, one of which is the mortgage of the plaintiff's assignor. It is true that Martin was not the original mortgagor, but he was the grantee of the title of that person, and it must be assumed that the purchase money which he agreed to pay, and in consideration of which he obtained the title, was, in part at least, secured by the very mortgage which he now claims to be discharged because there was a sale under the prior mortgage, which also he agreed to pay. The case looks now more like the line of cases of which Taylor v. Smith, 2 Whart. 432, and Woodburn v. Bank, 5 Watts & S. 447, are examples, in both of which the purchaser's title was held to be subject to the prior liens. Nor are we willing to say conclusively, at this stage of the pleadings, that no force is to be given to the other facts stated in the bill, as indicia of an improper purpose to use the sale under the first mortgage, as a means of divesting the lien of the second mortgage, which the purchaser Martin had, according to the bill, expressly agreed to pay. While we will not now review those facts, as we do not wish to prejudge the case, we are of opinion that they would be admissible in evidence, and be entitled to consideration in support of the charge of a combination between Martin and the other defendants to destroy the lien of the plaintiff's mortgage. The case comes before us only upon a demurrer to the bill, which necessarily admits the truth of the facts stated in the bill. We think the case should be heard upon its merits, and that there is a sufficient averment of facts in the bill to entitle it to be heard. We will therefore overrule the demurrer, and direct the defendants to answer over. The judgment of the court below is reversed, the demurrer of the defendants is overruled, the bill is reinstated, the defendants are directed to answer over, and the record is remitted, the costs of this appeal to be paid by the defendants.

MASON FRUIT-JAR CO. v. PAINE et al.

(Supreme Court of Pennsylvania. Feb. 18, 1895.)

EVIDENCE—DECLARATIONS.

In an action by a corporation on a contract between it and defendants, evidence of a conversation between one of defendants and a person alleged to be an officer of the corporation is not admissible, where it appears that the witness cannot identify the person with whom defendant had the conversation.

Digitized by Google

Appeal from court of common pleas, Philadelphia county.

Action by the Mason Fruit-Jar Company against George H. Paine and William E. Diehl, trading as Paine, Diehl & Co., on a contract for the manufacture and sale by plaintiff to defendants of salt shakes. From a judgment for plaintiff, defendants appeal. Affirmed.

A witness, Miss Dickson, was called to detail a conversation between one of the defendants and a person alleged to be the president of the jar company; but, as she was not able to say that it was that official, although she knew him by sight, and recognized him in court at the trial, her testimony upon that point was ruled out.

The assignments of error are as follows: "(1) The learned trial judge erred in sustaining the objection to the following question, asked the witness Helen E. Dickson: 'Q. I will ask you what the conversation was you overheard.' (2) The learned trial judge erred in sustaining the objection to the following question, asked the witness Helen E. Dickson: 'Q. What did you hear at that interview in regard to the manufacture by the plaintiff company of these salt tops?' (3) The learned trial judge erred in sustaining the objection to the following question, asked the witness Helen E. Dickson: 'You said that this was with a representative of the Mason Fruit-Jar Company?' (4) The learned trial judge erred in sustaining the objection to the following question, asked the witness Helen E. Dickson: 'State whether or not in that conversation you heard anything in relation to the manufacture by the plaintiff company of these salt tops.' "

Thomas Diehl, for appellants. Edw. D. McLoughlin, for appellee.

PER CURIAM. The admissibility of the offers of testimony by the rejected questions propounded to Miss Dickson depends entirely upon her ability to identify the person who was in conversation with Mr. Paine at the time and place to which the questions refer. She did not see the person, and repeatedly stated that she did not know who he was. She inferred, for a reason which she stated, that he was a representative of the Fruit-Jar Company. But she did not see him. He was in another room, and when the gentleman who, it was alleged by the defendants, was the one who was engaged in the conversation in question, was pointed out to her in the court room, she distinctly said she could not identify him as being the person whom she heard. Without such identification his declarations were not admissible. The witness knew Mr. Grange, the person in question, but she refused to say it was he who was in the room with Mr. Paine at the time of the conversation. Nor does Mr. Paine's testimony help the matter. It would still require a conjecture on the part of the jury as to whether Mr. Grange was the person whose declarations were proposed to be proved by Miss Dickson. Mr. Paine did not personally know that she was in the outside room at the very time of the conversation. He said he did, but on cross-examination admitted that the only way in which he knew was by Miss Dickson's subsequent statement to him to that effect, and that, of course, was but hearsay. We think the offers were all properly rejected. Judgment affirmed.

RESTEIN v. McCADDEN et al.

(Supreme Court of Pennsylvania. Feb. 18, 1895.)

SALE—COMMISSIONS—RIGHT OF AGENT.

Where plaintiff obtained for defendants, from K., an order for kites, and delivered it to defendants, who accepted and undertook to fill it, and agreed to pay plaintiff a commission thereon, he can recover the commission, though K. refused to accept the kites on the ground that they were not properly made, notwithstanding a provision that it was not to be paid till the goods were delivered and paid for.

Appeal from court of common pleas, Philadelphia county.

Action by E. P. Restein against McCadden & Bro. for commissions for making a sale. Judgment for plaintiff. Defendants appeal. Affirmed.

M. J. O'Callaghan, for appellants. A. E. Stockwell, for appellee.

GREEN, J. The learned court below was not mistaken in speaking of the contract as a matter that was not in dispute. It was proved by the plaintiff, and also by Mr. Kolb, who gave the order, written by himself, at the instance of the plaintiff; and it was admitted by the defendants in their affidavit of defense, and further proved on the trial by their agent, Leslie, who made the contract with the plaintiff. According to all of this testimony, the plaintiff obtained for the defendants, from Kolb, an order, in writing, for 150 gross of kites, at $2.25 per gross, and delivered it to the defendants, who accepted it. Leslie, on cross-examination, was asked: "Q. You accepted the order in which Mr. Kolb agreed to pay you $2.25? A. Yes, sir. Q. And you were to pay him fifty cents? A. Yes, sir; when the goods were delivered and paid for." The defendants then undertook to fill the order, and they made and delivered 54 gross of the kites. The purchaser, Kolb, and his bookkeeper, Connor, testified that they would not receive them because they were not properly made; they would not fly, after repeated efforts. Kolb also testified that he was anxious to have them, and would still take them at the time of the trial, if they were so made that they would fly. Of course, this testimony raised a question whether the kites were properly made, so that Kolb ought to have received them. But with

Digitized by Google

that question this plaintiff had nothing to do. He procured the customer, and the defendants accepted him as a purchaser, received his order, and undertook to execute it; and, upon all the authorities, the plaintiff had then earned his commission. Keyes v. Johnson, 68 Pa. St. 42; Reed v. Reed, 82 Pa. St. 420; Sweeney v. Gas Co., 130 Pa. St. 193, 18 Atl. 612; Mechem, Ag. § 967. Nor does it matter whether there was a controversy in the testimony as to when the commission was to be paid. That question was left to the jury by the learned court below, but it is perfectly apparent that the defendants could not relieve themselves of their liability for the commission by saying that the commission was not to be paid until the goods were delivered and paid for, when the very controversy between them and the purchaser was only upon the question of a defective execution of the order. If the goods were properly made, they could compel the purchaser to pay for them, or pay them compensatory damages. If they were not properly made, they could recover nothing from the purchaser, but that result would flow from their own negligence. But the plaintiff has no concern with either of these questions. Judgment affirmed.

In re PEPPER'S ESTATE.

(Supreme Court of Pennsylvania. Feb. 4, 1895.)

WILLS—CONSTRUCTION—DEATH WITHOUT ISSUE.

Testator directed his residuary estate to be divided into as many parts as he had children, and directed his executor to convey one share to each child, and the issue of deceased children, their heirs and assigns. The share of one son was, however, given to the executors in trust during the lifetime of the son, and, on his death, to all his issue equally, and on default of issue then to the surviving children of testator. The son died leaving surviving one child, and this child directed that on his death his share under testator's will should be distributed according to the directions of said will, in the same manner as though he had "never been born." *Held*, that the share in question belongs to the surviving children of testator, just as though the son for whom the trust estate was created had died without issue.

Appeal from court of common pleas, Philadelphia county.

On accounting by Joseph Norris, substituted trustee under a deed of trust executed by Charles Rockland Pepper, deceased. From the decree of distribution of said trust estate, Edward Pepper appeals. Affirmed.

The matter was referred to an auditor (Henry Flanders), whose report is as follows:

"(1) George Pepper, by his will, executed on the 5th day of January, A. D. 1846, proved at Philadelphia, January 13, 1846, provided, with respect to his residuary estate, as follows: 'Item. All the rest, residue, and remainder of my estate, real and personal, except my Fairy Hill estate, hereafter disposed of, I order and direct to be distinctly and separately valued, item by item, and divided, in the manner hereafter mentioned, into as many parts as I shall leave children and issue of a deceased child or children living at my death, the issue of any deceased child or children to represent their parent or respective parents, and each of the said issues to be considered in the division as one part only, that is to say: Five suitable persons to make the said valuation and division shall be appointed as soon as conveniently may be after my death, by my surviving children, or a majority of them, under their hands and seals, and, if they cannot agree, then by my executors, or a majority of them, under their hands and seals. The said five persons, being thus appointed, shall then proceed to value my residue as aforesaid, and to divide the same into the requisite number of equal parts as aforesaid, allotting to each share an equal portion of real and personal estate, of property improved and productive, and property unimproved and unproductive, as they conveniently can. The shares so divided shall be drawn for in the manner the persons making the division shall direct, so as to designate a particular share or part of my said estate for each child, and for the issue of any deceased child, to whom the same shall fall upon the said drawing. And my will is that, in all the acts of the said valuers in making the said valuation and division, a major part of them, respectively, shall have the entire power of the whole number in case of difference. * * * And I desire the said valuers to execute a plan and statement of the said valuation and allotment, under their hands and seals, or the hands and seals of a majority of them, and to have the same acknowledged or proved, and recorded in the proper office. And I give, devise, and bequeath to all my said surviving children, and to the issue of any of my deceased children, such issue to stand, respectively, in the place of their parent, and to take together only the share their respective parent, if living, would have taken, one equal share or part of all my said residuary estate, real and personal, allotted and drawn for as aforesaid; all my said children, and the issue of any deceased child or children, except the three sons and two daughters hereafter mentioned, to have and to hold their respective shares to them, respectively, and their respective heirs and assigns, forever. And I do authorize, empower, and direct my executors, or a majority of them, to convey the said respective shares of real and personal estates, so drawn for and allotted as aforesaid, to the said respective children, and issue of deceased children, their respective heirs and assigns, forever. And so far as regards the shares which may upon such drawing fall to my three sons, Edward, Charles, and Lawrence, and my two daughters, Mary Norris and Catharine Thompson, respectively, I do give and devise the same to my executors, and the survivors and survivor of them, and the

Digitized by Google

heirs of the survivor, in trust, as to the said respective shares, to the use of my said three sons and two daughters, respectively, to whom the same shall respectively fall upon the said drawing, for and during their respective natural lives; and, from and after their respective deaths, then to the use of such of their respective children and issue, and in such shares and for such estates as they shall respectively by last will appoint; and, in default of such respective appointment, then to the use of all the children of the son or sons, daughter or daughters, respectively, so failing to appoint, that may be living at their respective deaths, and the issue of any deceased child or children, their heirs, executors, and administrators, as tenants in common, in equal shares, the issue of any deceased child to stand in the place of their parent, and to take only the share their parent would have taken if living; and, in default of such issue, then as to one equal fourth part of the share appertaining to the son or daughter, respectively, whose issue shall fail at his or her death, to the use of such person or persons, and for such estates, and in such portions, as the said respective son or daughter shall in any way appoint; and as to the remaining three fourth parts, and also as to the said one-fourth part, so far as the same shall not have been appointed otherwise by the said son or daughter, to the use of my then surviving children, and the issue of any of my children then deceased, in the shares and proportions, and for the estates, which they would have taken under the intestate law of Pennsylvania, if the said respective son or daughter had died seised in fee simple of such estate, without any wife or husband surviving him or her. * * *' The power of appointment vested in the said Charles Pepper in and by the said will was not validly executed. See Pepper's Appeal, 120 Pa. St. 235. (2) Mr. Freedley offered in evidence the partition of the estate of George Pepper, deceased, made by deed dated January 13, A. D. 1847, recorded at Philadelphia, in Deed Book A. W. M., No. 29, p. 4, deed being made by Coleman Fisher, George N. Baker, John M. Ogden, D. Henry Flickwin, and Andrew D. Cook, being the five persons appointed, in pursuance of the will of George Pepper, to make partition and division of his estate; on page 29 of which deed, and subsequent pages, a particular share of the estate is set apart and allotted to Charles Pepper, under the limitations contained in the will of George Pepper, concerning that particular share. (3) Charles Rockland Pepper was the only child of Charles Pepper living at his death, which occurred May 3, 1887. The son Charles Rockland Pepper died without issue, March 7, 1890. By deed of trust executed July 2, 1868, recorded in Deed Book J. T. O., No. 238, p. 436, etc., Charles Rockland Pepper provided that one-half of the estate, real and personal, to which he would or might become entitled in case he survived his father, Charles Pepper, under the provisions of the will of his grandfather, George Pepper, should, in the event of his, the said Charles Rockland Pepper, dying without lawful issue surviving him, be held 'in trust to grant, convey, assign, and pay the said trust estate and premises unto such person or persons as would have been entitled to the same under the will of the said George Pepper, deceased, and for such estates and interests, and with and under the same powers, conditions, and limitations, as far as subsisting and applicable, and with the same effect, as if the said Charles Rockland Pepper had never been born.' (4) The question submitted to the auditor by the learned counsel (Mr. George Wharton Pepper and Mr. Freedley on the one side, and Messrs. Biddle & Ward on the other) is whether the trust estate of Charles Rockland Pepper should be distributed under the general clause of George Pepper's will or the particular clause of that will which relates to the trust estate of Charles Pepper. (5) To support the affirmative of the last branch of the inquiry, it is cogently said that the will of George Pepper explicitly provides how the trust estate of Charles Pepper shall go in case he dies without issue, namely, to the use of his (George Pepper's) surviving children, and the issue of any of his children then deceased, 'in the shares and proportions, and for the estates, which they would have taken under the intestate law of Pennsylvania' if the said Charles Pepper had died seised in fee simple of such estate without any wife surviving him. (6) Who, then, would have been entitled to this share, to wit, the trust estate of Charles Pepper, if Charles Rockland Pepper had never been born? The answer is that, if Charles Rockland Pepper had never been born, then his father, Charles Pepper, would have died without issue, and thereupon become the propositus, from whom the line of descent is to be traced. (7) The auditor agrees with this contention, which he thinks it is needless to elaborate, and holds that the estate before him for distribution descends to and becomes divisible in eighths, or multiples thereof, among the surviving brothers and sisters of Charles Pepper, and the issue of deceased brothers and sisters."

R. L. Ashhurst and S. Dickson, for appellant. A. T. Freedley and John S. Gerhard, for appellees.

PER CURIAM. All the facts necessary to a proper understanding and correct disposition of this case are sufficiently presented in the auditor's report, and the controlling questions arising thereon appear to have been carefully considered and rightly decided by him. Our examination of the record, with reference to the specifications of error, has failed to convince us that there is anything in either of them that requires a reversal or

Digitized by Google

modification of the decree, nor do we think that either of the questions involved requires further elaboration. All that is necessary to be said in relation to any of them will be found in the learned auditor's report, and on it the decree is affirmed, and appeal dismissed, with costs to be paid by appellant.

OTT v. SWEATMAN.

(Supreme Court of Pennsylvania. Jan. 21, 1895.)

CONDITIONAL SALE OR BAILMENT—EXECUTION CREDITORS.

A contract by a manufacturer to construct a refrigerating plant in a brewery, on foundations to be furnished by the brewer, with a stipulation that the title is not to pass until the entire purchase price has been paid, is a conditional sale, and not a mere bailment; and, while such a sale is valid as between the parties, the machinery and plant are subject to be sold on execution against the brewer, and the proceeds cannot be claimed by the manufacturer.

Appeal from court of common pleas, Philadelphia county; Jenkins, Judge.

Virtue C. Sweatman obtained judgment against Lorenz Leiling, and certain property was levied on and sold by the sheriff on execution under said judgment. George F. Ott claimed some of this property, and a sheriff's interpleader was granted. The court instructed the jury to find for defendant, Sweatman, in the interpleader issue, and George F. Ott appeals. Affirmed.

The following is the opinion of the court below (Jenkins, J.) on the rule for a new trial:

"This was a feigned issue upon a sheriff's interpleader, founded on an execution issued by Virtue C. Sweatman, the defendant, against Lorenz Leiling, George F. Ott being the claimant. On the trial of the case, it appeared from the evidence produced by the claimant that upon September 21, 1889, he made a written agreement with Lorenz Leiling 'to construct and erect at the brewery of Lorenz Leiling, Queen and Baird streets, Germantown, Philadelphia, the refrigerating machinery and plant' described. The agreement also stated: 'The whole plant to be erected upon foundations and supports furnished by Mr. Lorenz Leiling, and ready to be connected with steam and water connections, and ready to charge with brine and ammonia.' The price was to be $6,000, payable in installments, beginning September 21, 1889, and ending April 1, 1891, and 'it is understood that the machinery and refrigerating plant stays the property of George F. Ott until fully paid for.' Under this agreement, certain portions of the refrigerating machinery were placed upon Leiling's property; but Ott, fearing that the said agreement was not sufficient to prevent a levy and sale of the machinery, under an execution against Leiling, until the contract price was paid, Ott and Leiling, upon March 12, 1890, and after portions of the machinery had been delivered at the brewery, made another written agreement, whereby it was agreed: 'That the said George F. Ott, for the consideration hereinafter named, will erect at the brewery of the said Lorenz Leiling, Queen and Baird streets,' 'the refrigerating machinery and plant' (describing the machinery). That 'the whole of the above plant is to be erected upon foundations and supports to be built and furnished by said Lorenz Leiling, and to be sufficient for the purpose, and to be approved by said George F. Ott, and ready to be connected with steam and water connections, and ready to charge with brine and ammonia.' That the said plant and machinery should be in good working order on or before April 15, 1890. That Leiling should pay to Ott 'the sum of $500 upon the execution of this agreement, which, with the sum of $500 previously paid, makes the sum of $1,000,' and eight further sums, beginning March 15, 1890, and ending April 1, 1891, 'making in all the sum of $6,000.' That, in lieu of the eight payments, Ott would accept 'the notes of Leiling at four months, with interest added at the rate of six per cent. per annum for each payment.' and to renew said notes. That 'the express condition of this transaction is such that the title, ownership, or possession of said machinery and plant does not pass from said George F. Ott to said Lorenz Leiling until all of the said payments of said sums of money, according to the terms and conditions aforesaid, have been paid in full; and when the last of the above sums of money has been paid, and not until then, the said George F. Ott will execute and deliver to said Lorenz Leiling a bill of sale for said machinery and plant, the consideration whereof shall be the amount of the above-mentioned sums of money. The said Lorenz Leiling agrees to keep the said machinery and plant insured in the name of the said George F. Ott, in such company or companies, for $4,000, as the said George F. Ott shall determine; and such insurance policy or policies shall be held by said George F. Ott until all the covenants of this agreement shall have been complied with, when the said policy shall be assigned to said Leiling. In case of default by the said Lorenz Leiling in the payment of any of said sums as above provided, or of any of his covenants in this agreement, it shall be lawful for said George F. Ott to enter upon said premises, and remove and take away the said machinery and plant, and sell the same at public or private sale, with or without notice to said Lorenz Leiling; and said Lorenz Leiling agrees to pay to said George F. Ott any balance that may be due to George F. Ott of the total amount of the sums above mentioned, after deducting the net proceeds of the said sale, as damages and rental for said machinery and plant.' And 'it is distinctly understood and agreed that this is not a contract of sale,

Digitized by Google

conditional or otherwise, and that the whole of the contract between the parties hereto is expressed in this instrument, without limitation, modification, reservation, misrepresentation, or misapprehension of any kind.' That Leiling should keep the machinery and plant in good repair without expense or charge to Ott. Subsequent to this agreement, the remainder of the refrigerating machinery and plant was delivered at Leiling's brewery, put in place, operated by him, and the sum of $2,000 paid by Leiling to Ott on account of the purchase money. The machinery, while in place in Leiling's brewery, and while it was being operated by him, was levied upon by the sheriff, under the said execution, and sold, and the proceeds paid into court to await the determination of this issue. The trial judge instructed the jury to find a verdict for the defendant. The claimant has moved for a new trial, assigning as a reason therefor the binding instructions of the trial judge.

"The question raised by this motion is, did the contracts put in evidence by the claimant, coupled with the actual possession and operation of the machinery by the execution of defendant at the time of the levy, conclude the claimant? There are many cases in Pennsylvania in which has been considered the liability of goods to levy and sale by the sheriff, where the claimant has parted with their possession under a contract with the execution defendant by which the latter has or may become the owner; the contract preventing, or attempting to prevent, the title passing with the possession. A careful examination of these cases will show that they may be reduced to two classes,—one in which the goods have been bailed to the defendant, with the right in him to purchase them during the continuance of the bailment, or at its termination, and the other, in which the goods have been delivered to the defendant under a contract of sale, and the seller has sought to retain a lien on them for the price. In the former, the goods are not subject to the levy during the existence of the contract of bailment, nor until the title has actually vested in the bailee; in the latter, they are subject to the levy so soon as they reach the possession of the purchaser, though no part of the price has been paid. The reason for the distinction is that in a bailment, by the change of possession, no title to the goods passes, and the necessities of life require that bailments should be allowed and enforced; but where the possession of goods changes, under a contract which is essentially one of sale, the title does pass, though conditionally, and, as to an execution creditor of the buyer, will be held to have passed absolutely, and the seller will not be allowed to enforce the condition, as a lien for the price, because a secret lien on personal property is against public policy. The courts, in determining whether or not the contract was one of bailment or one of sale, with an attempt to retain a lien for the price, have not considered what name the parties have given to the contract, but what was its essential character.

"To the former class belong: Myers v. Harvey, 2 Pen. & W. 478, where certain horses, plows, and other farming utensils left by a purchaser of them at a sheriff's sale, with the execution defendant, under a contract of 'lease,' were held not to be subject to a levy against the 'lessee,' though he had the right to purchase them. The court said that the contract constituted a bailment, 'with a superadded agreement to vest the title in the bailee when he should pay a certain sum, and such an agreement is clearly consistent with public policy.' Clark v. Jack, 7 Watts, 375, where a loan of a law library, subject to be turned into a sale, by compliance with certain conditions, was held not to vest in the bailee such ownership as subjected the property to levy and sale upon an execution against him. M'Cullough v. Porter, 4 Watts & S. 177, where goods were consigned to an insolvent upon the terms that he was to sell them, and account for the proceeds to the consignors,—he retaining for his compensation what he received over certain sums, called the 'invoice prices,' and returning to the consignors all goods not sold by him,—the court held that the consignee was a bailee of the goods; that no title to them vested in him, and they, therefore, were not subject to levy under an execution against him. Lehigh Co. v. Field, 8 Watts & S. 232, where a canal company put one of its boatmen in the actual possession of a canal boat, under an agreement whereby he was to purchase it upon credit; the ownership in the boat to remain in the company until the price was fully paid; he to take freight only from the company. The boat retained its place in the company's register; having its number painted in letters and figures on its stern, not distinguishable from the other boats of the company. It was held that the boatman was merely the servant of the company, from which it would necessarily follow that his possession was the company's possession; that no title to the boat vested in him; and that it was, therefore, not subject to levy under an execution against him. King v. Humphreys, 10 Pa. St. 217, where rags were delivered to a paper manufacturer at a certain price, under a special contract that they were to be made into paper, which was to be returned to the owner of the rags, at a certain price, the difference to be paid by a note. The paper in the possession of the manufacturer, made from the identical rags, was held to be not subject to levy under an execution against him. Chamberlain v. Smith, 44 Pa. St. 431, 432, where the following contract: 'January 12, 1858. Received of John Benson one pair of three-year old, past, stags, to keep and work in a reasonable, farmer-like manner, for the term

Digitized by Google

of one year; said cattle to be returned in one year. But the said McWharter [the one who received the cattle] has the privilege, by paying $40 and legal interest at the expiration of the year, to keep the said cattle,'—was held to create a bailment. Rowe v. Sharp, 51 Pa. St. 26, where Sharp, by writing, 'let' to Goff two billiard tables for nine months,—Goff to use them at his place of business, pay a certain sum for their use, and at the end of the term to redeliver them; and, if then Goff had complied with the covenants of the agreement, Sharp was to make him a bill of sale of the tables, the consideration for which was the sum to be paid for their use. It was held that this was a bailment for use of the tables, with provision for sale in case of payment of the price, and that during the term of the bailment the tables were not subject to levy under an execution against Goff. Becker v. Smith, 59 Pa. St. 469, where Becker by articles sold real estate to Linn, and agreed that Linn should have the use of certain goods belonging to Becker, on the premises, and might sell the same on commission,—Linn to deposit the proceeds with the banker named; and, when the payments to the banker reached a sum named, Linn was to become the owner of any remaining goods. If the sales did not amount to that sum, Linn was to make up the deficiency. It was held that Linn was a bailee of the goods, and they were not subject to levy under an execution against him. Crist v. Kleber, 79 Pa. St. 290, where Kleber 'leased' a piano to Wilson for a 'rent' payable quarterly; the lease to terminate at the option of Kleber, if the rent were not paid, with the privilege to Wilson to buy, and, if purchased, all sums paid for rent to be deducted from the price,—Kleber still to retain the ownership. The piano, being in the possession of Wilson, was sold for taxes against him. It was held that the piano remained in bailment, and was not liable to a sale for Wilson's debt, or for his taxes, and that 'possession under a mere bailment for hire is not a constructive fraud.' Enlow v. Klein, 79 Pa. St. 488, where Enlow agreed with Moritz to furnish him with a team of horses, wagons, etc., for country peddling,—Moritz to pay Enlow two hundred payments, of $5 per week; $3 of the $5 per week to go as payment of the goods, and $2 per week for their use; the team, etc., 'to belong to and to be managed by Enlow until the last of the two hundred payments; Moritz to keep up all repairs, and, if a horse should die, to replace him at his own expense'; Enlow 'to relinquish all his right,' etc., 'to Moritz when the last payment is made of the two hundred.' It was held that the said agreement created a bailment, and no present interest in Moritz, so as to make the property subject, in his hands, to his execution creditors. Christie's Appeal, 85 Pa. St. 463, where a sublessee of ground containing an oil well and the incidental machinery agreed to purchase the leasehold and machinery, and to pay for the same in installments; the contract containing a condition that, in the event of his failing to make the payments at the time specified, his rights to the premises should cease, and the payments made prior to such default should be treated as liquidated damages. He made only one payment, and made default. It was held that neither the premises nor the machinery were subject to levy under an execution against him. Dando v. Foulds, 105 Pa. St. 74, where a lessee of a room, and of certain machinery therein contained, agreed to purchase the machinery at a certain price from his lessor, upon the determination of the lease, or at any time during the existence of the lease, after receiving thirty days' notice from his lessor that such purchase would be required, and in default of such purchase being made the lessor should have the right to enter, take out the machinery, sell it, and receive from his lessee the difference, if any, between the said price and the amount realized from such sale. It was held that until the payment of the said price by the lessee the said machinery was not subject to levy under an execution against him. The court said (page 77): 'We discover no intention to vest title in Freeman [the lessee] at the time of the execution of the agreement. His possession is to be only that of a tenant or bailee, and, except at the will of the lessor, he has no right to purchase until the expiration of the lease. But it is urged that, by the terms of the contract, Foulds [the lessor] could not only compel Freeman to buy after thirty days' notice, but that in default of his so doing he might sell the goods, as it were, on Freeman's account, and charge him with any deficiency in the price. This, however, only amounts to an option in Foulds to determine the lease, as to the personalty, on a thirty-days notice, and to treat the property as though owned by Freeman. But this option on the part of the lessor, except merely in the matter of time, does not alter the nature of the contract; and the balance is but a method of compelling performance, and the determination of the measure of damages in case of nonperformance. Strike this all out, and nothing has been materially altered, except to deprive the lessor of his option to call upon the lessee to perform his covenant before the expiration of the lease. But it still remains that he is bound to purchase at the end of the term, and if he does no do so he must answer for his breach of contract, in damages. But what difference in principle can it make that the lease might be determined in thirty days, rather than in one year? It was still a lease, and, if Freeman got the possession of the goods under it, he held, not as owner, but as a lessee or hirer.' Edwards' Appeal, 105 Pa. St. 103, where the facts and law, as found by the supreme court, were (page 110): 'There was the lease of the hotel, to run for the term of

Digitized by Google

five years from April 1, 1877. Then there was, second, the agreement "to furnish to the party of the second part, with the said hotel, under this lease, all the stock and furniture therein on March 31, 1877." This looks to us like a leasing of the furniture as well as the hotel. Under this lease the lessor was as much bound to put Ward into the possession of the personal property as he was to put him into the possession of the realty, and in fact the latter could not be used without the former. If Ward did not get the furniture he could not run the hotel. He thus went into the possession of both by virtue of the lease, and by virtue of nothing else. The matter remained, as it began, a bailment.' It was held that the furniture was not subject to levy under an execution against Ward. Ditman v. Cottrell, 125 Pa. St. 606, 17 Atl. 504, where the claimants, by a written agreement with the execution defendant, in consideration of a fixed sum, to be paid in monthly installments, had agreed 'to let to hire' to him, for a term of years, the personal property levied upon, and, in case of no default in the payments of the monthly installments, to execute to him a bill of sale for the same. It was held the agreement created a bailment.

"To the second class belong: Martin v. Mathiot, 14 Serg. & R. 214, where, on a sale of four horses upon credit, they were delivered to the buyer, under an agreement that the title to them should remain in the seller till the whole price was paid. It was held that they were liable to levy under an execution against the buyer, though only a part of the price had been paid; that 'such an agreement, as respects creditors and the sheriff, is fraudulent'; and the court below was affirmed in holding 'that if vendor and vendee agree that the possession shall pass to the vendee, but the property remain in the vendor until the whole purchase money is paid, such an agreement, as respects creditors and the sheriff, is fraudulent, and it is immaterial whether it appear that the creditor trusted the debtor on the credit of the goods which were in his possession or not.' Jenkins v. Eichelberger, 4 Watts, 121, where a contract by a merchant to deliver hides to a tanner, to be charged at cost and five per cent. commission, and interest after six months, and, when tanned, to be returned to the merchant, to be sold by him, and out of the proceeds of the sale the first cost and five per cent. to be deducted, the balance to be paid to the tanner, was held to be such a sale as would subject the hides, in the hands of the tanner, to levy and sale as his property. The court said (page 122): 'Can we shut our eyes to the true nature of the transaction, so as not to see that it was in substance a sale, and that the resale was a device to elude the wholesome principle of the common law, which forbids a lien to be created on chattels as a security separate from the possession?' and (page 123): 'If the effect of the contract were even doubtful, the construction of it would be influenced by considerations of policy. To tolerate a lien severed from the possession by any device whatever would be pregnant with all the mischiefs of colorable ownership; and to sanction it, at the expense of the community, could be justified but by the accomplishment of more important objects than individual accommodation. Policy and fair dealing require the courts to be as unsparing of transactions whose effect is to impart a delusive credit or protect the property of debtors from their creditors, and to be as regardless of devices and forms, as they have ever been of transactions prohibited by the statutes of usury. The resources of ingenuity are inexhaustible, and, to give entire effect to principles of policy, it is necessary to look at substance, without respect to form. It is said that this species of transaction is so prevalent that an immense amount of property will be affected by our decision. So much the more urgent is the demand for its suppression.' Prichett v. Cook, 62 Pa. St. 193, where it was agreed by parol that a tanner was to receive hides from a dealer at current prices, tan them, return the leather to the dealer, and after deducting the price of the hides, commission, interest, and current expenses, all that the leather would command was to be credited to the tanner. It was held that this was a sale to the tanner, and not a bailment. Haak v. Linderman, 64 Pa. St. 499, where the agreement stated that Haak had sold and agreed to deliver to Palm a car, for which Palm agreed to pay $600 in installments; that Haak reserved the right to said car until fully paid, but that Palm should have the use of the car from the date of the agreement, but, should Palm fail to comply with the agreement, Haak would have the right to take the car from Palm, who would forfeit the amount paid on the agreement. It was held to be a conditional sale, not a bailment, of the car, and being in Palm's possession, although most of the purchase money was unpaid, could be levied on by his creditors. In Stadtfeld v. Huntsman, 92 Pa. St. 53, goods were delivered to O. B. Carpenter under the following agreement: 'The above goods are received by the undersigned, Otis B. Carpenter, upon the following conditions, to wit: I hereby agree to pay not less than $5 for each succeeding week until the above amount [the price] is paid; the goods above enumerated to be and remain the property of D. W. Huntsman & Co., subject to removal by them, or their order, upon my failure to make any or all of the above payments.' The price was charged against the buyer in the sellers' books. The goods were subsequently sold by Carpenter, before the payment of the price, to a bona fide purchaser, without notice of the said agreement. Huntsman & Co. brought replevin against the purchaser. The court, in deciding against

Digitized by Google

the plaintiff, said (page 55): 'The transaction between the plaintiffs below and O. B. Carpenter was not a bailment, either in form or substance. It was not a lending of the goods, nor was it a contract of hiring. It was a sale of the furniture.' Brunswick v. Hoover, 95 Pa. St. 508, where the Brunswick, etc., Company, agreed to furnish Russell with four billiard tables, to be paid for in installments; said payments to be secured by a 'lease,' and the property to remain in the Brunswick Company until final settlement. The tables were delivered to Russell, and after their delivery a lease and notes executed as provided in said agreement. The tables were subsequently levied upon and sold by creditors of Russell. The Brunswick Company brought trespass against said creditors and the sheriff. It was held that the defendants were not trespassers; that the agreement between the Brunswick Company and Russell was a sale of the tables upon a credit, with a stipulation that payment should be secured by a lease; and that, while said contract was good between the parties, it was worthless as against Russell's execution creditors. Forrest v. Nelson, 108 Pa. St. 481, where a written agreement between Forrest, the owner of certain looms, and Andrews, stated that Forrest 'has agreed to sell' the looms to Andrews 'for the price or sum of $2,100, to be paid in four equal installments of $525, with interest.' The agreement then provided for the immediate delivery of the looms to Andrews, 'for use by him in his said business,' and that upon payment of each installment a bill of sale for a certain number of them should be executed, and, further, that the looms should remain the property of Forrest until paid for. Andrews covenanted to insure them in Forrest's name, and not to remove them without Forrest's consent. It was also agreed 'that neither this contract and agreement, nor the delivery of the said looms thereunder into the possession of the party of the second part, for use by him as aforesaid, shall in any way or manner vest any title or ownership thereto in him, either legal or equitable; but the said looms, and every one of them, shall be and remain the property of the party of the first part until paid for by the prompt payment of the quarterly installments as aforesaid.' Upon Andrews' failure to keep any covenant, Forrest was to have the right to enter upon Andrews' premises, and retake possession of the looms then unpaid for. Under this agreement, Andrews received possession of the looms, and held and operated them until they were levied upon by the sheriff under an execution against him. Forrest claimed them, and on a feigned issue, under the sheriff's interpleader act, the court charged the jury: 'My view of the agreement under the law is that, as to creditors, there was a sale of the property in question by Forrest to Andrews, and that it became subject to the claims of the execution creditors of the latter. Under this view, your verdict should be for the defendants.' The supreme court held that there was no error in the trial judge so charging, and said (page 488): 'Whenever it appears from the contract between the parties that the owner of personal property has transferred the possession thereof to another, reserving to himself the naked title thereof solely for the purpose of securing payment of the price agreed upon between them, the contract is necessarily a conditional sale, and not a bailment; and, while it is perfectly good as between the parties themselves, it is worthless as to creditors and bona fide purchasers from the transferee without notice. If the contract is verbal, it is, of course, the exclusive province of the jury to inquire and ascertain what the parties meant. If it is in writing, its construction is for the court.' Peek v. Heim, 127 Pa. St. 500, 17 Atl. 984, where a piano was shipped to one Hill under certain conditions, of which the court said (page 505, 127 Pa. St., and page 984, 17 Atl.): 'The whole contract appears from the two papers headed "Terms of Consignment," and signed by Peek & Son, and the other headed "Consignee's Agreement," and signed by F. K. Hill. It is true, the words "consignor" and "consignee" appear sufficiently conspicuous, but these are merely labels which the parties have placed upon the transaction. We must look within to see its real nature, and it is immaterial what the parties designate it. We thus learn from the "Terms of Consignment" that the piano named, and invoiced and consigned to Hill, "is the property of Peek & Son, of New York City, and is to remain their property until fully paid for; and the said Peek & Son ship and deliver the same upon the express condition that F. K. Hill, of Sunbury, in the state of Pennsylvania, shall remit the sum of $165 to them therefor, within * * * from the date hereof, or return the said piano to them at the expiration of the said time, at the expense of the said F. K. Hill." Then follows the "Consignee's Agreement," by which Hill acknowledges having received the piano on consignment; that it is to remain the property of Peek & Son until paid for, and, if not paid for, to be returned at his own expense, etc. That this was not an ordinary transaction between consignor and consignee is too plain for argument. Where goods are consigned to a factor for sale, they remain the property of the consignor, and are not subject to the debts of the factor, and no ingenious contract is required to protect them from his creditors. There is nothing upon the face of the papers to indicate that Hill was to sell the pianos for the account of Peek & Son, as their factor. On the contrary, it was manifestly a sale to Hill, with an agreement that the title was to remain in Peek & Son until the price was paid. The arrangement was good between the parties, but worthless as to Hill's cred-

Digitized by Google

itors The secret lien attempted to be created cannot affect them. It would seem almost a waste of time, at this late day, to cite authority for so evident a proposition.'

"While the decisions above cited are not all those in which the vexed question in this case has been considered, yet they are fairly representative; and a careful examination of the facts of each will show that our supreme court has consistently adhered to the principles announced in Martin v. Mathiot, 14 Serg. & R. 214, that: 'Possession of personal property is the great mark of ownership. It is almost the only index which the world, in general, has to look to. But there are exceptions. There are certain necessary and lawful contracts by which the owner parts with the possession, and yet fraud cannot be presumed. Such are the contracts of lending and hiring, both very useful, and without which society could not well exist. It is of the essence of these that the owners should give up the possession for a time. Such, too, are contracts by which an artisan or manufacturer has the possession of materials belonging to an other, for the purpose of making them up or repairing them for the owner. No suspicion of fraud can fairly arise, where the transaction is in the usual course of business. But the case is very different where it is intended that the property should be apparently in one, while it is in fact in another. This is out of the usual course of business, necessarily, and directly tending to the injury of those who are not in the secret.' The facts in the cases have not always been free from doubt. They have frequently been left to the determination of the jury, under the court's instructions, and inconsistent verdicts have been sustained. But where the contract under which the possession of the goods was obtained has been in writing, or, if oral, has been clearly defined, the court has determined its effect; and where there has been an actual bailment, though coupled with the right in the bailee to purchase the goods during the continuance of the bailment, they have been held not to be liable to an execution against the bailee; and where there has been a sale, coupled with an attempt upon the part of the seller to retain a lien for the price, the goods in the buyer's possession have been held subject to a levy under an execution against him, and in doubtful cases the court, in construing the contract, has been governed by the principle that 'possession of personal property is the great mark of ownership.' King v. Humphreys, 10 Pa. St. 217, may, at the first reading, appear to be opposed to Jenkins v. Eichelberger, 4 Watts, 121, and Prichett v. Cook, 62 Pa. St. 193; yet the facts of the former case, and therefore the principles governing it, widely differ from the latter two cases. In King v. Humphreys the rags and shavings were delivered to the manufacturer, to be made into paper. He was to receive for manufacturing the paper the difference between what the rags were worth at the rate of five cents a pound and what the paper would be worth at the rate of ten cents a pound. He took no risk of the market. Whether or not the transaction was a device to conceal a sale was submitted to the jury. As appears (page 218), the court below left it to the jury to say 'whether the rags of Humphreys were delivered to the paper maker in sale or exchange for paper. In other words, were they to be paid for in paper, either by way of payment, or as an exchange of commodities? If so, then the creditor might attach the paper in question.' The court further charging: 'But if the rags and shavings were delivered to the artisan in bags, with the name of Humphreys marked on them, to be worked into paper for Humphreys, in such event the identical paper made from these materials was not subject to attachment. * * * The creditors might have attached the debt or price of manufacturing the article in the hands of Humphreys, but cannot attach the article itself.' The jury found for Humphreys, thus determining as a fact that a sale or an exchange was not intended. In Jenkins v. Eichelberger, supra, and Prichett v. Cook, supra, the tanners were charged with the price of the hides, assumed the risks of the market as to the sale of the leather, and were charged commissions for selling the leather. They were clearly not cases where the manufacturers were paid for their services, but cases where the sellers of hides sought to retain a lien for their price. In Jenkins v. Eichelberger, 4 Watts, 121, the court said (pages 121, 122): 'An important if not a decisive feature of the case is that the hides were charged at cost, with five per cent. commission, and interest after six months. So far the transaction appears distinctly in the garb of a sale at a profit of five per cent., and a credit of six months. The plaintiff would doubtless have been willing to sell without stipulating for a resale, provided the purchaser had substituted cash for it, or satisfactory security. What had he principally in view? Undoubtedly, to part with the property at a given profit, to effect which required but an ordinary sale; and the transaction certainly took that shape in the first instance, the ulterior arrangements having respect but to security for the price. Annexed to the principal contract was an accessory agreement that the hides, when tanned, should be returned to the plaintiff, and resold by him, and that the proceeds should be paid to the manufacturer; "the price agreed upon for the hides," as it was aptly but significantly called, together with five per cent. for commission and guaranty, being first deducted. Now, what was the purpose of all this? Not to give the plaintiff the rise in the market, for he was to have no interest in it. If it were anything but security for the price of the raw material, what was it? Not to reserve a further profit, in the shape of commission for resale and guaranty of solvency, for that was ostensibly to be but compensation for the risk and trouble. But why a commission for selling the plaintiff's

Digitized by Google

goods, and why a guaranty of solvency, if the sale were not on account of the party to be secured by it? The very provision indicates not only that the sale was to be on account of the manufacturer, but that it would otherwise have been at his risk.' In Prichett v. Cook, 62 Pa. St. 193, the court said (page 197): 'The hides were either the plaintiffs all the while, notwithstanding they were charged to the defendant, and delivered to him, or they were delivered on a sale on credit, and a contract for resale when tanned. The plan of the parties was sufficiently disclosed in the contract, as proved by the plaintiff's witness, to have been to give to him the advantage and credit of an owner without the liability, as an owner, to have it seized by creditors. Had there been nothing of this kind in view, no one would have hesitated a moment in pronouncing the transaction a sale. The hides were charged, the debt or price to bear interest, and when leather was returned it was to be sold by the plaintiff, charged commissions for sales and guaranty and expenses, and crediting the proceeds to the defendant's account. It would be strange to hear of a man charging interest against his own goods, and more strange to charge commissions for sales and guaranties of sales of them. This the plaintiff's account, given in evidence, shows was done by them.' Crist v. Kleber, 79 Pa. St. 290, appears, at first sight, antagonized by Brunswick v. Hoover, 95 Pa. St. 508. In the former case Wilson came into the possession of the piano under an agreement called a 'lease,' but which was actually an agreement of hiring, so that he was a bailee, and, though he had the right to purchase the piano, still that right did not convert the bailment into a sale; while, in the latter case, Russell had obtained possession of the billiard tables under a written agreement, signed by the company, stating that he had ordered the tables of the company at a given price, to be paid in installments, the agreement further providing, 'Payment to be secured by first lease and fire insurance on said tables.' The lease was executed after Russell had come into actual possession of the tables, and was, as the agreement stated, made for the purpose of securing to the company the price for which the tables were sold. The supreme court therefore held that the tables were liable to execution on a judgment against Russell. In deciding the case the court said (page 512): 'The feeble attempt to prove that the tables were delivered under the lease, and not under the contract, will not avail, for the reason, among others, that the two papers must be regarded as one transaction. Taken together, they amount to a sale of the billiard tables upon credit, accompanied with a lease thereof as a security for the payment of the price. Such a contract, while good between the parties, will not keep creditors at bay. It is worthless as to them. There is no principle of law better settled in Pennsylvania than that a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase-money is paid, enables creditors of the vendee to seize and sell the same for the payment of his debts. * * * There is not a single element of a bailment in this transaction. It is immaterial what the parties call it. The law pays little heed to the label. It looks beneath, and examines the nature and character of the contract between the parties.' Farquhar v. McAlevy, 142 Pa. St. 233, 21 Atl. 811, is almost identical with Brunswick v. Hoover, supra, except that in the former case the goods were a sawmill, engine, and boiler, and in the latter, billiard tables; but the acts of the parties, and the written contracts produced in evidence, are practically the same, and in both cases the court held the transactions to be sales. Chamberlain v. Smith, 44 Pa. St. 431; Rowe v. Sharp, 51 Pa. St. 26; Enlow v. Klein, 79 Pa. St. 488; and Ditman v. Cottrell, 125 Pa. St. 606, 17 Atl. 504,—are governed by the same principles as Crist v. Kleber, supra. The possession of the goods in each case was obtained under a bailment. In Forrest v. Nelson, 108 Pa. St. 481, the court, in speaking of Rowe v. Sharp, supra, and Enlow v. Klein, supra, said those cases were on the border, and that in them 'the doctrine of bailment was carried to its extreme limit.' In Stadtfeld v. Huntsman, 92 Pa. St. 53, the court, in speaking of Enlow v. Klein, supra, said (page 57): 'An examination of the facts shows that it was a case of hiring; that $2 per week of the sum paid was for the use or hire of the horses. This was an important feature of the case, in our consultation, and is referred to now that it may not be misunderstood hereafter. * * * We will not take one step beyond it. We stop just where it ends.' This last remark is practically repeated in Farquhar v. McAlevy, 142 Pa. St. 233, 240, 21 Atl. 811. McCullough v. Porter, 4 Watts & S. 177, when contrasted with Peek v. Heim, 127 Pa. St. 500, 17 Atl. 984, shows that goods actually consigned to a factor are not liable to an execution against him, but that when the form of a consignment is taken to disguise a sale the form gives way to the substance, and the goods are liable to an execution against the purchaser. Becker v. Smith, 59 Pa. St. 469, is analogous to M'Cullough v. Porter, supra, in that the execution debtor was in possession of the claimant's goods, as his agent, with a power of sale. In Christie's Appeal, 35 Pa. St. 463; Dando v. Foulds, 105 Pa. St. 74; and Edward's Appeal, Id. 103,—the execution debtors obtained possession of the goods as lessees of the real estate on which the goods were placed; the use of the goods being in connection with, and as accessory to, the use of the real estate. The possession of the goods was therefore held to be bailment. In Haak v. Linderman, 64 Pa. St. 499, the car was 'sold' to Palm. Mr. Justice Blackstone defines a bailment to be 'a delivery of goods in trust upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the

Digitized by Google

bailee.' 2 Bl. Comm. 451. Chancellor Kent adopts the definition, with the addition, 'and the goods restored by the bailee as soon as the purpose of the bailment shall be answered.' 2 Kent, Comm. 558. Mr. Justice Story defines a 'bailment' to be 'a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust.' Story, Bailm. § 2. The examples of bailments given by Mr. Justice Blackstone are the delivery of cloth to a tailor, to make a suit of clothes; goods to a carrier, to convey; to an innkeeper or other person, to keep; to a pawnbroker, in pledge; cattle to an agister, to graze; and contracts of hiring or borrowing. These examples show the character of the trust referred to in his definition. 'A sale is a transmutation of property from one man to another in consideration of some price or recompense in value.' 2 Bl. Comm. 446. 'A sale is a contract for the transfer of property from one person to another for a valuable consideration.' 2 Kent, Comm. 468.

"The contracts at present under consideration are in writing, and are to be construed by the court. The contract dated September 21, 1889, required the claimant 'to construct and erect at the brewery of Lorenz Leiling,' 'the refrigerating machinery and plant,' 'upon foundations and supports furnished by Mr. Lorenz Leiling, and ready to be connected with steam and water connections,' for which Leiling was to pay $6,000 in installments. It is clear from this language that the 'refrigerating machinery and plant' were to become an integral part of Leiling's brewery. We see no difference, so far as the passing of title is concerned, between a contract to construct a 'refrigerating machinery and plant' in a brewery and a contract to construct a brewery. The bare walls do not constitute the brewery, but upon their construction they become part of the real estate. The character of the building is only ascertained by the character of the machinery placed in it. And when the machinery, fitting the building to its contemplated purpose, is put in place by the owner of the real estate, the land, building, and machinery are considered an entirety, as real estate, and are equally bound by the lien of mortgages and judgments, and descend to the heir upon the intestacy of the owner. Gray v. Holdship, 17 Serg. & R. 413; Christian v. Dripps, 28 Pa. St. 271; Heaton v. Findlay, 12 Pa. St. 304; Roberts v. Bank, 19 Pa. St. 71; Buck's Appeal, 2 Penn. 327. The words 'construct and erect' are the usual words employed in a building contract, and we do not recall that it has ever been doubted that they are effective words of sale, to pass the title to the building materials, when erected, from the builder to the owner of the land. The words 'construct and erect' are used evidently in the present contract with the same meaning as they are used in ordinary building contracts. Such words do not imply that a bailment is being created. Neither do the words, 'It is understood that the machinery and refrigerating plant stay the property of George F. Ott until fully paid for.' The latter words rather signify an intention to preserve a lien for the price.

"Upon the argument the learned counsel for the claimant practically admitted that the contract of September 21, 1889, would not sustain his contention. He, however, very strenuously and very ably argued that the contract of March 12, 1890, created a bailment, as to the machinery delivered before and after that date. We, however, do not agree with him. The contract of March 12, 1890, was simply an amplification of that of September 21, 1889, but with no essential difference. It provided that Ott should 'erect' 'the refrigerating machinery and plant' at Leiling's brewery, upon foundations and supports to be built and furnished by Leiling, 'ready to be connected with steam and water connections, for the sum of $6,000, payable in installments; Ott to take Leiling's notes for part of the price and renew them; the title, ownership, or possession of said machinery and plant' not to 'pass from said George F. Ott to said Lorenzo Leiling until all of the said payments have been paid in full,' when, 'and not until then,' the said George F. Ott will execute and deliver to said Lorenz Leiling a bill of sale for said machinery and plant, the consideration whereof shall be the said $6,000; Leiling to keep the machinery and plant insured, in the name of Ott, in such companies as Ott shall determine; Ott to hold the policies 'until all the covenants of this agreement shall have been complied with,' when they shall be assigned to Leiling. Upon Leiling's default in making payments or in keeping 'any of his covenants,' Ott to have the right to enter the premises, and take away the machinery, sell the same at public or private sale, appropriate the proceeds to the contract price; Leiling to pay the deficiency, if any, and the agreement not to be 'a contract of sale.' Though the agreement states that neither 'the title, ownership, or possession of the said machinery' should pass to Leiling, its actual possession did pass to him, and it became a part of the machinery used by him in his brewery. This last above-mentioned provision, and that relating to the execution of a bill of sale, are merely the mode adopted to preserve the lien for the price. The provision for insurance was to insure Ott's lien. The provision allowing Ott to enter and take away the machinery, and to sell it, was to enforce his lien, and give him no greater right, except the right to sell without notice to Leiling than the contract of September 21, 1889, for there is no other way in which the lien could be amicably enforced. Under either contract, if Leiling had refused to allow Ott to remove the machinery, the lien could have been enforced only by an action of replevin, or by a bill in equity. The covenant requiring Leiling to pay any deficiency between the contract price and the amount realized from a sale by Ott,

Digitized by Google

after an entry and retaking possession of the machinery by him for condition broken, is important in determining whether or not the transaction was a sale. If the machinery had been bailed, there would have been no reason for covenanting that the title should not pass, for, the goods being Ott's, he could have enforced his rights without a covenant. The provision that the agreement should not be considered a 'contract of sale' is of no effect, for the law ascertains the character of a contract, and we consider that both of the said agreements are contracts of sale. They are almost identical with that in Forrest v. Nelson, 108 Pa. St. 481, which this court and the supreme court held was a contract of sale. The said machinery, therefore, could not be claimed by Ott, as against an execution creditor of Leiling, and the trial judge was right in charging the jury to find for the defendant in the issue. The rule for a new trial is discharged."

Joseph de F. Junkin, for appellant. John F. Keator, J. S. Freemann, and O. B. Jenkins, for appellee.

PER CURIAM. The learned trial judge rightly held that the agreements between Leiling and Ott constituted a conditional sale, and not a bailment, and hence there was no error in directing a verdict in favor of the defendant in the issue. All that can be profitably said on the controlling question in the case will be found in the able and exhaustive opinion of the court below on the rule for a new trial. On it we affirm the judgment.

UNRUH v. LUKENS.

(Supreme Court of Pennsylvania. Feb. 4, 1895.)

EQUITY — TRANSACTIONS BETWEEN PHYSICIAN AND PATIENT.

1. A physician who also acts as agent and confidential adviser of his patient, a woman 70 years of age, has the burden of proving that a deed conveying all her real estate to him, in trust for herself for life, and thereafter to himself, was fairly and honestly obtained, and that the transaction is above suspicion.

2. The fairness of such a transaction is not established by evidence that the physician rendered professional services for a number of years without compensation, where he does not attempt to fix their value.

Appeal from court of common pleas, Philadelphia county.

Bill in equity by Emeline Unruh against Benjamin F. Lukens to set aside and annul a certain deed of trust, whereby plaintiff conveyed her real estate to defendant as trustee, and wherein she had appointed certain uses for life and disposition of the remainder. From a decree for complainant, defendant appeals. Affirmed.

The cause was referred to a master, whose report is as follows:

"The master appointed by the court on the 6th day of May, 1893, as will appear by the certificate hereto annexed, respectfully reports:

"The bill in this case, which was filed on the 8th of March, 1893, sets forth that on the 5th of January, 1891, the plaintiff, by deed, transferred to the defendant certain real estate, for the purposes set forth therein; that the same was duly recorded on the 8th of January, 1891, in the office for recording deeds in Philadelphia county, in Deed Book T. G., No. 6, p. 65; that the same was never delivered to the defendant, Benjamin F. Lukens; that the beneficiaries under the said deed of trust are the defendant and one Catherine Brown, who agrees and consents that the court shall make the orders and decrees prayed for in the bill; that the said deed and the record thereof are a cloud upon the plaintiff's title to the property, and interfere with her control and disposition of the same; that, at the time of the signing of the said deed, the defendant was both physician and business attorney of the plaintiff, and had been so for a long time prior thereto; that she was not at that time in good health, and was upward of seventy years of age; that the defendant, by reason of such relation, had acquired a strong influence over her, and, taking advantage of the same, persuaded and unduly influenced her to execute the said deed; that the interest of the said defendant in the said deed of trust is not less than five thousand dollars, and that he had not rendered any valuable service, as set forth in the said deed of trust, as a consideration therefor, nor was she aware of the said recital; that the said defendant has, since the signing of said deed, shown himself to be unworthy of the confidence and trust reposed in him by the same, and has attempted to convert to his own use two certain bonds, of the face value of one thousand dollars, which he had received from the plaintiff for collection, and also that he had falsely accused the plaintiff of having been guilty of slander; that there was no consideration for the said deed, and that said defendant persuaded the plaintiff to sign the same to secure for himself a part of her estate; that, when plaintiff signed the same she was assured by her attorney and by the defendant that she could at any time thereafter at will revoke the same, and regain the full control and title to her said property, freed and discharged of and from said trust, and she signed the said deed of trust relying upon the said assurance. The prayer asks (1) that the court will order and decree that the aforesaid deed and the record thereof are invalid and of no effect whatever; (2) that the court will decree that the plaintiff has the same title to the property described in the said deed as if the said deed had not been signed by her; (3) that the court will order and decree that the defendant, Benjamin F. Lukens, reconvey the title to the property in question to the plaintiff, freed and discharg-

Digitized by Google

ged from any and all trusts; further relief.

"The answer of the defendant, Benjamin F. Lukens, which was filed on the 26th of April, 1893, admits the execution and recording of the deed of January 5, 1891, to Benjamin F. Lukens, in trust; denies that the same was not delivered, and alleges that the delivery was to the defendant, but, as there were no active duties to be performed by him under the trust deed therein set forth, the same was returned by him to the then attorney of the complainant, George W. Bryant, Esq., for safe-keeping; denies that the said deed ever clouded the title of the plaintiff to the property therein described, or interfered with the control and power of disposition which complainant would otherwise have over the same; admits that the said defendant was, at the time of the making of said deed of trust, the physician of the complainant, and did attend to some business matters for her, and that he had so acted for some time; denies that she was not in good health, and avers that she was in very good health, both of body and mind, notwithstanding her age and former physical illness; denies that by reason of such relations, he had acquired a strong influence over her, took advantage of the same, and persuaded and unduly influenced her to execute the said deed; on the contrary, that he never influenced her in her business matters in any way whatever, nor did he know that the deed was contemplated or made until after its execution, when he was acquainted of these facts by the attorney of the complainant, and the same delivered to him, and that only after consideration did he accept the trusts therein limited and appointed. It further alleges that he is not aware of the value of his interest under the said deed of trust, but that, whatever it may be, it will not be too much compensation for his professional and other services to the complainant; and avers that she fully knew and was aware of all recitals therein. He denies that, since the signing of the said deed of trust, he has shown himself unworthy of confidence and trust, and alleges that the bonds referred to in the eighth paragraph of the bill were voluntarily given to him by the complainant; and denies that he falsely accused her of slander. It denies that there was no consideration for the aforesaid deed, and alleges that the same was voluntarily and justly expressed in the deed by the complainant herself; and he denies that he persuaded her to sign the deed for any purpose, and reiterates that he knew nothing whatever about the same until after it was executed. It further alleges that when the defendant was first called to attend the complainant, in his capacity as a physician, she was suffering from the effects of a serious disorder, which, by reason of his care and thoughtfulness and attention, aided by her otherwise robust constitution, he was enabled to bring about her cure; that for this he was never paid; he received trifling sums of money, but that she, from time to time, promised liberal compensation, and that, when the said deed of trust came to his knowledge, he abandoned all question of payment otherwise; that, when requested to attend to her business matters, he so did with earnestness and good faith, and, when she afterwards revoked his authority, he acquiesced; that there never was anything approaching an influence over her by the defendant; he was neither capable nor desirous of so doing. A prayer that the bill be dismissed, with costs. To this was filed the ordinary replication.

"It appears from the testimony that the complainant, Emeline Unruh, first met the defendant, Benjamin F. Lukens, in the spring of 1883, when he visited her professionally. They did not meet thereafter until the 19th day of April, 1886, when he visited her as her physician, and took formal charge of her case. From that time until the 1st of January, 1891, he was her physician; also acted for her in the capacity of agent, under a power of attorney, which gave him almost unlimited authority, and was the recognized messenger between herself and her attorneys at law. During this period, according to his own testimony, he paid upward of a thousand visits, and had charge of the greater part of her property. Complainant commenced proceedings in equity in the court of common pleas No. 2 of the county of Philadelphia, to June term, 1887, No. 972, against Bridget Nichols, to recover back certain real estate. Just previous to the commencement of the suit, at the suggestion of the defendant, and by him, she was introduced to H. B. Amerling, Esq., an attorney at law, whose first professional business for her was the preparation of a will, in which defendant was a legatee in the sum of one thousand dollars. This was almost immediately after he had commenced to treat her as her physician. Shortly after Mr. Amerling had been retained as counsel, these proceedings were begun, and, as associate counsel, Mr. Amerling had with him Edward Haugh, Esq., and W. W. Wiltbank, Esq. The case had been taken by the counsel, as far as Messrs. Haugh and Amerling were concerned, on a contingent fee of one-half the value of the property should they succeed in recovering back the same. This suit terminated adversely to Miss Unruh. Shortly before its termination, as she alleges, upon the suggestion and by the advice of Dr. Lukens, and for the purpose of covering up her property and preventing it being burdened by the costs of that suit, she gave to Dr. Lukens and to one Catherine Brown, a friend of hers and a codefendant in this bill, judgment notes for the sum of six thousand dollars each. She subsequently executed two mortgages for similar amounts and to the same parties. Subsequent to the mortgages, on the 6th of June, 1889, she executed a deed for all her real estate to Dr. Lukens and

Digitized by Google

Mrs. Brown, and the judgments upon the notes and the mortgages theretofore given were then satisfied of record. This deed, though absolute upon its face, was to all intents and purposes a trust deed, and, according to the testimony of Dr. Lukens, was made 'with the knowledge and intention of retaining the use of these properties, and at any time she could have them redeeded to her.' They were conveyed back to her, by a deed made by Benjamin F. Lukens and wife and Catharine A. Brown, on the 5th day of January, 1891, and on the same day the deed which is the subject of the present proceedings, and which is commonly known throughout as the 'trust deed,' was executed by the said Emeline Unruh, and was duly recorded. Up to the date of this recited deed, Dr. Lukens had retained his position as physician and attorney in fact for Miss Unruh. Thereafter he rendered no services whatever. Miss Unruh, in speaking of these several transactions and deeds, says that Lukens told her that Wiltbank had said she had better give him (Lukens) the power of attorney, and that she had better have her property put out of her name during the pendency of the Nichols suit, and that it was to be put back in her name after the suit was over, and she speaks of the judgment notes and the mortgages as shams. She says: 'They were made to save my property so they could not come on me when the suit was done.' She further says that there was no consideration for the conveyance, and that that written in the deeds was not true, and that she had never read it nor understood it; that she did not owe the doctor anything,—not more than a hundred dollars, at any rate. She further says that, at the time of the execution of the deed which is the subject of the present proceedings, the same was not read or explained to her, but she was informed by Mr. Bryant, who had by this time become her attorney, that she could change and revoke the same at her pleasure. In this she was, at least to some extent, corroborated by Catherine Brown. Dr. Lukens, on the contrary, testified that the deed was made to him, as compensation for his services, and that these services were the consideration therefor. Mr. Bryant testified that he fully explained the deed and its covenants to her, and that she had told him she wanted it so written that no one could interfere with it, not even herself. It does not appear anywhere in the testimony that Mr. Bryant or any one else explained to Miss Unruh the right of revocation, and how her failure to reserve that right would affect her in the future. The consideration claimed by Dr. Lukens, or how the amount was arrived at, did not appear. It was alleged by Miss Unruh, and not denied by the doctor, that no bill had ever been presented. No bill was presented before the master; no itemized account; no statement of the number of visits; nothing on which the master could form an opinion as to those visits, and place a value upon the same. The excuse for this absence was, as the doctor said, because Miss Unruh had promised to compensate him liberally for his services in a will which was afterwards made. But this will was made shortly after the commencement of his employment, and was canceled within a few months thereafter. It would seem almost incredible that a business man would have for almost five years visited his patient, his principal, and his client, upward of a thousand times, and keep no record, make no charge, and have no books of any kind to show either the number of the visits or their value.

"One peculiarity of the case, as it presented itself to the master, was in the fact that Messrs. Amerling & Son and Mr. Bryant had offices together in the same room, and that Mr. Haugh, her other attorney, had his office in the same building and on the same floor, and that, at the very time that Mr. Bryant prepared the deed of trust for which Emeline Unruh says she paid him the sum of $150, Mr. Amerling was the counsel for Dr. Lukens, although he had been previously counsel for Miss Unruh, and was then acting for her in the Nichols case, which had not ended. It is also singular that Amerling appears of record as counsel for Dr. Lukens in the judgment note of six thousand dollars, already referred to. Subsequently to the execution of the deed in question, according to the testimony of Miss Unruh, Mr. Amerling sued out two certain mortgages for her, and, as the proceeds of the sheriff's sale did not realize enough to pay the claim, he subsequently entered judgment on the bonds, and removed the same to Montgomery county, and received certain amounts thereon from the award of an auditor appointed to distribute certain funds in that jurisdiction. The doctor claims in his testimony that these bonds were voluntarily given to him, and his counsel admits that the judgments thereon were assigned to him, as a voluntary gift from Emeline Unruh, who, on the contrary, asserts he only held them for the purpose of collection. In the 'deed of trust,' so called (the subject of the present litigation), Miss Unruh placed out of her hands and control all her real estate. She subsequently gave to the doctor a judgment note for $1,000, which note seems to have been prepared by her own counsel, Mr. Bryant,—she says, because of a fear she had that the trust deed that then had been executed would be interfered with, and she made to lose all her property; Dr. Lukens alleges in settlement of a charge of slander made by him. At all events, this note was entered up, judgment had thereon, and the Germantown Saving Fund, her depositories, attached as garnishees. Both her real and personal estate were thus put out of her own name, and beyond her control. The income of the real estate alone was hers during life, and at her death, the whole estate would be distributed

Digitized by Google

among the defendants in this bill. Whether these matters, as stated in the testimony of the various parties, be true or not,—and there was a deal of confusion and contradiction throughout,—one thing is true, and seems to be admitted by all interested in the cause, that, by this deed, Miss Unruh entirely conveyed away all her real estate; that Dr. Lukens was her agent, her physician, and her confidential friend, and that the only consideration which passed from him to her was the value of the services he rendered her as such; that Catherine Brown and the church have relinquished all and any rights under the said deed, and agree that the decrees as prayed for shall be made. It did not appear to the satisfaction of the master that this deed in question had ever been delivered to Dr. Lukens. It is certain that he never formally or in writing accepted the trust. The most that he did was to tell Mr. Bryant, the attorney for Miss Unruh, who informed him of the provisions of the deed, that he would act as such trustee. The deed, however, has been continuously in the possession of Mr. Bryant, from the time of its record until it was produced before the master. He says upon that subject: 'I took them to my office, and put them in a box, and there they remained until I was called upon to testify, when I took them from there to your office, and left them there.' He afterwards qualifies this answer by saying: 'They had been in my possession, and also in Dr. Lukens' possession.' He came to my office, and examined them. Perhaps Miss Unruh came there, and very likely did. They remained in my box at No. 142 South Sixth street, together with all my papers and receipts.' 'I had a box in which I kept all my business transactions with Miss Unruh, and all the papers, policies, deeds, and all the papers referring to this were kept in that box.' This, it is suggested by the master, in a matter of such grave importance as the conveyance of all the property of a woman to her physician and agent, is very far removed from what the law contemplates as a proper and complete delivery.

"Much of the testimony taken, if not entirely irrelevant, did not bear directly upon the question at issue before the master. It was undoubtedly proven from the testimony of Dr. Lukens himself that, when he was called upon to first see Miss Unruh, it was at the suggestion of a fellow physician, and to examine her as to her mental condition. As he says: 'To see whether she was compos mentis, and capable of transacting her own business.' And, although he did not see her from 1883 to 1886, yet he says: 'After treating her for several days, it became evident from the condition in which I found her mentally that it was necessary for her to have some one to take charge of her business affairs.' It is not denied by Dr. Lukens that from that time, until the execution of the deed which is the subject of the present proceedings, he acted as her physician, her attorney in fact, and her adviser; but it is claimed that the services he rendered her in these different capacities are an adequate and valid consideration for such conveyance.

"Finding of Facts.

"The master finds from the testimony the following: (1) That on the 5th of January, 1891, Emeline Unruh, the complainant, executed a certain deed for her real estate to the defendant, Benjamin F. Lukens, in trust, for certain purposes therein set forth; that the said deed was duly and properly recorded by her attorney. (2) That the same was never delivered to the defendant, Benjamin F. Lukens. (3) That, at the time of the signing of the aforesaid deed, the defendant, Benjamin F. Lukens, was the physician and business attorney of the complainant, and had been such from the 19th of April, 1886. (4) That by this deed the plaintiff conveyed all her real estate, after her death, to the defendant, Dr. Lukens, and other parties, and that the latter have renounced all right to the same, and ask that the decree prayed for in the bill be made. (5) That no consideration passed from the defendant to the plaintiff at the time of the execution of the said deed. (6) That, at the time of the execution thereof, Emeline Unruh was upward of seventy years of age. (7) And that the effect of the said deed was never properly explained to her.

"The Master's Findings as to the Law.

"In the view taken by the master of the matter before him, the question to be determined is as to the validity and adequacy of the consideration. The position occupied by Dr. Lukens towards Miss Unruh was of such a confidential character as to throw upon him the duty of showing expressly that the arrangement was fair and conscientious, beyond the reach of suspicion. In Greenfield's Estate, 14 Pa. St. 505, the court says: 'While these connections exist, the advisor shall take no benefit to himself, from contracts or other negotiations, without establishing this perfect fairness and adequacy, and that the deed was the deliberate act of the confiding party, after being fully informed of his rights, interest, and duties, and put on his guard against even the suggestion of his own inclination.' It was argued by the counsel for the defendant, that the services of Dr. Lukens and the promise of Miss Unruh to compensate him liberally, together, formed such valid consideration, and that this conveyance in trust to Dr. Lukens was coupled with an interest which vested in him under the said deed, and which could not be divested by any subsequent action of Miss Unruh. It is suggested, however, that, while the reasoning of the counsel may be ordinarily true, the confidential relations existing between Miss Unruh and Dr. Lukens

Digitized by Google

were such as to withdraw this particular conveyance from the operation of ordinary rules, and throw upon the beneficiary the duty of showing expressly that the arrangement was fair and conscientious, beyond the reach of suspicion. This was not done. The value of the services rendered was not attempted to be proven, nor were the items of such services submitted. It is true, the doctor testified that upward of one thousand visits were made necessary by his duties; but he rested his consideration upon the promise which he alleged was made to him to compensate him by a will, and made no attempt to affix a value to them. It is not necessary to run through the various judgment notes, mortgages, and other conveyances, which were alleged to be frauds, in the law as well as in morals, because the question at issue is, in the master's view, only that of the existence of the relationship suggested, and the necessity, in consequence of such relationship, of proof, beyond the possibility of doubt or suspicion, of the fairness of the dealing, and the full knowledge of Miss Unruh as to the result of her act. From the time of Greenfield's Estate this has been the recognized law of the commonwealth, and in Darlington's Estate, 147 Pa. St. 624, 23 Atl. 1046, the court, in citing Greenfield's Estate, says further, and only in the development of the same principle: 'The confidential relation is not confined to any specific association of the parties to it. It embraces agent and principal, physician and patient.' So that, in the present case, the defendant, Lukens, occupied a relation which was doubly a confidential one. In view of the facts as found, and the law bearing upon those facts, the master has therefore concluded, and respectfully submits to the court, that the prayers of the bill should be granted, and that the defendant, Benjamin F. Lukens, be directed to reconvey the title to the property in question to the plaintiff, Emeline Unruh, freed and discharged of any and all trusts. All of which is respectfully submitted."

Wm. F. Johnson, for appellant. Melick & Potter, for appellee.

PER CURIAM. The controlling facts of this case are sufficiently presented in the pleadings and report of the learned master, which were approved by the court below. Our examination of the record has satisfied us that there is no substantial error either in the findings of fact or in the legal conclusions of which the decree is predicated. There appears to be nothing in either of the specifications of error that requires special notice. The questions involved are sufficiently considered in the master's report; and, for reasons there given, we think the decree should be affirmed. There appears to be no reason for imposing any part of the costs on the appellee. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

MORRIS et al. v. METALLINE LAND CO. OF LAKE SUPERIOR et al.

(Supreme Court of Pennsylvania. Feb. 18, 1895.)

ASSOCIATIONS—FORFEITURE OF STOCK—NOTICE.

Under articles of association of a joint-stock company, providing that the trustees may make assessments by notice published in Philadelphia and Detroit, and after 30 days from the time when the assessment is due may forfeit the stock, a forfeiture declared, where notice is published in a Philadelphia paper only, is void.

Appeal from court of common pleas, Philadelphia county.

Suit by Evan Morris and others, trustees, against the Metalline Land Company of Lake Superior and others. From the decree, defendant B. A. Hoopes appeals. Reversed.

William J. MacMullan, for appellant.

GREEN, J. In the case (March term, 1894) in which Brooking, Stevens, and Miller were appellants, reported in 164 Pa. St. 326, 30 Atl. 240, the parties to the record being the same as in the present case, we made a decree reversing the decree of the court below, and directing the record to be remitted, with instructions to distribute the fund in the hands of the trustees in accordance with the opinion filed in those cases. The present appeal, taken by B. A. Hoopes from the same decree, is in the same category with the former appeals, and is controlled by the decision there made. For the reasons and upon the conditions stated in the former opinion, we make the same decree as was there made. The decree of the court below is reversed, at the cost of the appellees, and the record is remitted, with instructions to distribute the fund in the hands of the trustees in accordance with the opinion already filed.

KEDWARD et al v. CAMPBELL et al.

(Supreme Court of Pennsylvania. Feb. 18, 1895.)

FINDINGS OF FACT—SUFFICIENCY OF EVIDENCE—REVIEW.

A finding that the mental capacity of a person at the time of signing a judgment note was such as to incapacitate him from understanding the effect of his act, being a finding on a pure question of fact, will not be disturbed, there being evidence to support it.

Appeal from court of common pleas, Philadelphia county.

Judgment was entered by William Kedward and another against Samuel J. Campbell on a judgment note. On application of Ellen S. Campbell, administratrix of Samuel J. Campbell, the judgment was set aside, and plaintiffs appeal. Affirmed.

James M. Beck, Wm. F. Harrity and John G. Johnson, for appellants. Josiah R. Adams and Samuel B. Huey, for appellees.

Digitized by Google

PER CURIAM. The instrument whose validity is involved in this controversy is a single bill, commonly called a "judgment note," for the payment of $12,085.03. It contains an authority to enter judgment for the whole amount, is dated June 13, 1892, but was signed on the 14th, and, being payable one day after date, was due as soon as it was signed. It contains also an agreement that the judgment may be entered without stay of execution, a waiver of inquisition, and a voluntary condemnation of the real estate of the obligor, an agreement that the prothonotary might enter the voluntary condemnation on the fi. fa., and that the real estate might be sold upon the fi. fa.; and it contains also a waiver and release of "all relief from any and all appraisement, stay, or exemption laws of any state now in force or hereafter to be passed." Ordinarily, the voluntary signature of a person to such a paper implies that he knew its contents. But this paper was signed by the obligor in the extremity of his last illness, when he was entirely prostrated physically and mentally, and while he was constantly progressing to his dissolution, which followed in less than 48 hours. His disease was meningitis. His attending physician testified as to his condition from the evening of the 12th that "during a portion of the time he was in a state of stupor, during a portion of the time in a state of coma, as I would call it, and during a portion of the time he was actually delirious, and at no time was his mental condition what a physician would call clear." At a quarter past 10 a. m. on the 14th his temperature was 102.2, pulse 120; at half past 4 p. m., temperature 103, pulse 160. The paper was signed between 11 and 12 a. m. There was no testimony that the contents of the paper were explained to him at the time of signing or before or after it was signed. The subscribing witnesses were both unable to say that when he was asked whether the signature to the paper was his he made an affirmative answer. They said they could not understand what he said. The signature is illegible, though he wrote an excellent hand. There was a mass of testimony as to his condition of mind and body at the time of the execution of the paper and shortly before and after. From the whole of the testimony the auditor found as follows: "The facts clearly proved show that at the time the judgment note was signed there was such mental impairment of the defendant, produced by bodily weakness, as well as by a disease of the brain itself, that in making his trembling attempt at his signature to the paper he was oblivious of the real nature of the act, and totally unable to grasp its effect and consequence; that his mental capacity at this time was such as to thoroughly incapacitate him from understanding the effect of his act,—an act authorizing an execution immediately to issue to sweep away his entire property. Under all the evidence offered, the auditor is of opinion that the note in question was not the clear, voluntary act of a man in the possession of his senses, and that the judgment confessed thereon cannot stand." This finding has been confirmed by the learned court below. It is a finding upon a question of pure fact. After a patient and careful reading of the testimony, the auditor's report, and the arguments of counsel, we do not feel at liberty to say that it was not justified by the evidence. It seems to us there was abundant testimony to sustain the finding. The decree of the court below is affirmed, at the cost of the appellants.

COMMONWEALTH v. FREEMAN.

(Supreme Court of Pennsylvania. Feb. 11, 1895.)

JURY—DRAWING—WAIVER OF IRREGULARITIES.

Under Act Feb. 21, 1814, providing that pleading the general issue shall be a waiver of all errors and defects in or relating and appertaining to the drawing of jurors, defendant, after pleading not guilty, cannot complain of irregularities in drawing the jury, which occurred prior to the plea, though he did not know of them, as he might have.

Appeal from court of oyer and terminer, Westmoreland county.

William Freeman was convicted of murder, and appeals. Affirmed.

James S. Beacom and Curtis H. Gregg, for appellant. Joseph A. McCurdy, Dist. Atty., and J. E. B. Cunningham, for the Commonwealth.

DEAN, J. The jury, on evidence which fully warranted the verdict, found the appellant guilty of murder of the first degree. The court below, after careful consideration of the reasons therefor, overruled a motion for a new trial, and imposed sentence of death; and from this judgment defendant appeals, assigning for error the refusal of the court to quash, for irregularities, the indictment and the array of grand and petit jurors. Defendant's counsel, in support of the motion to quash, offered to prove (1) that the jury wheel, after being filled, had not been sealed as required by law; (2) that the wheel and the key thereto, contrary to law, were both retained in custody of the sheriff; (3) that the wheel was not kept in a place where it could not be tampered with. As the court declined to hear the oral evidence offered to prove these facts, we must assume they existed. We do not consider them trifling or immaterial. The statutes providing for the selection of names to be put in the wheel; how it shall be locked and sealed; its custody, and that of the key,—should be strictly observed. The officers charged with this duty are allowed no discretion, and are subject to severe penalties for either willful or negligent omission.

Digitized by Google

But a complaining suitor for mere irregularities must make his objection in time, or he will be deemed to have waived it. Here the prisoner on being arraigned, pleaded "not guilty." Then twenty-three jurors were called. Fifteen of these were stood aside by the commonwealth; four were peremptorily challenged by the prisoner, and four were accepted by him, and sworn to try the issue. Then the motion to quash was made, which was overruled by the court because made too late. All the text writers concur in holding that, after plea pleaded, a motion to quash for such defects as these will not be sustained. Besides, this case, on its facts, is clearly within the intent of section 1 of the act of 21st February, 1814, as follows: "A trial or an agreement to try on the merits, or pleading guilty, or the general issue in any case shall be a waiver of all errors and defects in or relative and appertaining to the said precept, venire, drawing, summoning and returning of jurors." Each one of these defects or omissions had relation to the drawing. That this may be certainly fair and impartial, provision is made for the safekeeping of the wheel and its contents preparatory to the several drawings of jurors therefrom for the several terms of court. For at least 30 days before this motion to quash was made the facts on which it was based could have been within the knowledge of the prisoner and his counsel. Assume, as stated, that they were not actually known to them until after plea and challenge to the poll, the waiver is presumed, not alone from what was actually known, but also from what might have been known. The presumption is that the prisoner, on an inspection of the array after drawing, was content to be tried by a jury selected therefrom, without inquiry as to whether the strict requirements of the law had been observed preparatory to the drawing. This is a reasonable interpretation of the act of 1814, and it fairly admits of no other. If the plea, either in a criminal or civil case, be entered before the filling of the wheel from which the jury is drawn to try the particular case, it follows that the act of 1814, so far as it declares such plea shall be deemed a waiver of irregularities, can have no application. And this may often be the fact in a civil cause; but it can seldom occur in a criminal issue, where trial follows soon after accusation. The plea is a waiver of existing irregularities, not of future ones. Then, the motion must be made as soon as the defects are known, or as soon as, with reasonable diligence, they might have been known. The effort of courts is to give all statutes a reasonable interpretation. If there be actual fraud or corruption in filling the wheel, or actual tampering with it to the prejudice of a suitor, they, in the interests of justice, will not hesitate to apply the proper remedy, without regard to the time the motion is made. But here there was no intimation of anything beyond irregularity. The trial was in every respect fair; to such a degree, indeed, that the prisoner makes no complaint. A very careful examination of the whole subject, and the authorities applicable thereto, brings us to the conclusion that the learned judge of the court below was right in refusing the motions to quash the indictment and the array of grand and petit jurors. The judgment is affirmed, and record remitted, that it may be carried into effect according to law.

ASHHURST et al. v. EASTERN PENNSYLVANIA PHONOGRAPH CO.

(Supreme Court of Pennsylvania. Feb. 18, 1895.)

LEASE—CONSTRUCTION—INTENTION TO DETERMINE—NOTICE.

Under a lease for a year, with a provision that if the lessee shall hold over after such term, with the consent of the lessors, it shall be deemed a renewal of the lease for the term of another year, and so on, if the possession is still continued, with like consent, after the expiration of the additional year, from year to year, unless either party shall give three months' previous notice of intention to determine the tenancy at the end of any year, the notice is not necessary at the end of the first or the second year, but only at the end of any succeeding year.

Appeal from court of common pleas, Philadelphia county.

Action by Richard Ashhurst and another, trustees, and others, against the Eastern Pennsylvania Phonograph Company, on a lease for rent. Judgment for defendant. Plaintiffs appeal. Affirmed.

The lease sued on was for the term of one year, with a provision: "It is hereby further agreed that if the lessee shall hold over after the expiration of the term hereby created, with the consent of the lessors, it shall be deemed and taken to be a renewal of this lease, and of all terms, conditions, covenants, and provisos herein contained, for the term of another year, and so on, if the possession is still continued, with like consent, after the expiration of this additional year, from year to year, unless either party shall give three months' previous notice to the other of an intention to determine the tenancy at the end of any year; provided, also, that, if the lessors in their option so elect, the failure of the lessee to give said notice of its desire to determine said tenancy shall be deemed and taken to be such a renewal."

R. H. Bayard Bowie and Rowland Evans, for appellants. Henry C. Terry, for appellee.

McCOLLUM, J. Does the affidavit contain a good defense to the action? The answer to this question depends entirely upon the construction of the lease, because the portion of the affidavit which relates to the

Digitized by Google

surrender of the demised premises is clearly insufficient to prevent judgment. An averment of the surrender is unavailing, without the further averment of an acceptance of it by the lessor. Teller v. Boyle, 132 Pa. St. 56, 18 Atl. 1069. The real question, therefore, is whether the provision in the lease in regard to notice of an intention to determine the tenancy applies to each year of the lessee's occupancy of the demised premises, or is limited to his possession of them after the expiration of the additional year mentioned therein. This provision is somewhat obscure and confusing, but there is no room in it for a construction which dispenses with notice the first year, and requires it to be given in order to terminate the tenancy at the end of the second or "additional year." If the lessors could have dispossessed the lessee at the end of the first year, without having given three months' previous notice of their intention to determine the tenancy at that time, we see no good reason why they could not have done so at the end of the second year; and, if the rights and obligations of the parties were mutual in this respect, it follows that the lessee was at liberty to surrender the premises at the expiration of either year without having given such notice or incurring further liability under the lease. It appears to be conceded by the appellants that notice was not necessary to determine the tenancy at the end of the first year, and so far we agree with them. The second term of one year was not founded upon a failure to give the three-months notice before the expiration of the preceding term, but upon a holding over by the lessee with the consent of the lessors. It seems to us that the rights and obligations of the parties were the same the second year as the first, and that the provision in respect to notice is applicable only to tenancies arising from a holding over after the expiration of the "additional year." It being conceded that the notice clause was not operative the first year, the contention based on its concluding words "any year" loses its significance, and becomes unimportant. This construction gives effect to the words, "after the expiration of this additional year," while the construction which makes the notice clause applicable to that year ignores them. Judgment affirmed.

In re TUCKER AND FRANKFORD STREETS.

Appeal of PLUMB.

(Supreme Court of Pennsylvania. Feb. 18, 1895.)

RAILROAD AND STREET CROSSING — CHANGE OF GRADE—DAMAGE—LIABILITY OF CITY.

Where a grade crossing of a street and railroad was changed by agreement of the railroad company and the city, the company raising its tracks and the city lowering the street, damages to one owning land adjoining the track by reason of the increased cost of moving freight to and from the cars on the track, cannot be collected of the city, as caused by the change of street grade.

Appeal from court of common pleas, Philadelphia county.

In the matter of the change of grade of Tucker and Frankford streets, in the city of Philadelphia. From a decree setting aside the report of a jury assessing damages by reason of such change of grade, Fayette R. Plumb appeals. Affirmed.

John Roberts and David W. Sellers, for appellant. Howard A. Davis, James Alcorn, and Chas. F. Warwick, for appellee.

McCOLLUM, J. The damages awarded by the viewers were the direct consequence of work done by the Philadelphia & Trenton Railroad Company on its right of way adjoining the plaintiff's property. It consisted of an elevation of the railroad tracks to a height which impaired his facilities for loading his goods on the cars. He claims that the city is liable to him for these damages, on the ground that the act from which they resulted was necessitated by its change of the grade of Frankford street. It appears that on the 29th of March, 1887, the councils, with the approval of the mayor, authorized a revision of the lines and grades of the city plans along the line of the Philadelphia & Trenton Railroad from Tacony street to Pennypack creek in the Twenty-Third ward, for the purpose of avoiding all grade crossings of the railroad between these points. In the ordinance authorizing this work it was provided that before confirmation of the revised plans the railroad company should file an approved obligation that it would at its own cost and expense change the elevation of its road at such points as in the revision of the plans might be found necessary in order to construct overhead or undergrade bridges, and, in accordance with the revision, construct all the bridges and other works incident thereto, within its right of way. In view of the proviso in the ordinance, the latter may be regarded as a proposal by the city to the railroad company of co-operation in the abolition of the grade crossings of its road between the points named. The acceptance of this proposal by the railroad company was voluntary, and in its interest, as well as in that of the city. It was followed by a confirmation of the revised plans, and the physical change of the grade of Frankford street in accordance with them. The work of lowering the grade of the street was done by the city, and the work of constructing the overhead bridge and raising the railroad tracks to correspond with it was done by the railroad company. While this proceeding was instituted for the purpose of assessing the damages the plaintiff sustained by the change of the grade of Tucker and Frankford streets, it was conceded in his tes-

Digitized by Google

timony, and found by the viewers, that his property was not injured by any work done by the city on either of them. Tucker street was not opened beyond the railroad, and there has been no physical change of its grade. His property does not abut on Frankford street, and is not affected by the lowering of it. It was the elevation of the railroad tracks, and that alone, which caused the injury complained of; and this, as we have seen, was work done by the railroad company, at its own expense, within its right of way, on which his property abutted. Access to the property on the side of it which has a frontage on the right of way was, and still is, exclusively by rail, but the elevation of the tracks has increased the labor and expense involved in receiving the materials from and loading the manufactured products upon the cars. In all other respects access to it is unchanged. The undisputed facts, therefore, present a case of highways crossing each other at grade, one of them created and controlled by the city, and the other by the railroad company. A mutual desire of these corporations to abolish grade crossings resulted in an agreement under which, to accomplish the common purpose, the city lowered its street and the company elevated its road. The outcome of the facts is a proceeding against the city for the recovery of the damages sustained by a property owner in consequence of the elevation of the railroad. The city contends that its change of the grade of Frankford street was not the proximate cause of these damages claimed, and it rests its contention in this particular on the plaintiff's testimony and the report of the viewers, who distinctly found that the entire damage done to plaintiff's property was "the result of the elevation of the tracks of the Philadelphia and Trenton Railroad Company." It also contends that there is nothing in its agreement with the company which subjects it to liability for damages occasioned by the act of the latter. We think that upon the undisputed facts on which the plaintiff's claim is based the city's entire contention is sound, and the order of the court below setting aside the report of the viewers should be sustained. In this conclusion we do not disregard, or in the slightest degree qualify, the principle on which Snyder v. City of Lancaster (Pa. Sup.) 11 Atl. 872, and Mellor v. City of Philadelphia, 160 Pa. St. 614, 28 Atl. 991, were decided. These cases are plainly distinguishable in their facts from the case at bar. In Snyder v. City of Lancaster the opening of Filbert street was the direct cause of the injury complained of. The opening of the street took away from plaintiff's house the lateral support it had, and left it without a gable. In Mellor v. City of Philadelphia access to plaintiff's property by vehicles was cut off by the change of the grades of Oxford and Margaret streets. The injury complained of in the cases cited was the direct and proximate consequence of the opening of a street or a change of its grade. The principle on which they were decided is unquestionably sound, but it is not applicable to the facts of this case. The order setting aside the report of the viewers is affirmed.

COMMONWEALTH ex rel. HOLLAND, District Attorney, v. SCHNEIPP.

(Supreme Court of Pennsylvania. Feb. 18, 1895.)

STATUTES—REPEAL—POWERS OF BURGESS.

Sp. Act Feb. 27, 1851 (P. L. 115), chartering the borough of Bridgeport, and incorporating within its terms certain sections of the general borough law of 1834 (P. L. 163), which provide that the burgess shall be elected for one year, that he shall be a member of the borough council, with power to vote, but no veto power, is, together with the law of 1834, so far as they relate to the election of burgess, repealed by the general law of May 23, 1893 (P. L. 113), which makes the term of the burgess three years, disqualifies him for the next term, provides that he shall not be a member of the council or have power to vote, gives him the veto power, and provides that "all acts or parts of acts inconsistent herewith are hereby repealed."

Appeal from court of common pleas, Montgomery county.

Quo warranto, on the relation of James B. Holland, district attorney of Montgomery county, to determine the right of William F. Schneipp to the office of burgess of the borough of Bridgeport. Decree for relator, and respondent appeals. Affirmed.

Edward F. Kane and Montgomery Evans, for appellant. N. H. Larzelere and M. M. Gibson, for appellee.

GREEN, J. In the case of Com. v. Weir, 165 Pa. St. 284, reported also in 30 Atl. 835, we considered and decided the very question involved in the present contention. In that case, as in this, the official whose title was in question was a burgess of a borough (Indiana). We decided that the special law of March 12, 1869 (P. L. 344), "regulating the election of burgess and town council of the boroughs of Indiana and Brookville," so far as the election of burgess was concerned, was repealed by the general law of May 23, 1893 (P. L. 113). We held that the special repealing clause of the act of 1893 was an express repeal of the act of 1869, with which it was so inconsistent that they could not stand together. The same repealing clause of the same general law (Act 1893) is now invoked as having the same effect in this case upon the law which, prior to 1893, regulated the election of burgess of the borough of Bridgeport, in the county of Montgomery. The points of difference are not identical with those appearing in the former case, but they are of the same character, and are sufficiently inconsistent with the provisions of the former law in this case to bring it within the operation of the repealing clause of

Digitized by Google

the act of 1893. In this case the borough was chartered by a special law, approved February 27, 1851 (P. L. 115), which incorporated within its terms eight sections of the general borough law of 1834 (P. L. 118), to wit, sections 7 to 13, both inclusive, and also section 16. By section 3 of the act of 1851, the burgess was to be elected for the term of one year; whereas by the act of 1893 the burgess is elected for the term of three years, and is not eligible to election for the next succeeding term,—a disqualification which does not appear in the act of 1851. By the eighth section of the general law of 1834, which is made a part of the borough charter, the burgess is constituted a member of the borough council, with full power to act and vote as a member upon all bills and ordinances which may come before them. The language of the section is: "It shall be the duty of the town council of each borough hereinafter incorporated, four of whom, including the burgess if present, shall be a quorum, to meet at such times and places as by the by-laws and ordinances of said borough shall be appointed, at which meetings they may enact, revise, repeal, and amend all such by-laws, rules, regulations and ordinances," etc. Numerous powers are specially conferred upon them by the remainder of the section. The section further provides: "And the burgess shall be president of the town council and shall have and exercise all the rights and privileges as a member thereof, but in case of the absence of the burgess the members present may elect one of their number to preside for the time being." By the second section of the act of 1893, it is provided: "Such chief burgess shall not hold any other borough office or appointment during the term for which he is elected, nor be a member of nor preside at the meetings of the town council of said borough. But such meetings shall be presided over by a president of council to be at the annual organization thereof elected by such council from among their number, and in the absence of such president shall be presided over by a president pro tempore."

It will be perceived at once that the provisions of these two acts upon this subject are utterly hostile to each other, and cannot possibly stand together. Under the acts of 1851 and 1834, there is no power in the burgess to veto any ordinance or resolution of council; but, under the third section of the act of 1893, a full power to veto all such ordinances and resolutions is conferred upon the burgess, with an additional provision requiring a vote of two-thirds of the members to pass the measure over the veto. In case of a veto it would require a vote of two-thirds of all the members to pass an ordinance or resolution, whereas under the former laws a majority was always sufficient. Under the act of 1851, the burgess, being a member of council, could vote on any measure; but, under the act of 1893, he could not in any circumstances cast such a vote. If, under the act of 1893, he should veto a measure, he could, under the act of 1834, vote as a member on the question of sustaining his own veto. For these and other reasons which it is unnecessary to point out, we hold that the act of 1893 repeals the acts of 1851 and 1834 so far as they relate to the election of a burgess, and that the act of 1893 is now the only one in force. There is much discussion in the paper books which we do not regard as relevant, and therefore do not stop to consider it. The assignments of error are dismissed. The decree of the court below is affirmed, at the cost of the appellant.

CITY OF PHILADELPHIA v. SCHOFIELD.

(Supreme Court of Pennsylvania. Feb. 18, 1895.)

CLAIM OF CITY—SCIRE FACIAS—NOTICE—WAIVER.

The provision of Act March 23, 1866, regulating the filing and collecting of municipal claims in Philadelphia, that, before scire facias shall issue on any such claim, written notice shall be given to the owner of the property liened, is not mandatory, in the sense that it cannot be waived by the owner; and an agreement by him with the city for an amicable sci. fa. on the claim is a waiver or admission of the service of the notice.

Appeal from court of common pleas, Philadelphia county.

Amicable action of scire facias by the city of Philadelphia against Mary E. Schofield, as owner of a lot of land, on a claim for the cost of laying a water pipe in front of the lot. Judgment for defendant. Plaintiff appeals. Reversed.

E. Spencer Miller and Charles F. Warwick, for appellant. Charles Davis, for appellee.

McCOLLUM, J. The city filed its claim on the 16th of April, 1883, and an agreement for an amicable scire facias thereon was entered on the 24th of March, 1886. An affidavit of defense to the claim was filed on the 9th of April, 1886, and in September, following, a plea, a rule to reply, a demurrer, and a joinder in demurrer were filed. The demurrer was sustained on the 17th of December, 1890. Judgment in favor of the plaintiff was entered the next day, and the damages were assessed at $116.13. A rule to show cause why the judgment should not be stricken from the record was taken on the 24th of October, 1893, and on the 4th of the next succeeding month the judgment was opened by agreement. A case stated, embodying the above facts, was filed on the 4th of June, 1894, and two days thereafter judgment was entered thereon in favor of the defendant.

The claim in suit is subject to the act of 23d March, 1866, regulating the filing and collection of municipal claims in Philadelphia, which act, in the first section thereof, provides that, before any scire facias shall be

Digitized by Google

issued on any such claim, diligent search shall be made for the owner or reputed owner of the property liened, and that a written or printed notice shall be given to him or her to make payment to the city solicitor within 10 days. The obvious purpose of the act, manifested by the preamble to and the provisions of it, was to protect property owners against costs on claims of which they were ignorant, and to prevent, as far as possible, the sale of their properties without actual notice to them. A written or printed notice served upon the owner or reputed owner, whose residence is known, is thus made a condition precedent to the issuing of the sci. fa. on the claim. It is not mandatory, however, in the sense that it cannot be waived by a party for whose benefit it was enacted. If such a party, having knowledge of the claim, appears at the office of the city solicitor, and announces his intention to contest it, and enters into an agreement for an amicable sci. fa. upon it, he thereby confesses the knowledge, and rejects the opportunity for payment that the statutory notice would have given him. There is no object to be accomplished by serving the notice, and postponing the issuing of the writ after that.

Because it does not affirmatively appear in the case stated that the notice required by the act had been given, the learned court below inferred that it had not been, and accordingly entered a judgment for the defendant. In this, we think, there was error. There is no admission in the case stated that the city failed to comply with the provisions of the statute in regard to notice, but it distinctly appears therein that the owner agreed with the city to the issuing of the sci. fa. This agreement, in the absence of fraud or duress, may well be regarded as a waiver of the notice prescribed by the statute, or as an admission that it had been duly given. An owner who voluntarily becomes a party to a suit on the claim, and who enters a plea and files an affidavit of defense to it, cannot, after judgment against him on a demurrer filed to them, be heard to allege, as ground for setting aside or opening the judgment, that the city failed to give the statutory notice before issuing the sci. fa. expressly authorized by his agreement with it. Nor does the opening of the judgment enable him to successfully interpose such a defense. We think, therefore, that, upon the facts appearing in the case stated, judgment should have been entered on it for the sum of $116.13, with interest thereon from December 18, 1890, with costs. In reaching this conclusion, we have not overlooked the entries of April 13, 1888, showing the filing of an affidavit of service of notice, and the issuing of another sci. fa. But we do not regard these as admissions that the city failed to give the proper notice before the agreement for the first sci. fa. was filed. If they could be so regarded, they would not constitute an answer to the agreement, which, as we have seen, is a waiver of notice. Judgment reversed, and record remitted to the court below, with direction to enter judgment in accordance with this opinion.

SHEEHAN v. PHILADELPHIA & R. R. CO.

(Supreme Court of Pennsylvania. Feb. 18, 1895.)

RAILROAD CROSSING—INJURY TO PEDESTRIAN—NEGLIGENCE.

1. For one to go onto a railroad track immediately in front of an approaching train is negligence, no matter what he may say about having stopped, looked, and listened.

2. The negligence of a pedestrian who pays no attention to the warning given by the gates being down at a railroad crossing, but passes onto the track, bars recovery for his injury by an approaching train, and it matters not that the gates were always down.

Appeal from court of common pleas, Philadelphia county.

Action by Walter Sheehan, by his next friend, Michael Sheehan, against the Philadelphia & Reading Railroad Company, for personal injuries. There was judgment of nonsuit, and plaintiff appeals. Affirmed.

A. S. L. Shields, for appellant. Gavin W. Hart, for appellee.

PER CURIAM. That the plaintiff went upon the track of the railroad immediately in front of an approaching train is conclusively proved by the fact of the collision. We have so often ruled that this is negligence, no matter what the plaintiff said about his stopping, looking, and listening, that it is unnecessary to cite the authorities by anything more than the merest reference. Carroll v. Railroad Co., 12 Wkly. Notes Cas. 348; Moore v. Railroad Co., 108 Pa. St. 349; Marland v. Railroad Co., 123 Pa. St. 487, 16 Atl. 624; Myers v. Railroad, 150 Pa. St. 386, 24 Atl. 747. There are many others to the same effect. Upon this view only of the plaintiff's case the nonsuit was properly ordered.

But, in addition to this, it was fully proved, and is not disputed, that the accident occurred on a street of the city at a place where the street was crossed by the tracks of the railroad, and that the gates were down when the plaintiff attempted to cross the tracks. In the case of Cleary v. Railroad Co., 140 Pa. St. 19, 21 Atl. 242, we held that safety gates on a city street at a railroad crossing are a warning of the passing of trains not only to vehicles, but to pedestrians; and if, in disregard thereof, a pedestrian pass a gate in broad daylight, enter upon the crossing, and, while watching one train, is struck by another, and killed, his contributory negligence will prevent a recovery of damages. Undoubtedly, that case rules this. Here a train was approaching, the gate was down, as it should be, and the plaintiff was thereby warned of danger. He paid no attention to the warning, and received his injury as the

Digitized by Google

direct consequence of his own negligence. It is a matter of no moment whether the gates were always down or not. In this particular instance the train was approaching, and the gate was down, and the defendant discharged its duty in that regard. If the plaintiff had performed his duty, he would not have been injured. Judgment affirmed.

MILLER et al. v. BAKER et ux.

(Supreme Court of Pennsylvania. Feb. 25, 1895.)

JUDGMENT CREDITORS — PURCHASE AT EXECUTION SALE—RIGHTS AGAINST CESTUI QUE TRUST.

Where there is a resulting trust in lands in favor of the wife of a judgment debtor, in whose name the title stands, the judgment creditor purchasing at the execution sale with notice of the trust gets no greater rights against the wife than those possessed by the husband.

Appeal from court of common pleas, Washington county.

Action by James M. Miller and another against William J. Baker and wife. Judgment for defendants. Plaintiffs appeal. Affirmed.

For report on former appeal, see 28 Atl. 648.

McCrackens & McGiffen and H. M. Dougan, for appellants. J. M. Garrison, J. I. Brownson, Jr., E. E. Crumrine, and Boyd Crumrine, for appellees.

McCOLLUM, J. We reversed the former judgment in this case because the court below rejected the plaintiffs' offers to prove acts and declarations of William J. Baker inconsistent with and tending to discredit his testimony. We were then asked to reverse the judgment on the broader ground that upon the evidence in the case and the law applicable to it, the court should have directed the jury to find for the plaintiffs. This, for reasons then stated, we declined to do. We thought the evidence was sufficient to establish a resulting trust, and that the sixth section of the act of April 22, 1856, was not applicable to the case of a cestui que trust in possession. We thought also that the plaintiffs, being purchasers at a sheriff's sale upon a judgment against the trustee, and having notice of the trust, acquired such title only as their debtor had and could enforce against the cestui que trust. This appeal invites us to reconsider these conclusions, and to hold that upon all the evidence in the case, and the law governing it, the plaintiffs are entitled to recover the land in dispute. In accordance with their request, we have carefully read and duly considered all the testimony with a view to determine whether it is sufficient to authorize a finding of the facts essential to the existence of a resulting trust. It occupies 388 pages of their paper book, and it would serve no useful purpose to insert it, or any portion of it, in this opinion. It relates principally to the ownership of the money with which the farm was purchased, to the understanding between the husband and wife in reference to the purchase, and to the alleged mistake in the deeds. We think it is clearly sufficient to warrant a finding that the farm was purchased for the wife, and with her money, upon an understanding between her and her husband that she should receive the title to it; and further, that the deeds were made to him without her knowledge, and by mistake. Two juries have found these facts, under careful and correct instructions in regard to the character of the evidence required to establish them. The facts so found raised a resulting trust in favor of the wife. By virtue of them she became the beneficial owner of the farm, and her husband became a trustee of the legal title for her. We do not care to add anything to what was said in our former opinion respecting the wife's possession of her farm, her husband's continued acknowledgment of her claim to it, and the relation of the act of April 22, 1856, to the case. It is clear that under the circumstances shown the husband could not have successfully maintained that his wife's title was extinguished by her laches. Aside from the common-law rule that laches cannot be imputed to a married woman during coverture, we have in this case his continuous recognition of his wife's title, which alone would defeat any claim by him upon this ground. In Clark v. Trindle, 52 Pa. St. 492, as in this case, there was a resulting trust arising from the payment of the purchase money, and it was sustained after the lapse of 25 years. In that case the heirs of the trustee brought ejectment against the widow of the cestui que trust, and she defended her possession on the ground that her husband paid the purchase money, and his mother, to whom the deed was made, was a mere trustee of the legal title for him. In Douglass v. Lucas, 63 Pa. St. 9, Sharswood, J., said: "There is great reason and justice in holding that when the holder of a legal title, subject to a resulting trust, permits the cestui que trust to occupy and enjoy the land as owner, that he shall derive no benefit from the lapse of time." But, inasmuch as the plaintiffs appear to think they acquired by their purchase greater rights against the cestui que trust than their debtor had, a brief reference to some of our decisions on this point is deemed proper. Their position in regard to the property in dispute is clearly and correctly defined in the following excerpts from the opinion of Chief Justice Gibson in Reed's Appeal, 13 Pa. St. 476. "If anything is settled by reason and authority, it is that a judgment creditor is not entitled to the protection of a purchaser of the legal title against an equitable owner or his creditors, or to any advantage which his debtor had

Digitized by Google

not. * * * It has always been supposed that notice of a resulting trust or an incumbrance is early enough at the sheriff's sale of the legal title; but, if the judgment creditor had the immunity of a purchaser, notice would then be too late to impair the value of his security. A sheriff's vendee with notice buys exactly what the judgment creditor can sell, and, if he can sell no more than the interest of the debtor, it follows that he stands in the place of the debtor." See, also, Shryock v. Waggoner, 28 Pa. St. 430; Smith v. Tome, 68 Pa. St. 158; and McLaughlin v. Fulton, 104 Pa. St. 161,—to the same effect. We would not have cited any of the long list of cases in which this familiar principle has been recognized and enforced but for the persistence of the plaintiffs in ignoring it. We are not convinced of error in the rulings complained of in the third, fourth, and fifth specifications, or in the instructions in regard to the effect of the acts and declarations of William J. Baker inconsistent with his testimony. It follows from these views that we overrule all the specifications. Judgment affirmed.

HIESTER v. YERGER.

(Supreme Court of Pennsylvania. Feb. 25, 1895.)

WILLS—CONSTRUCTION—NATURE OF ESTATE.

A devise to H. for life, and after his decease "unto his then surviving heirs in fee," gives H. the fee-simple title to the estate.

Appeal from court of common pleas, Montgomery county; H. K. Weand, Judge.

Action of assumpsit by Samuel P. Hiester against Charles W. Yerger. From a judgment for plaintiff, defendant appeals. Affirmed.

Facts as agreed on by the parties, being the case stated:

"And now, to wit, April 25, 1894, it is hereby agreed by and between the parties to the above-entitled action that the following case be stated for the opinion of the court in the nature of a special verdict: Mary Hiester Weber, late of the borough of Norristown, county aforesaid, deceased, being seised of all that certain lot or piece of ground, with the three-story brick messuage thereon erected, situate in said borough, on the southwesterly side of East Airy street (No. 32), containing twenty-five feet (25) two inches (2) in front on said East Airy street, and extending in depth the distance of one hundred and sixty feet (160), on the 24th day of March, 1891, made her last will and testament in writing, which has, since her death, been duly probated and recorded, to wit, December 22, 1893, in the register's office in and for said county, wherein she provided, inter alia, as follows: 'Clause 4. I give my residence, No. 32 East Airy street, with the lot and appurtenances belonging thereto, and the premises No. 55 Penn street, both in said borough [Norristown], to my nephew Samuel P. Hiester for and during the term of his natural life, upon condition he keep the same in good repair and insured, and also pay all the taxes thereon during said term; and after his decease, whether before or after my decease, I give and devise the said premises No. 32 East Airy street unto his then surviving heirs in fee simple.' (A copy of said will is hereto attached.) On the 28th day of March, 1894, the said Samuel P. Hiester entered into a contract in writing with the said Charles W. Yerger (a copy of which contract is hereto attached, and the same made a part of this case), whereby he agreed to sell and convey the said premises No. 32 East Airy street in fee simple to the said Charles W. Yerger for the sum of seven thousand dollars ($7,000,) and the said Charles W. Yerger expressed his willingness to perform his said contract in case the said Samuel P. Hiester could make him a good and marketable title in fee simple for said premises; but he refuses to accept the title tendered him, alleging that the said Samuel P. Hiester has only a life estate in said premises, and cannot make a good title in fee in accordance with the terms of said contract. If it be the opinion of the court that the plaintiff is seised of a fee-simple estate in said premises under said will, then judgment is to be entered for the plaintiff in the sum of fifty dollars ($50), but, if the court be not of that opinion, then judgment is to be entered for the defendant. Costs to follow the judgment, either party reserving the right to sue out a writ of error without oath or bail."

The opinion of the court below is as follows (Weand, J.):

"Whether intentional or otherwise, the testatrix has used words which, under the uniform rulings of our courts, confer an absolute estate in the first taker. Had the will read 'to Samuel P. Hiester' for life, and after his decease to his 'heirs in fee simple,' there could have been no serious contention as to the construction to be placed upon the devise. The added words 'his then surviving' heirs do not change the meaning to be given to the word 'heirs,' and may be treated as superfluous, as was done in Criswell's Appeal, 41 Pa. St. 288, where the devise was to testator's son Joshua during his natural life, and that of his present wife, etc., 'and it is further my will and desire that after the decease of my son Joshua and his present wife that the said tract of land descend to their heirs jointly, and their heirs and assigns forever, or to such of them as may be living,' the court holding that the addition by the testator of the words 'then living' to the word 'heirs' was insufficient to cause the latter to give way; for superfluous or inconsistent words or doctrines in a will will not suffice to reduce the words 'heirs' or 'heirs of the body' to words of purchase. To the same effect is Appeal of Cockins and Harper,

Digitized by Google

111 Pa. St. 26, 2 Atl. 363, where the devise was 'to my three nieces, share and share alike, during their lives, and at their deaths to go to their heirs in equal amounts to all heirs living at the time of their deaths'; and it was held that the devisees took under the rule in Shelley's Case,—the real estate in fee simple, and the personal estate absolutely. There is no distinction between the expressions 'his then surviving heirs' and 'heirs then living' or 'heirs then living at the time of their deaths.' In each case the word 'heirs' refers to those who, under the intestate laws, would inherit from the first taker qua heirs. Following the ordinary rules of construction, therefore, the word 'heirs,' as used in this devise, must be presumed to have been used by the testatrix in its technical sense, and is to be regarded as a word of limitation, and not of purchase, there being nothing in the will to show that it was used in any other manner. The testatrix unquestionably intended the remainder-men to take through the tenant for life, and not directly from herself. Conceding that the testatrix intended to give Samuel P. Hiester but a life estate in the premises No. 32 East Airy street, yet having ascertained that she used the word 'heirs' in its technical sense, we must apply the rule governing cases of this kind, although by so doing we defeat the particular intent of the testator. And now, October 1, 1894, judgment is entered in favor of the plaintiff and against the defendant for the sum of fifty dollars, with costs of suit."

William F. Solly, for appellant. James S. Williams, for appellee.

PER CURIAM. For reasons given by the learned judge of the common pleas, we think he was clearly right in holding that under the will of Mary Hiester Weber the plaintiff is seised of a fee-simple estate in the premises in question, and in entering judgment in his favor on the case stated. All that need be said in support of the judgment will be found in the clear and concise opinion of the court below, and on it the judgment is affirmed. Judgment affirmed.

COMMONWEALTH v. BELL.

(Supreme Court of Pennsylvania. Feb. 25, 1895.)

INCEST—EVIDENCE—PRIOR ACTS.

1. On a prosecution for incest, evidence is admissible of illicit relations between the parties prior to the specific offense charged, though such evidence discloses other indictable offenses of like nature, barred by the statute.

2. Evidence that defendant denied prosecutrix the privilege of going to church and entertainments is admissible, in connection with evidence that his denial was based on his wrongful desire.

3. Where prosecutrix, in reply to the question whether she told her brother and sisters about the offense charged in the indictment at the time of or immediately after its commission, replied that she did not, but added that she told them five or six months thereafter, and the court accordingly refused to allow her to state what she said to them, and no motion was made to strike out that part of her answer which was not strictly responsive to the question, nor suggestion made that it was prejudicial, there was no error.

4. Admission of evidence in rebuttal, objected to because part of the commonwealth's case in chief, is not assignable in error.

Appeal from court of quarter sessions, Armstrong county; Calvin Rayburn, Judge.

William Bell was convicted of incestuous fornication, and appeals. Affirmed.

W. D. Patton and M. F. Leason, for appellant. H. N. Snyder, Dist. Atty., and McCain & Christy, for appellees.

McCOLLUM, J. Seven of the nine specifications of error filed in this case really raise but one question, and that is whether, in a prosecution for incestuous fornication, it is competent for the commonwealth to introduce evidence of illicit relations between the parties prior to the commission of the specific offense laid in the indictment. In Wharton on Criminal Evidence (section 35) it is said by the learned author that, "in prosecutions for adultery or for illicit intercourse of any class, evidence is admissible of sexual acts between the parties prior to, or when indicating continuousness of illicit relations even subsequent to, the act specifically under trial." This is in accord with the rule as stated in 2 Greenl. Ev. § 47, and in 1 Am. & Eng. Enc. Law, p. 214, and 10 Am. & Eng. Enc. Law, p. 344. Roscoe, in his treatise on Criminal Evidence, says the notion that acts of improper intimacy cannot be shown, if they disclose other and distinct offenses of the same nature as the one charged in the indictment, is exploded. To this point the language of the court in State v. Markins, 95 Ind. 464, is so pertinent that we quote it: "It would be a singular rule that would admit evidence of lascivious conduct, and yet exclude evidence of acts which, of all the series, supplies the strongest evidence that the crime charged was one likely to be committed. If the rule were that the state might show previous lascivious conduct, but must not show an act of sexual intercourse, we should have the singular anomaly of a legal rule rejecting evidence simply because of its strength and importance." If an act is so remote in point of time from the act laid in the indictment that the statute of limitations would protect the participants in it, in case of their prosecution for it, it is still admissible if it is one of a series of acts indicating continuousness of sexual intercourse. 2 Greenl. Ev. § 47, and 10 Am. & Eng. Enc. Law, p. 344, and cases cited. The principles above stated are well sustained by the cases referred to as authority for them, and they are not in conflict with any rule established by the decisions of this court. To the extent that our decisions

Digitized by Google

throw light on the question we are considering, they are in accord with these principles. Respublica v. Hevice, 2 Yeates, 114, and Gardner v. Madeira, Id. 466. We conclude, therefore, that it was proper for the commonwealth to introduce evidence of prior illicit relations between the parties, although such evidence disclosed other indictable offenses of like nature which were barred by the statute of limitations. This evidence was carefully restricted by the learned court below to the purpose for which it was clearly admissible, and the correctness of the instructions in regard to it is not questioned by any specification of error. But it appears in the evidence descriptive of the incestuous relations between the parties that the defendant denied the prosecutrix the privilege of attending church and Sunday school, and of social intercourse with the young people of the neighborhood. While the existence of the fact thus disclosed was not disputed, the learned counsel for the defendant contend that it was irrelevant, and that its appearance in the case was prejudicial to their client. If it be conceded that it was immaterial as an independent fact, having no relation to the alleged incestuous intercourse between the parties, it does not follow that it was so under the circumstances shown in this case. According to the testimony of the prosecutrix, the defendant based his denial of the privileges mentioned on his desire for sexual intercourse with her. In the light of this evidence, it seems that the denial was prompted by his illicit passion, and was intended to secure the gratification of it. Whether it be regarded as punishment for unwillingness to yield to every demand of his lust, or as a method of increasing the opportunities for satisfaction of it, makes no difference, as in either case it was an act in furtherance of his incestuous purpose. In view of the prosecutrix's testimony in regard to the defendant's explanation of the act, and the statement of his reasons for it, we cannot say that it was irrelevant.

There is no merit in the fifth specification of error. It is defective and misleading, because it does not show all that was done under the ruling complained of. The prosecutrix was asked if she told her brother and sisters about the offense charged in the indictment at the time of it, or immediately after its commission; and she replied that she did not, but added that she told her sisters about it five or six months afterwards. The court refused to allow her to state what she said to them, because, upon her own showing, it was not within the ruling which limited the evidence to what she said at the time or immediately after the offense was committed. No motion was made by defendant's counsel to strike out her answer, or so much of it as was not strictly responsive to the question, nor was any suggestion made by them that it was in any degree prejudicial to their client. In fact, such suggestion could not have been made with any show of reason for it. We conclude, therefore, that there is nothing in the fifth specification which calls for a reversal of the judgment.

The objection to the ruling complained of in the ninth specification of error is that the evidence offered was part of the commonwealth's case in chief. This being so, the admission of it in rebuttal is not assignable in error. Finlay v. Stewart, 56 Pa. St. 183, and Brown v. Finney, 67 Pa. St. 214.

The defendant ought not to object to what the prosecutrix said to her grandmother respecting the paternity of her second child. It was a declaration in support of his contention regarding its paternity, and it cannot well be claimed that he was injured by it. Judgment affirmed.

SNYDER v. SCHMICK.

(Supreme Court of Pennsylvania. Feb. 25, 1895.)

EXEMPTIONS—TIME OF CLAIMING.

A claim for $300, exemptions allowed by Act 1849, should not be rejected because it was made six days after the first advertisement of execution sale, and only ten days before the sale, where the sale was not delayed by the appraisement of the exemption, and no additional costs were incurred.

Appeal from court of common pleas, Lehigh county.

Judgment by confession was entered on a note in favor of Jonas Snyder, to the use of Jacob Snyder, against Hannah Schmick, on which a fieri facias was issued, and land sold. Previous to sale, an appraisement of $300 exemptions was made, on demand of defendant; and afterwards a rule was granted to show cause why the appraisement should not be set aside. From a judgment dismissing the exceptions to the appraisement, and discharging the rule to show cause, plaintiff appeals. Affirmed.

The opinion of the court below is as follows (Albright, P. J.):

"The defendant, on March 5, 1890, signed a note for the payment of $370 to the legal plaintiff, which contained authority to confess judgment, a waiver of condemnation of real estate, and an agreement for an attorney's commission; also a statement 'the same being for purchase money.' A clause waiving exemption was stricken out. Shortly after said date, judgment was entered upon the note. On December 16, 1893, a fieri facias was issued. Pursuant to written directions of plaintiff's attorney, there was indorsed on the writ by the prothonotary a note that the judgment was for purchase money of a house and lot, describing the latter, containing about half an acre, and that condemnation was waived. Said judgment, when entered, became a lien on 9 94/160 acres, including said half acre. The 9 94/160 acres were levied on, and were sold under

Digitized by Google

the fieri facias as one tract, on January 5, 1894, for $700. The first day of the term was January 1, 1894. The relative values of the half acre and what defendant owned before its purchase do not appear. The conveyances to defendant recite the consideration for the half acre to have been $370, and that for the residue (made in 1888) $800. The sheriff found no personal property. He advertised the land. The notice of sale was in two newspapers published on December 20 and 27, 1893, and January 3, 1894. The only time the sheriff saw the defendant was on December 26th, when he called at her place of residence, and served on her a handbill notice of the sale. She was a woman 83 years of age, and then residing with relatives 8 or 10 miles from the land in question. There is no showing by either side as to whether defendant knew of the execution before the service of the handbill. The appraisement was made on the day of sale, but before the sale. The appraisers certified that the land could not be divided. On February 5, 1894, plaintiff filed exceptions to the appraisement, and took a rule to set it aside. Certain exceptions allege fraud by defendant by reason of a sale by her of personal property, shortly before the issuing of the writ. These were not insisted on at the argument. They are not sustained. The same is the case regarding the exception that the judgment represents purchase money, and that such fact bars the claim for exemption. The main contention is that the demand was made too late.

"When the question is the debtor's right to exemption of real estate, is it to be held that it is lost because of delay in the demand, when it appears that the claim was made the tenth day after the issuing of the writ, and there is no showing of knowledge by defendant of the execution before the time of demand? Said question, applied to this case, involves the further fact that the records showed that, as to a part of the real estate seized, the debtor was, and as to the residue she was not, entitled to exemption. 'The general rule is that the exemption should be allowed when it can be done without prejudice to the rights of creditors. It must not be unnecessarily delayed until costs have been incurred which might have been readily avoided. Cornman's Appeal, 90 Pa. St. 257. In a number of cases it has been held to be in time if made at a period so early as not to delay the sale, or to require new advertisements. Com. v. Boyd, 56 Pa. St. 402; Yost v. Heffner, 69 Pa. St. 70.' Justice Clark, in Williamson v. Krumbhaar, 132 Pa. St. 461, 19 Atl. 281. In that case the execution had issued on May 23, 1888. A demand for exemption was made on June 9th of same year. No day of sale had been fixed then, no advertisements posted, nor was it shown that any other expense had been incurred. It was decided that the claim was made in time. Unless there is a waiver or other specific act of the defendant which without a doubt deprives him of the right to exemption brought to the sheriff's notice, that officer ought to make the appraisement. If it is alleged that the allowance was illegal, the remedy is by moving to set aside the appraisement. Case last cited, and Seibert's Appeal, 73 Pa. St. 359. The exemption act of 1849 excepts from seizure $300 worth of property, besides wearing apparel, etc. It provides that, if requested by the debtor, the sheriff shall cause an appraisement of the property the debtor elects to be made. In case of land, what is thus exempt shall be set off by metes and bounds if a division will not spoil the whole. If what is chosen does not exceed in value what the debtor is entitled to, the whole tract is set apart for him. If there can be no division, he receives the proceeds of the sale of the land. Where inquisition is waived, the sheriff may sell land on the first writ; but he must advertise the proposed sale in newspapers once a week during three successive weeks, and by handbills, one of which shall be given to the defendant, and one fixed on the premises 10 days before the sale. Execution Act 1836, §§ 45, 62, 63 (P. L. 772).

"In this case the sale took place 16 days after the first notice in the newspaper. The handbill was served on the defendant the 10th day before the sale, at the place she was then residing, which was in a township other than and not adjoining the one in which the land lay. There is no proof, direct or by inference, that she knew of the seizure of her property before such service. Consequently she could not have avoided by a prompt claim the expense of the first insertion of the advertisement on December 20th. In view of the facts, the case does not admit of serious argument whether defendant's laches occasioned the expense of advertising on Wednesday, December 20th, under the writ issued on the previous Saturday, which was December 16th. No neglect to claim appears. Defendant did not know that an execution was out until the sheriff called on her. She made a claim then.

"April 2, 1894, the rule is discharged, and the exceptions to the appraisement dismissed."

Evan Holben, for appellant. James L. Marsteller, for appellee.

PER CURIAM. We find nothing in this record that would have justified the rejection of defendant's claim to the $300 exemption, either on the ground that it was too late, or for other reasons suggested by plaintiff's exceptions thereto. The sale was not delayed, nor were costs incurred that might have been avoided by an earlier presentation of the claim. There was therefore no error in dismissing the exceptions and discharging the rule to set aside the appraisement. The questions presented by plaintiff's exceptions have been sufficiently considered

Digitized by Google

and properly disposed of in the opinion of the court below. For reasons there given, the decree should not be disturbed. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

BARRY v. HILL et al.

(Supreme Court of Pennsylvania. Feb. 18, 1895.)

ACTION FOR GROUND RENT—EVIDENCE—TRUST EX MALEFICIO—WHAT CONSTITUTES—LIMITATIONS.

1. In an action for ground-rent arrears, it appeared that B., a former owner, assigned it by recorded deed to plaintiff's devisor, and afterwards assigned it to a building association, which conveyed to defendant nearly 10 years after the assignment to such devisor. *Held*, that proof that the conveyance from B. to such devisor was made without consideration, and under an agreement that the ground rents were to be sold subject to the exclusive ownership of B.; that the devisor had no interest in them; and that B. received the interest for his own use after the assignment,—did not establish a trust ex maleficio in favor of B. and his successors in title, including defendant.

2. Act April 22, 1856, which prohibits any right of entry by reason of any implied or resulting trust but within five years after the trust accrued, applies to the attempted establishment of a trust ex maleficio.

Appeal from court of common pleas, Philadelphia county.

Action by Thomas Barry against Edward C. Hill to recover ground rent. Rebecca L. Gillespie, terre tenant, was permitted to intervene and defend. From a judgment for plaintiff, the terre tenant appeals. Affirmed.

The suit was brought on the 4th February, 1893, to recover ground-rent arrears reserved out of premises on Bancroft street in Philadelphia, conveyed, in 1871, by Matthew Hall to Edward C. Hill, by deeds which reserved two ground rents of $48 per year each. These ground rents were assigned by Matthew Hall, the covenantee, to John Bardsley, in 1873, and by John Bardsley to Thomas Gannon, in 1877. The deeds above referred to were recorded at Philadelphia, each within a few months of its date. It was alleged that Thomas Gannon, while apparently from the record the last assignee of these ground rents, died on October 24, 1880, having by his last will, dated October 3, 1880, devised all his estate to Thomas Barry, the plaintiff. The specific claim was for arrears of ground rent accruing on and after September 1, 1881, with interest on each item of the arrears. The present owner of the premises, Rebecca L. Gillespie, by leave of the court, intervened to defend. The defense was that John Bardsley made the assignment to Thomas Gannon, a man in his employment, in 1877, only for his (Bardsley's) convenience; and that Bardsley retained the ownership and control, and in 1879, by a deed then recorded, assigned these ground rents as his own to the Samuel Miller Savings & Building Association, which, in 1882, assigned them to William Whiteside, the then owner of the premises, thus effecting an extinguishment. At the trial, Biddle, J., refused to admit evidence to prove this defense, and instructed the jury to render the verdict, which was entered for the full amount claimed by the plaintiff.

John G. Johnson and Henry T. Dechert, for appellant. Jos. V. Gallagher and F. B. Bracken, for appellee.

GREEN, J. The deed from Bardsley to Gannon was made January 18, 1877, and was recorded September 26, 1877. It contained, among other things, an assignment to Gannon of the ground rents now in question. The appellant alleges that Bardsley, in 1879, by a deed then made and recorded, assigned the same ground rents, as his own, to the Samuel Miller Savings & Building Association, which, in 1882, assigned them to William Whiteside, the then owner of the premises, thus effecting an extinguishment. An examination of the record of deeds, at any time after September 26, 1877, would have disclosed the conveyance by Bardsley to Gannon, which was therefore notice to all the world of Gannon's title. That title devolved upon the present plaintiff by virtue of the will made by Gannon October 3, 1880, and duly proved on October 27, 1880. The plaintiff's title was therefore disclosed by the record from the latter date. The defendant's title was acquired by deed from Whiteside and Hall, trustees, dated March 7, 1890, at which time plaintiff's title had been nearly 10 years of record, and with nothing showing any reconveyance from Gannon to Bardsley. In these circumstances, the defendant Mrs. Gillespie offered to show on the trial that the conveyance from Bardsley to Gannon was made without consideration, and upon the agreement that the ground rents were to be sold subject to the exclusive ownership of John Bardsley, and that Thomas Gannon had no interest in them; also, that Bardsley received the interest for his own use after the date of the assignment; also, that certain other ground-rent papers were in the custody of Mrs. Gillespie, received in the ordinary course of conveyancing. This offer of testimony was rejected by the court below, and to this decision the second assignment of error is made, thus raising the chief question in the case.

It is contended that the proof, if received, would have established a trust ex maleficio in favor of Bardsley, and therefore of his successors in the title. It is contended for the appellee that the proof offered would not establish a trust ex maleficio, and, if it did, the trust is barred by the statute of limitations. It seems to us that both these objections are fatal to the offer. A trust ex maleficio can only result from some act of bad faith, and a mere refusal to perform

Digitized by Google

a parol contract to hold or convey land is not sufficient to create such a trust. There is no act of bad faith on the part of Gannon alleged in the offer. He was a mere grantee of the ground rents, without consideration, and subject to an agreement to sell them for the exclusive use of Bardsley, according to the offer. The absence of consideration would be of no moment of itself, and, in point of fact, Gannon never sold the ground rents to any one. On the contrary, it is a part of the offer of proof that Bardsley received the interest for his own use after the assignment. It was not proposed to prove that Gannon ever denied the alleged parol agreement, or that he made any effort to prevent Bardsley from taking the rents, or that he ever asserted title in himself, or did any act in contravention of the agreement offered in evidence. He simply continued to hold the title which Bardsley voluntarily gave him, until his death. As his death did not occur until nearly four years after the inception of his title, Bardsley had ample opportunity to assert and secure his claim of title during Gannon's life, but it does not appear that he ever did so. In such circumstances, we think it impossible to raise a trust ex maleficio.

But even if the offer had gone further, and alleged a breach of the parol agreement, it would not have been sufficient. In Kellum v. Smith, 33 Pa. St. 158, we held that a promise to purchase real estate at a sheriff's sale, and to convey it to the defendant in the execution whenever he should repay to the purchaser their advances to him, does not raise a resulting trust in favor of the defendant. Strong, J., delivering the opinion, said: "When the purchaser at a sheriff's sale promises to hold for the debtor, and afterwards refuses to comply with his agreement, the fraud, if any, is not at the sale, not in the promise, but in its subsequent breach. That is too late. It is abundantly settled that equity will not decree such a purchaser to be a trustee, unless there is something more than the mere violation of a parol agreement. * * * It may in all cases be assumed that, when a promise is made to buy or hold for another, confidence is invited, and more or less reposed. So it is in every parol contract for the purchase of lands. But the statute of frauds would be worse than waste paper if a breach of the promise created a trust in the promisor which the contract itself was insufficient to raise." In Williard v. Williard, 56 Pa. St. 119, we held that in a transaction claimed to create a resulting trust, if there is nothing more than is implied from the violation of a parol agreement, equity will not decree the purchaser a trustee. Said Agnew, J., in an opinion reviewing the cases: "The language of the cases was almost run into a formula in which it is said: 'But, where there is nothing more in the transaction than is implied from the violation of a parol agreement, equity will not decree the purchaser a trustee.'" Porter v. Mayfield, 21 Pa. St. 263, is to the same effect. In Hoge v. Hoge, 1 Watts, 214, Gibson, J., said: "The question has been as to the circumstances which constitute such a fraud as will be made the foundation of a decree. A mere refusal to perform the trust is undoubtedly not enough, else the statute which requires a will of lands to be in writing would be altogether inoperative." There are many other cases of the same kind, but it is unnecessary to cite them. As to the statute of limitations, the cases are equally clear, and the bar of the statute applies as well to resulting trusts which arise ex maleficio as to those which are founded upon the payment of purchase money. In Christy v. Sill, 95 Pa. St. 380, which, on its facts, was a clear case of fraud, and a consequent resulting trust ex maleficio, we held that the trust was barred by the sixth section of the act of April 22, 1856, which prohibited any right of entry by reason of any implied or resulting trust but within five years after the trust accrued. In Hollinshead's Appeal, 103 Pa. St. 158, we held the same doctrine, and also that there must be more than the violation of a mere parol agreement respecting land to create the trust. We applied the same rule to another case of trust ex maleficio, in Silliman v. Haas, 151 Pa. St. 52, 25 Atl. 72, and held it was barred by the statute. In Way v. Hooton, 156 Pa. St. 8, 26 Atl. 784, we enforced the rule, again holding that the act of 1856 was a statute of repose, requiring a liberal construction in support of titles, and holding that it contained no exception in favor of persons under disabilities.

It is not essential to pursue the subject further. This title, by means of a trust ex maleficio, is sought to be set up without proof of any fraudulent acts, either in the inception of the title or subsequently, against a good record title 10 years after its inception; and we are clearly of opinion that it cannot be done.

We do not consider the first assignment of error, as it becomes entirely unimportant in view of the testimony subsequently given and of the considerations above expressed upon the main subject of contention. Judgment affirmed.

GANDY v. DICKSON et al.

(Supreme Court of Pennsylvania. Feb. 25, 1895.)

LANDLORD AND TENANT—DEATH OF TENANT—DISTRAINT OF GOODS IN HANDS OF ADMINISTRATOR.

A lease which gives the lessor a right of distress, and extends the rights and liabilities of the parties to their respective "heirs, executors, administrators, successors, and assigns," does not authorize the legal representatives of the deceased lessor to distrain for rent on the

Digitized by Google

goods of his deceased lessee in the hands of the latter's administrator.

Appeal from court of common pleas, Philadelphia county; Arnold, Judge.

Action of replevin by George S. Gandy, administrator of the estate of Harrison Robbins, deceased, against Frederick S. Dickson and others, landlords, and George B. McClellan, bailiff, in which a judgment directed for defendants was set aside, and a new trial granted. From a judgment entered on a verdict directed by the court in favor of plaintiff, defendants appeal. Affirmed.

The opinion of the court below, on granting a new trial after verdict for defendants, is as follows (Arnold, J.): "Harrison Robbins was tenant of 916 Chestnut street, under a yearly lease, at $5,800 a year, payable quarterly on the 24th of January, April, July, and October. It was agreed in the lease that all goods on the premises, and for thirty days after removal therefrom, should be liable to distress for rent. Mr. Robbins died June 11, 1892, and letters of administration on his estate were granted to the plaintiff, who removed the goods from 916 to 924 Chestnut street, for the purpose of selling the same and applying the proceeds to the payment of the decedent's debts. A quarter's rent fell due on July 24, 1892, and on August 12, 1892, the landlords distrained therefor on the goods of the intestate at Nos. 916 and 924 Chestnut street, to the last of which places most of the goods had been removed between June 11 and July 24, 1892. The plaintiff thereupon commenced this action of replevin, and the question is whether the distress was lawful. The right of distress comes from the civil law, under which land that was let to a tenant was considered as hypothecated and held in pledge to pay the rent, and the whole profits arising from the land were liable to be sold for the payment and satisfaction of the rent. Gilb. Rents, pp. 3, 26, 92; Tayl. Landl. & Ten. § 556. At the common law a distress for rent could not be made after the termination of the relation of landlord and tenant, which might happen by the death of either, and therefore the statute of 8 Anne, c. 14 (1710), was passed, to give a remedy to the landlord, by enacting that his executor might distrain within six months after the termination of the lease, but *during the possession of the tenant from whom such arrears became due.* These italicized words were omitted from our Pennsylvania statute of March 21, 1772, which re-enacts the statute of Anne, probably because they were considered superfluous, and merely declaratory of existing law. Clifford v. Beems, 3 Watts, 246. The English statute limits the right of the executor of a landlord to distrain to six months after his death, while the right of the executor to distrain under our statute is without limit as to the time when it may be exercised. Moss' Appeal, 35 Pa. St. 162; Lewis' Appeal, 66 Pa. St. 312. So much as to the right of the landlord to distrain. As to the liability to distraint, another question arises, and, notwithstanding the early decisions in England, the law may now be considered as well settled there that there is no right to distrain in a case like this. In Bradby, Dist. 77, it is said that, as a distress is in the nature of a remedy upon the land, if the tenant be dead the goods of the deceased remaining thereon may be distrained in the hands of his executor or administrator for rent accruing before and after his death. For this the author cites Bolton v. Canham, Poll. 125 (25 & 26 Car. II., A. D. 1675), which was not a proceeding on a distress, but an action against an executor for rent in arrear, and the dispute was over a question of priority in the distribution of the personal estate of a decedent. Another case cited by Bradby is Braithwaite v. Cooksey (1790) 1 H. Bl. 465, decided per curiam, and without reasons assigned. On looking at the arguments in behalf of the successful landlords, we find it based on three English statutes, neither of which, however, by express words or fair inference, confers a right on the landlord to distrain on the goods of a deceased tenant. Perhaps, however, the reason given by the court of appeals of New Jersey was the true reason of the old law. That court said that 'under the old law it was a mere struggle among the creditors for priority, and the law was indifferent who succeeded.' Wood v. Hopkins, 8 N. J. Law, 263. In Turner v. Barnes (1862) 2 Best & S. 435, Braithwaite v. Cooksey was declared not to furnish a precedent to be followed, and it was decided that when a tenant at will at a yearly rent died, owing rent in arrear, and the day after his death the landlord distrained, the house being occupied by the lessee's servants, the distress was unlawful. A modern English writer (Foa, Landl. & Ten. on page 408) well expresses the law when he says that the right to distrain after the death of the tenant must be limited to the case in which the personal representative becomes tenant under the lease in his testator's place, and the arrears distrained for have not actually fallen due until after the death. The question has been considered and decided in two cases in this state, in the first of which—Hoskins v. Houston, 2 Clark (1844) 489—Judge Lewis, in the common pleas, held that a landlord has no right to distrain for rent after the death of the tenant. Judge Lewis' opinion is an elaborate dissertation upon the law on this subject, and he comes to the conclusion that since our acts of 1772, 1794, and 1834, providing for the distribution of a decedent's estate, no priority can be obtained by a distress levied after the death of a tenant. The other case is Stahlman's Estate (1879) 26 Pittsb. Leg. J. 113, in which Judge Hawkins, of the orphans' court of Allegheny county, issued an injunction to prevent a landlord from proceeding by a distress for rent after the death of the tenant. We have not overlooked the agreement in the lease in this case that the goods on the premises should be liable

Digitized by Google

for rent for thirty days after their removal from the premises, but consider that this applies merely to a removal during the life of the tenant; nor the other agreement in the lease that the rights and liabilities of either of the parties shall extend to the heirs, executors, administrators, successors, and assigns of such party. The tenant cannot, by any such agreements, deprive other parties of their right to have the personal estate of a decedent administered according to the statute of distributions without any preference other than those given by it. It is a rule without an exception, said Chief Justice Gibson in Pierce v. Scott, 4 Watts & S. 344, that a landlord cannot distrain goods which are in the custody of the law; and Judge Lowrie, in Mickle's Adm'r v. Miles, 1 Grant, Cas. 320, said that the goods of a deceased lessee are not liable to distress. The act of February 24, 1834, which gives the landlord the second preference in distribution, would be neutralized if the landlord could by a distress obtain the first place as to goods on the demised premises. There would be no necessity for giving the landlord a second preference as to such goods if he could by a distraint obtain a priority over all other creditors. The insolvency of the deceased tenant makes no difference in the application of the law, which was intended principally for just such cases; for, if the estate were solvent, the preferences would not consume the estate before all the creditors were paid. In the language of Judge Woodward in Moss' Appeal, 35 Pa. St. 162, no attentive reader can doubt that the legislature meant to substitute the landlord's claim on the proceeds of an execution or administration for his right of distress. As death brings administration, the same as judgment brings execution and levy, with their preferences and equalities, it is not in the power of parties to defeat the rights of creditors which are vested in them by law. Upon the death of a tenant his personal estate is placed at once in the grasp of the law, and no creditor can obtain any advantage over another, either by distraint, execution, or agreement. The verdict in favor of the defendants being erroneous, it is therefore set aside, and a new trial granted."

E. Hunn Hanson, for appellants. Frank P. Prichard and John G. Johnson, for appellee.

McCOLLUM, J. We think the learned judge of the court below reached a correct conclusion in this case, and gave good reasons for it. The contention, briefly stated, concerns the right of the legal representatives of a deceased lessor to distrain for rent due the goods and chattels of his deceased lessee in the hands of the administrator of the latter. They base their claim of a right so to do upon the lease which created the relation of landlord and tenant between the decedents, and by its terms extended to their respective "heirs, executors, administrators, successors, and assigns" their respective rights and liabilities under it. The right of distress as defined by the lease was exercisable on the nonpayment at maturity of any quarter's rent, and included goods while on the premises and for 30 days after their removal therefrom. It is undisputed that the goods replevied in this case were distrained by the legal representatives of the lessor while in the custody and under the control of the administrator of the lessee, and the question to be decided is whether the distress was authorized by the provisions of the lease to which reference has been made. The distrainors have not brought to our notice any decision of this court which directly sustains their claim, nor do we know of any. They have cited Gratz v. Bayard, 11 Serg. & R. 41; Laughlin v. Lorenz, 48 Pa. St. 275; and Leaf's Appeal, 105 Pa. St. 505,—as analogous in principle to the case at bar. In the first case cited it was held that by express agreement a partnership may continue after the death of one of the partners; and further, that upon the assignment by the survivor of the firm effects for the benefit of creditors, the whole partnership fund, including what was contributed thereto by the deceased partner's estate, passed to the assignee, and was applicable to the partnership debts. Laughlin v. Lorenz decided that the legal representatives of a deceased partner may carry on the business for and bind the estate where a covenant to that effect existed in the articles of copartnership, or he directed by will that it should be done. Leaf's Appeal recognized the validity of a stipulation in the copartnership articles for the continuance of the firm after the death of a member, and enforced the principle that during the continuance of it real estate constituting a part of the partnership fund must be regarded as personalty, subject, however, to the qualification that one partner cannot dispose of the firm interest in it unless specially authorized to do so. These cases acknowledge and sustain the power to create a partnership which may survive the death of one of its members. The exercise of the power may postpone the recovery by the estate of the deceased partner of a possible asset ascertainable on the dissolution of the partnership and the liquidation of its affairs, and it may perhaps diminish the same, but such asset, when recovered, is on the footing of other assets of the estate, as regards distribution among creditors. It is believed, therefore, that the cases cited do not govern the case at bar, nor afford material assistance in the decision of the question involved in it. The distrainors had no lien on the goods for rent in the lifetime of the decedent, and at his death they passed to his administrator, as other assets of the estate did. His custody of them was lawful, and for the purposes of administration. It was his duty to apply them to the payment

Digitized by Google

of the decedent's debts in the order prescribed by the statute. In this order, funeral expenses, medicine furnished and medical attendance given during the last illness of the decedent, and servants' wages not exceeding one year, constitute the first class, and have precedence; rents not exceeding one year form the second class, and all other debts belong to the third class, "except debts due to the commonwealth, which shall be last paid." It is possible that the order thus prescribed may be qualified as to assets on which there are liens acquired in the lifetime of the decedent, but, as no liens of this character appear in the case before us, the qualification suggested does not require present consideration. Our conclusion is that the distress of which this litigation is the outcome was not warranted by the lease, and was in plain violation of the laws governing the administration and distribution of the estates of decedents. We do not consider it necessary to add anything further to what was well said by the learned judge of the court below in vindication of the judgment entered there. Judgment affirmed.

MORGAN v. MORGAN.

(Supreme Court of Pennsylvania. Feb. 25, 1895.)

FORECLOSURE OF MORTGAGE—AFFIDAVIT OF DEFENSE.

In an action by an administratrix to foreclose a mortgage, an affidavit of defense is sufficient which states, in substance, that defendant agreed to sell and convey the premises to plaintiff's decedent; that they had an attorney prepare a bond and mortgage of the premises to deceased to secure $5,000, with interest, and also a deed for the premises from defendant to a third person; that defendant executed the mortgage, and, by agreement with deceased, left it and the unexecuted deed with such attorney to hold in escrow, "the same not to be considered as delivered," to keep without recording until defendant and deceased should give him other instructions; that at that time no money was paid to defendant on account of such mortgage; that defendant never received any money on account of it; that he does not owe any part of the $5,000 so purporting to be secured by the bond and mortgage, or any interest thereon; and that no interest was ever demanded by deceased, nor was any ever paid by defendant, on account of such mortgage.

Appeal from court of common pleas, Montgomery county.

Scire facias on a mortgage by Ann Morgan, administratrix of the estate of Francis Morgan, deceased, against Michael Morgan, in which plaintiff entered a rule for judgment for want of sufficient affidavit of defense. From a judgment discharging such rule, plaintiff appeals. Affirmed.

The affidavit of defense was as follows: "Michael Morgan, the defendant in the above case, being duly sworn according to law, deposes and says that he has a just, true, full, and legal defense to the whole of the plaintiff's claim, the nature and character of which is as follows, to wit: That on or about the first day of December, A. D. 1887, he purchased at sheriff's sale a messuage and tract of land situate in the township of Whitpain, in the county of Montgomery, aforesaid, containing 39 acres and 41 perches, more or less; and on December 12, A. D. 1887, Henry C. Kline, high sheriff of said county, acknowledged and delivered to him a deed poll for said premises, which deed is recorded in said court in Sheriff's Deed Book I, page 161, etc. That some time afterwards the decedent, Francis Morgan, who was his brother, desired to purchase said property for the benefit of the children of a deceased sister, Mrs. Daniel Crowley, some of whom were minors; and your affiant agreed to sell and convey said premises, but nothing was put in writing concerning the same. Subsequently, your affiant and said Francis Morgan, at the suggestion of the latter, called on C. Henry Stinson, Esq., a member of this bar; and the said Francis directed him to prepare a bond and mortgage of said premises to secure the sum of $5,000, with interest, which was to be executed by your affiant, and also to prepare a deed for the same premises from your affiant to Daniel Crowley, father of said children aforesaid, the plan being, as your affiant understood it from said Francis, to have the title of said premises placed in said Daniel Crowley, under and subject to the lien of said mortgage, so that, after the title was so vested in said Crowley, he, the said Francis, could foreclose said mortgage, and compel a sale, if occasion should demand it, for the interest of said children. Your affiant further avers: That afterwards, to wit, on March 20, 1888, the said Francis and himself called again upon the said C. Henry Stinson, Esq., for the purpose of executing said papers which he had been directed to prepare. That all said papers were ready for execution, but the said Francis did not desire your affiant to execute and deliver a deed to said Daniel Crowley at that time. At his request, however, your affiant executed said bond and mortgage; and at the time of said execution, contemporaneously therewith, the said Francis directed the said C. Henry Stinson to hold the said bond and mortgage in escrow, the same not to be considered as delivered, to keep the same in his fireproof safe, and not to record them or do anything with them until he and your affiant should subsequently give him other instructions regarding the same, as the entire matter was a family arrangement. That said Francis, at that time, also directed the said Stinson to place said deed, unexecuted, with said bond and mortgage in his fireproof safe, until he and your affiant should give him other instructions concerning the same, which said deed is still in the possession of said Stinson, and has been ever since, as your affiant is informed. Your affiant further avers that said bond and mortgage remained in escrow and

Digitized by Google

undelivered, in the hands of the said C. Henry Stinson, until after the death of the said Francis Morgan, when the said Stinson informed the administratrix of his estate that he held said papers, and afterwards, on demand made by her, he delivered the said bond and mortgage to her, informing her at the same time, as your affiant is informed, that the said papers were never delivered to said Francis Morgan, but were simply held in escrow by said Stinson. Your affiant further avers that, at the time of the execution of said bond and mortgage, no money had been paid to him on account thereof by the said Francis Morgan, nor was any paid on the day of the execution; that he never received any money afterwards for or on account thereof; that he does not owe any part of said $5,000 so purporting to be secured by said bond and mortgage, nor any interest thereon; and that no interest whatever was ever demanded of him by said decedent, nor was any ever paid by him on account thereof. All of which your affiant has been informed, verily believes, and expects to be able to prove upon the trial of the cause."

William F. Meyers, for appellant. Charles H. Stinson and William F. Solly, for appellee.

PER CURIAM. Assuming, as we must in cases such as this, that the averments of fact contained in the affidavit of defense are true, the court was right in holding that there is enough in defendant's affidavit to carry the case to the jury; and hence there was no error in discharging plaintiff's rule for judgment for want of a sufficient affidavit of defense. Appeal dismissed, with costs to be paid by plaintiff, but without prejudice, etc.

RUDOLPH v. PENNSYLVANIA S. V. R. CO.

(Supreme Court of Pennsylvania. Feb. 25, 1895.)

RAILROADS—BRANCH LINE—PURPOSE—PARTY TO COMPLAIN—PASSING THROUGH DWELLING.

1. The commonwealth, not an individual, is the proper party to complain that the construction of a branch by a railroad is not to accommodate the public, but an attempt to connect an individual siding without compliance with the lateral railroad statutes.

2. A location of a railroad across a corner of a lot not interfering with the reasonable use and enjoyment of a dwelling house, on another part of the lot, 125 feet distant, is not a "passing through any * * * dwelling house in the occupancy of the owner," within the inhibition of Act Feb. 19, 1849, § 10.

Appeal from court of common pleas, Montgomery county.

Suit by Sebastian A. Rudolph against the Pennsylvania Schuylkill Valley Railroad Company to enjoin the construction of a branch line across the corner of plaintiff's lot. Decree for defendant. Plaintiff appeals. Affirmed.

The following is the report of the master:

"The Pennsylvania Schuylkill Valley Railroad Company, a corporation organized under the general railroad laws of the commonwealth of Pennsylvania, has built and is now operating a line of railroad reaching from a point of connection with the Pennsylvania Railroad near 52d street, in the city of Philadelphia, to New Boston, a point west of Pottsville, in Schuylkill county, a distance of over 105 miles. At a meeting of the directors of the said Schuylkill Valley Railroad Company held September 5, 1889, the following resolutions were adopted: 'Whereas, the Philadelphia, Norristown and Phoenixville Railroad Company, the corporate property, franchises, and rights of which, by virtue of consolidation and merger, became vested in this company, did, December, 1883, cause to be located a branch railroad from its main line of railroad at a point near West Manayunk, in the township of Lower Merion, Montgomery county, extending northwardly a short distance, and thence across the line of the railroad of the Philadelphia and Reading Railroad Company, and thence southwardly between the said railroad of the Philadelphia and Reading Railroad Company and the Schuylkill river to the Pencoyd Iron Works, a distance about one and one-quarter mile, and did at that time cause the said route to be located, marked upon the ground, and a plan thereof made, which is on file in the office of this company, and did then acquire a portion of the property necessary for the construction of the same; and whereas, the minutes of the company do not exhibit any formal action by the board of directors in reference to the said subject: Therefore, that the said action may be formerly evinced, resolved, that the aforesaid action of this company be now formally approved and ratified, with the same effect as though formal action had been taken at the time of said location, and the secretary is directed to certify the said plan accordingly, and the president of the company is authorized to proceed in the construction of said branch railroad at and upon the line so surveyed and marked as aforesaid, with such minor changes as in his judgment may tend to economical construction.' Subsequently, on November 11th, of the same year, the following action was taken: 'Resolved, that inasmuch as the present construction of the branch from the main line of the railroad of this company near West Manayunk to Pencoyd, in the county of Montgomery, authorized by a previous resolution, is necessary to increase the business of this company and accommodate the trade and travel of the public, the president is directed to proceed with the construction thereof upon the line of the amended survey crossing the Philadelphia and Reading Railroad overhead instead of under grade, as was provided in the former location, and that the

Digitized by Google

action heretofore taken by him on said amended survey is ratified and approved.' Under this authority the company proceeded to locate and build the branch road specified in the foregoing resolution. In its course it passes through the barn and lot of the plaintiff, Sebastian A. Rudolph. Mr. Rudolph is the owner and occupier of a dwelling house in Lower Merion township, this county, fronting on the river road. The lot on which this dwelling house is built contains in front —— feet, and extends in depth —— feet. Fronting on a public road stands his dwelling house, and his office at the distance of —— feet from said road. There is a private lane running along almost the whole width of his lot. In the rear of this lane, and fronting thereon, stands a row of eight tenement houses, in the occupancy of various tenants. In a line with these tenement houses, and in rear of a continuation of said lane, stood the barn of plaintiff. The nearest wall of this barn was 128 feet distant from the nearest point of plaintiff's dwelling house. The line of this branch road passes through the corner of plaintiff's lot, and completely demolishes this barn. The railroad here is an elevated structure, crossing over the Philadelphia and Reading Railroad, which adjoins this property on the west by an overhead bridge. The pier of this bridge comes in the place where the stable formerly stood. The nearest point the railroad comes to the dwelling house is 128 feet.

"The plaintiff, on May 31, 1890, filed his bill in equity, praying for an injunction restraining the said Pennsylvania Schuylkill Valley Railroad Company, its officers, agents, and employés, from taking or occupying any portion of his dwelling house and necessary curtilage thereof for the purpose of its railroad or for any other purposes without his consent. A preliminary injunction was refused by the court. The railroad company proceeded to lay out this road, and has actually built the same, and is now operating the road over the line as laid out. The bill was proceeded with, and a master appointed, who has taken the testimony, which is herewith returned. The bill and the building raised three distinct questions. It was contended by the plaintiff: First. That the said Schuylkill Valley Railroad Company and the Pennsylvania Railroad Company, as lessee, have no right to construct and operate the said branch road, because the same is to be constructed and operated purely as a private road for the traffic and trade of the Pencoyd Iron Works, and not for public trade and travel. Second. That this branch road was previously located over another route, and that the defendant company, on February 3, 1890, filed in the court of common pleas of Montgomery county, No. 112, March term, 1890, a petition and bond showing an actual location of their proposed branch over said other route, and gave bond in the sum of $20,000, which was approved by said court; and that said location is final; and that defendants have no right to change to a new location. Third. That the route now occupied, being a portion of plaintiff's barn, and a necessary part of the curtilage of his dwelling house, cannot be so occupied because of the prohibition contained in the act of February 19, 1849 (P. L. 83), which prohibits a railroad from 'passing through any burying ground or place of public worship, or any dwelling house in the occupancy of the owner or owners thereof without his or their consent.' We will consider these objections in their order.

"The first objection denies the right of the defendant company to build the road in question, because it is not within the purview of the act of 1868, known as the 'General Railroad Laws.' The ninth section of that act provides 'that any company incorporated under this act shall have authority to construct such branches from its main line as it may deem necessary to increase its business and accommodate the trade and travel of the public.' It cannot, of course, be denied that this railroad company has the right to build a branch when it is for the purpose of increasing its business and accommodating the trade and travel of the public. This is the expressed language of the act, and the question has been passed upon in many instances by the court, as in Western Pennsylvania R. Co.'s Appeal, 99 Pa. St. 155; McAboy's Appeal, 107 Pa. St. 548. In the last-named case the supreme court gives a very comprehensive definition of a branch road. It says: 'The definition of a branch railroad, under the act of 1868, does not depend upon either its length or its direction. A branch of a railroad is a section of railroad which may be an offshoot from the main road, or a shoot from either of its termini. The necessity for such branches and their direction rest in the will and discretion of the president and directors of the corporation by which they are to be constructed.'

"Plaintiff, however, contends that this branch is not intended for trade and travel of the public, but that it is intended solely for the accommodation for the private industrial firm of A. & P. Roberts, who are the owners and operators of an extensive industrial establishment known as the 'Pencoyd Iron Works'; and they further contend that, since the railroad has been built, it has been used solely to convey freights to and from the above-named works, and has run no passenger trains whatever, nor has it delivered freight to any other persons than the aforesaid firm. It is true that this road runs to and connects with the tracks and switches of the Pencoyd Iron Works; that no station house is erected for the reception or unloading of freights; that no passenger coach has run over the road, so far as shown by the evidence; but it is also true that the resolu-

Digitized by Google

tion above named under the authority of which this road was constructed recites that the building of this road is necessary 'to increase the business of the company, and to accommodate the trade and travel of the public.' Pencoyd is a village with a large number of houses and many people living in the immediate vicinity of this road. A siding runs along the public road from which cars can easily be loaded and unloaded. The village and the public are well accommodated with railroad facilities, far better than can be afforded by this branch road, and, no doubt, the other roads are better located to catch the general business of the community. But I can hardly conceive that simply because of the greater convenience of another railroad, and the fact of the volume of general business that would come to a new enterprise would be small, should make it unlawful for a new railroad to enter the territory of a rival. Every reason shows that this railroad would be very glad to get all the trade that is offered, and no testimony has been submitted to show that any business has been refused. The act of assembly of June 19, 1871, provides 'that where it is alleged that the private rights of individuals or the rights or franchises of other corporations are injured or invaded by any corporation, claiming to have a right or franchise to do the act from which such injury results, it shall be the duty of the court to ascertain whether the corporation does, in fact, possess the right or franchise to do the act from which the alleged injury results, and if such rights or franchises have not been conferred upon such corporations,' then to afford relief. This act the plaintiff invokes, and asks the master to declare that this railroad has not the right to construct this branch road, and take the private property of the defendant for the reason above stated. He cites the familiar case of Edgewood Ry. Co.'s Appeal, 79 Pa. St. 257, where the court declared that the road there proposed to be built was not to accommodate the trade and travel of the public, but was a mere attempt by a coal company to connect their line with a railroad company, without complying with the provisions of the lateral railroad statutes. In that case the incorporators and officers of the railroad company were also the owners of the mine, and the road ended in a gully in which was the opening of the mine. A part of the road was built over the land of the mine company, and their grant to the railroad contained the expressed reservation 'for the right of way for their coal railroad, and for no other purposes whatever, except such other purposes as are necessary for the ordinary workings of coal works.' None of these special features exist in the case at bar. It is not A. & P. Roberts attempting to evade the provisions of the law of lateral railroads; it is the effort of the railroad company reaching out to tap a rich field of freights and business.

"When this branch road was building, the same question came before the court of common pleas of Montgomery county on a motion for a preliminary injunction, and the preliminary injunction was refused, and the reasons for the same are given in an able opinion by his honor, Judge Weand, reported in Schofield v. Railroad Co., 8 Montgomery Co. Law Rep. 125. In that case the court expressed the opinion that the company had the right to build this very road in question. The same question was raised and decided in Dobson v. Railroad Co., 6 Montgomery Co. Law Rep. 109. The light derived from a full hearing has in no wise changed the facts, nor the law as then known to the court. It is, however, further contended that since those opinions were read, on motions for preliminary injunction, the method of defendant company in operating this road has developed itself, and now shows that it is not operated to 'accommodate the trade and travel of the public'; that no passenger car has been run over the road since it has been in operation. This, we think, is an objection that will not avail, even if true. The act of 1871, above quoted, expressly says: 'If such rights or franchises have not been conferred upon such corporation, then to afford relief.' The only question for the court to consider is, have the rights and franchises been conferred? not are the duties and responsibilities incumbent upon the corporation fulfilled? Judge Allison, in Lejee v. Railroad Co., 10 Phila. 362, says on this very subject, after quoting the act as above quoted: 'The inquiry which the court is here required to institute is whether the right or franchise claimed by the corporation charged with a usurpation of power has been conferred or granted to such corporation; whether, by virtue of such grant, it can lawfully be the act which it is alleged inflicts injury upon the private rights of individuals.' If the corporation is not fulfilling its duties and responsibilities to the public, this wrong can be righted in another way; but, 'if the charter gives the right, a court of equity cannot declare that a corporation has fulfilled its franchises, on an injunction bill by a private plaintiff.' Western Pennsylvania R. Co.'s Appeal, 104 Pa. St. 399. 'Whether a corporation has failed to perform the conditions of its existence is a question between the state and corporation, which cannot be raised or litigated in an action between the corporation and private parties.' Lumber Co. v. Ward (W. Va.) 3 S. E. 227, cited in American Digest for 1887 (page 224).

"We therefore conclude on these points: First, that the defendant company has the undoubted right to build this branch road, 'to increase the business of the company, and accommodate the trade and travel of the public'; second, that nothing has been shown to make us doubt the integrity of the action taken, so as to justify us in saying that this was an attempt to connect an individual siding with the railroad without complying

Digitized by Google

with the provisions of the lateral railroad statutes; third, that the court, in this proceeding, cannot inquire into the method of conducting the business of this corporation, and from this draw a conclusion that no right to construct the branch existed in the first instance. Testimony was also submitted to prove that this branch road, or a part of it, was actually built by the employés of the Pencoyd Iron Company. On the other hand, the engineer of the railroad company swore that this was a mistake, and that no part of this branch road was built by the Pencoyd Iron Company, nor paid for by it, and that the other witness was in error, and had mistaken certain sidings for the road itself. The master is of the opinion that this latter testimony was the correct statement of the facts of the case, and that there was therefore no attempt by the Pencoyd Iron Company to evade the statutes relating to the lateral railroads.

"Secondly, the plaintiff contends that this branch road was previously located over another route, and that the defendant company, on February 3, 1890, filed in the court of common pleas of Montgomery county, No. 12, March term, 1890, a petition and bond showing an actual location of their proposed branch over said other route, and gave bonds in the sum of $20,000, which was approved by said court; and that said location is final; and that defendants have no right to change to a new location. Whatever other location was attempted, was attempted on other property than that mentioned in the bill; and the master is of opinion that, even if another location was made, this plaintiff cannot take advantage of that fact. There was but one location upon the property of the plaintiff. That is the location upon which the railroad was built. The question was virtually decided by this court when the case was before it on motion for a preliminary injunction, and the court there refused the motion, and we see nothing now before the master which could or should change the decision that was there arrived at by the court.

"The third contention arises over the meaning of the word 'dwelling house,' used in the act of February 19, 1849 (section 10). This section reads as follows: 'Not, however, passing through any burying ground or place of public worship, or any dwelling house in the occupancy of the owner or owners thereof without his, her, or their consent.' The plaintiff would include in the word 'dwelling house,' not only the actual house itself, but also such curtilage as is necessary for its reasonable enjoyment; and in the case at bar he maintains that the barn here destroyed was a part of this curtilage, and necessary for the reasonable enjoyment of the dwelling house by its owner. In support of this position, plaintiff cites a number of cases in which the word 'house' has been held to include the curtilage necessary for its reasonable enjoyment. These cases arise in devises of a house, as in Bennet v. Bittle, 4 Rawle, 339; and in construction of the same word as used in the mechanics' lien acts, as in Pennock v. Hoover, 5 Rawle, 314. I hardly think the above cases are in point. While the curtilage is included in the word 'house,' so as to make a reasonable interpretation, yet it has also been recently held by the supreme court in Bevan v. Thackara, 6 Montgomery Co. Law Rep. 177, 'that a lien filed against a dwelling house, describing it, will not give the plaintiff the right to include material furnished to a stable, although a sale on the lien would carry the lot and all the improvements, including the stable.' Judge Boyer, in Clegg v. Railroad Co., 1 Montgomery Co. Law Rep. 10, did not think these cases had any application to the point at issue. In two important railroad cases in England, the word 'house,' in an act of parliament very similar to our act of assembly, has been held to include what is necessary for the convenient occupation of the house. See Steele v. Railroad Co. L. R. 1 Ch. App. 285; Grosvenor v. Railroad Co., 58 Eng. Ch. *446. These English cases have never been followed in this country, nor have they been cited with approval in any case that has been called to the master's attention.

"In Wells v. Railroad Co., 2 Am. Law Reg. (N. S.) 659, a case decided by the supreme court of Maine, the Maine statutes read: 'No corporation shall take any meeting-house, dwelling house, or public or private burying-ground without the consent of the owner thereof.' The court there held 'that the term "dwelling-house" means only the house itself, and includes no part of the garden, orchard, or curtilage.' This act of assembly has been before the supreme court of our own state three times. No definite rule has been laid by their tribunal by which to judge what is included in the word 'house' and the curtilage appurtenant thereto. The first case is Swift's Appeal, 111 Pa. St. 516, 2 Atl. 539, where the court decided that they must so construe its statutes as to give a reasonable effect to its purposes and intent, and said: 'This necessarily includes some curtilage connected therewith. The exact extent of that curtilage cannot be defined by any arbitrary rule as to distance. As each case arises, the right of the owner and occupier of the dwelling house, against hostile location of a railroad, must be determined by a consideration of what is necessary for a reasonable and proper enjoyment of a house as a residence, in view of its location and surroundings.' Decided by this rule, the land taken in that case, which was a corner in the rear of the lot, and distant 155 feet from the nearest portion of the house, was not considered as included in the mansion house and necessary curtilage. This case was followed by Damon v. Railroad Co., 119 Pa. St. 287, 13 Atl. 217. In that case the land taken

Digitized by Google

by the railroad company was more than 100 feet distant from and not within the same inclosure with the dwelling, and the court held that this land was not included within the prohibitive words of the statute. In delivering those opinions, Judge Green says: 'It may be gravely questioned whether it is within the lawful power of the judiciary department of the government to depart from the plain letter of a statute which is free from ambiguity. As a general rule, of course it cannot be, and is not done,'—and in speaking of the former case of Swift's Appeal, said that the language of that case was somewhat indefinite, but said that the court certainly did mean to limit 'the curtilage to be exempted to that portion of it which was necessary to the enjoyment of the house, nor to that which was desirable or convenient, or which depended alone upon the will of the owner.' The taking of outbuildings has never, in this commonwealth at least, been held a violation of prohibitive words of the act of 1849; and we do not mean to intimate that it would or should be so held. The three cases of Lyle v. Railroad Co., 131 Pa. St. 437, 18 Atl. 1111, 1112, were decided in 1890. In this case the owners had a lot 44 feet wide, fronting on a street, and extending 96 feet to an alley 16 feet wide. Upon this lot there was a dwelling house 12 feet back from Ruth street, and 3 feet from an easterly line of the lot. Back of the dwelling house are several small outbuildings, to wit, a coal house, cow stable, chicken house, etc. The railroad company has appropriated a strip of land 16 feet wide and 40 feet long adjoining the alley, moved the outbuildings in upon the lot, and given bond for the damages caused thereby. Even in a case as strong as this, the supreme court refused to declare that the land taken was included within the prohibitive words of the statutes. The court say: 'The law regards that which is essential to the enjoyment of a dwelling house, and not that which is merely ornamental and pleasant in its surroundings. The location of a railroad across a lot in which the owner has his dwelling house, or upon grounds which constitute part of a valuable country seat, is not in violation of the statute.' Taking the three cases just quoted as showing the spirit in which the court has met this question, we cannot come to any other conclusion than that the barn here taken and the land do not constitute any part of the dwelling house or curtilage which would be exempt under this statute. It cannot include an unlimited quantity of land just because the owner of the house, for his aesthetic taste or desire for wide-spreading acres, included a large tract within his inclosure. Here this barn and land taken were included in a small corner of an extensive lawn. Should the private lane before spoken of be extended to the west line of plaintiff's property, the barn and land taken would all fall considerably beyond this line. There still remains a lot in front containing some 300 feet and in depth some 200 feet. This will give ample room for stable and carriage house. In fact, the plaintiff has, since the building of this road, erected a stable and carriage house upon this inclosure. The master is of opinion that while this will greatly inconvenience plaintiff, and has materially lessened the market value of his elegant home, yet the land taken is not necessary for the reasonable enjoyment of his home, that his stable must be erected where it formerly stood. For his damage and inconvenience, and for the reduction of the market value of his property, he will be compensated in damages by a jury, as remedy for all inconveniences is adequated. There may be, and doubtless are, cases where the destruction of a barn might practically destroy the dwelling house, where, from the character of the curtilage, no other place could be found within the inclosure to erect a new stable; but that case is not this case. We therefore conclude that in the case before us the railroad has not passed through any dwelling house in the occupancy of the owner.

"This disposes of all the objections mentioned in the bill or raised in the argument before the master. The master therefore recommends a decree dismissing the bill, at the costs of the plaintiff."

R. P. White and Chas. Hunsicker, for appellant. Charles H. Stinson, C. Henry Stinson, and William F. Solly, for appellee.

PER CURIAM. An examination of this record, with special reference to the legal propositions so clearly and forcibly presented by the learned counsel for appellant, has not convinced us that either of the assignments of error should be sustained. Defendant company is expressly authorized by its charter "to construct such branches from its main line as it may deem necessary to increase its business, and accommodate the trade and travel of the public." As evidenced by the resolution of November 11, 1889, the construction of the branch line in question was avowedly undertaken by the company for these very purposes; and it does not sufficiently appear that, in constructing and operating the same, there has been any departure from or abandonment by the defendant or its lessee of either of said declared purposes. In his second conclusion, which, with others, was approved by the court below, the learned master says: "Nothing has been shown to make us doubt the integrity of the action taken, so as to justify us in saying that this was an attempt to connect an individual siding with the railroad without complying with the provisions of the lateral railroad statutes." In this, we think, he was right. We find nothing in the

Digitized by Google

case that would justify the inference of bad faith on the part of the company in not carrying out its declared purpose to exercise the authority given by its charter to construct the branch line in question. If it were otherwise, the commonwealth would be the proper party to complain.

In view of the undisputed facts, the learned master was clearly right in holding that the location and construction of defendant's branch road across the southwesterly corner of plaintiff's lot does not interfere with the reasonable use and enjoyment of his dwelling house on another part of the lot, at least 125 feet from said branch line, and therefore not, in any proper sense of the words, such a "passing through any * * * dwelling house in the occupancy of the owner," etc., as the statute was intended to prohibit. This conclusion is abundantly sustained by the authorities cited by the master in support thereof. All the questions involved have been so fully considered and satisfactorily disposed of by the learned master and court below that further elaboration of either of them is deemed unnecessary. There was no error in dismissing the bill. Decree affirmed, and appeal dismissed, with costs to be paid by plaintiff.

SHATTUCK v. CUNNINGHAM et al.

(Supreme Court of Pennsylvania. Feb. 18, 1895.)

LAND CONTRACT — DESCRIPTION OF PROPERTY — CONSTRUCTION — SPECIFIC PERFORMANCE — TENDER.

1. Pursuant to a conditional agreement to give plaintiff an option on lots 928, 930, and 932 North Eighth street, defendant contracted to convey to plaintiff "all the certain lot or piece of ground known as Nos. 928, 930, 932 North Eighth street [53' 4" front, and 53' 7" deep], in said city of Philadelphia." Defendants had acquired title by a deed which described each lot separately,—Nos. 930 and 932 as each 18 feet front and 53 feet 7 inches deep, and No. 928 by metes and bounds; the three lots thus described making a tract with a frontage of 53 feet 4 inches, and a general depth of 53 feet 7 inches, but with an irregular projection in the rear of lot 928, all of which, at the time of the contract, was occupied as one lot, and used for one purpose. *Held*, that it was all included in the contract, the description by lot numbers not being limited by, but governing, the further description "53' 4" front and 53' 7" deep," as far as they were repugnant.

2. Plaintiff did not lose his right to specific performance by failure to make a formal tender to defendants, where, long before expiration of plaintiff's option, he had notice that defendants would not give a deed of the property claimed by plaintiff to be embraced in the option, and defendants' attorney agreed that tender should be waived, and prepared an agreement to that effect for defendants to sign, and plaintiff had no notice that they refused to sign it till 4 p. m. on the last day of the option, when they tendered him a deed of the property which they claimed was covered by the option, and, on his saying that he was willing to take a deed of the property which he claimed, refused to make such a deed.

Appeal from court of common pleas, Philadelphia county.

Action by Frank R. Shattuck against Florence Cunningham and another for specific performance. Judgment for plaintiff. Defendants appeal. Affirmed.

The report of the referee was as follows:

"The bill of complaint alleges: That on March 2, 1894, the defendants were the owners in fee of the premises known as Nos. 928, 930, and 932 North Eighth street, and still own the same. That they obtained the same by deed dated August 8, 1893, which deed described each of the three lots separately. The lot No. 928 was described as follows: 'All that certain lot or piece of ground beginning at a point on the west side of Eighth street, at the distance of three hundred and twenty-three feet five and seven-eighths inches northward from the north side of Poplar street, in the Twentieth ward of the city of Philadelphia; thence extending northward, along the west side of Eighth street, seventeen feet four inches, to a point; thence westward, on a line at right angles to the said Eighth street, fifty-three feet seven inches, to a point; thence southward, on a line parallel to the said Eighth street, seventy-two feet, to a point; thence eastward, on a line at right angles to the said Eighth street, thirty-one feet ten and seven-eighth inches, to a point; thence north, fourteen degrees fifty-eight minutes fifty-one seconds east, fifty-four feet nine and five-sixteenth inches, to a point; and thence eastward, on a line at right angles to the said Eighth street, eighteen feet two and one-half inches, to the said Eighth street and the place of beginning,—being premises No. 928 North Eighth street.' The lot No. 930 adjoins No. 928 on the north, and is a rectangular lot, having a front of eighteen feet, and extending westward, of that width, fifty-three feet seven inches; and lot No. 932 adjoins this on the north, and is of the same shape and dimensions. That the prices paid by defendants for the three lots, respectively, were: For 928 North Eighth street, $1,850; for 930 North Eighth street, $1,500; for 932 North Eighth street, $1,525,—total, $4,875. This was clear of incumbrances. That the said premises are now subject to a mortgage of $6,000 to the City of Penn Building Association, which mortgage, however, also binds the premises known as No. 935 Darien street, purchased at the same sale with the other lots for $1,315, clear of incumbrances. That on March 2, 1894, the defendants entered into an agreement with plaintiff to sell to him the said lots on North Eighth street, and the agreement is recorded, and a copy is annexed to the bill. It is as follows: 'This agreement, made the second day of March, A. D. one thousand eight hundred and ninety-four (1894), between Florence Cunningham and Georgianna Cunningham, single

Digitized by Google

women, of the city of Philadelphia, of the first part, and Frank R. Shattuck, attorney, of the same place, of the second part, witnesseth: That the said parties of the first part, for the consideration hereinafter mentioned, do hereby, for themselves, their heirs, executors, and administrators, covenant, promise, and agree with the said party of the second part, his heirs and assigns, that they, the said parties of the first part, shall and will, at the time hereinafter mentioned, at the proper costs and charges of the said Frank R. Shattuck, attorney, his heirs and assigns, by a good and sufficient deed of conveyance, grant, convey, and assure unto the said party of the second part, his heirs and assigns, all that certain lot or piece of ground known as Nos. 928, 930, and 932 North Eighth street [53' 4" front and 53' 7" deep], in said city of Philadelphia, free, clear, and discharged of all liens and incumbrances of any nature or kind whatsoever, together with all and singular the buildings and other improvements and appurtenances thereunto belonging. And the said party of the second part, for himself, his heirs, executors, and administrators, does hereby covenant, promise, and agree with the said parties of the first part, their heirs and assigns, that he, the said party of the second part, shall and will well and truly pay unto the said parties of the first part, their heirs and assigns, the sum of six thousand dollars, in manner following: Five hundred dollars upon the execution of this agreement; fifty-five hundred dollars at any time within sixty days from March 1st, 1894, provided that, if the said party of the second part shall neglect to pay said sum of fifty-five hundred dollars within said time, then the said first payment of five hundred dollars shall be retained by said parties of the first part, as and for liquidated damages. At the time of the delivery of any such deed of conveyance, it is agreed that immediate possession of said premises shall be given to said party of the second part, his executors, administrators, or assigns. In witness whereof, the said parties to these presents have hereunto set their hands and seals, this second day of March, one thousand eight hundred and ninety-four. Florence Cunningham. [Seal.] Georgianna Cunningham. [Seal.] F. R. Shattuck. [Seal.]' The bill further alleges: That on April 23, 1894, the plaintiff presented a good and sufficient deed for the premises to the defendants for execution, and notified them of his election to become the purchaser of the same, and his desire to pay the balance of the purchase money; and that the defendants refused to execute the deed, but on April 30, 1894, presented and offered to deliver to him an executed deed, which did not accurately describe the said premises, but omitted from the description a considerable portion of the same, which deed plaintiff refused to accept, for that reason and because the premises were subject to the aforesaid mortgage; and that thereupon the defendants refused to execute any deed containing any description differing from that in the deed they had tendered, and did waive any tender of the purchase money. That plaintiff is ready to pay the balance of the purchase money, and perform his part of the agreement, whenever the defendants shall execute a deed for the premises described, free and clear of incumbrances. The bill then prays relief that the defendants may be decreed to execute and deliver a deed for the premises known as Nos. 928, 930, and 932 North Eighth street, free of incumbrances; that the defendants be restrained from conveying or incumbering the said premises; and general relief.

"The answer admits the ownership of the premises; that they were obtained by deed as alleged; that they paid the price alleged; that the premises are subject to mortgage as alleged. It admits that they entered into the agreement set out in the bill, does not admit that the premises first described are known as No. 928 North Eighth street, and avers that the price paid for the premises is immaterial. The answer denies that the plaintiff on April 23, 1894, presented to them a deed for execution in accordance with the agreement, and avers that on April 30, 1894, they tendered a deed accurately describing the premises, offering to convey the same to him clear of incumbrance upon payment of the balance of purchase money, but that plaintiff refused to accept the same, and refused to pay the balance of the purchase money. It also denies that defendants waived tender of balance of purchase money by plaintiff. The answer denies that plaintiff is and has been ready to pay the balance of purchase money and perform his part of the agreement, and avers that he has evaded a consummation of it, and is not entitled to specific performance.

"The dispute which gave rise to the case is this: The southernmost of the three lots in question (No. 928) is shaped something like the letter L, having a projection from the rear end thereof towards the south fifty-four feet eight inches on the west line, and having a width of thirty-one feet ten and seven-eighth inches on the south line, and widening as it approaches the main body of the lot to thirty-five feet four and one-half inches, having an area of 1,750 square feet; and the plaintiff contends that, under the agreement, he is entitled to a conveyance of the three lots, including this projecting portion of the southern lot; while the defendants claim that he is entitled to a conveyance of the three lots, having a front of fifty-three feet four inches, and extending westward of that width fifty-three feet seven inches,—in other words, that the agreement does not include the ground projecting from lot No. 928.

"From the allegations of the bill, the ad-

Digitized by Google

mission of the answer, and the testimony adduced, the referee reports the following to be the facts of the case:

"Findings of Fact.

"The three lots of ground on Eighth street in question, together with a fourth lot fronting on the street in the rear, named Darien street, the rear end of which adjoins the projecting lot of ground in dispute, were conveyed to the defendants in one deed, dated August 8, 1893, and recorded. Each lot was described as a separate tract. The description of lot No. 928 is set out in the second paragraph of the bill, and includes this disputed tract, within the metes and bounds given, and concludes with the words 'being premises No. 928 North Eighth street.' The three lots constitute one open place, used as a marble yard. There is no division fence between the northern portion of No. 928 and the projecting portion in dispute. This use of the entire lot for the one purpose is apparent to any one going upon it, and the plaintiff, before the negotiations began, had visited the lot, had seen that it extended in the rear of the premises Nos. 924 and 926 North Eighth street, making these two lots very shallow, and had observed that the entire tract was used as one. In the negotiations that ended in the agreement attached to the bill, William E. Cunningham, the brother of the defendants, represented them as their agent. The negotiations were begun by one Atkinson, who held an option for the purchase of the premises in the following words: 'Philadelphia, Pa., 2, 10, 1894. If the lots 928, 930, and 932 North Eighth street (8th) are not sold by March, 1894, (1st) first, I agree to give W. Atkinson, his heirs or assigns, an option on said lots for the period of (60) sixty (March, April) days from March 1st, 1894, provided said M. Atkinson shall give me five hundred dollars ($500.00) on March 1st, 1894, to be held as a forfeit, provided he does not purchase the lots in time specified, option to be for $6,000.00 (six thousand dollars), free of all incumbrances. [Signed] Wm. E. Cunningham. Jane Y. Cunningham. Witness: M. Atkinson.' Atkinson offered to transfer his option to the plaintiff, and he agreed to pay, and did subsequently pay, $750 for it. In the meantime plaintiff made an examination of the record, to ascertain the description of the property, and to learn who was the owner, and found that the title was in defendants. He then prepared an agreement, which he gave to Atkinson, to have defendants sign. This agreement is like the one which is Exhibit A to the bill, except that it did not contain the words and figures in brackets in the eighteenth line thereof, as printed, viz.: '53' 4" front and 53' 7" deep,' and it did not contain the words 'and a good and sufficient deed for said premises shall have been executed and tendered for delivery by said parties of the first part,' which words are not in Exhibit A. A day or two after the plaintiff had given this agreement to Atkinson, Mr. Charles H. Downing, a member of the bar, with William E. Cunningham, came into the plaintiff's office, having this agreement with them. Mr. Downing objected to the words relating to the tender of a deed by defendants last quoted, and plaintiff assented that they should be stricken out, and it was done. Mr. Downing also insisted that the size of the lots be inserted, and with a pencil he wrote the words '53' 4" front and 53' 7" deep' in one of the blank spaces of the paper, and indicated to Mr. Everitt, the plaintiff's clerk, where words should be inserted in the new written agreement, which the plaintiff had instructed him to prepare. A large portion of the evidence adduced related to what took place at this interview, but nothing was proved that affected the integrity of the paper as it was signed. The demand of Mr. Downing that the size of the lots should be inserted was made in a tone loud enough to be heard by several persons present, and might have been heard by plaintiff. When he subsequently signed the agreement, he had an opportunity, and it was his duty, to read it. The referee finds no evidence of fraud on which the agreement could be reformed, and, indeed, though so much was made of it in the evidence, the bill does not pray for its reformation. It is to be observed, however, that no mention was made in this conversation by any one of the projecting portion of lot No. 928. Mr. Everitt wrote the new agreement, conforming to the suggestions made by Mr. Downing, and took it to his office. It was there executed and acknowledged by the defendants, and on the next day Mr. Downing and one of the defendants brought it to the plaintiff's office. He only looked at the paper to see that it was executed and acknowledged, and, without reading it, executed it, and paid Mr. Downing the money, and took his receipt for it. The paper then executed is Exhibit A to the bill, and was retained by the plaintiff, who procured it to be recorded. During all of this transaction Mr. Downing considered himself as representing the defendants, and the plaintiff certainly had a right to assume that he did. He also represented a building association, which held a mortgage of $600 on these lots, together with the lot on Darien street, which mortgage is still unsatisfied. Shortly after the execution of this agreement, the plaintiff learned that William E. Cunningham had offered this projecting piece of land for sale, and a correspondence ensued between them, which the referee does not deem material to the case, except that it manifested to the plaintiff that the defendants would not convey the lot to him, including this projecting portion.

"About April 25, 1894, the plaintiff, having prepared a deed conveying the three lots to him, in which the lot No. 928 was described as including this projecting portion, took it

Digitized by Google

to Mr. Downing, as attorney for the defendants, tendered it to him, and requested him to have it executed. In this interview it was agreed that everything of a technical nature connected with the proceedings to be instituted to enforce the agreement should be waived. Mr. Downing, to carry out this agreement, wrote upon the deed the following: 'Phila., April 25, 1894. By reason of the description of the property named in the within deed being different from that agreed to be sold according to the terms of agreement, dated March ——, 1894, we do hereby refuse to execute said deed. The tender of the purchase money (that is, the balance thereof) is hereby waived.' He subsequently gave the deed thus indorsed to William E. Cunningham, with instructions to have his sisters sign it, so as to raise the question fairly, their refusal to execute the deed, and their reason for it. It was certainly the understanding between the plaintiff and Mr. Downing to submit to the court the simple question whether the plaintiff's contention or the defendants' should be maintained, uncomplicated by any question as to proper tender of performance by either side. The defendants did not sign the memorandum made by Mr. Downing, nor consult him further about it, but employed other counsel, who, in ignorance of the agreement made by Mr. Downing, prepared a deed describing the lot No. 928 as a rectangular lot, in conformity with the defendants' construction of the agreement; and after four o'clock on April 30, 1894, the day on which the plaintiff's option expired, while the plaintiff was attending an auditor's meeting, held in office of another lawyer, the defendants, with their counsel, made a tender to him of this deed, duly executed. The plaintiff stated that at that late hour he did not have the purchase money to pay, but refused further to consummate the transaction, because of the mortgage upon the property, and because the description did not conform to the agreement. The defendants offered to have the incumbrance removed at the time of the settlement, if he would accept the deed as they had tendered it, and offered to meet him the next day or any reasonable time to make settlement. The plaintiff declined, and stated to them that he was ready to make settlement at any time that they tendered a deed with proper description. In this interview plaintiff informed defendants of this arrangement with Mr. Downing.

"Conclusion as to the Law of the Case.

"This suit is brought to procure the specific performance of a written contract. As there are no facts in the case which justify a change of any of the terms of the contract, the rights and duties of the parties thereto are to be determined by the ordinary rules for the construction of such contracts. The first of these is to ascertain the intention which the parties have expressed in the agreement. The defendants have contracted to convey to the plaintiff 'all that certain lot or piece of ground known as Nos. 928, 930, and 932 North Eighth street [53' 4" front and 53' 7" deep], in said city of Philadelphia, free and clear and discharged of all liens and incumbrances of any nature or kind whatsoever.' The referee is of the opinion that the contention of the plaintiff should prevail, and that a proper construction of the agreement makes it the duty of the defendants to convey the entire lot as claimed by plaintiff. The subject of the contract was 'all that certain lot * * * known as Nos. 928, 930, and 932 North Eighth street'; and the proof is that the entire lot, as claimed by the plaintiff, was occupied as one lot, and used for one purpose, without any fence separating the piece of ground in dispute from the rest of the lot, and that the deed by which the defendants obtained title conveyed the entire lot by metes and bounds as one tract, and described it as 'being premises No. 928 North Eighth street.' In view of these facts and the wording of the whole contract, do the words '53' 4" front and 53' 7" deep' manifest an intent to convey a rectangular lot of these dimensions rather than the whole lot, as occupied by the defendants and described in the deed to them?

"There are numerous reported cases in which repugnant descriptions found in the contract or conveyance have been construed by the courts. In all the cases in which the thing granted has been described by its number as found on the ground, or a plat, or by a name by which it is known or designated, or where it is described as a tract occupied by a particular person, such description has been held sufficient in a conveyance, contract, or writ of ejectment to be a sufficient description to effectuate the purpose of the parties; and, even when the instrument construed contained a repugnant description by metes and bounds, the latter has been made to yield to the former. Thus, in Rutherford v. Tracy, 48 Mo. 325, the granting clause in the deed was: 'Lot 3 in block 87, beginning at the northeast corner; thence west to the alley; thence south eighteen feet,' etc.,—the latter description embracing a less area than lot 3. The court held: 'The legal inference or presumption is that the grantor conveyed the whole lot, and attempted to give it a more particular description by bounding it with courses and distances. The designation of the lot by its number must be regarded as the prominent object or monument, and, where there is uncertainty, the monument must prevail over the description by courses and distances.' The same principle is applied in Transit Co. v. Skinner, 9 Mo. App. 189. In Lodge v. Lee, 6 Cranch, 237, a grant of an island in the Potomac river, by name, superadding a description by courses and distances of the lines thereof, which a survey showed did not include the whole island, was held, nevertheless, to pass title to

Digitized by Google

the whole island. The legislature of Pennsylvania, by act of March 24, 1785, provided for the survey of certain lands, and directed that each section should be marked with a number on a tree at the northwest corner, and return made to the land office. In Smith v. Moore, 5 Rawle, 348, Gibson, C. J., held: 'If, then, at the time of making the survey on the ground, the lot received a name of baptism sufficient to distinguish it from all the rest, its individuality could not be destroyed or its name changed by a blunder in the return in respect of the boundaries. Where there is a discrepancy between the numbered corner and the boundaries returned, it appears more reasonable that the number should be taken to determine the boundaries than the boundaries should be taken to determine the number.' See, also, Dunn v. Ralyea, 6 Watts & S. 475. In Koch v. Dunkel, 90 Pa. St. 264, it was decided that where land is described in a deed of conveyance by courses and distances, and also by calls for adjoiners, the latter, where there is a discrepancy and there are no monuments on the land, must govern. It is said in 1 Dart, Vend. 602, that where the deed contains an adequate and sufficient definition, with convenient certainty, of what is intended to pass, any subsequent erroneous addition will not vitiate it, according to the maxim, 'Falsa demonstratio non nocet.' For instance, under a conveyance by A. of all his meadow Blackacre, described as containing 10 acres, but which in truth contains 20 acres, the whole 20 acres will pass. In Ross v. Baker, 72 Pa. St. 186, there was a parol sale of land, and the receipts for the purchase money described the premises as 'Fleming Farm, on French Creek,' and the description was held to be sufficiently certain to pass the title. In Rodgers v. Olshoffsky, 110 Pa. St. 147, 2 Atl. 44, the lot was described as 'all that certain lot * * * in the city of Bradford bounded and described as follows, to wit: "Commencing at a stake in north line of Main street; * * * thence westwardly, along the north line of Main street, twenty feet," ' etc. This line was only eighteen and one-third feet long, and it was held that the grantee could not recover from the grantor for the deficiency. The manner in which the point was raised did not call for special reference to the principle here contended for; yet it evidently influences the court's opinion. In Tallman v. Franklin, 14 N. Y. 584, the auctioneer's book described the lots: 'Building lots on One Hundred Thirty-Second and One Hundred Thirty-Third streets, between Fifth and Sixth avenues, numbered 132 to 135 and 154–157.' In point of fact, the four first lots were on One Hundred Thirty-Second street, and the other four on One Hundred Thirty-Third street. This was shown by proof. The lots were sold as Harlem lots which had been previously sold. Held, that the description was sufficient compliance with the statute of frauds. This was an action to recover difference in price on subsequent sale. In Barry v. Coombe, 1 Pet. 640, 652, the description of the property was: 'Your one-half E. B. wharf and premises.' Johnson, J., said: 'For anything that appears on the face of the instrument, E. B. wharf may be as definite a description of locality as F. street, and then the ambiguity could only arise if it be shown that the bargainor had more than one house in F. street like the two Manors of Dale, put by several authors.' This was a bill for specific performance. In Lewis v. Reichey, 27 N. J. Eq. 240, which was a bill for specific performance, the description was: 'Property held by H. Reichey on Bruce street, Thirteenth avenue, and South Orange avenue, in Newark, N. J., which said title is held by Reichey by declaration of sale from mayor and common council of Newark.' Held to be sufficient under statute of fraud, and performance decreed. In Cate v. Thayer, 3 Greenl. 71, the line of the town of Dresden being described in the act of incorporation as running a north-northeast course, including the whole of a certain farm, it was resolved that the line of the farm should prevail, as being the more certain monument, and more evidently intended by the legislature. In Keith v. Reynolds, Id. 393, it was held that where a parcel of land is conveyed as being the whole of a certain farm, which is afterwards described in the deed by courses and distances, which do not include the whole farm, so much of this description will be rejected as that the whole may pass. A large number of cases of the same import are collected in the decision of the court in Sherwood v. Whiting, 54 Conn. 330, 8 Atl. 80. The use of the street numbers in Philadelphia in leases is well known; and in Flanigen v. City of Philadelphia, 51 Pa. St. 492 (an amicable action and confession of judgment in ejectment), the description was, 'The premises situated No. 136 South Third street, in the city of Philadelphia,' and it was sustained as a sufficient description. In that case Judge Agnew said: 'The description of the cause of action is meager, but not wholly indefinite. * * * In a city having a known system of notation, regulated by municipal laws, recognized in the transactions of general business, and acted upon by every one, the description of a parcel of ground, or the messuage thereon, by a number, is sufficiently definite. The state adopted a system of notation by numerals for the donation and depreciation lands covering nearly the whole of the northwestern part of the state. * * * The conclusive effect of it will be found set forth in Smith v. Moore, 5 Rawle, 348, and Dunn v. Ralyea, 6 Watts & S. 478. Thousands of tax titles in this territory, and in towns and cities in other parts of the state, rest upon no other foundation than the number affixed to the ground, which, as any other descriptive fact, is a subject of proof.' The principle announced in the closing sentence

Digitized by Google

of this quotation shows that, in ascertaining the subject-matter of the contract, it is proper to take proof as to the occupancy and use of the land to which it relates; and from the same principle it would seem certain that, whatever irregularity in the lines of the lot No. 136 South Third street the proof would have disclosed, all the ground shown to be occupied and used as a part of those premises must have passed by the lease, and must have been recovered by the ejectment. It is true that, in some of the cases cited, the lot which was described by number was so numbered on a recorded plan or plat; but this cannot prevent their being authority in the decision of this case, for in such case the plat is not referred to or made part of the instrument construed. The production of the plat is the method of proof, possible in that case, to show what was meant by 'lot 3,' or by the like description. The same result was reached by that method as was reached in the case of the land described by its occupancy by showing just what land was occupied. The court was thus made acquainted with the subject-matter about which the parties were contracting, and enabled to fit the contract to the subject-matter. The court in Flanigen v. City of Philadelphia, supra, has said the same may be done with reference to a lot in this city; and it seems to follow as an irresistible conclusion that if the contract in this case had only described the lot as No. 928 North Eighth street, without adding the front and depth, the whole lot, as it was occupied, would have been included in the description.

"The contention of the defendants, however, rests upon the use of these words describing the front and depth of the lots. It is to be observed, however, that they are not strictly repugnant to prior descriptions of the lot by its number. The lot is fifty-three feet four inches front and fifty-three feet seven inches deep. Its front and depth could not be otherwise truthfully described. These words and figures do not purport to describe the full dimensions of the lot to be conveyed, and therefore the referee is of opinion that they cannot be held to limit the clear meaning of the words 'all that certain lot * * * known as No. 928,' etc. If the contract had called for a lot situate three hundred and twenty-five feet north of Poplar street, having a front of fifty-three feet seven inches, and a depth of fifty three feet four inches, it would be clear that a rectangular lot of those dimensions was intended, but the use of the words 'lot * * * known as No. 928,' etc., makes a very different case. The defendants' claim requires that these words '53' 4" front and 53' 7" deep' should be construed as equivalent to the words 'having a front on said Eighth street of 53' 4", and extending westward between parallel lines at right angles with said Eighth street to a depth of fifty-three feet seven inches.' If the contract did contain these words, it would manifest a clear intention of the parties to pass only the rectangular lot. Such a description would limit the former description of the full lot, but, as the contract does not contain them, it is not admissible to add them by construction. Construed as the referee suggests, every word of the contract has its full operation. The thing conveyed were the lots Nos. 928, 930, and 932 North Eighth street. The length of the front and depth lines are merely added by way of further description. Even if this description was false, it would not affect the true description by the lot number, under the authority of the maxim above quoted from Dart, on Vendors, 'Falsa demonstratio non nocet.'

"The intention to convey the entire lot is further shown by reference to the option which William E. Cunningham, the agent of the defendants, gave to Atkinson, which was the paper on which the plaintiff first acted. It reads: 'If the lots Nos. 928, 930, and 932 North Eighth street are not sold by March 1, 1894, I agree to give M. Atkinson, his heirs or assigns, an option on said lots,' etc. This paper was the foundation of the plaintiff's rights, and may be used to ascertain the intention of the parties. Koch v. Dunkel, 90 Pa. St. 264.

"The referee is also of the opinion that the plaintiff has not lost his right to the specific performance of the agreement by his failures to make a formal tender to defendants. Long before the expiration of the plaintiff's option, he had notice that the defendants would not perform their agreement. In view of this, it might be held that it was not necessary for him to make any tender. Dixon v. Oliver, 5 Watts, 509; Hampton v. Speckenagle, 9 Serg. & R. 212; Pom. Eq. Jur. § 1407, note; Lyman v. Gedney, 114 Ill. 390, 29 N. E. 282. At the time he did take the deed to Mr. Downing, it was agreed between them that all technicalities should be waived, so that the question might be raised as to the construction of the agreement. The agreement which Mr. Downing indorsed on the deed to be signed by defendants contemplated this, and waived the tender of the purchase money. The plaintiff evidently rested on this agreement, and had no notice that the defendants refused to sign the agreement for at least five days afterwards, and on the last of the sixty days during which his option ran, and then at an hour when, in the nature of things, it was impossible to pay the purchase money, even if he had been willing to accept the deed they then tendered. In this interview he told the defendants that he was willing to take the property as when he received a deed conveying the premises according to the agreement, and they refused to make such a deed. For the same reasons, the referee is of opinion that the existence of the mortgage and its nonpayment before the tender of the deed should not affect the right of the defendants. The mortgage can be satisfied at the time of

Digitized by Google

the settlement out of the purchase money.

"The referee is therefore of the opinion that a decree should be entered in favor of the plaintiff, as prayed for in his bill, and that the defendants be ordered to pay the costs."

De Forrest Ballou, for appellants. Alexander P. Colesberry, for appellee.

PER CURIAM. The judgment in this case is affirmed, upon the findings of fact and conclusions of law contained in the report of the learned referee in the court below.

CITY OF PHILADELPHIA v. BOWMAN.

(Supreme Court of Pennsylvania. Feb. 18, 1895.)

MUNICIPAL CORPORATIONS—ACTION ON PAVING CLAIM—DEFENSE.

Act June 9, 1857 (P. L. 802), supplemental to the charter of the P. & D. R. R. Co., subjects the company to any ordinances passed by city councils in reference to the grading, paving, repaving, etc., of streets over which the railroad is laid. Ordinances of Philadelphia provide that all the passenger railway companies within the city shall be at the entire cost and expense of maintaining, paving, repaving, etc., that may be necessary on any street occupied by them. *Held*, that the owner of a lot abutting on a street occupied by such railroad company could set up the liability of the company for the expense of paving it, in an action by the city against him to enforce an assessment.

Appeal from court of common pleas, Philadelphia county.

Action by the city of Philadelphia, to the use of Michael O'Rourke, to the use of William Kelley, against Fremont Bowman, on a claim for paving a street. From a judgment for plaintiff, for want of sufficient affidavit of defense, defendant appeals. Reversed.

Frank P. Prichard and Wendell P. Bowman, for appellant. John M. Ridings, for appellee.

GREEN, J. As this case raises only a question of the sufficiency of the affidavit of defense to prevent judgment, we are, of course, not at liberty to regard any other matters than such as appear in the affidavit. The action was a scire facias upon a municipal claim for paving the street in front of the defendant's lot. The defense was that a designated passenger railway company was legally bound to do the work for which the claim was made, and therefore the defendant was not liable. In the case of Philadelphia v. Spring Garden Farmers' Market Co., 161 Pa. St. 522, 29 Atl. 286, we held that, where the legislature has imposed upon a street-railway company the obligation of paying for the original paving of a street, an abutting landowner can set up such legislative action as a defense to a suit brought by the city against himself to recover the cost of the original paving. Our Brother Mitchell, delivering the opinion, said: "We see nothing to prevent the property holder from taking advantage of the provisions of the act of 1864. That act, it is true, is a charter, and in that sense a contract between the state and the company, to which the property owner is not a party. But as was said by Sharswood, J., in Canal Co. v. Graham, 63 Pa. St. 290: 'The charter is, indeed, a contract imposing upon the corporation the burden of performing a certain duty to the public.' And in the present case the intent is clear to put on the railway company that portion of the public duty which relates to the paving of streets, and thereby to relieve the abutting property owner."

In the case at bar the affidavit of defense sets up the act of June 9, 1857 (P. L. 802), which is a supplement to the charter of the Philadelphia & Delaware River Railroad Company, which subjects that company to any ordinances passed by the city councils with reference to the grading, paving, repaving, etc., of the streets over which their railway is laid, and a proviso that the said streets shall be kept in repair by the railway company. The affidavit further asserts that the railway built by the said company is laid upon the street on which the defendant's property is situated, and further sets forth certain city ordinances which provide that all passenger railway companies within the city shall be at the entire cost and expense of maintaining, paving, repaving, and repairing that may be necessary upon any road, street, avenue, or alley occupied by them. The act of 1857 and the various ordinances of the city which are described in the affidavit of defense make out an apparent nonliability of the defendant for the work claimed for in this action, and therefore it was error to enter judgment for want of a sufficient affidavit of defense. A discussion appears in the paper books upon the effect of another and later ordinance of the city upon the defendant's liability, but, as that ordinance does not appear on the record, we can take no cognizance of it at this time. A prima facie defense is set forth in the defendant's affidavit, and therefore judgment must be deferred until a final hearing. Judgment reversed, and procedendo awarded.

GACKENBACH v. LEHIGH COUNTY.

(Supreme Court of Pennsylvania. Feb. 25, 1895.)

STATUTE—TITLE.

Act June 24, 1885, entitled "An act to perfect the records of deeds, mortgages and other instruments in certain cases," and providing that the proper county shall pay the fees for such services, is unconstitutional, as not expressing its object in its title. Pierie v. Philadelphia, 21 Atl. 90, 139 Pa. St. 575, followed.

Appeal from court of common pleas, Lehigh county.

Digitized by Google

Action by Henry J. Gackenbach against the county of Lehigh to recover $11,326.20 for services rendered by him in 1889, as recorder of deeds of said county, in certifying and signing deeds and other instruments entered by his predecessors, pursuant to Act June 24, 1885, entitled "An act to perfect the records of deeds, mortgages and other instruments in certain cases," which provides that the proper county shall pay the fees for such services, in which there was a judgment of compulsory nonsuit. From an order refusing to take off the judgment of nonsuit, plaintiff appeals. Affirmed.

John Rupp, for appellant. C. J. Erdman and T. F. Diefenderfer, for appellee.

PER CURIAM. In principle this case is substantially the same as Pierie v. Philadelphia, 139 Pa. St. 575, 21 Atl. 90, and is ruled thereby. There was, therefore, no error in refusing to take off the judgment of nonsuit. Judgment affirmed.

CULVER v. TOWN OF FAIR HAVEN.

(Supreme Court of Vermont. Rutland. Jan. 10, 1895.)

HIGHWAY—RESURVEY.

Under R. L. § 2920, providing that, if the terminations and boundaries of a highway cannot be ascertained, the selectmen may resurvey the highway, the selectmen may relocate the highway, whether or not the lines of the relocation are the same as those of the original survey.

Exceptions from Rutland county court; Munson, Judge.

Petition by J. Dana Culver against the town of Fair Haven for the appointment of commissioners to review the action of selectmen of the town in resurveying a highway. From a judgment sustaining exceptions of petitioner to the report of commissioners, and dismissing the petition, both parties bring exceptions. Reversed.

The petition alleged that two of the selectmen of the town of Fair Haven, professing to act under R. L. § 2920, but wholly without application therefor, and without the existence of any facts which would give them jurisdiction so to act, made a pretended resurvey of the east line of Main street, in the village of Fair Haven, and thereby so altered the line of the original highway as to include within its limits certain land of the petitioner; that the said selectmen awarded the petitioner no damages therefor; that there was no original survey of such highway which had been preserved, and no terminations or boundaries which could now be ascertained. The commissioners reported that said highway was originally surveyed April 10, 1788, and was, at the point in question, laid out six rods wide; that according to the original description the survey began at the bridge, on the west side and the north end thereof; that the bridge, at the starting point of the survey, had been changed; and that at the time of the action of the selectmen the location of said bridge and the location of the eastern line of the highway in question could not be ascertained, nor could it be ascertained by the commissioners and located with any degree of certainty. The commissioners did not attempt to resurvey the said easterly line, nor to make any award to the petitioner in the matter of damages.

Joel C. Baker, for petitioner. W. H. Preston, for defendant.

TAFT, J. The selectmen of Fair Haven resurveyed a highway under the provisions of section 2920, R. L., which reads as follows: "If the survey of a highway has not been properly recorded, or the record preserved, or if its terminations and boundaries cannot be ascertained, the selectmen may re-survey the same, and make a record thereof in the town clerk's office; but fences or buildings erected or continued thereon for more than fifteen years shall not be removed or the lands enclosed taken for the highway, without compensation as in other cases of altering highways." The petitioner, under No. 15, Acts 1886, took an appeal to the county court, alleging that he was the owner of land included in the resurvey, that it had been inclosed for more than 15 years, and that no damages had been allowed him for the land so taken; and further alleging that the public good, or the convenience of individuals, did not require a resurvey of said highway. Commissioners were appointed by the county court, who reported that the highway was originally surveyed and laid out April 10, 1788; including in their report an accurate description of the survey, with its termini and courses. The commissioners further reported that the boundary of the highway, at one terminus, could not be ascertained, nor can it now be ascertained and located with any degree of certainty; that the resurvey of the east line of the highway was not, nor was it intended by the selectmen to be, a reproduction of the old or original survey of the highway at that point. This, in substance, is all that the commissioners report in relation to the case before them. There are no findings upon the various questions presented by the petition,—whether the petitioner was the owner of land included in the resurvey; whether such land, if any, had been inclosed for more than 15 years; whether the petitioner had sustained damage, and, if so, how much, etc. It is not stated in the report why the commissioners did not report fully upon the case before them, but we infer that it was for the reason that, having found that the lines of the original survey could not be reproduced or ascertained and located as they were when first surveyed, in 1788, they were of the opinion that the selectmen had no

Digitized by Google

jurisdiction or legal authority to make a resurvey. This is the view taken by the petitioner's counsel, who argues that, for the reason the selectmen had no jurisdiction, the whole proceedings are void; citing Trudeau v. Town of Sheldon, 62 Vt. 198, 20 Atl. 161. That case simply holds that "the fact that a survey has been made must appear, to give the selectmen jurisdiction to make a resurvey." There are three instances in which a resurvey of a highway can be made: If the survey has not been properly recorded; if the record has not been preserved; if its terminations and boundaries cannot be ascertained. It is evident from the report that the survey was recorded, and the record preserved, so that in neither of these respects could a resurvey be made; but the commissioners report that at the time of the action of the selectmen the boundary of the highway at the point of beginning could not be ascertained, neither could it at the time of the hearing before them. Thus the commissioners found the very fact that gave the selectmen jurisdiction to make a resurvey of the highway, viz. that "its terminations and boundaries cannot be ascertained." To say that the word "resurvey," as used in the statute, means nothing more than to locate the lines of the boundaries in their original location, is to give the word too narrow a construction. If the terminations and boundaries can be ascertained according to the original survey, there is no need of a resurvey. Under this section of the statute, to "resurvey a highway" means to relocate it, and the lines may be where originally located, and may be elsewhere. Whether the lines by the resurvey are where the lines of the original survey were, can in no case be known, for the location of the latter cannot be ascertained. When the fact that the terminations and boundaries of the highway could not be ascertained was found by the commissioners, it was their duty to investigate the various questions presented by the petition and evidence, and report the facts found by them,—such facts as whether the petitioner's land was taken by the resurvey; whether, if any, it had been inclosed for more than 15 years; the damages sustained by the petitioner, if any, etc. That the commissioners may investigate and report such facts, it is necessary that the report be recommitted to them; and for that purpose the judgment is reversed, and cause remanded.

VITTUM v. ESTEY.

(Supreme Court of Vermont. Windsor. Dec. 3, 1894.)

CONTRACT TO CONVEY LAND—TIME OF PERFORMANCE.

A contract to convey land on or before a certain date gives the option of the date to the vendor, and not to the purchaser. Taft, J., dissenting.

Exceptions from Windsor county court; Thompson, Judge.

Action by Frank H. Vittum against Ormel C. Estey to recover damages for breach of contract for conveyance of land. From a judgment for defendant, plaintiff brings exceptions. Affirmed.

The agreement upon which the plaintiff's suit was predicated was as follows: "Cavendish, Vt., Oct. 7, 1893. Received of Frank Vittum, by hand of M. S. Buck, fifty dollars, in part payment for the 'Cady Farm,' so called, where I now reside, in Cavendish, which I agree to convey to the said Frank Vittum by a warranty deed in common form, for $1,025, the purchase money for said farm and certain personal property, on or before Nov. 1st, 1893. O. C. Estey. Attest: M S. Buck."

Gilbert A. Davis, for plaintiff. W. W. Stickney and J. G. Sargent, for defendant.

ROWELL, J. This is an action to recover damages for the anticipatory breach of a contract whereby the defendant agreed to convey to the plaintiff a farm and certain personal property on or before November 1, 1893, at and for the price of $1,025. Plaintiff paid down $50, and claimed that the defendant orally agreed to throw off $50 from the balance for cash, instead of a mortgage. On October 30, 1893, the plaintiff's attorney in his presence, tendered to the defendant $925, and demanded a deed at once. The defendant himself was willing and anxious to deed, but he said: "You know how it is. Father owns the farm with me. It is deeded to us both, and he won't join in the deed, and I can't deed." The attorney replied that that made no difference to the plaintiff; that the plaintiff bought of him; and that there was the balance of the money. The defendant said that the amount of money was all right, but that he could not deed, and that was the end of it, or that was all there was of it, or something like that. Thereupon the attorney put the money into the hands of a bystander, and told the defendant that the money was ready for him any time he saw fit to deed, and told the bystander to accept a deed and give the defendant the money. Nothing further appears to have passed between the parties, and on the next day (October 31st) this suit was brought, and the defendant claims that it was prematurely brought, while the plaintiff claims that by the contract he had a right to demand and have performance on the 30th, but, if not, that the defendant renounced the contract on that day, and that, by bringing his suit the next day, the plaintiff treated that renunciation as a breach of the contract, as he well might, and that, therefore, the suit was not prematurely brought.

As to the contract giving the plaintiff the right to demand and have performance on the 30th, we think it did not. The option to

Digitized by Google

convey on or before November 1st was the option of the defendant, who was the party to convey, and not the option of the plaintiff, who was the party to receive the conveyance. As to a breach by renunciation, it is settled law in England and in many jurisdictions here that when one party to a bilateral contract, before the time of performance on his part has arrived, repudiates the entire contract, or a part of it that goes to the whole consideration, and declares that he will no longer be bound by it, the other party may, if he pleases, act upon the declaration, and treat the contract as thereby broken and at an end for all purposes except for bringing a suit upon it, which he may bring at once, without waiting for the time of performance. Or, to put it as Lord Blackburn does in Iron Co. v. Naylor, L. R. 9 App. Cas. 434, 442, the other party may say: "You have given me distinct notice that you will not perform the contract. I will not wait till you have broken it, but will treat you as having put an end to it, and, if necessary, will sue you for damages; but, at all events, I will not go on with the contract." But declarations that do not amount to an absolute and unequivocal refusal to perform the contract cannot be treated as a renunciation of it. Dingley v. Oler, 117 U. S. 490, 6 Sup. Ct. 850; Johnstone v. Milling, 16 Q. B. Div. 460. Now, when we consider the defendant's refusal, it does not appear to be of that character. He did not say that he would not deed in any event. He was willing to deed, and refused only because his father was not willing. His refusal amounted to no more than saying: "I will deed if father will, but, as he refuses, I cannot. If he changes his mind, I will deed, for I am anxious to perform." The plaintiff seems to have so understood it, for by his tender he left the contract open, and gave to the defendant further time and opportunity to perform if his father should, after all, as he might, conclude to join in a deed. It follows, therefore, that the plaintiff does not bring his case at all within the rule for which he contends; hence, if we were to adopt it, it would profit him nothing.

Concerning the claimed agreement to throw off $50 from the contract price, the plaintiff contends that it excused him from tendering more than he did, because it was made after the written contract was executed, and that performance or readiness to perform according thereto is as available to him as performance or readiness to perform according to the written contract. But the plaintiff's testimony does not show that that agreement was made after the written contract was executed, for he expressly said on cross-examination that it was made before the day on which that contract was executed, but that it was talked about afterwards. If it antedated that contract, it could not be received to vary its terms. We are not called upon to say what effect it would have if it postdated it. Judgment affirmed.

TAFT, J., dissents, thinking that the defendant's declarations did amount to an absolute and unqualified refusal to perform the contract, and that the plaintiff treated the contract as thereby broken and at an end by bringing this suit.

SCOTT v. SCHOOL DIST. NO. 9 IN WILLIAMSTOWN.

(Supreme Court of Vermont. Washington. Dec. 3, 1894.)

LIMITATION OF ACTIONS—COMMENCEMENT OF SUIT—DEFECTIVE SERVICE—SCHOOL-DISTRICT MEETING—SUFFICIENCY OF WARNING — PRUDENTIAL COMMITTEE AS TEACHER — RIGHT TO COMPENSATION.

1. Under R. L. 1880, § 973, providing that if, in an action commenced within the time limited, the writ fails of service or return by unavoidable accident, or by default or neglect of the officer to whom it is committed, or is abated, the plaintiff may commence a new action within a year thereafter, a replication alleging that plaintiff seasonably commenced a former action, and that the writ therein was served only 15 days before the return day, and that, for that reason, the defendant being a corporation, and therefore entitled to 30 days' notice, the action was dismissed on motion, and that the action was commenced within one year thereafter, is not a sufficient answer to a plea of the statute of limitations on the ground either of failure of service of the writ or of abatement of the former action, there being no allegation that such failure was by unavoidable accident, or by default or neglect of the officer to whom the writ was committed.

2. Where the warning of a district meeting, which provided for the instruction of scholars out of the district, did not state that such business was to be transacted (R. L. 1880, § 521), the defect is not supplied by the fact that for nine years the district used the same form of warning in respect to such business.

3. Under R. L. 1880, § 515, providing that prudential committees shall appoint and agree with a teacher to instruct the school, and remove him when necessary, a person acting as prudential committee cannot teach the school himself.

4. Where a person without authority rendered services to a district in teaching its school, and in properly keeping and seasonably returning the school register, and in consequence the district became entitled to and its treasurer received a share in the public moneys, the district is liable for such services on a quantum meruit.

Exceptions from Washington county court.

Action in assumpsit by Charles W. Scott against school district No. 9 in Williamstown to recover for services as teacher, and for repairs made upon the schoolhouse. From a judgment for plaintiff, defendant brings exceptions. Reversed.

The demurrer to the plaintiff's replication to the plea of the statute of limitations was overruled, and replication adjudged sufficient, Taft, J., presiding. The defendant excepted, and, by stipulation of parties, it was agreed that the exceptions might lie, and the case proceed without prejudice to the ex-

Digitized by Google

ceptions. The defendant, being thereupon permitted to plead over, pleaded the general issue, and a trial was had by the court, Tyler, J., presiding. Upon the facts found by the court, judgment was rendered for the plaintiff for the sum claimed in the specifications, and interest and costs. The defendant excepts. The plaintiff resided in school district No. 9 in Williamstown. At the annual school meeting held in March, 1884, he was elected prudential committee of that district, but it was subsequently found that the warning for that meeting was defective, and he was duly appointed prudential committee by the selectmen of the town. In September, 1885, another school meeting was held, under the following warning. "The legal voters of school district No. 9 in the town of Williamstown are hereby notified to meet at schoolhouse in said district on the 18th day of September, 1884, at 1 o'clock in the afternoon, to consider and act on the following propositions: (1) To choose a moderator to govern said meeting; (2) to see if the district will vote to sustain a school or schools in said district, and to fix the time for the commencement of the terms thereof, and the length of such terms; (3) to see if the district will vote a tax upon the grand list to defray the expense of such school or schools, or take other measures therefor; (4) to transact any proper and necessary business." At that meeting the district voted to sustain a school for eight weeks in the fall, which school should begin September 22d, and to provide for the instruction of those who might wish to attend school in the winter in adjoining districts. Pursuant to this vote, the plaintiff hired a teacher, who taught the fall school. Not being able, as he thought, to provide for the instruction of the scholars in adjoining school districts, he determined, after some inquiry, to have a school in district No. 9, and did in fact teach a winter term of 12 weeks, boarding himself, and charged $1.25 per day therefor. Before commencing his school, the plaintiff was duly examined and licensed as a teacher. He kept the school register properly, and duly returned it to the town clerk's office. The parents in the district sent their scholars to school without objection, and the district drew the public money upon the attendance of scholars that term. Before beginning his school, the plaintiff made some repairs upon the schoolhouse, and provided some fuel, for which he charged $2.50. At the end of the term, he drew an order, payable to himself, for the amount due him for services in teaching the school, and for said $2.50, and presented the same to the treasurer of the district for payment. Payment was refused, and the treasurer made him a tender of $2.50, which the plaintiff declined. The defendant offered evidence tending to show that all the children in the district could have been instructed in other districts, and that the parents were willing to send them there. This evidence was excluded as immaterial, to which the defendant excepted. The court held, as matter of law, that no article in the warning for the meeting of September 18, 1885, authorized the vote relative to having the scholars of the district taught in adjoining districts, and that, notwithstanding the action of the district at that meeting, it was the duty of the plaintiff to provide a school in the district for the winter term, and that he was entitled to a reasonable compensation for his services in teaching the same; and, since the defendant offered no evidence in respect to the value of the plaintiff's services, the court held that, under the common counts, the plaintiff might recover the items charged in the specifications. The defendant offered evidence tending to show that the district had used this form of warning in respect to having scholars instructed out of the district for eight or nine years previous, which evidence was excluded, under the exception of the defendant.

W. A. & O. B. Boyce, for plaintiff. Edward W. Bisbee, for defendant.

ROWELL, J. The replication to the statute of limitations is demurred to. The replication seeks to bring the case within the statute [1] that if, in an action commenced within the time limited, the writ fails of a sufficient service or return by unavoidable accident, or by default or neglect of the officer to whom it is committed, or is abated, the plaintiff may commence a new action for the same cause within a year; and it alleges, in effect, that this plaintiff seasonably commenced a former action for the same cause, and that the writ therein was served on the defendant only 15 days before the return day, and that, for that reason, the defendant being a corporation, and therefore entitled to at least 30 days' notice, the county court dismissed the action on motion, to which the plaintiff excepted, but, as he did not file his exceptions in time, the judgment became final, and that this action was commenced within one year thereafter. The replication is not good as constituting an answer to the plea on the ground of a failure of sufficient service of the writ in the former action, for it does not allege that such failure was by unavoidable accident, nor by default or neglect of the officer to whom the writ was committed, as was necessary to bring the case within the statute. Nor is the replication good as constituting an answer to the plea on the ground of abatement of the former action, for the abatement was caused solely by reason of the failure of service, and it would be illogical to give the abatement greater effect as an answer to the plea than is given to the thing that alone caused the abatement, such thing itself be-

[1] R. L. 1880, § 973.

Digitized by Google

ing, when occasioned as mentioned in the statute, substantive ground for allowing another action to be brought.

The offer to show that for eight or nine years the district had used this same form of warning in respect to having scholars instructed out of the district was properly excluded. The statute [2] required that warnings for school district meetings should specify the business to be transacted or question to be considered at such meetings. This warning contained nothing upon the subject of having scholars instructed out of the district, and usage could not supply the defect. The powers of the district being wholly statutory, they could not be enlarged nor diminished by proof of usage. 1 Dill. Mun. Corp. (2d Ed.) 356. Abuses of power and violations of rights derive no sanction from time nor usage. Hood v. Mayor, etc., 1 Allen, 103. The vote to have the scholars instructed out of the district being void, the plaintiff, as prudential committee, was at liberty to "appoint and agree with a teacher to instruct" a school in the district; and the question is whether he could himself instruct the school, and recover for it on the quantum meruit. As said in Brown v. School Dist., 55 Vt. 43, there are cases in this state that seem to indicate that agents and officers of corporations have authority to pledge the credit of the corporation to one another; but, after a review of some of the cases the true rule is there said to be that a committee may do by one of its members what it has a right to do by all, and that, for all things furnished or done by one or all, recovery can be had on the quantum meruit or valebant, and that it is not understood to have been decided by this court that a committee with authority only to contract have power to enter into agreements with themselves. The case of Langdon v. Castleton, 30 Vt. 285, not referred to in Brown v. School Dist., comes nearer to holding that than any other, perhaps. There the plaintiff was agent of the defendant town to prosecute and defend suits in which the town was interested, and, being himself a lawyer, he prosecuted a suit in that capacity; and it was held that he could recover for his services and disbursements therein. The question is not discussed in the opinion, the court merely saying that it saw no reason why the plaintiff was not legally entitled to be paid, and that such had been the general understanding and practice in such cases. But the statute concerning the powers of such agents is different from the statute concerning the powers of prudential committees of school districts in respect of hiring teachers. Such agents are chosen, to use the language of the statute, "to prosecute and defend suits in which the town is interested." This language does not in terms nor in effect, we think, restrict the authority of the agent to contracting for legal services, but leaves him at liberty to perform them himself, if competent. It has always been quite the practice for towns to elect lawyers as such agents, because they could act in the double capacity of agent and lawyer, and thereby make it cheaper and better for the town. But the statute [3] concerning the authority of prudential committees of school districts was much more restrictive. Its language was "shall appoint and agree with a teacher to instruct the school, and remove him when necessary." This confined their authority to appointing and agreeing; and, as their official power in this regard was fiduciary, the case would seem to fall logically within the principle that it is against public policy to allow one standing in such a relation to contract with himself concerning the subject of his trust; and, when we consider that it was the duty of such committees to remove a teacher when necessary, the case all the more clearly falls within that principle, for it is fundamental that a man shall not be a judge in his own case, and that doctrine is not alone applicable to strictly judicial officers, but to every one who acts in a judicial capacity, as a prudential committee did when he sat to determine whether it was necessary to remove a teacher or not. The law of this subject is so well settled and so familiar that we deem the citation of authority unnecessary, but those desirous of looking into the books will find an instructive case in Pickett v. School Dist., 25 Wis. 551. That case goes much further than this court has gone, and would prohibit recovery in many cases where we permit it; but the ground and reason of the law is there well stated. We hold, therefore, that the plaintiff had no authority to teach the school himself.

The parents in the district sent their children to school without objection, and the plaintiff kept the school register properly, and duly returned it to the town clerk's office, and the district drew public money according to the attendance that term; and the question arises whether by reason of these things, or of any and which of them, the district became liable to the plaintiff for his services. If it did, it was upon the ground of assent and ratification. It is said that when work done for a corporation without complete legal authorization is for a corporate purpose, and beneficial to it, and the price reasonable, strong evidence of the assent of the corporation is not required, but that such assent must be shown, and that ratification, whatever its form, must be by the principal or by authorized agents. 1 Dill. Mun. Corp. (4th Ed.) §§ 464, 465. The work in question comes within this proposition, in that it was done without such authorization, was for a corporate purpose,

[2] R. L. 1880, § 521.

[3] R. L. 1880, § 515.

Digitized by Google

and, presumably, beneficial to the corporation; and we think it further comes within it in that it was assented to and ratified by an authorized agent. By reason of the plaintiff's services in teaching the school and properly keeping and seasonably returning the school register, the district became and was entitled to a proportionate share of the public moneys, which share the district received in due course; and it was presumably, as the statute provided it should be, paid over to the treasurer of the district, who was, by statute, fully authorized to accept and receive it, which made his act in this behalf, in legal effect, the act of the district. And so the question is, had the district, by authorized corporate action, accepted and received this money, would it thereby have made itself liable to the plaintiff for his services? We think it would have, on the ground that if one accepts, or knowingly avails himself of, the benefit of services performed for him without his authority, and the fruits of which he can reject, he shall be held to pay therefor a reasonable compensation,—a principle as applicable to a corporation when the services are performed in and about a corporate business as to an individual. One cannot, in such a case accept in part and reject in part. If he accepts in part, he thereby ratifies and confirms the whole.

Judgments reversed, demurrer sustained, replication adjudged insufficient, and cause remanded.

NORTON'S ADM'R v. PERKINS.

(Supreme Court of Vermont. Addison. Dec. 3, 1894.)

DEED — CONDITION — SEPARATE INSTRUMENTS — EJECTMENT — EVIDENCE — DECLARATIONS — IMPEACHMENT OF WITNESS — RECORD OF CONVICTION.

1. Where, at the time of receiving a deed, the grantee executed an unsealed instrument, declaring that the deed was made on condition that the grantee should support the grantor during his lifetime, the deed and such instrument should be read together, in determining the grantee's title under the deed.

2. In ejectment, it appeared that plaintiff's intestate conveyed the land to defendant on condition that the latter would support him on the land during his lifetime. Intestate lived for some time with defendant on the land, and then went away. He afterwards returned, and resumed his residence with defendant. *Held* error to refuse to charge that the jury could infer that any breach of condition occurring before the time he returned to defendant's house was waived, and, if so waived, could not afterwards be set up as a forfeiture.

3. A party cannot, against exceptions, introduce improper evidence, and cure the error by having the court charge the jury to disregard it.

4. On an issue as to whether a grantee performed the condition of a deed requiring him to support the deceased grantor on the premises during his lifetime, acts and declarations of deceased while living off the premises, and in the grantee's absence, are not admissible to show a breach of the condition.

5. It was error to allow the grantor's son to testify that he did not visit his father while he lived on the premises, because the grantee was not a man he wished to associate with.

6. It was error to allow the son to testify that he acted in good faith, and on what he considered sufficient ground, in bringing a petition to have his father declared insolvent.

7. A record of conviction which merely shows that a witness was charged with having found stolen property, and that he was found guilty and fined, is not admissible to impeach the witness, as it does not show that he was convicted of any crime.

8. In ejectment to recover land because of a breach of a condition in a deed thereof, providing that the grantee should support the grantor, defendant cannot set up in defense that the deed was made in fraud of the grantor's creditors, or that the grantor fraudulently concealed from him the fact of his insolvency.

Exceptions from Addison county court; Munson, Judge.

Action in ejectment by Hiram Norton's administrator against John Perkins. From a judgment for plaintiff, defendant brings exceptions. Reversed.

September 4, 1889, the plaintiff's intestate conveyed to the defendant the premises in question, and upon the same day gave him a bill of sale of certain personal property which was on the premises. The deed contained the usual covenants of warranty "subject to certain mortgages which the said Perkins is to assume." Upon the same day, and in pursuance of the contract in virtue of which the deed and bill of sale were executed, the parties signed the following agreement: "Whereas, I, Hiram Norton, of Addison, in the county of Addison and state of Vermont, have this day given a warranty deed of my home farm, in said Addison, together with a bill of sale of certain articles of personal property, to John Perkins, of Crown Point, N. Y., upon the condition that the said John Perkins, his heirs, executors, or administrators, shall furnish me a good support, in sickness and health, during my natural life,—meat, drink, clothing, lodging, spending money, doctors' bills paid, suitable horse, harness, and buggy, or cutter, for me at all times seasonable to drive and use,—all of which, if well and faithfully done, the said property to vest in and belong to the said John Perkins, or his heirs, executors, or administrators. Witness our hands this September 4th, 1889. Hiram Norton. John Perkins." This agreement was made as one of the instruments necessary to carry out the contract which the parties had entered into, and was executed at the same time with the other two instruments. The three were recorded in the land records of the town of Addison. The plaintiff claimed that the last writing was to be read in connection with the deed, and as a part of it, and that, inasmuch as the defendant had not complied with the conditions therein expressed, he, as the representative of the intestate, was entitled to recover the possession of the premises. The defendant insisted that the third

Digitized by Google

writing was to be read by itself, and that inasmuch as there had been, before the beginning of the suit, no re-entry, or demand for possession, the plaintiff was not entitled to recover, even though there had been a breach of the conditions of that instrument. The court held that the deed and writing should be construed as one instrument, and that the plaintiff was entitled to recover if there had been a breach of the conditions. To this ruling of the court the defendant excepted.

As bearing upon the character of the support to be furnished the intestate, the plaintiff was allowed to show, subject to the exception of the defendant, the value of the real and personal property so conveyed. It appeared from the testimony of the plaintiff that it was the understanding of the defendant and the intestate that the intestate should be supported upon the premises; that in pursuance of this agreement the defendant and his family moved onto the premises soon after the execution of the deed, and the intestate took up his home with them, and continued to reside there until some time in the month of June, 1890, when he left, taking with him his horse and carriage; that the intestate remained away, stopping at various places, until April, 1891, when he returned to the defendant's; that he then remained with the defendant until the last of August, 1891, when he again left, not returning until November 4, 1891; that he then remained upon the premises until April 12, 1892, when he once more left, and never returned. The intestate deceased in April, 1893. When not residing with the defendant upon the premises, he lived with his relatives, for the most part, in the near vicinity. Against the exception of the defendant, the plaintiff was allowed to show that, while so absent from the premises, the defendant did not contribute to the support of the intestate. The plaintiff was the son of the intestate, and the intestate resided at his house a considerable portion of the time after the conveyance of the property, when not residing with the defendant. The plaintiff testified that he did not visit the intestate at the house of the defendant, and was further allowed to state, against the exception of the defendant, as follows: "Q. Why didn't you visit your father while he was at Mr. Perkins'? Ans. Well, for several reasons. The greatest reason is, why I didn't, is because I don't think he is a man of very good disposition, and he isn't a man that I wish to associate with, any way." The Mr. Perkins referred to was the defendant. It appeared that the intestate, at the time of the conveyance, was indebted to various parties in considerable sums; and the evidence of the defendant tended to show that he (defendant) had no knowledge of this fact, and that the intestate represented to him that he had no debts of any amount, except the mortgage resting upon the real estate.

The defendant requested the court to instruct the jury that they were at liberty to infer from the fact that the intestate returned to the home of the defendant November 4, 1891,—that being the last time he returned to the defendant's house,—and accepted his support for a considerable period thereafter, that he had waived any breach of the condition which might have occurred previous to that time, and that, if so waived, it could not afterwards be set up as a forfeiture. The defendant also requested the court to instruct the jury that if the intestate was indebted September 4, 1889, to various persons, as the testimony tended to show, and if he concealed the fact of such indebtedness from the defendant, and fraudulently represented to him that no such indebtedness existed, that would be a defense to this action, and the plaintiff could not recover. These instructions the court declined to give, and the defendant excepted. With reference to what use the jury were entitled to make of the testimony in reference to the absence of the intestate from the home of the defendant, the court gave the following instruction: "You are not at liberty to infer from the mere fact that Hiram Norton went away that there was a breach of the contract on the part of the defendant. But you are entitled to consider, in connection with the direct evidence as to the support and treatment he received at the defendant's, the circumstances under which he was living there, the circumstances under which he left there, the circumstances under which he remained away, and the circumstances under which he returned from time to time, as bearing upon the question of breach. You may draw from the facts which you find to be proven such inferences as are justified by the common experiences of men, but you are not at liberty to indulge in surmises not founded upon the evidence." The defendant excepted to so much of this portion of the charge as related to the circumstances under which he remained away, and the circumstances under which he returned from time to time, as bearing upon the question of the breach.

Hard & Bliss, for plaintiff. Stewart & Wilds, for defendant.

ROSS, C. J. The intestate and defendant, September 4, 1889, to effectuate a contract then entered into, executed and delivered three written instruments. Over the intestate's signature, under seal, he executed a warranty deed to the defendant, containing the usual covenants, except against a mortgage resting on the premises; and over his signature, without seal, he executed a bill of sale of certain personal property to the defendant. Then, signed by both, was an instrument which reads: "Whereas, I, Hiram Norton, of Addison, in the county of Addison and state of Vermont, have this day given a warranty deed of my home farm, in

Digitized by Google

said Addison, together with a bill of sale of certain articles of personal property, to John Perkins, of Crown Point, N. Y., upon the condition that the said John Perkins, his heirs, executors, or administrators, shall furnish me a good support in sickness and health, during my natural life,—meat, drink, clothing, lodging, spending money, doctors' bills paid, suitable horse, harness, and buggy, or cutter, for me at all times seasonable to drive and use,—all of which, if well and faithfully done, the said property to vest in and belong to the said John Perkins, or his heirs, executors, or administrators." The writings were on separate papers, but all placed on record in the town clerk's office. The defendant does not contend that, if the writing expressing the condition can be read as a part of the deed and contract, the title to the farm ever passed to him, except conditionally; and he admits that the plaintiff can recover in ejectment, if he shows that he has failed to perform the conditions. Nor does the plaintiff contend that he can recover unless it can be read as a part of the deed and contract.

1. Hence, the first contention is whether the writing expressing the condition can be read as a part of the deed and contract. The three written instruments were made to effectuate one contract, and should be read together, unless there is some well-established legal principle which forbids it. Only by so reading then can the contract be ascertained. If the condition had been written into the deed, it was the deed of the intestate, or a deed poll. By accepting it, the implied and expressed agreements to be performed by the defendant would not be under seal. Covenant could not be maintained on them. Johnson v. Muzzy, 45 Vt. 419. In Whitney v. French, 25 Vt. 663, and Graham v. Stevens, 34 Vt. 166, it is held, where the condition to a deed poll is written on its back,—in the one, unsigned, and, in the other, signed by the person accepting the deed,—that the title passed only conditionally. This was so, not because of any covenant to that effect by the grantee. It was so because, by accepting it, he obtained no greater rights than were evidenced by the entire contract. The question is not whether, if by the deed the title passed unconditionally to the defendant, a conditional reconveyance from him must be under seal. Without doubt, if that were the question, the instrument required to effect a reconveyance at law from him must be under seal, in compliance with the statute for the conveyance of real estate. Here the question is, what kind of a title did the defendant take? This must be determined from the written instruments evidencing the contract between the parties. To determine what the contract was, and what the parties intended to effectuate by the three written instruments, all may and must be read together. When read together, the defendant would take fee in the premises declared for only on performance of the condition. In legal principle, there is no more objection to reading the condition as a part of the contract, and of the deed, when written on a separate paper, than when written on the back of the deed. When written on the back of the deed, it need not be signed or sealed by the party accepting the deed, and to be bound by it. It simply shows that he accepted the deed on the condition named in what is written on the back of the deed. When written on a separate paper, signed by the grantee in the deed, the instrument shows equally as well, and is as effective legally, and as much a part of the whole contract, as when written into or on the back of the deed. There was no error in the rulings of the court on this point. When the defendant, contemporaneously with receiving from the intestate the deed conveying the fee, executed and delivered the condition, he thereby said to and agreed with the intestate that he accepted the deed upon the condition written, and that the title to the property described in the deed and bill of sale should not become vested in him until he had furnished the intestate the support specified in the condition. Such, we think, is the legal effect of the execution and delivery of the three writings of September 4, 1889. They were all properly received in evidence, and so was the value of the property conveyed, as bearing upon the kind and quality of the support contemplated by the parties.

2. Subsequently, on the trial, the plaintiff conceded that the parties understood that the defendant was to furnish the support upon the premises in contention. The defendant immediately entered upon the execution of the contract. The intestate remained with him, and received the support given until April 12, 1892, with the exception of absences from some time in June, 1890, to July 4, 1890; from some time in February, 1891, to some time in April, 1891; and from the last of August, 1891, to November 4, 1891. The intestate spent these absences with his children and friends in the immediate neighborhood. The plaintiff claimed, and gave some evidence, which will be considered later, that the absences were occasioned by the failure of the defendant to perform the condition of the contract in regard to support. The returns of the intestate were voluntary, and uninfluenced, so far as is shown, by the defendant. Immediately, on each return, the defendant entered upon furnishing the required support, and the intestate received it without protest or reservation. Under these circumstances, the defendant requested the court to charge: "The jury are at liberty to infer from the circumstances developed in the evidence that any breach of the condition, occurring before November 4, 1891, the last time he returned to the defendant's house, was waived by the intestate. If so waived, it could not be after

Digitized by Google

wards set up as a forfeiture." The court did not comply with this request, in terms, nor in substance. In this we think there was error. By the contract, the intestate had no right to call upon the defendant for support, and at the same time claim that no contract requiring him to furnish such support existed between them. The two positions were inconsistent, and could not be held by the intestate at the same time; certainly, not without protest and notice. He could not, under the contract, call upon and receive from the defendant his support, and at the same time, by mental reservation or otherwise, claim that the contract for such support theretofore existing between them was at an end. Whether the condition to the deed requires an act to be done in order to the vesting of the fee, or to prevent a defeasance of the fee already vested, the grantor, or party for whom the act is to be performed, may waive its performance. This is especially true where the condition is for the support, as in this case, of the grantor, upon the premises. What is proper support and care, and what such a lack of it as will put an end to the contract, and prevent the fee of the estate from vesting, often depends upon a great variety of circumstances and considerations. The kind of support and of treatment which would be wholly inadequate and inappropriate for one person might be fully adequate and appropriate for another. It might depend upon the amount of property conveyed, upon the manner in which the person had been accustomed to live, the courtesy and forbearance with which he had been accustomed to be treated and to treat others. Vulgarity or profanity, which would shock one, and render his life miserable, might be inoffensive to another, of a different character and habits of life. In every walk in life, many things are to be forborne, rather than insisted upon. The person to whom such support is due always has the right to elect whether he will waive or insist upon a partial or full failure, for a brief time, to perform such a condition, as putting an end to the contract, and his right to support. The failure to perform, which will defeat the vesting of the title, should be a failure in substance, rather than of the letter of the contract. Otherwise, after years of faithful performance, one might lose or be divested of his estate by a technical or partial failure. Where both parties are living on the estate, and in some sense in possession, so that a re-entry is not required to terminate the conditional estate, it is more imperative that the grantor should by some unmistakable act indicate his intention to put an end to the contract for the vesting of the estate upon a failure to perform the condition. Exacting, or acquiescing thereafter in, the performance of the condition is evidence for the jury, from which they would be warranted in inferring and finding that he did not insist upon ending of the contract for such nonperformance, but that he still treated it as subsisting. Some of the cases seem to treat such exacting or acquiescing in the further performance of the contract as a legal waiver of any acts then known to him, which otherwise might work a forfeiture of the contract. Hubbard v. Hubbard, 97 Mass. 188, 93 Am. Dec. 75, and note. In which case the court say, in substance, not only that receiving subsequently performance of the condition is evidence of a waiver, but "if he treated the condition as still subsisting and obligatory upon the tenant, after the alleged breach of it, it would be a sufficient waiver." See, also, Cross v. Carson, 8 Blackf. 138, 44 Am. Dec. 742, and an extended note collecting and reviewing the authorities. What is held and said in Dunklee v. Adams, 20 Vt. 424, on the subject of waiver of a forfeiture, is not inconsistent with the present holding. The question under consideration in that case was whether equity would relieve against a forfeiture. There had been a judgment of forfeiture at law. The court, in reply to the contention that acceptance of certain things of minor importance under the contract was a waiver of the forfeiture, said, "Waiver of the forfeiture would have been a good defense at law, and the judgment is to be taken as conclusive evidence that there had been none at the time it was rendered."

3. In the earlier part of the trial, against the defendant's exception, the plaintiff was allowed to put in evidence to show that the defendant did nothing towards the intestate's support when he was absent from the premises in controversy. If the defendant was under the duty of supporting the intestate when he was absent, this testimony would have been admissible as tending to show that he had failed to furnish the support required by the contract. Later in the trial, on the plaintiff's showing, the defendant was to furnish the support on the premises. His failure to furnish it elsewhere was not evidence tending to show that the defendant had failed to perform his contract. It was of a character which would be likely to prejudice the defendant in the minds of the jury. Under our practice, a party cannot, against exception, introduce prejudicial testimony, and cure its injurious effect by having the court charge the jury to disregard it, nor by changing the ground upon which he claims to recover. The admission of this testimony was error, not so much of the court as of the plaintiff. The case, in regard to the admissibility and materiality of testimony, stood as it would if the intestate had been living. If the intestate had been living, he could not have been allowed to show his acts and declarations done and made in the absence of the defendant to establish a failure of the defendant to perform his part of the contract, unless the defendant had first introduced such acts and declarations, on the ground they were incon-

Digitized by Google

sistent with the intestate's claims on the trial, and then the intestate could introduce them only in explanation of the acts and declarations introduced by the defendant. One cannot make evidence in his own favor. This is so whether he is the party to the action, or his administrator. Godding v. Orcutt, 44 Vt. 54. It was error to receive in evidence, as tending to establish a failure by the defendant to perform the contract, against exception, the acts and declarations of the intestate when he was absent from the defendant. The charge on this subject, excepted to, is objectionable. It allowed the jury to consider, as evidence tending to show a breach of the contract on the part of the defendant, "the circumstances under which he remained away, and the circumstances under which he returned." The most such circumstances could legitimately be used for would be to show that the intestate, by his acts and declarations when absent from the defendant, was claiming there had been a breach of the contract for his support by the defendant. Such claims could be only used for the purpose already indicated. They could not be used to establish that there had been such a breach. So far as the charge allowed the jury to use them to establish a breach of the contract by the defendant, it was erroneous. We also think the court erroneously allowed the plaintiff to give his reasons for not visiting his father at the defendant's, and to state that he acted in good faith, and on what he considered sufficient grounds, in bringing the petition to have the intestate adjudged an insolvent. These matters did not tend to show that the defendant had failed to perform his contract to support the intestate, and would naturally prejudice the jury against the defendant. Doubtless, as now claimed, the defendant did not except to the admission to some testimony, which he would have excepted to, if he had known that the plaintiff would claim that the defendant was bound to support the intestate only upon the premises conditionally conveyed. But this court cannot aid him in this respect. Neither was the county court in error in its action because he was misled on this point.

4. The defendant also excepted to the refusal of the court to receive in evidence the certified copy of record made by two justices of the peace for the purpose of impeaching Hiram Winch, a witness produced by the plaintiff. Whether two justices of the peace, who, on proper complaint, charging the person in whose possession the property was claimed to be, with having stolen it, had issued a warrant to search for the property in the nighttime, and, if the property was found, to arrest and bring before them the person charged, have authority, under the law, upon trial, to render a valid judgment against such person, for petit larceny, we have not considered or determined. The alleged record does not raise that question It does not show that Hiram Winch, in and by the complaint, was charged with any offense known to the law. The complaint, under oath, avers that he has had stolen from him six turkeys, of the value of six dollars, which had been found by Hiram Winch, and which he suspected and believed were then concealed in the hogpen or barn of Hiram Winch. He prays for a warrant to search the premises, and, if the property is found, to bring the property and Hiram Winch before the justices, to be dealt with as the law directs. The record does not disclose whether the warrant prayed for was issued, but proceeds to aver that Hiram Winch was put to answer the complaint, pleaded not guilty, and put himself on the court for trial, and on hearing the evidence the justices adjudged him guilty of the crime charged in the complaint. This is the substance of what the record discloses. The only thing therein charged against Hiram Winch is that he found some stolen property, and of this he is found and adjudged guilty and fined. But finding stolen property is no crime known to the law. If the complaint had charged Hiram Winch with having stolen the property, or with having concealed it, knowing it to have been stolen, the question argued—whether two justices of the peace could therein convict the person charged of petit larceny—would have been raised. As it is, the record does not show that Hiram Winch was charged with or convicted of any crime. It was properly rejected.

5. By his sixth request the defendant asked the court to charge that if the intestate conveyed to the defendant the property in contention, with the fraudulent and deceitful purpose of avoiding his debts, enumerated, the plaintiff could not recover. By the seventh request he asked the court to charge that if the intestate fraudulently concealed that he owed these debts, at the time of the contract, from the knowledge of the defendant, the plaintiff cannot recover. A fraud committed by the intestate upon his creditors, or, by concealment of his debts, upon the defendant, might furnish the defendant a cause of action, so far as he was injured thereby. It might give the defendant the right to rescind his contract with the intestate, if seasonably acted upon. In defending this action, the defendant is insisting upon the contract, and claiming that the property has become vested in him. As it vested only upon performance of the condition, he must show performance. That he was defrauded into making the contract may entitle him to recover damages; but, when he is insisting that the title to the property has vested in him, it does not excuse him from performing the condition on which alone the title could vest in him. These requests were properly refused. Judgment reversed, and cause remanded.

TAFT, J., being sick, did not sit.

Digitized by Google

SWERDFERGER et ux. v. HOPKINS.

(Supreme Court of Vermont. Caledonia. Dec. 22, 1894.)

ISSUE AS TO BOUNDARY — ADVERSE POSSESSION — TRESPASS QUARE CLAUSUM — SUIT BY HUSBAND AND WIFE — DECLARATIONS OF FORMER OWNERS.

1. In trespass quare clausum by a husband and wife, where the declaration described the premises as a lot deeded to plaintiffs, and the deed offered in evidence was in the wife's name only, the court may, in its discretion, allow the declaration to be amended to avoid the variance.

2. In an action for trespass on land standing in the wife's name, the husband and wife may join as plaintiffs, unless the land is held to the sole and separate use of the wife.

3. On an issue as to boundary between adjoining owners, plaintiff, claiming by adverse possession, may show by the testimony of his predecessor in title what his understanding was as to the dividing line at the time he acquired the property.

4. Testimony of one formerly in possession of the land occupied by plaintiff, that he had stated to the then owner of the adjoining tract that he had bought up to the line claimed by plaintiffs as the true dividing line, and intended to occupy to that line, is admissible to show a claim of title.

5. In the absence of evidence that a written agreement between prior owners of the adjoining lots owned by plaintiffs and defendant, as to the dividing line, was lost, evidence tending to show what line was established therein is inadmissible.

6. Statements by a former owner of plaintiff's land that he had always occupied to the line claimed by plaintiff are inadmissible.

7. Where a witness testified in chief that a former owner of one of the lots pointed out to him its boundary line, he may be asked on cross-examination what such owner said at the time.

8. Where plaintiffs claimed a certain line as the boundary between their land and that of defendant, plaintiffs may bring out, by cross-examination of defendant, in order to show that they had made claim of title up to such line, that defendant knew that they so claimed, though plaintiffs had previously put in testimony on the same point.

9. It cannot be said that rebutting evidence adduced by plaintiffs was not proper in rebuttal, where defendant's evidence to which it was directed is not in the record.

10. In an action of trespass quare clausum, a description of the premises in the declaration as "plaintiffs' close, situate in the town of Hardwick," is sufficient.

Exceptions from Caledonia county court; Munson, Judge.

Action of trespass quare clausum by Simeon Swerdferger and wife against Amos D. Hopkins. From a judgment for plaintiffs, defendant excepts. Reversed.

The plaintiffs were husband and wife. The deeds introduced by them showed the title in the wife. When the deed from her immediate grantor to the plaintiff wife was offered in evidence, the defendant objected to its admission on the ground of a variance, and excepted to the action of the court in admitting it. At the close of the plaintiffs' testimony, the defendant moved the court to direct a verdict in his favor upon the ground of a variance between the proof and the declaration. The court overruled the motion, and the defendant excepted. Thereupon the plaintiffs asked leave to amend the declaration so as to show that the legal title stood in the plaintiff wife, and the court allowed this amendment, subject to the objection and exception of the defendant. At the close of the testimony, the defendant moved for a verdict, for the reason that the plaintiffs, being husband and wife, were improperly joined, which motion the court overruled, and the defendant excepted.

The plaintiffs and defendant were the owners of adjacent lots, and the dispute was as to the boundary line between these two lots. The plaintiffs claimed to own to a line which ran through a group of plum trees, and which was called upon the trial the "Plum-Tree Line," and their testimony tended to show that they and their grantor had occupied up to this line for more than 15 years, and had acquired title to the same by adverse possession, if it was not covered by the description in their deed. As bearing upon this question, one John Nichols, who was for two years the owner of the plaintiffs' premises, was allowed to testify that when he took the property, and during the time he occupied it, he understood his line to be as claimed by the plaintiffs upon the trial. To his testimony as to his understanding of the location of the line the defendant excepted. William Fort, a witness improved by the plaintiffs, was the husband of one Agnes Fuller, who had formerly held title to the plaintiffs' premises. Fort had occupied the premises with his wife, and he was allowed to testify, against the exception of the defendant, that upon one occasion while living there one Judevine, then the owner of the adjacent lot, came to him claiming a portion of the premises occupied by him; and that thereupon he said to said Judevine that he had bought up to the line as claimed by the plaintiffs, and should occupy to that line, and that if Judevine got any of the land it would be by a lawsuit, and that he never heard anything more from Judevine. One Curtis, a witness for the plaintiffs, testified that he occupied the place as a tenant of Perley, the then owner, from January, 1874, until the fall of 1884, and that during that time he occupied up to the plum-tree line. He was further allowed to testify, against the exception of the defendant, that one day in 1876 or 1877 a hired man of Judevine's, who then owned the adjacent lot, began to dig post holes for the purpose of constructing a fence upon the line as claimed by the plaintiffs; that Perley objected to the construction of the fence at that point; that, after some discussion between Perley and Judevine in reference to that subject, they went to the town clerk's office, and drew up and signed an agreement fixing the location of the line in dispute, and that this agreement was left with the town clerk for safe-keeping. The plaintiffs attempted to show the loss of this paper, and to prove the contents thereof, by secondary

Digitized by Google

evidence, but the court excluded the testimony. It appeared in the cross-examination of this witness that, after the writing had been drawn, Perley instructed him to bury a piece of wood in one of the old post holes upon the line claimed by the plaintiffs; and upon re-examination the witness was allowed to state that at the time Perley had stated to him that he wanted the piece of wood buried there to fix the location which they had then agreed upon, and that Perley further said at that time that he had occupied in the past up to the plum-tree line. One Taylor, a witness for the defendant, testified that he had surveyed the lot of the defendant and plaintiffs, and had made a plan, which was put in by the defendant; that upon one occasion, in talking with Perley about the boundaries of the lot, Perley had pointed out to him a post hole in the line claimed by the plaintiffs. Upon cross-examination the witness was allowed to state what Perley had said about the location of the line upon this occasion. Pike, a witness for the defendant, testified that he occupied the defendant's premises for nearly one year in 1876, and again from 1885 to 1889. The defendant then offered to show by this witness that he had a talk with Judevine, the owner of the other parcel, and that Judevine pointed out the line of the land in dispute, and told him where the line was, and that the line then pointed out was where the defendant now claimed it. This evidence was excluded by the court, under the exception of the defendant. Johnson, a witness for the defendant, testified that in 1881, while working for Judevine, he piled some lumber belonging to Judevine on the lot in dispute. Upon cross-examination, the plaintiffs were allowed to show, subject to the exception of the defendant, that in consequence of piling the lumber there Perley and Judevine, the then owners of the two lots, had some discussion in reference to the line, and that they then referred to a writing which had been drawn up between them for the purpose of determining where the line was. In the opening of their case the plaintiffs put in proofs as to surveys, distances, and places where they claimed all the trespasses were committed, and the kind and character of those trespasses, and their occupation, etc. In rebuttal the plaintiffs were allowed by the court, not in the exercise of its discretion, but as matter of strict legal right, to give in evidence measurements made by the witnesses of the plaintiffs, after the defendant had rested its case in reference to the plum-tree line, and to show that certain trespasses were north of an old gateway to which the defendant had claimed.

In reference to the exceptions of the defendant to the charge of the court, the bill of exceptions was as follows: "The defendant seasonably presented written requests to charge, which are referred to. The entire charge is referred to. The defendant excepted to the refusal of the court to charge in accordance with said requests, and to the charge as given upon the points covered by the requests. Defendant also excepted to the charge as to what the existence of the fences owned indicated, if found to exist; to the charge as to the effect of the fences upon the possession of the plaintiffs, as to its requiring fifteen years' adverse possession on the part of the defendant to secure title, if the plaintiffs had acquired one; to so much of the charge as related to * * *; to the charge that, as against any proper title shown by the defendant, plaintiffs need do no more than show a prior possession." Upon the argument of the case in supreme court, no copy of the requests to charge, nor of the charge as given, was furnished the court. After verdict the defendant moved in arrest of judgment, for that the description in the plaintiffs' declaration was insufficient. The court overruled the motion, and the defendant excepted. The declaration described the locus as part of a given lot in a certain range, and referred to the record of the deed to the plaintiffs.

J. P. Lamson, for plaintiffs. Bates & May, for defendant.

TAFT, J. I. The premises are described in the declaration as the lot deeded to the plaintiffs. The plaintiffs offered in evidence a deed from one Perley to the feme plaintiff. Objection being made upon the ground of variance between the contract described in the declaration and the one offered in evidence, the court granted leave to amend the declaration so as to describe the lot as the one deeded to the feme plaintiff. This amendment did not change the parties nor the nature or cause of action. The court, therefore, had the legal right to permit the amendment to be made, and, if the court had power to allow the amendment, its action was discretionary, and not revisable. There was no error in granting the motion to amend. Bowman v. Stowell, 21 Vt. 309; Bates v. Cilley, 47 Vt. 1.

II. Can the husband and wife join as plaintiffs? Such was the law prior to No. 140, Acts 1884, as held in Smith v. Fitzgerald, 59 Vt. 451, 9 Atl. 604. It is urged that by section 2 of that act the law was changed, and that an action qua. clau. for trespass upon the wife's land must be brought in her name alone. Such might be the result if the property was held to the sole and separate use of the wife, and the husband had no marital rights therein. It is unnecessary, however, for us to pass upon that question; for, if the property in the case at bar was not held to the sole and separate use of the wife, the husband was properly joined. It does not appear from the record whether it was so held or not, for she may have acquired it during coverture by gift from her husband. If she did, the action was properly brought. As we

Digitized by Google

cannot presume error, we must sustain the ruling of the court below.

Questions of Evidence.

III. 1. The plaintiffs claim that they and the grantors in their chain of title had occupied the close in question to the fence, on what is called the "Plum-Tree Line," and claimed title to the land by deed and by adverse possession. John Nichols, a witness, called by the plaintiffs, who formerly owned and occupied the plaintiffs' premises, testified, under exception, that when he bought the place he understood from the description in the deed that the fence marked the line of his land. The defendant insists that the understanding of the witness was not admissible. To acquire title by adverse possession, it is necessary that the party occupies the land, claiming it, and we think the understanding of where the line of his land was, in connection with his testimony relating to the occupation of the land, and that he claimed it, was admissible. We infer if necessary that there was testimony in the case tending to show both the occupation of and claim to the land. His understanding of where the line was, was material. He would be more likely to occupy the land to the line where he understood it to be than otherwise, and we see no objection to the testimony showing what his understanding was in respect to it.

2. There was no error in admitting the testimony of William Fort. He, with his wife, was in possession of the premises now claimed by the plaintiffs, and his testimony tended to show that he occupied and claimed the premises to the line as now claimed by them. Judevine was then claiming a portion of the premises, and the testimony of the witness Fort tended to show that he, the witness, upon the premises made claim to the land as far as the line now claimed by the plaintiffs. What he said to Judevine, upon the occasion testified to, in making known his claim and the extent of it, was legal evidence, not of the truth of what he said or that he had any right to occupy as far as the line, but that he at the time made claim to the land that was fenced in by the fence standing on the plum-tree line. The testimony should have been limited to this latter fact; it does not appear but that it was. The fact that he claimed the land was competent to be shown, even if it necessarily involved what he, at the time, said. Kimball v. Ladd, 42 Vt. 747.

3. One Perley owned the plaintiffs' premises from January, 1870, until April, 1889, and Judevine owned the adjoining premises for several of the intervening years. The exceptions show that, about the year 1876, Perley and Judevine, when owning the respective premises, had a controversy in regard to the line in question. To settle the dispute, they agreed upon a certain line. The agreement was reduced to writing, and left with Mr. Hathaway, the town clerk. The contents of the written agreement was a pertinent question upon the trial. No loss of it was shown, and the court ruled that parol evidence of its contents was not admissible. This agreement as to the division line was recognized by both Perley and Judevine as late as the year 1881. The testimony of the witness Curtis, tending to show the statements of Judevine and Perley made in connection with what they were doing upon the land, was objected to. We cannot say that it was error in excluding the statements of Mr. Judevine, for it is not shown what they were. For aught that appears, they may have been in favor of the defendant's claim, and therefore not injurious to him, and they may have been wholly immaterial. The statements of Mr. Perley tended to show the contents of the written agreement which had been made between him and Judevine. The witness testified that Perley said he wanted the old post holes marked; that Judevine might die, and some dispute arise about the corner, and that Judevine might disregard the agreement that he had made with him, and that he (Perley) would have the corner marked. This was testimony strongly tending to show that the plum-tree line was the one that had been agreed upon by the written contract. This testimony had already been ruled inadmissible, and it should have been excluded. Perley's statements, made at the same time, in relation to his having always occupied the land to the fence on the plum-tree line, were inadmissible. While statements are sometimes admissible as showing what the party's then claim to the land may be, his declarations as to what he had done in the past with reference to the transactions are not admissible.

4. The plaintiffs being properly joined as parties, the wife was a competent witness.

5. The testimony of the witness Taylor, which was objected to, was proper matter of cross-examination. He was called by the defendant, and testified that Perley pointed out the boundary of his lot. The plaintiffs had a right, in cross-examination, to ask the witness what Perley said about the boundary of the lot when pointing it out.

6. One Johnson, called by the defendant, testified that, when he worked for Judevine, he piled lumber belonging to Judevine upon the lot in dispute. We understand the cross-examination, which was objected to by the defendant, had reference to the matter of this same lumber and its being piled there, and was therefore a proper matter of cross-examination.

7. The question as to the testimony of the witness Pike was waived.

8. The cross-examination of the defendant was objected to, upon the ground that it put into the case the declarations of the plaintiff husband in his own favor. There was no error in the cross-examination. The plaintiffs had a right to examine the defendant upon any material matter in the way of

Digitized by Google

cross-examination, whether he had testified upon the point or not; and they had a right to show that the defendant knew that the plaintiffs, at the time in question, made claim to the premises to the plum-tree line, and this was the effect of the testimony. It should not have been admitted to establish the fact of where the line was located, but to show that the plaintiffs claimed the premises in dispute, as it was a material question whether they claimed to occupy the land adversely.

9. The defendant claims that the plaintiffs were permitted to give testimony in rebuttal relating to certain measurements from the plum-tree line to certain corners, for the purpose of showing that certain trespasses were upon land which the plaintiffs claimed; and also the testimony of their brother George, that he had never seen Judevine's man mow the disputed tract, nor Mr. Pike tear down the fence; and also certain testimony of the plaintiff Simeon, as to the condition of the tract in question when the place was deeded to his wife, and as to certain other measurements. The defendant insists that none of this testimony was in rebuttal. It was admitted, not in the exercise of discretion, but as a matter of strict legal right. It is true the exceptions show that the plaintiffs in their opening had put in testimony tending to show certain distances and places claimed to have been trespassed upon, and the kind and character of the trespasses, and their occupancy of the disputed tract, etc. While the testimony objected to may have been in the same line as that given by the plaintiffs in their opening, it does not appear from the record that it was not strictly in rebuttal of what some of the defendant's witnesses had testified to. There is no recital of the testimony given by the defendant and his witnesses upon these points, and we cannot say, therefore, that there was error in admitting the testimony in question.

10. The record is not full enough to enable us to determine whether there was any error in respect to the testimony of the plaintiff Simeon in regard to the application of Eldred to the selectmen; no error appears. This disposes of the questions of evidence which have been made in argument.

IV. The fourth point in the brief for the defendant is that the charge as given upon the subjects noted upon page 10 of the exceptions was not warranted by the facts. The exceptions stated on page 10 are to the refusal of the court to charge in accordance with the requests, and to the charge as given upon the points covered by the requests. These questions are not considered, as no copy of the requests or the charge has been furnished us.

V. The motion for a judgment at the close of the plaintiffs' evidence was waived, as the defendant introduced evidence subsequently, and, as the motion to order a verdict at the close of all the evidence was based upon the misjoinder of parties, that question has already been disposed of adversely to the defendant. The defendant filed a motion in arrest of judgment, upon the ground that the declaration did not sufficiently describe the locus in quo, and cites, in support of this claim, Davis v. Judge, 44 Vt. 500. That was an action of ejectment for the recovery of the possession of land, and involved the question of title. In such actions, it is necessary to describe the premises with the particularity stated in the opinion in that case; but, in an action of trespass qua. clau., it has been held in this state (Rice v. Hathaway, Brayt. 231) that the premises were well described in the following words: "The close of the plaintiff, situate, lying, and being in St. Albans." The premises in this case are described as "the plaintiffs' close, situate in the town of Hardwick," and also as a part of lot No. 3, in the ninth range of lots, with a reference to the deed to the plaintiff Sarah, recorded in Book 16, p. 361. We think this description, under the authority of the case cited, is good.

VI. The sixth point made in defendant's brief it is unnecessary to consider, in view of the holding upon the question of parties.

Judgment reversed, and cause remanded.

ROWELL, J., being absent in county court, did not sit.

MAGOON v. BOSTON & M. R. CO. et al.

(Supreme Court of Vermont. Orleans. Dec. 29, 1894.)

ACTION AGAINST RAILROAD COMPANY — ACCIDENT AT CROSSING—PASSING BETWEEN CARS —CONTRIBUTORY NEGLIGENCE.

1. In an action against a railway company for personal injuries received by plaintiff, while attempting to pass between cars standing across a highway, and to which no engine was attached, plaintiff, who had often been obliged to wait from 5 to 25 minutes through a like obstruction, testified that having waited 15 minutes, and being in a hurry, though there was no necessity for him immediately to cross, after stepping back and looking up and down the track to see if an engine was in sight, and not seeing one, though he could not see very far up the track on account of a curve, he attempted to follow several other persons who passed between the cars by climbing over the bumpers. A city ordinance prohibited the blocking of streets for the length of time the highway in question had been blocked. Plaintiff while between the cars was injured through the sudden coupling of the cars by an engine. Defendant's evidence showed that the train crew were attending to their duties, and did not see plaintiff, one being at each end of the cars, and the others on the engine. *Held*, that plaintiff was guilty of such negligence as precluded a recovery.

2. Remarks by counsel, tending to impress the jury with the idea that a witness for defendant was hired to swear falsely, are, in the absence of evidence of such fact, ground for reversal.

Exceptions from Orleans county court; Rowell, Judge.

Digitized by Google

Action on the case by Orrin Magoon against the Boston & Maine Railroad Company and others, for personal injuries. Judgment for plaintiff, and defendants except. Reversed.

The plaintiff was injured while attempting to pass over the buffers and drawbars between two freight cars standing upon a highway crossing in the village of Newport. He testified that the cars were standing there when he first came in sight of the crossing, on his way down the street; that he stood beside them for some 15 minutes before attempting to pass through; that he saw no employé of the defendant in charge of said cars, and neither saw nor heard any engine, during all the time that he stood there; that both ends of the train, which consisted of some 8 or 10 cars, were visible, and that he could see a considerable distance down the track upon which the cars stood, towards the south, but, owing to a curve, could not see a great way towards the north; that another person passed between the cars, and that he, being desirous to pursue his way, stepped back so that he might have a view of the track to the north as well as the south; that from the position in which he was standing he could see up the track a considerable distance; and that he neither saw nor heard any engine, and thereupon attempted to pass over the drawbars. The remaining facts, and the exceptions taken by the defendant, sufficiently appear in the opinion.

C. A. Prouty, for plaintiff. Dickerman & Young, for defendants.

TYLER, J. This suit was brought to recover damages for injuries sustained by the plaintiff by reason of the alleged negligence of the defendant. The plaintiff's evidence tended to show that the defendant was guilty of negligence; that it might have pushed the cars further south, so as to have cleared the crossing, instead of leaving them upon it; that it thereby violated Act No. 39, Laws 1882, and rendered itself liable to a fine of from $5 to $20. It further tended to show that this highway crossing had existed in substantially the same manner for 20 years or more, and that during a considerable part of that time, in going to and from his work, the plaintiff had passed it daily; that he knew that it was within the limits of the Boston & Maine freight-car yard; that freight trains were made up on it; that in passing he frequently found cars upon the crossing, and had to wait for their removal, the time varying from 5 to 25 minutes; that on this occasion 8 or 10 cars stood upon the crossing (3 or 4 south and the others north of it) when he reached it, and had stood there, he thought, after he came in sight of it, about 15 minutes, when he attempted to pass over the couplings; that as he stood beside these cars he could see quite a distance south, and that no other cars stood on that track; that the north end of the obstructing cars cut off his view of the track in that direction; that no engine was attached to these cars, and none was in sight; that before attempting to pass he stepped back from the cars some 15 or 20 feet, to see if an engine was in sight, and saw none; that an engine of the Boston & Maine, with two cars attached in such a way that the cars were between the crossing and the engine, stood north of the crossing, at or near the water tank; that he then stepped forward to the cars, siezed hold of the irons (ladders) on the ends of two cars, and threw his feet upon the heads of the drawbars, but was unable to throw his body up; that he was engaged in a lively struggle for about half a minute, as he estimated the time, when the engine and two cars ran down from the north, and coupled with the obstructing cars, and pushed them south, off the crossing; that in his attempts to raise himself his left foot slipped onto the coupling links so that when the cars came together his foot was crushed between the two drawbar heads; that two or three persons passed between the cars before he made the attempt; that no bell rang and no whistle sounded while he was waiting; that there was no necessity for his crossing before the cars should be removed, other than that he expected his daughter was, as usual, waiting for him, with a carriage, on the east side of the tracks, though she was not in fact waiting. The plaintiff was 65 years old, and weighed from 180 to 190 pounds. It did not appear that any official or employé of the defendant knew that other persons had crossed, or of the plaintiff's attempt. Although, upon the plaintiff's evidence, no employés of the defendant were in charge of the cars, and there were no indications that they were about to move, he must have known that they would soon be moved from the crossing; that, if they stood there as long a time as he thought they had, they were liable to be moved at any moment. It is apparent that the people who had collected at the crossing, on both sides of the tracks, momentarily expected the cars to be moved, as was the custom. Though the plaintiff could see that no engine was attached, he could not assure himself that one was not in position to run down and be attached in a less time than he would require to mount and cross over the couplings. It does not appear that he inquired of any person whether or not the cars were about to move, or that he used any diligence to ascertain, except to step back a few feet, so that he could the better see the track, which he says he could see but a short distance. The engine was in fact close at hand, as the event proved.

It is a general rule that, though the defendant may have been guilty of negligence and of a violation of law, the plaintiff cannot recover if his own negligence contributed to the happening of the accident. Beach,

Digitized by Google

Contrib. Neg. § 64, says: "No failure on the part of the railroad company to do its duty will excuse any one from using the senses of sight and hearing upon approaching a railway crossing; and, whenever the due use of either sense would have enabled the injured person to escape the danger, the injury is conclusive evidence of negligence, without any reference to the railroad company's failure to perform its duty." This court has repeatedly held that, where a party claims to have suffered damage by the carelessness or negligence of another, it is a rule nearly if not entirely universal that, if the negligence or carelessness of the person injured contributed in any material degree to the production of the injury complained of, he cannot recover; that, if the injury is in whole or in part owing to the plaintiff's want of ordinary care or prudence, he cannot recover. Rob. Dig. p. 480, pl. 14, 15.

The defendant claimed in the court below that the case made by the plaintiff showed him to have been guilty of contributory negligence, so that in law he was not entitled to a verdict. Ordinarily, under the long-settled rule in this state, this is a question of fact, for the jury; and in this case there was no error in the refusal of the court to direct a verdict for the defendant, unless the case fell under the exception to the rule. Rogers v. Town of Swanton, 54 Vt. 585; Fassett v. Town of Roxbury, 55 Vt. 552. The exception to the general rule is clearly stated by Ross, C. J., in Latremouille v. Railway Co., 63 Vt. 336, 22 Atl. 656, as follows: "It only becomes a question of law, purely, when, conceding the facts to be undisputed, or to be such as the testimony most favorable to the plaintiff has any reasonable tendency to establish, they will not warrant a legal inference, nor, if the inference be of a fact, have a reasonable tendency to support such inference of fact, necessary to give the plaintiff a verdict." In that case the plaintiff's intestate was a car inspector and repairer of the defendant, and went under a standing car to repair it, knowing that a train was liable at any moment to back down upon it. A train did back down, and he received fatal injuries. Held, that the danger was obvious, and that there could be no recovery. In Worthington v. Railroad Co., 64 Vt. 107, 23 Atl. 590, Rowell, J., stated the rule concisely as follows: "* * * When the standard of negligence is not prescribed, and there is a combination of facts and circumstances relied upon to show negligence, the question becomes one of law only when those facts and circumstances are so decisive one way or the other as to leave no reasonable doubt about it,—no room for opposing inferences. This is clearly shown by the adjudged cases." In that case the plaintiff, a passenger, was unnecessarily standing on the steps or platform of a rapidly moving train. See Germond's Adm'r v. Railroad Co., 65 Vt. 126, 26 Atl. 401.

It has often been held that it is gross negligence in a traveler to attempt to pass between the cars of a standing train, to which an engine is attached, and which he knows, or reasonably ought to know, is ready to move. This is so laid down in the text-books. In Corcoran v. Railway Co., 105 Mo. 399, 16 S. W. 411, it was held that, although the plaintiff did not know whether an engine was attached to the cars or not, yet as he did know that one ought to have been attached, for the purpose of moving them off the crossing, and that engines were at work in the yard, moving trains and switching cars, it was gross negligence in him to attempt to go upon them. It was said by the court in Railroad Co. v. Houston, 95 U. S. 697, that it was the duty of the plaintiff, when about to cross a railroad track, to make use of his senses, as far as there was opportunity, in order to ascertain if there was danger in crossing; some cases say "vigilant use." In Hudson v. Railroad Co., 101 Mo. 13, 14 S. W. 15, the court held that for a person to climb over stationary cars without looking to see whether or not they were attached to an engine was such gross negligence as precluded a recovery for injuries received in the attempt, and cited 1 Thomp. Neg. 429; 2 Ror. R. R. § 1055; Beach, Contrib. Neg. § 72; Gahagan v. Railroad Co., 1 Allen, 187; Railroad Co. v. Dewey, 26 Ill. 255; Lewis v. Railroad Co., 38 Md. 588; Railway Co. v. Pinchin, 112 Ind. 592, 13 N. E. 677. In that case the plaintiff placed one foot on the drawbar of one car, and the other on the drawbar of the other car; each foot being just behind each of the coupling pins of the two connecting cars, so that, as the court observed, the slightest oscillation of either car would in an instant convert the drawbars and coupling pins into an improvised trap, which would seize and did seize and crush his foot. The court said: "If such conduct does not constitute contributory negligence, how shall it be christened? * * * It is no answer to this to say that the defendant was guilty of reprehensible conduct in obstructing the street with its cars beyond the time allowed by the city ordinance." "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he does not himself use common and ordinary care to be in the right. * * * One person being in fault will not dispense with another's using ordinary care for himself." Butterfield v. Forrester, 11 East, 60. The facts in Railway Co. v. Pinchin, supra, were different from those in the case at bar, but some rules are laid down by the court in that case that are applicable in this, viz.: "A person who has knowledge that a train of cars is stopping temporarily at a way station, on its way to its destination, has no right to assume the risk of passing between the cars. It is a danger so immediate and so great that he must not incur it. * * * It will not avail the plaintiff that

Digitized by Google

he was not fully aware of his danger, for the plaintiff is bound to know the extent of the danger in cases like this, where the circumstances are known to him, or the hazard is apparent to a reasonably prudent man." * * * "One who attempts to cross between the cars of a train which he knows, or might know by using his natural faculties, is likely to move at any moment, is guilty of negligence. * * * A man has no right to cast himself upon a known danger, when the act subjects him to great peril. If there is a risk, apparent or known, that will probably result in injury, he must not encounter it." Numerous cases of the same import are cited in the opinion. In that case the plaintiff attempted to pass between the coupled cars of a freight train that was standing temporarily across a street at a way station. He did not see, but might have seen, that an engine was attached. In O'Mara v. Canal Co., 18 Hun, 192, the train had stood upon a public crossing for some time. The plaintiff could not see whether an engine was attached or not, owing to a curve in the track. He attempted to climb over between the cars, and was injured by the train being suddenly moved. Held, that he could not recover.

There are numerous reported cases, many of which are noted in the briefs, in which it is held that it is gross negligence in the traveler to attempt to pass between the cars of a moving train; also, between the cars of a standing train, with an engine attached and steam on, ready to move; also, where the traveler could not see whether an engine was attached or not. Counsel, in their extended researches, have found no case precisely like the one at bar, in its facts. The one above referred to, in 105 Mo. and 16 S. W., is like it in this respect: That the plaintiff in that case knew that an engine ought to be attached, in order to move the cars off the crossing. Other cases lay down the rule that when the traveler knew, or reasonably ought to have known, that the cars were liable to be moved at any moment, it is legal negligence in him to attempt to pass between them. Cases cited by plaintiff's counsel seem to hold a somewhat different doctrine, as, "When a train stands across a public street, without right, a person has a right to walk along the street, behind the rear car, and assume that the train will not back without giving notice." Robinson v. Railroad Co., 48 Cal. 409. In Klanowski v. Railroad Co., 57 Mich. 525, 24 N. W. 801, it was held that when the defendant neglected certain statutory duties, made for the benefit of travelers and others, and a person was injured, the defendant would be liable, although the person was guilty of some fault which contributed to the injury complained of; that such fault ought not to be available to the defendant, in making defense against its wrongful acts, unless it was willful or gross, so as to be inexcusable. Other cases cited seem to require less care and prudence from the party injured when cars obstruct a public street in violation of law than under other circumstances. We think the better doctrine is that stated in Andrews v. Banking Co., 86 Ga. 192, 12 S. E. 213. In that case the court said: "* * * The obstruction was open and visible, and no reason is shown why the plaintiff should not have anticipated that the train might not move at any moment. Yet, without waiting for it to move, applying to have it moved, or attempting to go round it, he voluntarily, and without warning any one of his intention, exposed himself between the cars by climbing upon their platforms adjacent to the bumpers, and was injured." The court further said: "Though a standing railway train be an unauthorized obstruction of a public crossing, a person attempting to pass between the cars by climbing over the platform and bumpers, if injured thereby in consequence of a sudden movement of the train, cannot recover, unless the engineer, conductor, or some other person having control of the train's movements, knew of his attempt to cross, or had notice of his exposure to danger."

The plaintiff knew from experience that the cars had already stood on the crossing a longer time than usual. If the engine and two cars were within the range of his vision, he ought to have seen them. If, as he claimed, he could see but a little distance up the tracks, and the engine and two cars were at or near the water tank, and beyond his vision, he had no right to attempt so hazardous an undertaking; for he had no assurance that the engine was not where it could be run down and attached in a moment's time, as was in fact done. As was said by the court in Lewis v. Railroad Co., 38 Md. 588, "his attempt to cross where he did was simply consulting his own convenience at the risk of his safety." It was a voluntary contribution of his own negligence to the occurrence of the accident. The reason for the holdings in the various cases cited by counsel does not rest in the mere fact that an engine is attached to the cars, even when it has steam on and is ready to move, but because the situation is one of danger, the imminency of which the plaintiff, in the exercise of his faculties, might have, and should have, understood. If it would have been gross negligence in the plaintiff to have attempted to pass between the cars when an engine was attached, with steam on, ready to start, it is difficult to see why it was not equally negligent in him to attempt to pass when it was in fact in such a position that it could be attached in a moment.

When the plaintiff rested the defendant moved for a verdict. The motion was denied, and the defendant excepted. To have availed itself of its exception, it should have then rested. By proceeding with the trial the motion and exception were waived. The defendant's evidence tended to show "that all the men, being the engineer, fireman, con-

Digitized by Google

ductor, and two brakemen, in charge of the Boston & Maine engine and cars, were attending to their respective duties, and were in their proper places; that the gateman was in his house, attending to his duties, and that none of them saw the plaintiff before he was injured"; that the cars had not obstructed the crossing longer than was necessary; and that only one person crossed over before the plaintiff's attempt. When the defendant rested, and the plaintiff renewed its motion for a verdict, this was the case presented: The defendant's cars were obstructing a public crossing,—one much used, especially at that hour of the day. People had congregated on both sides of the cars, waiting for them to be moved. One, two, three, or four persons had passed over the couplings. The conductor and trainmen were at the time of the accident attending to their respective duties, and none of them saw the plaintiff, or were aware of his attempt to cross. The circumstances required, as has often been declared by other courts in respect to the running and operating of trains in towns and cities, especially on and over streets and other public places therein, that the greatest diligence, watchfulness, and care should be observed by those operating them. Burger v. Railway Co., 112 Mo. 239, 20 S. W. 439. Although none of the defendant's employés saw the plaintiff, his counsel insists that it was a question of fact for the jury whether, in the exercise of that degree of care which, in the circumstances, the law required of them, they ought not to have seen him, in his attempt to pass between the cars.

In Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653, the rule of law was recognized that the contributory negligence of the plaintiff would not exonerate the defendant and disentitle the plaintiff from recovering, "if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence." In that case the court said that the jury might well be of opinion that while there was some negligence on the part of the plaintiff, in standing where and as he did, yet that the officers of the boat knew just where and how he stood, and might have avoided injuring him if they had used reasonable care to prevent the steamboat from striking the wharf with unusual and unnecessary violence; that if such were the facts the defendant's negligence was the proximate, direct, and efficient cause of the injury. In Bemis v. Railroad Co., 42 Vt. 375, it was held that a railroad company was bound to exercise ordinary care to avoid injury to an animal that was upon the track by the wrongful act of its owner; but in that case it appeared that the engineer, from his position, had a full view of the track for a distance of 75 rods ahead of his engine. In Corcoran v. Railway Co., supra, it is said: "It is well settled that, notwithstanding the negligence of the defendant, if the plaintiff was also negligent, which the defendant did not know, or was not required to know, at the time, and the negligence of both concurred and co-operated in producing the damage, then the proximate cause of the injury will be attributed to the plaintiff, and there can be no recovery." In that case the plaintiff, a police officer, was injured while attempting to climb over stationary cars, without knowing whether an engine was attached or not, the cars obstructing a public street in violation of a city ordinance. It was not claimed that any employé of the defendant knew of the plaintiff's perilous situation. In Rine v. Railroad Co., 88 Mo. 392, it was said that, if the employés of the company saw the plaintiff in an exposed and dangerous situation in time to have avoided the accident, then they were bound to use all reasonable diligence to have avoided it; "that the liability of the defendant should be limited to negligence and want of care after the exposed and dangerous position of the plaintiff came to the knowledge of the servants who are charged with the want of care." In Corcoran v. Railway Co., supra, the court said that the defendant's employés "were not bound to look for the plaintiff where he had no right to be," by which remark was evidently meant that no inference of negligence could be drawn from the mere fact that they did not see him. In Andrews v. Banking Co., supra, the defendant's liability was limited to the knowledge which the employé in charge of the train had of the plaintiff's attempt to cross, and notice of his exposure to danger. In Lucas v. Railroad Co., 6 Gray, 64, the wife of the plaintiff went into a car to assist an aged and infirm relative to a seat, and then left the car after the train moved. In jumping to the platform she was thrown under the wheels, and fatally injured. The plaintiff's evidence tended to show that the usual signals for starting the train were not given, and that it started with a sudden jerk. The court said: "* * * Mrs. Lucas, when the train started, and when the jerk occurred, was where she had no right to be. And conduct which the law requires of those who wrongfully bring themselves into an emergency is not to be measured by that which the law excuses in those who are wrongfully brought into an emergency by others." Shear. & R. Neg. (2d Ed.) §§ 25, 36, carry the rule no further than this: That a plaintiff may recover, notwithstanding his own negligence, if the defendant became aware of his danger, and failed to use ordinary care to avoid injuring him.

In this case the defendant's evidence tended to show that all the defendant's employés who were near the place of the accident were attending to their respective duties. No evidence in the case tended to show the contrary. None of the employés saw the plaintiff

Digitized by Google

attempt to pass between the cars, and there was no evidence that tended to show that they had reason to anticipate that he would attempt so hazardous an enterprise. If those employés had seen or been apprised of the attempt, they would have been legally bound to have used all reasonable efforts to have avoided the accident; but the liability of their employer did not begin until they saw or had notice of the peril, or, in the exercise of the care of a prudent and careful man, they ought to have seen or known of it. Then, considering the dangerous situation, and the opportunity which the defendant's employés had to see the plaintiff and others attempting to cross over, as disclosed by the evidence, was there a question of fact fairly arising upon the evidence, whether the employés ought to have seen the plaintiff, or ought to have noticed that persons had passed over the couplings, or ought to have anticipated that they would attempt it? The evidence as to the positions occupied by the employés at the time of the accident, and what they were severally doing, came almost wholly from the defendant's witnesses, and was not conflicting. The conductor stood on the north side of the crossing, east of the cars, attending to the work; a brakeman stood at the north end of the cars, on the east side, ready to make the coupling, and did make it, when the engine and two cars came down. The engineer and fireman were in their proper places, and a brakeman was on the top of the car next to the engine. No question arises but what each was attending to his duties in respect to backing the engine and two cars down to the crossing, making the coupling, and removing the other cars. Was there any inference to be drawn from the undisputed facts that the defendant's employés were negligent of any duty they owed the plaintiff? Was there any room for a difference of opinion among reasonable men as to the inference which might be drawn from those facts? We think not. It should have been held, as matter of law, that no inference of negligence could be drawn from the fact that they did not see the plaintiff and others in their attempt to pass between the cars.

The evidence was conflicting upon the question whether the bell was rung and the whistle sounded as a warning that the cars were about to be moved. It has often been held that the mere omission of a railroad company to give such signals at crossings will not excuse the traveler from using ordinary care and prudence. In Railroad Co. v. Houston, supra, plaintiff's wife was fatally injured by a passing train while she was attempting to cross the track at a street crossing. The plaintiff's evidence tended to show that no signal was given as the train approached the crossing. The court said: "Negligence of the company's employés in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant." "When, by law, ringing the bell and sounding the whistle are required, in approaching and passing over public crossings, the omission thereof amounts to actual negligence on the part of the company. But such omission and negligence does not render the company liable for injuries received at such crossings, unless the omission be the cause thereof or contribute thereto, without contributory negligence of the injured party. Negligence in the railroad company in giving the signals or in omitting signals of any kind will not excuse plaintiff's omission to be diligent in such use of his own means of avoiding danger; and where, by such use of his senses, he might avoid danger, notwithstanding the neglect to give signals or warning, his omission is contributory negligence." Rumpel v. Railway Co. (Idaho) 35 Pac. 700, citing 2 Ror. R. R. § 1130; Railroad Co. v. Copeland, 61 Ala. 380; Railroad Co. v. Houston, supra. Upon the whole case, we think there was no other inference to be drawn from the evidence than that the plaintiff's negligence was the proximate cause of the injury, and therefore, as matter of law, he was not entitled to recover.

The plaintiff's counsel, in his closing argument to the jury, made certain statements which defendant's counsel objected to, and to which exceptions were allowed the defendant. The exceptions state that: "The plaintiff called one George Magoon, and had him sworn, with his other witnesses, at the opening of his case, but did not improve him as a witness before he rested. After all its other testimony had been introduced, the defendant called said George Magoon to the witness stand, and he testified, in answer to the questions of the defendant's counsel, that he was at work on Lane's block with the plaintiff, and had gone down to the crossing just ahead of the plaintiff; that when he went down the west gate was lowered immediately after he passed, and before the plaintiff passed; that he stood a short time —perhaps, a minute or more—beside the cars, and then hurriedly passed over the bumpers, and between the cars; that, as he passed over the space between said gate and the cars, he thought he saw two engines above

Digitized by Google

there, but knew that he saw one; that when he stepped between the cars he thought he saw one or two cars standing on the main line, next to the passenger depot, with an engine above them, and knew he then saw an engine on the main line somewhere near the water tank, and thought it was backing down towards the highway crossing, and that the bell of one of the engines was ringing, which had something to do with his hurrying through between the cars. The evidence of the plaintiff tended to show that in a previous conversation this witness had stated that the west gate was up; that he stood beside the train for 10 minutes before passing between the cars; that he saw an engine, but could not tell whether it was backing down or not. The plaintiff claimed that the testimony of this witness was false in fact, and utterly at variance with the statements which he had made as above, and in consequence of which he had been subpoenaed by the plaintiff. The witness himself testified that he had been subpoenaed by the defendant the day before. In commenting upon this testimony and upon the credibility of the witness, counsel for the plaintiff said: 'He is here on the other side. Let the full panel ask how he got here. He says he was subpoenaed, and that until he took the stand they did not know what he would swear to; that he hadn't talked with Young or Dickerman, hadn't talked with Crane or Alfred, hadn't talked with Folsom.' Mr. Young: 'We desire an exception to that statement. The witness said he talked with me at noon.' Mr. Prouty: 'If I have misstated the testimony, you will correct me. My recollection is that he did not talk with any of these gentlemen.' Here the reporter read from the witness' testimony as follows: 'Cross-examination by Mr. Prouty: Q. Did you ever talk with anybody on the other side till to-day noon? A. No, sir; not unless some one was talking it over at different times about the accident. Redirect by Mr. Young: Q. Did you ever talk with Mr. Dickerman or myself or Crane or Alfred about this case until to-day noon? A. No, sir. Q. Or with Mr. Folsom? A. No, sir. Q. Or with Mr. Brady, the superintendent of the Canadian Pacific? A. Yes, sir; I presume Mr. Brady said something. Q. I mean Mr. Brady, the superintendent of the Canadian Pacific Railroad. A. Oh, no, sir; I don't know him.' Then Mr. Prouty went on to say: 'If that is true, gentlemen, it probably accounts for his testimony. I don't know how much they paid that fellow, but I tell you that when he gave his testimony on the stand he was in the employ of the Boston & Maine Company.' Mr. Young: 'We desire an exception to that.' The Court: 'Take your exception.' Mr. Prouty: 'That is, in my opinion. I presume it did not cost them much. That sort of a fellow don't come high. A viper of that sort don't value his services at an extraordinary price. They wanted to know why I did not put him on. I didn't put him onto the stand because, of all the witnesses I talked with about the case, he was the only man that couldn't look me in the eye and tell me his story.' Mr. Young: 'We desire an exception to that.' Mr. Prouty: 'I didn't put him on because I knew, if I put him on, he would knife me.' Mr. Young: 'We desire an exception to that.' The Court: 'Exception allowed.' Mr. Prouty, continuing, said in substance: 'Gentlemen, you have seen this fellow, and you have seen his manner of testifying. You have seen the other witnesses for the plaintiff, and their manner of testifying. I appeal to you. He is the only witness, of those originally called here by the plaintiff, who has not been able to look you in the eye, and tell his story in an honest, straightforward manner.' There was no evidence offered tending to show that said Magoon was paid, given, or promised anything for testifying on behalf of the defendant, or that he was ever in the employ of the defendants, or either of them, or that he did not or could not look Mr. Prouty in the eye and tell him his story, any further than the appearance of the witness, and his manner of testifying, might indicate. Nor did it appear that Prouty knew that the witness would knife him if he put him on. Mr. Prouty, in his argument, did not give the jury to understand that he had any personal knowledge of the fact that the witness had been paid for his testimony, unless they understood that from what he said as above stated." The exceptions further show that: "The employés of the defendant who were improved as witnesses nearly all testified that both engines were just north of the crossing at the time of the accident, and moving towards the crossing, and that the bells upon one or both of the engines were ringing at that time. In commenting upon the idea that these witnesses should be able to remember whether or not the bell was in fact ringing upon that occasion, counsel for plaintiff said: 'I don't know how many suits in which railroad companies were involved you may have heard tried, but it is a general rule that the bell always rings. There is no case on record in which the bell did not ring.' Mr. Young: 'We desire an exception to that.' The Court: 'Take your exception.' Mr. Prouty: 'It is the universal rule that the bell always rings. One of the stock questions which a railroad manager asks an applicant for employment is, "Does the bell ring?"' No evidence was offered tending to show anything about bell ringing on any other occasion, or about any claim being made by this or any other railroad company that a bell was rung on any occasion, save the time of this accident."

The tendency of the remarks concerning the witness Magoon was to induce the belief in the minds of the jurors that he had been hired to falsify, either by the defendant or its counsel, and to prejudice the defendant

Digitized by Google

and its case, without any warrant therefor, so far as is disclosed by the evidence. It was competent for the plaintiff to show, if he could, that the witness had made statements out of court contradictory to his testimony, and thus impeach his credibility; and it was competent for counsel to comment upon the claimed impeachment, but the record shows no justification for a charge or an insinuation of bribery. The other statement above quoted was unauthorized by any evidence that was, or by any known rule of evidence could have been, in the case; and yet the statement was made as a fact, was likely to have been received by jurors as such, and to have prejudiced the defendant's rights in their minds. That these statements were valid ground of exception is well settled. "Counsel, in their arguments to the jury, are bound to keep within the limits of fair and temperate discussion. The range of that discussion is circumscribed by the evidence in the case. Any violation of this rule entitles the adverse party to an exception which is as potent to upset a verdict as any other error committed during the trial." State v. Hannett, 54 Vt. 83. "Exception was taken by defendant to a remark of the counsel for the plaintiff in the closing argument to the jury. He made a statement of a fact to the jury which concededly was not in proof. The impropriety and wrong of counsel thus stating or assuming facts in argument which are outside of all evidence are perfectly manifest. If a deliberate act, its object can be only to have the jury consider a fact not in the case, and thus induce a verdict not warranted by the evidence. Legitimate argument elucidates the truth. Its power and usefulness in this behalf are very great. The largest latitude should therefore be allowed to counsel in argument fairly within the scope of the evidence. But it has been repeatedly held in other jurisdictions, and recently in this, that when counsel persistently travel out of the record, basing argument on facts not appearing, and appealing to prejudice, irrelevant to the case, and outside of the proof, it not only merits the severe censure of the court, but is valid ground for exception." Rea v. Harrington, 58 Vt. 181, 2 Atl. 475. In Bullard v. Railroad Co., 64 N. H. 27, 5 Atl. 838, it was held that a verdict would be set aside for unwarranted remarks of counsel to the jury in closing, unless the presiding judge found as a matter of fact, that the jury were not influenced thereby, or that the effect upon their minds was wholly removed by a retraction of counsel, the charge of the court, or in some other way. In commenting on this subject, Smith, J., said: "In spite of the fullest and frankest retraction, and the most explicit and emphatic instructions to lay the remark entirely out of consideration, the trial may not be fair. It may not be in the power of the retracting counsel and the court to remove the prejudice. Their combined and vigorous exertions may not control the mental operations of the jury. The jury may not be able wholly to free their memory or their judgment from the unfair and illegal impression made by a plausible statement of fact which may seem to them entitled to more respect than the rule of law that excludes it." In Perkins v. Burley, 64 N. H. 524, 15 Atl. 21, counsel stated in argument to the jury "that, if they knew how the plaintiff and his father and brother were regarded in the vicinity in which they lived, he would be willing to submit the case without argument." Blodgett, J., said that this "was, in effect, a declaration that the reputation of the plaintiff and his witnesses was bad in the vicinity of their homes, and was known to be such by the counsel himself. This declaration, not being evidence, was plainly without the bounds of legitimate advocacy, and, from its character, inevitably tended to prejudice the plaintiff's case, and to deprive him of that fair and impartial trial to which all parties are entitled as of right." See, also, Robertson v. Town of Madison (N. H.) 29 Atl. 777. In Brown v. Swineford, 44 Wis. 282, the court reversed a judgment, and ordered a new trial, on an exception of this kind, and said: "The learned counsel went beyond the legitimate scope of all argument by stating and commenting on facts not in evidence. * * * The appellant took his exception, and his counsel now supports it by numerous cases. * * ** All of them support the rule now adopted by this court, that it is error sufficient to reverse a judgment for counsel, against objection, to state facts pertinent to the issue, and not in evidence, or to assume arguendo such facts to be in the case when they are not. Some of the cases go further, and reverse judgments for imputation of counsel of facts not pertinent to the issue, but calculated to prejudice the case. There are cases in conflict with those which support this rule. But, in the judgment of this court, the rule is supported by the weight of authority and by principle." In Coble v. Coble, 79 N. C. 589, it was held not to be within the privilege of counsel, in argument to the jury, to use language calculated to humiliate and degrade the opposite party in the eyes of the jury and bystanders, when he had not been impeached. "If counsel go beyond the evidence, and bring in foreign and unproved matters, courts should interfere; and if the trial court does not interfere, and the matter improperly brought before the jury is of a material character, the appellate court may reverse the judgment. * * * If the statement is an unimportant one, or one not likely to wrongfully influence the jury, the verdict will be upheld." Proctor v. De Camp, 83 Ind. 559; Battishill v. Humphreys, 64 Mich. 514, 38 N. W. 581. That case and the others noted on the briefs are to the effect that, while a verdict will not be set aside for mere irrelevant

Digitized by Google

remarks of counsel in argument, counsel must be confined within legitimate bounds in the discussion of facts before the jury. None of the cases to which we have been referred are at variance with the rule laid down by Veazy, J., in Rea v. Harrington. The statements of counsel in the present case clearly fall under that rule, and entitle the defendant to a reversal. The omission of the trial court to stop the counsel in his argument, and require him to retract his unwarranted statements, when objection was made, was tantamount to a ruling that the statements were warranted by the evidence. In this there was error. Judgment reversed, verdict set aside, and cause remanded.

TAFT, J. (doubting upon the first question discussed). Upon the other question, if the omission to stop the counsel when misstating facts is regarded as a ruling, I concur; otherwise, I dissent, as this court sits only in revision of errors made in the rulings, and the refusals to rule, made in the court below. I, for one, think the proper manner to deal with the misconduct of counsel in argument is for the trial court, in its discretion, to set aside the verdict, if by such means one is obtained.

LLOYD et al. v. TOWN OF FAIR HAVEN.

(Supreme Court of Vermont. Rutland. Jan. 10, 1895.)

CONDEMNATION PROCEEDINGS—IMPROVEMENTS.

Where, pending condemnation proceedings to acquire land for widening a street, an owner, with notice of the proceedings, erects a building on the land to be taken, his damages will be assessed without reference to the value of such building.

Exceptions from Rutland county court; Munson, Judge.

Petition by Lloyd and Culver for the appointment of commissioners to revise the action of the selectmen of the town of Fair Haven in altering a highway. From a judgment accepting the report of commissioners, and confirming the award of damages therein, petitioners bring exceptions. Affirmed.

The petition averred that the selectmen for the town of Fair Haven had altered a public highway; that, in the making of such alterations, the lands of the petitioners were taken; that they were dissatisfied with the action of the selectmen in the making of the alterations, and also with the damages awarded. The commissioners reported that the highway in question was Main street, in the village of Fair Haven, and that the same had been a public highway for many years. Originally said highway had been laid out six rods wide, but in process of time it had become impossible to determine exactly where the boundaries were, and the owners of lots upon the east side of said highway, which ran nearly north and south, had not professed to erect their buildings upon the line of the street. The point in controversy was between the block of Hughes & Owens, upon the north, and Knight, upon the south. In 1879 a large part of the buildings between these two blocks was destroyed by fire, and the landowners, in erecting their new buildings, built them somewhat nearer the street than they had previously been, and substantially upon the line of the Knight block. If the line of this block was extended to Hughes & Owens' block, it would strike the south side of the building about eight feet east of the southwest corner. In 1892 most of the buildings between these two blocks were again destroyed by fire. It seemed desirable to some of the landowners and many of the residents in Fair Haven that the buildings to be erected at this point should conform to a straight line running from the southwest corner of the Hughes & Owens block to the northwest corner of the Knight block. The landowners did not, however, concur in this view, and began the erection of buildings for the most part some six or eight feet further west upon what they claimed to have been the original east line of the street. Thereupon the selectmen widened the street at that point, so that the east line would be a straight line drawn from the Hughes & Owens block to the Knight block, as above indicated, and awarded damages, among others, in the sum of $25 to the petitioner Culver, and in the sum of $100 to the petitioner Lloyd. The present petition was begun to correct the action of the selectmen. In the decision of the selectmen in widening the street most of the landowners acquiesced, and proceeded to erect their buildings upon the line as thus established. The petitioners, however, proceeded to erect their buildings upon the line which they claimed was the true east line of the street. For the purpose of preventing this, the selectmen of Fair Haven began proceedings in chancery, and obtained a temporary injunction enjoining the petitioners from erecting their buildings further west than the line as established by the survey of the selectmen; but, upon the answer of the petitioners, this injunction was dissolved. The commissioners found that, in view of the use of the street at that point, the alteration made by the selectmen was required by the public necessity and convenience, and that the damages awarded by the selectmen were ample if they were to be determined with reference to the situation and condition of the property at the time the award was made.

Joel C. Baker, for petitioners. W. H. Preston, for defendant.

TAFT, J. The only question in this case relates to the appraisal of damages to land taken for highway purposes, under section 2940, R. L. The highway was altered by the selectmen, who appraised the damages, and

Digitized by Google

the petitioners applied to the county court for the appointment of commissioners to rehear the questions passed upon by the selectmen. It is upon the report of the commissioners that the question before us arises. After the proceedings before the selectmen and their award of damages, the petitioners built upon their land which had been taken in altering the street, and now claim that damages should be appraised as of the time the commissioners' report is accepted and the final orders made in the county court. We hold that the petitioners are entitled to such damages only as they sustained by the taking of their land in the condition and situation it was in at the time of the proceedings before the selectmen. When condemnation proceedings are begun, in case it is proposed to take land for a highway, and the selectmen make an award of damages, the landowner thereafter stands very much like a purchaser pendente lite. After the proceedings before the selectmen, and appraisal of his damages, the landowner has notice that his land may be taken,—in fact, that it has already been taken,—and that it will remain devoted to the use of the public, unless, by petitioning the county court, he secures a reversal of the action of the selectmen; and, if he builds upon it during the proceedings, it is at his own peril. To permit him to build upon the premises after proceedings are begun, and allow him to recover the value of the buildings thus erected, might make the premises so valuable that the town might not wish, and could not afford, to take the land. There is no injustice in holding that, when condemnation proceedings are begun, the premises must remain in statu quo until the proceedings are terminated. This rule violates no principle of constitutional law nor legislative provision. The judgment below awarded the petitioners damages in accordance with the principle herein stated; and that judgment is affirmed, with the same orders, dating from January 18, 1895.

TAYLOR v. SLATER et al.

(Supreme Court of Rhode Island. Feb. 5, 1895.)

MARRIED WOMAN—NECESSITY OF SUING BY NEXT FRIEND.

Pub. Laws 1893, c. 1204, removing the disabilities of married women, permits a wife to sue her husband directly without the intervention of her next friend.

Bill by Maria L. Taylor, by her next friend, against John W. Slater and others. Dismissed.

Edward D. Basset, for complainant. Charles P. Robinson, for respondents.

PER CURIAM. By Pub. Laws R. I. c. 1204 (of May 26, 1893), the disabilities of married women were removed, and married women were, for the most part, put on the footing of unmarried women. They may make contracts and subject their property to liability for their debts in the same circumstances and with the same effect as if they had continued sole and unmarried. This being so, there is no longer any necessity for a married woman having occasion to sue her husband and others in equity to proceed by a next friend, instead of proceeding directly herself. Having been put by the statute on the footing of a single woman, and there being no longer any necessity for the intervention of a next friend, we think that a married woman is bound to sue in such a case in the same manner as a single woman would be required to do; that is, directly, and not through a next friend. We are of the opinion, therefore, that the present bill was improperly brought by the complainant by her next friend, instead of by herself directly. The motion to dismiss is granted.

SCHULTZE v. HILL et ux.

(Supreme Court of Rhode Island. Jan. 31, 1895.)

MARRIED WOMAN—VALIDITY OF COVENANTS.

Under Pub. St. c. 166, § 4, the covenants of a wife relating to her land, when made by deed properly acknowledged, in which her husband joins, are valid.

Exceptions from court of common pleas, Providence county.

Action by William Schultze against Alpha R. Hill and wife. A demurrer to the declaration was sustained, and defendants except. Sustained.

C. F. Butterworth and Robert W. Burbank, for plaintiff. Page & Owen, for defendants.

PER CURIAM. The defendants demur to the declaration on the ground that the defendant Lizzie M. Hill, as a married woman, was not bound by the covenant relating to the land contained in the mortgage deed dated August 10, 1891, given by them to the plaintiff, as averred in the declaration. They cite in support of their demurrer, Porter v. Bradley, 7 R. I. 538, decided at September term, 1863, of this court for Providence county. Pub. Laws R. I. c. 851 (of March 23, 1870), however, provided that the covenants and agreements of a married woman thereafter made relating to her real estate should be binding on her when made by deed in which she should join with her husband, and which should be acknowledged by her in the manner prescribed. This provision was incorporated in Gen. St. R. I. c. 152, § 4, and also in Pub. St. R. I. c. 166, § 4, and has continued in force to the present time. The demurrer is therefore overruled, and case remitted to the common pleas division for further proceedings.

Digitized by Google

LAVELLE v. KIMBALL.

(Supreme Court of Rhode Island. Feb. 2, 1895.)

RIGHT TO JURY TRIAL.

Judiciary Act, c. 26, § 1, provides that in all answered causes there shall be a decision of the court and a judgment. Chapter 19, § 17, provides that entries on the docket or papers are deemed to be a decision. *Held*, when the only entry on the papers is defendant's submission to judgment for a certain sum, and there is no entry of judgment, his application within two days for a jury trial should be granted.

Exceptions from court of common pleas, Providence county.

Action between Joseph Lavelle and Nehemiah Kimball. An application by defendant for a jury trial was refused, and he excepts. Sustained.

Stone & Lovejoy, for plaintiff. Williams & Tower, for defendant.

PER CURIAM. We are of the opinion that the defendant's petition for a trial in the common pleas division should be granted. The judiciary act (chapter 26, § 1) provides that in all answered cases there shall be a decision of the court and judgment on the seventh day following, except as provided in said section. The section also provides that, in cases of submission to judgment, judgment may be entered at any time thereafter on ex parte motion and proof of claim. This provision, however, relates only to the entry of judgment, and does not alter the other provision relating to a decision. The scheme of the act seems to be that there shall be (1) a decision of the court, and (2) a judgment. By section 17, c. 19, of said act, the entries on the docket or papers are deemed to be a decision, within the use of that term in the act. The only entry on the papers presented to us is defendant's submission to judgment for $73.75. This, then, must be taken as a docket entry equivalent to a decision. There is no entry of any judgment actually rendered. Within two days after the entry on the papers, the claim for jury trial was filed. This took the case to the common pleas division. The dismissal of the case by the common pleas division was, we think, erroneous.

BRADFORD et al. v. KING et al.

(Supreme Court of Rhode Island. Dec. 29, 1894.)

FORECLOSURE OF MORTGAGE — TRUSTEES UNDER FOREIGN WILL—SUCCESSORS IN INTEREST—CONVEYANCES WITHOUT CONSIDERATION—POWER OF SALE.

1. A mortgage held by trustees under a will was assigned, and the assignee sold the property, under a power in the mortgage, to complainant, one of the trustees, who sold it to H. H. gave a mortgage thereon to the trustees in the amount of the original mortgage, and then conveyed the land to complainant individually. All of said conveyances were without consideration. *Held*, that complainant acquired no individual title to the property.

2. Trustees under a foreign will may foreclose in Rhode Island a mortgage acquired after the testator's death, without recording a copy of the will in that state.

3. The admission, by all parties in interest, of power in trustees under a will to foreclose a mortgage belonging to the estate, is sufficient to protect a purchaser at the foreclosure sale.

4. Trustees under a will held a mortgage belonging to the estate in their individual names. Upon their death their executors assigned the mortgage, and the assignee sold the property, under a power in the mortgage, to one of the succeeding trustees, who sold it to H. H. gave a mortgage thereon to the succeeding trustees in the amount of the original mortgage. All of said conveyances were without consideration, and the succeeding trustees sought to foreclose the original mortgage. *Held* that, the trustees being the equitable holders of the original mortgage under said conveyances, and not being the "assigns" of the original trustees, within the meaning of that word as used in said mortgage, the foreclosure should be in accordance with the practice in equity.

Bill by John H. Bradford and others against David H. King, Jr., and others, to enforce the specific performance of a contract for the purchase of land. Decree for complainants.

Wm. R. Tillinghust, for complainants. James Tillinghust, for respondents.

STINESS, J. In 1867, Samuel D. Bradford, Jr., mortgaged real estate in Newport to Alfred Smith for $40,000, and then conveyed the same to Arthur W. Austin, of Massachusetts, in trust to sell and pay his debts, including the mortgage debt; then in trust for the grantor and wife during their lives, and after them to distribute to his issue or next of kin. In 1871, Smith assigned this mortgage to said Austin and Paschal W. Turney, of New York, executors and trustees under the will of Samuel D. Bradford, Sr., who paid for it out of the trust estate, although the assignment ran to them individually. Bradford, Jr., Austin, and Turney have died, leaving wills which were duly proved in their respective states; but neither of the four wills have been filed or proved in this state, nor has administration upon either estate been taken out here. John H. Bradford, and the successors of Austin and Turney as trustees, are complainants. In 1885 the nonresident executors of Austin and Turney sold the Smith mortgage to Hales W. Suter, of Boston, who thereupon sold the estate at auction, under the power of sale contained in the mortgage, to the complainant John H. Bradford, who then sold the estate to William A. Hays, 2d, of Boston. Hays thereupon gave a mortgage to the complainants, as trustees under the will of Samuel D. Bradford, Sr., for the sum of $40,000, and then made a conveyance to John H. Bradford individually, who has made a contract of sale with the defendant, which he now seeks to have specifically performed; or, if need be, that the complainant trustees may be decreed to sell under the Smith or Hays

Digitized by Google

mortgage, as the court may find one or the other to be valid, in order to perfect the title. The bill shows that no consideration has been paid in any of these conveyances, since the original assignment of the Smith mortgage to Austin and Turney, which was paid for out of the trust funds in their hands under the will of Samuel D. Bradford, Sr., whereby the mortgage debt and security became in equity their property as trustees of said estate. Jenckes v. Cook, 9 R. I. 520; Watson v. Thompson, 12 R. I. 466. The case, then, is this: Austin held the estate in trust, subject to the Smith mortgage held by himself and Turney as trustees. Sundry conveyances were then made for the purpose of working a foreclosure of the mortgage under the power of sale, and thus creating a title to the whole estate freed from the trusts under which John H. Bradford contracted to sell the estate to King. Whatever might have been the result of these conveyances had there been an actual sale for value, it is plain that the mere form of a sale and passing of papers did not change the equitable title a whit. Trusts cannot be wiped out in this easy way. What was done, at most, could be nothing more than to transfer the mortgage around through one and another into the place whence it started,—into the trust estate under the will of Samuel Bradford, Sr. John H. Bradford has acquired no individual title to the estate which he can convey to another, and therefore he cannot require the respondents to perform the contract made with him individually for the purchase of the estate. But the bill further alleges that, although John H. Bradford took the conveyance to himself, he took and holds the same under the trusts of the will of said Samuel D. Bradford, Sr., and under the agreement of sale in behalf of said trust estate. The trustees, adopting the contract as their own, have also prayed, in case the title is defective, that it may be perfected through a sale under the Smith mortgage, and to this the respondent King and all parties in interest, they being before the court as parties to the suit, assent. It appears from the bill that the trustees had full power to invest and reinvest under the will, and so had power as trustees to take the mortgage; that they did in fact take it as trustees, although they were not described as such. But it came to them after the death of the testator. The will, therefore, did not impose a trust upon this particular property, but relied upon the accountability of the trustees for the value of the trust estate under the different forms into which it might pass. In such a case, the legal title being in the trustees, we think they may proceed to foreclosure, even though the will has not been recorded in this state. No question is before us which involves the will or the title to the estate, except the power of the trustees, and the admission of this by all parties in interest is sufficient to protect a purchaser at the sale. Read v. Knell, 69 Hun, 541, 23 N. Y. Supp. 941. Whether, in any case of sale by trustees under a foreign will, it may be necessary to record a copy of the will in this state we need not now decide. We do not think that such a sale can be made under the power of sale in the mortgage, because the present trustees were not the original appointees, nor are they their "assigns," in the strict sense in which that term should be construed in a power of this kind. Douglas v. Hennessy, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, and 10 Atl. 583. They are the equitable holders of the mortgage under the conveyances which have been made. It did not go to them by operation of law as successors of the original trustees, nor by any direct transfer of interest in the mortgage, but it became their equitable property in the way we have stated. The foreclosure, therefore, should be in accordance with the practice in equity, and this may be by strict foreclosure or by sale under the order of the court.

SULLIVAN et al. v. CHAMBERS et al.

(Supreme Court of Rhode Island. Feb. 8, 1895.)

TRUST DEED—WHEN TITLE VESTS IN BENEFICIARY—COMPULSORY ACKNOWLEDGMENT.

1. Where a deed of land to a trustee requires no duties to be performed by him, the title immediately vests in the cestui que trust under the statute of uses.

2. A grantor of a deed signed, sealed, and delivered may be compelled by arrest and imprisonment to acknowledge it. Pub. St. c. 173, §§ 6, 7.

Bill by Theodore G. Sullivan and others against Andrew Chambers and others. Dismissed.

James Tillinghast, McGuinness & Doran, and Frank S. Arnold, for complainants. Bassett & Mitchell, for respondents.

PER CURIAM. We are of the opinion that the deed from the Mechanics' Savings Bank to Isabella Chambers, Margaret Chambers, trustee, is to be construed as a deed to Margaret Chambers as trustee for Isabella Chambers, and that, there being no duties required of the trustee by the terms of the conveyance, the title to the real estate described in the deed vested, under the statute of uses, on the delivery of the deed in the said Isabella. The subsequent partition deed, dated October 6, 1883, between Bessie C. Bowen, William A. Tucker, and Holder B. Bowen, trustees, and the said Isabella Chambers, Margaret Chambers, trustee, was duly executed by Isabella, though from the form in which the certificate of acknowledgment is written it is impossible to determine whether it was acknowledged by her or by Margaret Chambers, trustee, who also executed the deed. This being the condition of the title as disclosed by the record, all

Digitized by Google

that is necessary to cure the defect is the acknowledgment or reacknowledgment of the partition deed by said Isabella. This can be obtained by the complainants, if she refuses to make it voluntarily, under the provisions of Pub. St. R. I. c. 173, §§ 6, 7.[1] We see no occasion, therefore, for the relief prayed by the bill.

COX v. TRUITT.

(Supreme Court of New Jersey. Feb. 25, 1895.)

CONSTITUTIONAL LAW—TAXATION OF OFFICIAL MORTGAGES.

The act of 1893 (P. L. p. 280) which provides for the assessment of taxes on official mortgages to the person having the beneficial interest therein is unconstitutional because of its special character, in that it fails to extend its provisions to all mortgages of like nature made to officers of the several courts of this state.

(Syllabus by the Court.)

Certiorari by Harris Cox against John F. Truitt, collector, to review action of defendant in assessing a tax upon the principal sum of a mortgage. Assessment set aside.

Argued before REED and GARRISON, JJ.

S. M. Dickinson, for plaintiff. R. S. Clymer, for defendant.

GARRISON, J. This writ brings up the assessment of a tax on the principal sum of a mortgage given in partition proceedings under an order of the court of chancery. The prosecutor is the beneficiary for life of half of the income under the will of his father. The assessment of this tax to the prosecutor is resisted by him upon several grounds, of which one only need be noticed, viz. that the statute under which the assessment is made is special, and hence unconstitutional. The act in question is a supplement to the "act concerning taxes" (P. L. 1893, p. 280). The evident purpose of this enactment is to permit the collection of the taxes imposed on these official mortgages from the beneficiaries thereof. Its fatal defect is that it proceeds upon an imperfect classification. An act of like import was before this court in the case of Shotwell v. Dalrymple, 49 N. J. Law, 530, 10 Atl. 386, and was held to be unconstitutional, in that it did not include in its operation all official mortgages having substantially like characteristics. The act now before us is open to the same criticism, in that it fails to extend its provisions to mortgages made under the order of the prerogative court. Revision, tit. "Partition," § 10.

The assessment to the prosecutor is invalid, and must be set aside.

HELLER v. BROWN.

(Supreme Court of New Jersey. Feb. 25, 1895.)

DESERTION OF WIFE—COMPLAINT.

The complaint of the overseer of the poor, under section 5 of the act concerning disorderly persons, must aver that the township may become chargeable.

(Syllabus by the Court.)

Certiorari by John Heller to have an order issued by a justice of the peace in an action brought against him by one Brown, overseer of the poor, set aside. Order set aside.

Argued November term, 1894, before REED and GARRISON, JJ.

J. E. Bantle, for prosecutor. Gilbert & Atkinson, for defendant.

GARRISON, J. The complaint of the overseer failed to set forth that, by reason of the alleged desertion, the family of the defendant might become chargeable to the township. Such an allegation is essential to the jurisdiction of the justice. Gedney v. Dey, 44 N. J. Law, 576.

Objection to jurisdiction upon this ground was made at the opening of the trial below, and, before going into the merits, it is therefore up now as a reason for setting aside the justice's order. The proceedings are reversed.

THOMPSON v. BOARD OF EDUCATION OF BOROUGH OF ELMER.

(Supreme Court of New Jersey. Feb. 25, 1895.)

MANDAMUS—RESTORATION OF DISMISSED TEACHER—JURISDICTION OF STATE SUPERINTENDENT OF SCHOOLS.

1. A school teacher, who has litigated successfully before the state superintendent the controverted questions upon which her right to compensation depends, is entitled to a writ of mandamus to enforce a decision in her favor.

2. In such case the only burden upon the relator is to show that the jurisdiction of the state superintendent extended to the matter in dispute and over the parties in controversy.

3. The state superintendent having been given authority to hear and determine certain matters, his determination thereupon has the conclusive quality of a judgment pronounced in a legally created court of limited jurisdiction acting within the bounds of its authority.

4. There is no distinction in point of conclusiveness between the decisions of special tribunals and the judgments of courts of record; the difference is solely in the presumption of jurisdiction.

(Syllabus by the Court.)

Application upon the relation of Sallie H. Thompson against the board of education of

[1] Pub. St. c. 173, § 6, provides that, if a grantor of land refuses to acknowledge his deed signed, sealed, and delivered, any judge within the town where the grantor dwells may, on complaint, issue a warrant, and commit him to jail, without bail, until he does acknowledge it. Section 7 provides for an appeal to the supreme court.

Digitized by Google

the borough of Elmer for a writ of mandamus. Writ allowed.

The relator was dismissed from her position of teacher and principal by the district school trustees. She appealed to the county superintendent, who refused to decide the question in dispute. The relator then took a further appeal to the state superintendent, before whom the parties appeared and were heard. The decision of the state superintendent was that relator's dismissal was without just cause. She thereupon applied for a writ of mandamus.

Argued November term, 1894, before REED and GARRISON, JJ.

Morris H. Stratton, for relator. Martin P. Grey, for respondent.

GARRISON, J. (after stating the facts). Apgar v. School Trustees, 34 N. J. Law, 308, is authority for the proposition that mandamus is the proper remedy by which a teacher to whom compensation is due under our school law may obtain payment thereof out of the fund provided for that purpose.

The remedy by mandamus differs essentially from all original suits for the recovery of money. In debt or assumpsit the burden is on the plaintiff to prove every material fact and establish all conditions precedent, but a relator who has submitted her claim to a tribunal lawfully authorized to pass upon it may, upon mere proof of jurisdiction, rest her case upon the rights therein successfully litigated. In respect to one class of disputes, viz. those arising under the school law, the legislature has created a series of tribunals, and has provided for them a system of appellate jurisdiction. To these tribunals the relator, being within the class of public officials for whom they were erected, had recourse. The original controversy was whether the removal of the relator as a teacher and principal of a graded school was without good cause. Jurisdiction to decide this precise question is vested in the county superintendent by section 46 of the school law (Revision, p. 1078); and by section 28 (Revision, p. 1075) a right of appeal to the state superintendent is given in all controversies arising under the school law. Buren v. Albertson, 54 N. J. Law, 72, 22 Atl. 1083. The decision of the county superintendent not being favorable to the relator's contention, she appealed to the state superintendent, who assumed jurisdiction, and decided that her discharge was without just cause. The powers of this official when sitting as a court are so ample, and the effect given to his decisions by express legislative enactment is so conclusive, that a mere reading of the statute must dispose of most of the questions discussed before us. "He shall decide subject to appeal to the state board of education all controversies and disputes that may arise under the school laws of the state or under the rules and regulations prescribed by the state board of education * * * and his decision shall be binding until a different decision shall be given by the state board of education." Revision, § 13, p. 1072.

In the case in hand the controversy submitted to the state superintendent covered three points, viz. the contract of the relator with the local trustees, her conduct under this contract, and the effect of her certificate. This latter point is proven to have been submitted, and was peculiarly within the cognizance of the expert tribunal, for the reason that certain changes had been made in the grade of the school pending the relator's incumbency, and she had been elected principal, and permitted to serve under conditions that may have brought her case within the rules of the state board of education respecting provisional certificates. However that may be, the existence of these rules is one of the things of which the state superintendent would take official notice, and the correctness of his exposition and application of them was a legitimate subject of appeal to the state board of education if the local trustees were dissatisfied with it. For present purposes it is entirely unimportant whether the decision of the state superintendent was warranted by the facts before him or whether it was grossly erroneous, inasmuch as he had indubitable jurisdiction over the parties and the subject-matter. There is no distinction in point of conclusiveness between the decisions of a special tribunal such as this and the judgments of a court of record. The sole difference is in the presumption of jurisdiction that inheres in general courts alone. If the right of the special tribunal to pass on the matter in controversy between the parties be established, its determinations are conclusive upon the parties until reversed by some appellate court. As a general rule, whenever any person is given authority to hear and determine any question, such determination is, in effect, a judgment having all the properties of a judgment pronounced in a legally created court of limited jurisdiction acting within the bounds of its authority. In the present case the legislature, for the government of a particular branch of the public service, has given authority to a special tribunal to hear and decide all controversies arising thereunder. The express provision that the decisions of these tribunals shall, until reversed on direct appeal, be binding on the parties, is nothing more than a declaration of the legal effect of such decisions where jurisdiction to pronounce them is established.

I fail to see how the defendants can raise here any of the questions passed upon by the decision from which they have not seen fit to appeal; nor can they be permitted to turn this rule to show cause into an action of assumpsit for the purpose of putting upon the relator the burden of proving her case. The relator followed the course provided by the school law until she obtained a judgment

Digitized by Google

in her favor, which she is now seeking to enforce by the appropriate suit. She is entitled to a mandamus upon showing that the authority of the special tribunal extended to the matter in dispute and over the parties in controversy. This she has done. Let the writ issue.

LESLIE et al. v. LESLIE et ux.

(Court of Chancery of New Jersey. Feb. 18, 1895.)

RESULTING TRUST — CONVEYANCE TO WIFE—DECLARATION OF TRUST.

1. If a husband purchases land with his own money, and voluntarily procures the title to be conveyed to his wife, the presumption is that he intended it as a gift to her, and no trust for him will result.

2. A writing intended to operate as a will, but which fails as such by reason of imperfect execution, cannot operate as a declaration of trust, unless it contains, on its face, a clear and distinct declaration that the title to the land has been, as a matter of fact, from the beginning, held in trust by the would-be testator for the benefit of the devisee named.

(Syllabus by the Court.)

Bill by John F. Leslie and others against Hugh Leslie and wife to have a purchase by defendants of property sold at sheriff's sale declared not binding on the complainants, and have the title acquired by defendants under the sale declared to be a mortgage of complainants' title therein. Decree for complainants.

Gilbert Collins, for complainants. Flavel McGee and John F. Garrick, for defendants.

PITNEY, V. C. The complainants are the surviving children of Ann Teresa Leslie, late of the county of Hudson, deceased, and the defendants are Hugh Leslie, the father of the complainants, and once husband of Ann Teresa, and his present wife. The subject of the controversy is a parcel of land in Jersey City, near the station of the Pennsylvania Railway, 50 feet front on the street by 100 feet rear, comprised, in fact, of two 25 by 100 feet city lots. These lots were conveyed to Ann Teresa Leslie on the 1st of May, 1875, by the Kingsland heirs, of New York City, in consideration of $6,900; and as part consideration the defendant Hugh and his then wife, Ann Teresa, gave back two separate mortgages, each on one of the two lots comprising the whole plot, for $2,415 each, to two different persons interested in the Kingsland estate. Those mortgages were afterwards, on the 5th and 6th of April, 1889, assigned to the executors of Jacob R. Wortendyke, deceased, and on the 27th of April and the 3d of May, respectively, separate bills for foreclosure founded upon them were filed against the defendant Leslie and wife and all the complainants, and such proceedings were had thereunder that the property was afterwards sold at sheriff's sale for the amount of the several decrees, and purchased,—one of the lots directly by the defendant Hugh Leslie, and the other indirectly through a friend. The object of the bill is to have those sales declared not binding on the complainants, and to declare the title of Hugh Leslie thereunder to be no more than that of a mortgagee of the complainants' title therein, and to confine him to his estate in the premises as tenant by the curtesy of England. Ann Teresa Leslie died in August, 1882, leaving seven children, viz. John F., William J., Jerome H. (since deceased), Mary A. (since deceased), Thomas F., Parthenia, and Annie. Jerome died without heirs. Mary married, and died, leaving a husband and child surviving her, and the child afterwards died. So that, but for the sheriff's sales complained of, the title to the premises would be vested in the five complainants, subject to their father's right as tenant by the curtesy of England, and subject to the right of the surviving husband of Mary A. Leslie as tenant for life in the one-seventh share of Mary.

As to one of the sales by the sheriff it appeared at the hearing that it had not been completed, and that the premises had been ordered to be resold, so that the complainants may protect themselves therein without the aid of this court; but the circumstances attending the foreclosure and sale of that lot throw light upon the case of the foreclosure and sale of the other lot, and will be referred to as I proceed. Upon one of the mortgages $415 of principal appears to have been paid by Hugh Leslie, and the interest on both was paid by him up to the 1st of November, 1888. They were both held by some one or other of the trustees of the Kingsland estate in New York City. At that time there was a considerable sum of taxes and assessments in arrear upon the premises, and pressure was made for their payment. Some time about the 1st of January, 1889, or shortly thereafter, Hugh Leslie made an effort to raise a loan of $6,500 on the premises for the purpose of paying and discharging the two mortgages, then amounting to less than $4,500, principal and interest, and also of paying the arrears of assessments and taxes; and for that purpose, through a Mr. John Halyard, a loan and real estate broker in Jersey City, since deceased, applied to the executors of Jacob R. Wortendyke. The executors had the money to loan, were well satisfied with the security, and agreed to advance the money. But it had been represented to them that the title of the property was in Mr. Leslie, the defendant. On investigation they found that the title had been in his deceased wife, and at present was in his seven children by his first wife, four of whom were infants. To meet this difficulty Mr. Leslie produced a paper in the nature of a testamentary disposition made by his first wife, giving all her property to him; but it was not executed with the formalities necessary to give it testamentary force, and young Mr. Wortendyke, the solicitor and counsel of the executors,

Digitized by Google

so informed Mr. Leslie. He also, in the course of his examination, discovered the existence of the two mortgages,—in fact, probably was told of them by Mr. Leslie, who seems to have been an intelligent man,—and, having the money lying idle, and, as I infer from a close examination of his evidence and that of Mr. Leslie, having in mind that Mr. Leslie would be very glad to have those mortgages foreclosed, and the title cleared, and his title perfected, as against the children of his first wife, by a sale under them, applied to the present holders of the mortgages, and took assignments of them, one on the 5th and the other on the 6th of April. He applied for information either to Mr. Leslie, or, as I think more likely, to Mr. Halyard, and obtained the names and ages of Mr. Leslie's children, and their residences. He also procured from Mr. Leslie written authority from himself and two of his three adult children to his (Leslie's) stated counsel, Messrs. Bedle, Muirheid & McGee, to enter an appearance for him in a suit for foreclosure of those mortgages. He first prepared his bill on the mortgage upon which only $2,000 was due, and filed it on the 27th of April. Upon the mortgage on which $2,415 was due he filed his bill on the 3d of May. He issued subpoenas in both cases on one day, but before handing them to the sheriff he took the authority to appear, which had been signed by two of the children and by Hugh Leslie, to Bedle, Muirheid & McGee, and they acknowledged upon its back service for those parties, viz. Hugh Leslie, John F. Leslie and his wife, and Jerome H. Leslie. That acknowledgment of service by Bedle, Muirheid & McGee is dated the 7th day of May, and on the 10th of May the sheriff served, as he certifies, the subpoenas personally on William J. Leslie and his wife, and on Mary, Thomas, Parthenia, and Annie, the four infants. The deputy who served the process was not produced. William and his wife both swear that no subpoena was served upon either of them. There is some evidence tending to show that Hugh Leslie induced the deputy sheriff to leave William's subpoena at his (Hugh's) house. The service on the infants, according to their account of it, was made in the presence of their father; and, while the subpoenas were handed to them, they were in each case, except that of Mary, the eldest of the infants, at once taken from them by their father, and kept by him, and were, in fact, produced by him at the hearing. Mr. Wortendyke, the solicitor, swears that he himself personally served the notices of appointment of a guardian upon the infant children at their father's house, in the father's absence. The surviving children deny ever having received any such notices. All of these notices, as well as the copies of all the subpoenas served upon the infants, except that of Mary, were found in the father's possession, and produced at the hearing. I am satisfied that the children intended to swear to the truth, and that they do, substantially, swear to the truth, but that there is some confusion in their minds between the call which they received from the deputy sheriff and that which they received from Mr. Wortendyke, the solicitor. But the fact remains that their father told them it was a matter of no consequence, that they need pay no attention to the papers so served, and that he took charge of all of them. The clear effect of Mr. Wortendyke's evidence is to establish the fact that the foreclosure was collusive, and done to assist the father in getting title. The father denies this. But there is a circumstance in the case which seems to me to be conclusive against him on this point. One of the mortgages was given to Ambrose C. Kingsland, trustee, his successors and assigns, without the use of the word "heirs." Mr. Wortendyke, in preparing the foreclosure bill, discovered this, and alleged in the bill that it was a mistake, and that the intention was to give a mortgage in fee, and prayed that the mortgage might be reformed in that respect. Hugh Leslie, on the trial of this cause, swore that he was aware of that defect, and always meant to set it up as a defense, but, through negotiations for time, etc., it was omitted, and decree went against him by default. In point of fact, an examination of the master's report in the foreclosure suit shows that he was sworn as a witness for the complainant to prove the allegation of the bill in that behalf, and did prove that the intention was to give a mortgage in fee.

Decrees were made in both cases in June, 1890, but execution was delivered to the sheriff in only one. In that case the property was brought to a sale on the 28th of August, and was sold to a Mr. Steele for $1,500. The deed was made to Steele, and Steele afterwards conveyed it to the defendant Hugh. It was proved and admitted that, before the sale took place, Steele, at the request of Hugh Leslie, and as a favor to him, advanced the money temporarily to the Wortendyke executors, and they assigned the decree to him, and after that he managed the sale. Afterwards Hugh Leslie repaid him his money, and he conveyed the lot to Leslie. Leslie afterwards mortgaged it to a third party for $2,000. He also paid up all the arrears of taxes and assessments, and the interest and costs on the other decree. Finally, in the fall of 1893, falling in arrears on his payment of interest on the remaining decree, the complainants issued an alias execution, and upon that, on December 21, 1893, the premises were struck off to Hugh Leslie for $2,727, which was the amount due, with interest and sheriff's execution fees, and he paid $300 on account of his bid. This sale was confirmed on the 2d of January, 1894. He failed to pay the balance, and the matter rested, waiting his action in that behalf, until after this bill was filed, and then the complainants in that foreclosure applied for and obtained an order setting aside the decree of confirmation of the sale of December, 1893, and the premises are now subject

Digitized by Google

to sale. I am entirely satisfied that neither of these foreclosures or sales need have taken place if Hugh Leslie had paid the interest on the mortgages, and kept the taxes and assessments down; and that the real object of both was to perfect the title of the premises in himself as against his children. Hugh Leslie was in possession of these premises, which were used for a boiler factory, and always have been, since they were purchased. There is no pretense that the rental value was not sufficient to keep down the interest and taxes and assessments. There has been no surrender by him to the complainants, the children of his first wife; no call upon them to take the premises, and protect themselves against the interest on these mortgages and the taxes and assessments. As long as he was in possession of the premises, and until some such action was taken on his behalf, it was his duty to keep down the taxes and interest; and, if they had been kept down, the mortgages were so desirable an investment as that he would have had no difficulty in being protected against the effect and expense of a foreclosure. The real defense of Hugh Leslie, and the only one seriously insisted upon, was that these premises, so far as they were paid for, were paid for by his own money; that he, with his own money, paid the difference between the amount of the mortgages and the original purchase money; besides which, before the purchase from the heirs of Kingsland, he had invested $2,000 or $3,000 in a building on them. He claims that under these circumstances the testamentary disposition of his first wife, although insufficient as such, still should be held to amount to a declaration of trust. This position is untenable. It is well settled that if a husband purchases lands with his own money, and voluntarily procures the title to be conveyed to his wife, the presumption is that he intended it as a gift to her and no trust for him will result. Read v. Huff, 40 N. J. Eq. 229; Whitley v. Ogle, 47 N. J. Eq. 67, 20 Atl. 284. It is equally well settled that a writing intended to operate as a will, but which fails as such by reason of imperfect execution, cannot operate as a declaration of trust. To hold otherwise would be to repeal the statute of wills. Boyes v. Carritt (1884) 26 Ch. Div. 531; Lewin, Trusts (Flint's Ed.) 58; Perry, Trusts, §§ 91–94. If the testamentary writing contains, on its face, a clear and distinct declaration that the title has been in fact all the time held in trust by the wife for the husband, then, as pointed out by Mr. Perry (section 91), it might be construed as a declaration of trust. The writing produced in this case does not contain such a declaration. It does not mention any particular property, but states, in effect, that any and all property, real and personal, standing in the wife's name, was given to her by her husband, and was paid for by him with his money, and closes with this language: "In case I should die, I want my husband to be sole owner of every article that I ever was and am now owner." This is an assertion of a gift, and cannot be construed as a declaration of trust. The case cannot be brought within the authorities cited by counsel for defendant. In Gogherty v. Bennett, 37 N. J. Eq. 87, the conveyance was made to the wife without the knowledge or consent of the husband. Irick v. Clement, 49 N. J. Eq. 590, 27 Atl. 434, is only partially reported. There was no proof in the case which would warrant the inference that the wife, whose money in part paid for the property, was at all responsible for the vesting of the title in her husband's name, or that she ever intended to give it to him. The children, whose money made up the balance of the purchase money, were infants at the time of the transaction. The defendant's case, therefore, fails, and his title must be declared to be that of a mortgagee to secure whatever of principal money he may have paid on account of the two purchase-money mortgages, and also, as I now think, for any assessments for benefits to the property which he may have paid, but not for any interest thereon which may have accumulated before payment. If the amount due upon the mortgage upon which sale has not been had exceeds the original principal money, such excess must be charged against payments on account of principal upon the other mortgage. To prevent misapprehension, I think it worth while to remark that the testamentary paper was proven wholly by the evidence of Hugh Leslie. No objection to this evidence was made on the ground that complainants were suing in a representative capacity.

DWYER v. BONITZ.

(Court of Chancery of New Jersey. Feb. 18, 1895.)

CONTRACT OF EMPLOYMENT—SHARING OF PROFITS—DATE OF COMPUTATION.

Under a contract made May 15, 1891, plaintiff was to receive from defendant a salary as manager of defendant's manufactory, and also one-half the net profits, to be ascertained "at the end of each and every year during the employment." June 30, 1893, there was a balance to the profit account, one-half of which was credited to complainant, and he drew against it to some extent. Thereafter all profits were wiped out by losses. Plaintiff claimed that the profits were to be computed July 1st in each year, and introduced a letter from defendant, written after July 1, 1893, requesting him not to draw any money, on account of the financial panic. Defendant claimed that the profits were to be computed as of January 1st. *Held*, that the computation of profits as of June 30, 1893, was binding on defendant.

Bill by David Dwyer against Hermann Bonitz. Decree for complainant.

Eugene Stevenson, for complainant. Gilbert Collins, for defendant.

Digitized by Google

PITNEY, V. C. This is an action by an employé against his employer to recover compensation for services rendered under a written agreement. The reason for bringing it in this court is that a portion of the compensation—that which remains unpaid—depends upon the amount of profits for a stated term of the business in the conduct of which the services were rendered. The agreement was entered into between the parties on the 15th day of May, 1891, and provided that the complainant should enter into the employment of the defendant "for the period of three years from this date as general manager, to take charge of, carry on, and attend to" the business in question; and, after an agreement on the part of the complainant to perform certain services mentioned, about which there is no dispute, the defendant agreed to pay him a stated compensation of $120 a month, which has been paid. Then is found this clause: "And the said Hermann Bonitz also further agrees that, in case there should be any balance of profits from said business after paying all expenses thereof and six per cent. per annum on the capital invested therein by him, and the reservation of five per cent. to cover the depreciation in the value of the real estate and wear and tear of machinery, buildings, engine, boiler, light and heating plant, gearings, beltings, and fixtures, that then, in such case, one-half of said balance or profits so remaining shall be paid to the said David Dwyer as additional compensation and salary, for his said services, the same to be ascertained from the books, and paid at the end of each and every year during said employment." At the time of entering into the agreement the defendant was not engaged in the business proposed to be carried on, which was, in fact, a manufacturing business. He was himself a manufacturer of machinery fitted for use in such a business, and the complainant was skilled in the business itself. He immediately, as the employé of the defendant, attended to the purchase of land and a building, and the construction and placing therein of the proper machinery and plant for carrying on the manufacturing business, and devoted himself thereto, to the satisfaction of the defendant, without interruption, from about the date of the agreement to the latter part of December in the same year, when the plant was substantially finished, and ready for work, and work was actually commenced therein. During all that time the complainant received his stated salary of $120 a month, and substantially, on the 1st of January, 1892, the actual business of manufacturing was commenced and carried on during the year 1892, during which, as is alleged by defendant, no profits were made. The books were kept by the defendant, and show on the 1st of January, 1893, a balance to the credit of "Profit and Loss" of $151.13. Then on the 30th of June, 1893, are these entries in the profit and loss account, made by defendant: "By small accts., $33.24; by merchandise profits, $3,846.77." These merchandise profits were arrived at by an inventory taken by the parties, about the fairness and accuracy of which there is no dispute. On the debit side of the profit and loss account are several charges of losses, amounting to $1,190.40; and then are found these two charges: "To David Dwyer, profit, $1,515; to Herm. Bonitz, profit, $1,515;" after deducting which there still stood $189.26 of profit, which was carried forward to a new balance for the second half of the year 1893. On the same day defendant credited Mr. Dwyer, on Dwyer's private account, with "profit, $1,515." He had previously, on the 23d of June, advanced him on account of anticipated profits, and charged to his account, the sum of $200, and that left a balance of $1,315 to his credit. He subsequently, on August 5th, paid him $100, on September 22d, $65, and on November 18th, $100; making $465, —all charged to Dwyer against the credit to him of $1,515 of profits. These payments were all in addition to his regular salary. The occasion of their being made was that Mr. Dwyer was either contemplating or actually engaged in, the building of a dwelling house for his use. It is for the recovery of the balance due upon this balance to the credit of profit and loss on June 30, 1893, that the complainant brings this suit. The answer made by defendant is that the time fixed by the written agreement in the clause thereof above recited for the ascertainment and payment of the one-half of the net profits was the end of each and every calendar year, and that the profits ascertained on the 1st of July were subject to be reduced by any losses that might occur between that and the 1st of the next January; and that, in fact, such losses did occur, showing more than enough to wipe out all the profits in the first six months of the year, and the question is whether this contention on the part of the defendant can be sustained. The argument on the part of the complainant is that his employment commenced on the 15th of May, 1891, and that, strictly speaking, he was entitled to an ascertainment of the profits at the end of one year from that date, and thereafter yearly; that such is the result of the language used in the clause before referred to, viz. "at the end of each and every year during said employment." And he says and swears, though it is denied by the defendant, that the time for ascertaining the profits was, by consent, changed from the 15th of May to the 1st of July; and in support of his contention the complainant relies upon the fact that the defendant did, of his own motion, credit the complainant with the sum of $1,515 profits on the 30th of June, 1893, which was a practical interpretation of the contract in accordance with complainant's view, and that the giving complainant credit at that time can only be accounted for on the ground that the defendant felt that it was due to him under the terms of the contract. In further

Digitized by Google

support of his contention, complainant produces the following letter from the defendant to him, dated July 24, 1893, which it will be perceived antedated some of the payments made to him on account of profits above referred to: "Passaic, N. J., July 24, 1893. Mr. David Dwyer, Lodi—Dear Sir: In answer to your call for 500 dollars as part of the profit of the business based on the inventory of July 1/93, I deem it necessary to explain matters to you, so as to beware you of troubel & embarrassments, which you would undoubtedly have to meet, if you enter into a contract at this time either for the purchase of a property or building of a house. If the time had been running along as they did the first 4 months of this year, there would not been the least objection to your drawing at sight your share of the profits as invoiced July 1/93, but since that time the state of business turned from bad to worse, and the values of our merchandise have declined considerable, so much in fact that a new inventory taken today would not only show from 15–20 per cent. less values, but wipe out the largest part, if not all, of the profits shown July 1/93. It is impossible at present for anybody to tell how long this state of affairs will continue, and when values of Mdse. will have reached bottom. Until a change for the better is in sight, it would not be wise to enter into obligations that you cannot meet with funds on hand. I have during month of August to meet a bank loan of 3,000 dollars, and indications are now that I canot figure on a renewal, but may have to take it up. It will require every cent I can gather up to that time to pay for that, besides meeting running bills & expenses; while the small sales in June & July are pointing to very small collections. For two years I have not drawn one dollar capital out of the business, but, besides leaving all intress stand, have added over 8,000 dollars by outside earnings & sales of bonds, so as to allow the business to run financially independent. We do not meet a panic like the present one very often, but when it does come all of us ought to be ready to carry our share of it, and learn to get along the best we can. I am sorry if I have to advise you to postpone your present plans for a few months till we see daylight again. As soon as the business shows any marked improvement from present stagnation, I will gladly offer you to draw on your credit as it appeared July 1/93. Yours, truly, Hermann Bonitz." Complainant contends that the clear result of this letter, taken as a whole, is an admission by defendant that the profits ascertained and credited to him on the 1st of July were his legal dues under the agreement. One other circumstance is shown by the books which makes in favor of the defendant, viz. that, as far as appears, nothing was charged on the 30th of June for "five per cent. to cover the depreciation in the value of the real estate and wear and tear of machinery, buildings, engine, boiler, light and heating plant, gearings, belting and fixtures." At the end of the year 1893, $1,532.52 were charged to profit and loss on this account. If the yearly rest to ascertain profits was to be taken on the 1st of July, then that was the proper time to charge 5 per cent. for depreciation.

One other matter requires notice. The complainant attacks the accuracy of the accounts under which the item of profits under merchandise, $3,846.77, was arrived at, on the ground that the defendant, in addition to the ordinary expenses of the business, charged for his own services, keeping books, etc., $67.50 a month. Complainant contends that under the language of the clause of the agreement before cited he is not entitled to any credit for his own services. The principal question submitted is not without its difficulties. But upon the whole case I come to the conclusion that the safer course is to hold the defendant to the entries on his books and his own interpretation of the contract, and to charge him with the credit of $1,515, and with the one-half of $189.26 carried forward,—$94.63; total $1,609.63; and to credit him with cash payments, $465, and with the one-quarter of $1,532.52 depreciation on the plant, etc., for the current year, which is $383.13, making $848.13; leaving a balance due complainant of $761.50.

BAKER v. GUARANTEE TRUST & SAFE-DEPOSIT CO. et al.

(Court of Chancery of New Jersey. Feb. 11, 1895.)

RAILROAD COMPANIES—MORTGAGE BONDS—POWER TO ISSUE — VALIDITY—RIGHTS OF BONDHOLDERS —INNOCENT PURCHASERS — EVIDENCE—BURDEN OF PROOF.

1. Revision, p. 175 (General Corporation Act) § 1, subsec. 4, authorizes every corporation "to mortgage its real and personal estate and franchises." Act April 2, 1873, known as the "General Railroad Law" (P. L. p. 88; Revision, p. 925) § 20, as amended by Act 1878 (P. L. p. 20; Supp. Revision, p. 824), provides that any company incorporated under such act may borrow such money from time to time, not to exceed in the whole its paid-up capital stock, as shall be necessary to build, repair, and equip its road, and secure the repayment by bonds and mortgages, provided that such bonds shall be a first lien on all its property and franchises, and the proceeds of such bonds shall be used to aid in constructing such railroad; and that, if any persons issue such bonds to any greater amount than the amount that at the time of such issue shall have been actually paid up on the capital stock of such railroad, they shall be guilty of a misdemeanor, etc. *Held*, that the power of a railroad corporation to mortgage its property and franchises is limited strictly to borrowing money on its mortgage bonds, and to the amount of cash paid in on account of subscriptions to its capital stock.

2. But neither such statute nor the policy of the law forbids the giving of a mortgage on a railroad not yet built, or on property not yet acquired by the corporation.

3. Bonds issued by a railroad corporation in excess of the amount of cash paid on its capital stock, or to pay for constructing a road

Digitized by Google

other than that specified in its articles of incorporation, to be used as a branch line, and secured by a mortgage which on its face contains what amounts to a promise by the corporation to observe the law governing the making of such bonds and mortgage, are valid in the hands of innocent holders for value, whether taken as security for a pre-existing debt without any present parting with property or losing any right of action, or otherwise, but are void in the hands of officers or directors of such corporation, or others who have notice of the facts, and of persons who did not pay value therefor.

4. Where a creditor of such corporation receives such bonds after notice of the facts rendering them invalid, but was entitled to the bonds under a contract with the corporation, prior to such notice, the creditor will be protected as an innocent holder.

5. Where an innocent holder of such bonds, as security for a debt of a third person, has other security for the same debt, the corporation or its receiver, on payment of the debt and redemption of the bonds, is entitled to be subrogated to the rights of such holder as to such other security.

6. Where such bonds are held as security, the corporation or its receiver is liable only to the amount of the debt secured.

7. In proceedings to establish such bonds as a claim against a receiver of such corporation, the burden is on the claimant to show that he paid value for them without notice of their illegality.

8. Where associations pay par for such bonds in good faith, they may establish them as claims against the receiver of such corporations, though some of the directors and stockholders in the associations were directors of the railroad corporation when the bonds were issued. De Kay v. Water Co., 38 N. J. Eq. 158, applied.

9. Where a director of such corporation holds some of such bonds, and also others that were legally issued, and paid for by him, and it appears that the invalid bonds were part of an illegal scheme with which such director was connected from its inception, he is not entitled to have such valid bonds allowed as a claim against the receiver of such corporation.

10. Where a contractor is to be paid for building a railroad in the bonds and stock of the corporation as the work progresses, in determining the amount of stock paid for by him in work and materials at a particular time, as affecting the validity of bonds issued at such time, only the labor and materials actually paid for by the contractor can be taken into account, even if stock paid for, but not issued, can be considered; since the corporation is liable for the labor and materials not paid for.

Bill by Philip P. Baker, receiver of the Philadelphia & Seashore Railway Company, against the Guarantee Trust & Safe-Deposit Company and others, to declare void a mortgage on the property of such company. Decree for complainant for part of relief prayed.

Philip P. Baker, appointed receiver of an insolvent railroad corporation whose roadbed and other property was covered by a mortgage, having sold the entire property under order of the court free of the mortgage, now brings this bill against all the creditors, of which there are two classes (those who hold the bonds of the railway company secured by the mortgage, and those whose claims are unsecured except by judgments recovered subject to the mortgage), for the purpose of obtaining and distributing the proceeds of the sale. This becomes, in effect, a bill of interpleader by the receiver, in an action by the judgment creditors against the claimants under the mortgage.

This is, in form, a bill by the receiver of an insolvent railroad corporation, appointed by this court, praying that a certain mortgage which covers the roadbed and other property of the company may be declared to be void. In effect, however, as matters now stand, it is a bill of interpleader. The roadbed, and all the property of the railroad, has been sold by the receiver by order of this court, pending the suit, free and clear of the mortgage, and the proceeds are in his hands to be distributed; and, under the prayer for other relief, he asks the direction of the court in their distribution. All the creditors of the insolvent corporation of every class have been made parties, and the real contest is between them. There are, primarily, two classes of creditors,—those who hold the bonds of the railway company secured by the mortgage directly attacked by the receiver, and those whose claims are unsecured except by judgments recovered subject to the mortgage. The bondholders, however, are disputing among themselves as to which are entitled to participate in the fund; and it may be here observed that, if any of the bonds are held to be entitled to the benefit of the lien of the mortgage, then there are enough of that character to absorb the whole fund, which is less than $200,000. The particular allegations of the bill and answer are not important. The serious matter insisted upon at the hearing was that the bonds were issued in advance and excess of the payments on account of stock subscriptions, in violation of the provisions of the act of February 19, 1878 (Supp. Revision, p. 824). A general outline of the facts, as developed at the hearing, is as follows:

The insolvent company, the Philadelphia & Seashore Railway Company, was formed by articles of association entered into on the 6th day of August, 1889, by 16 gentlemen, and the object of the organization was to build a railway from the village of Winslow, on the line of the Philadelphia & Atlantic City Railway, in the county of Camden and state of New Jersey, to the borough of Sea Isle City, in the county of Cape May and state of New Jersey. The amount of the capital stock was declared to be $900,000, to be divided into 18,000 shares, of $50 each, and the length of the road was stated to be 35 miles, though, in point of fact, it was about 40 miles. All of those 16 gentlemen were declared, by its provisions, to be directors for the first year. They were stated to be 13 in number, but, in point of fact, each of the 16 was named as a director. The articles of association were not filed with the secretary of state until the 18th of November, 1889, on which day the company paid $70,000—$2,000 a mile upon 35 miles of the road—to the state treasurer. The articles of association contained subscriptions to the stock amounting to 1,400

Digitized by Google

shares, or $70,000. Of these, Edward R. Wood, of Philadelphia, subscribed 754 shares; John J. Deery, of Philadelphia, subscribed 500. The remaining 146 shares were subscribed by the others of the 16 gentlemen who signed the articles, in sums varying from 1 to 40 shares. Of the $70,000 paid to the state treasurer on the 18th of November, 1889, $60,706 was furnished by Mr. Edward Wood under an agreement comprised in a resolution of the board of directors adopted on the 3d day of October, 1889, in these words: "Whereas, it is important that the charter of the Philadelphia & Seashore Railway Company should be obtained at once, in order to secure business during the season of 1890, from which a profit of many thousand dollars is looked for, and to save loss of interest and waste on moneys collected, and to secure more prompt and efficient work in construction; and whereas, sufficient moneys have not yet been received from subscribers to the stock of said company under the ten per cent. call to pay the required state deposit; and whereas, Edward R. Wood has agreed to pay upon his subscription to said stock sufficient in excess of the ten per cent. called in to make the necessary amount for deposit, namely, seventy thousand dollars, on condition of being protected against loss and guarantied in the return of the same as soon as other payments upon stock of the company, whether by himself or other parties, amount to the said sum of seventy thousand dollars: Therefore be it resolved, that the said Edward R. Wood shall be, and is hereby, constituted the proper officer of this company to collect the amount of this deposit by installments from the state as the same may become repayable to this company, by reason of the progress of construction on its road, and apply the amounts so received in repayment of his said advance payment. Further resolved, that in case of the abandonment of the construction of the said road so proposed by this company, whether caused by the failure on the part of subscribers to make good their subscriptions or otherwise, the said advance payment of the said Wood shall at once be repaid to him; and after six months from date of deposit, unless he shall be reimbursed his said advance, he shall be the sole judge of whether such abandonment shall be necessary, and in such event the officers of this company are hereby instructed to render him all necessary assistance to collect from the state said deposit. Further resolved, that said Edward R. Wood is hereby empowered to draw upon the treasurer of the company for the two per cent. premium charged by the Trust Company of North America, which he has been required to pay to obtain the said funds."

This resolution, taken in connection with the fact that the total amount of subscriptions contained in the articles of association amounted to just $70,000, indicates that, between the date of the articles of association (August 6th) and the date of this resolution, considerable additional subscriptions to stock had been made. In point of fact, this was true, as the books show that large subscriptions to stock were actually at some time made in addition to those mentioned in the articles of association; and over $10,000 had, before November 18, 1889, been paid in thereon by numerous persons on account of stock subscriptions; but the subscription books or lists, or whatever evidence there may have been of the actual subscriptions of stock outside of the articles of association, were not produced, and appear to have been destroyed or suppressed by the agents or officers of the company, and never to have come to the hands of the receiver. Mr. Wood raised this $60,706 by temporary loans on either his own credit or the credit of the company, or both. He appears to have had very little, if any, free capital of his own to invest in the enterprise. Subsequently, on the 20th of November, 1889, Mr. Wood resigned his position as director and treasurer of the company, and entered into a contract with the company on the 27th day of November, 1889, which may be best understood by setting it out in full:

"Agreement between the Philadelphia & Seashore Railway Company, a corporation under the laws of the state of New Jersey, of the first part, and Edward R. Wood, of Philadelphia, of the second part: Whereas, the party of the first part desires to build a railroad from Winslow Junction, on the Philadelphia & Atlantic City Railroad, to points in Cape May county; and whereas, the party of the second part is familiar with the construction of railroads, and is also the holder of a certain valuable contract or traffic agreement with the Philadelphia & Atlantic City Railroad Company, securing to him and his assigns a connection with that road and business facilities believed valuable to the extent of many thousand dollars of annual income: Now, therefore, this agreement witnesseth:

"First. That said party of second part agrees to construct for party of first part a railroad from Winslow Junction, on the system of the Philadelphia & Reading Railroad, to a point on the seashore, at Ludlam's Beach, as near as may be to Corson's Inlet, and extending thence, through the city of Sea Isle, to the southwestern portion of the island; provided, always, that the said party of the first part, or the landowners along the line of said proposed railroad and the city authorities of Sea Isle, shall grant a suitable and convenient 'right of way' for this purpose; and provided, further, that the party of the first part will in due course and shortly hereafter organize, or render every proper assistance to the process of organizing, a railroad company to build a railroad, which shall serve as an extension or branch, from near Tuckahoe to the city of Cape May, and also that said party of the first part hereby

Digitized by Google

agrees that any contract it may make, influence, or control for building the same shall be given to said party of the second part upon the same general terms and conditions, so far as they may be thereto applicable, as those which govern this contract for building the line to Sea Isle.

"Second. That it is agreed said railroad shall be built with seventy pound steel rails, of best quality; that bolts and fastenings shall be equal to Pennsylvania standard, and ties of standard size and weight; and that the grades of the road to be built shall be equally favorable to traffic as those on Philadelphia & Atlantic City Railroad.

"Third. That it is also agreed that party of second part shall erect attractive and commodious station houses, sufficient, in his opinion, to accommodate the business of each place, and to equip the road with such rolling stock as he shall consider requisite for its business; provided, that on the completion of said road, and of its contemplated extension to Cape May, the total rolling-stock equipment shall not be less than six locomotives, thirty passenger coaches, and thirty freight, gondola, and construction cars.

"Fourth. That the price to be paid to said Wood for construction and equipment of the railroad to Sea Isle City shall be five hundred and fifty thousand dollars ($550,000) in the stock of this company, and a like amount in the first mortgage bonds thereof; and the said Wood also agrees to construct the line from Tuckahoe to Cape May for three hundred and fifty thousand dollars ($350,000) in the stock of this company, and a like amount in its first mortgage bonds, as aforesaid; provided, that the total amount to be issued to the said Wood for all the railway construction and equipment which he herein undertakes shall not exceed nine hundred thousand dollars ($900,000) of the stock, and nine hundred thousand dollars ($900,000) of the bonds, of this company. Provided, further, that no part of said mortgage bonds shall be issued until an amount at least equal thereto shall have been issued of the capital stock in bona fide return for cash, labor, or material expended upon said road. Provided, further, that the said securities shall not be issued more rapidly than at the rate of ten thousand dollars ($10,000) each of stock and bonds per mile in payment of the construction of the said railroad, and the additional amounts due to said party of the second part shall be held in reserve, and shall be paid to him in due proportion as he shall supply the equipment of locomotives, passenger coaches, and freight cars; and provided that the sum of fifty thousand dollars ($50,000) each in stock and bonds out of the said ten thousand dollars ($10,000) per mile shall be held as a reserve by the party of the first part until the completion of the roadbed and line of rails to the termini determined upon; and it is understood that twenty-five thousand dollars ($25,000) shall be that part of the above reserve of the fifty thousand aforesaid which shall be applicable to the construction of the line to Sea Isle, and shall be payable when said line is completed, and the additional twenty-five thousand dollars ($25,000) shall be applicable to the construction of the branch to Cape May, and payable on the completion of that road to Cape May city. Provided, further, that the securities which may be issued to said party of second part under this contract shall not be additional to those due by this company for any subscriptions, whether made to its stock or to its bonds, and the said party of the second part shall at all times protect the said party of the first part in this respect, and shall stand ready to receive cash at par instead of stock or bonds, as the case may be, and by so doing shall permit the treasurer of the company to reserve out of the payments due unto him as much of the stock or as many of the bonds as may be needed to make deliveries to the subscribers to either of these securities.

"Fifth. That it is understood that, until five hundred thousand dollars ($500,000) shall have been realized by subscriptions or from sales of the securities of this company, the said party of second part shall have authority to make necessary purchases and contracts upon the credit of this company, and shall not be obliged to use his own credit.

"Sixth. That this contract shall not be transferable by party of the second part, except by the consent of board of directors of party of first part.

"Seventh. That, unless prevented by adverse litigation, the party of second part agrees to finish the said railroad on or before the 1st day of October, 1890.

"Eighth. That the cost of securing the 'rights of way' shall be borne by the party of second part.

"Witness the signatures of the proper officers of the company, attesting the corporate seal thereof, and of the said E. R. Wood, this 27th day of November, 1889. Charles W. Potts, President. Edward R. Wood. Witness: Chas. Rudderow, Jr. Attest: G. A. Benson, Treas."

On the 6th of December, immediately following the execution of this contract, the company executed the mortgage here in controversy to the defendant, the Guarantee Trust & Safe-Deposit Company, to secure 900 bonds of $1,000 each, with interest at 6 per cent. per annum, payable semiannually, principal payable in the year 1913. This mortgage was executed in pursuance of a resolution of the stockholders on the 25th of November, 1889, in these words: "Resolved, that in pursuance of the authority contained in an act of the legislature of the state of New Jersey, entitled 'An act to amend an act entitled An act to authorize the formation of railroad corporations and regulate the same, approved April second, one thousand eight hundred and seventy-three'; said amendment having been approved February

Digitized by Google

19, 1878,—the board of directors of this company be, and they are hereby, authorized and empowered to make and execute the bonds of this company to the aggregate amount of nine hundred thousand dollars, to bear interest at the rate of six per cent. per annum, and to execute and deliver a mortgage to the Guarantee Trust & Safe-Deposit Company, a corporation of the state of Pennsylvania, as trustee, on all the lands, privileges, franchises, and appurtenances of, and belonging to, this company, which said mortgage shall constitute a first lien on all the railroad and branch lines of this company now in process of construction, and hereafter to be constructed, its cars, real estate, and franchises, acquired and to be acquired, to secure the payment of said bonds; and that said bonds and mortgage shall be in such form as the said board of directors shall deem proper: provided, the said bonds shall not be issued to an amount exceeding the paid-up capital stock of this company, and the proceeds of the sale of said bonds shall be used for the purpose of aiding in the construction of said railroad."

And a corresponding resolution of the directors of the company on the same day, in these words:

"Resolved, that in pursuance of the authority contained in the act of the legislature of the state of New Jersey, entitled 'An act to amend an act entitled An act to authorize the formation of railroad corporations and regulate the same, approved April second, one thousand eight hundred and eighty-three,' said amendment being approved February 19, 1878; and in further pursuance of the authority of a resolution of the stockholders of this company expressed in their resolution adopted at a meeting held on the 25th day of November, A. D. 1889,—this company do make its coupon bonds to the amount of nine hundred thousand dollars, to wit, nine hundred bonds, for one thousand dollars each, to be numbered consecutively from No. one to nine hundred, both inclusive, all to be dated on the —— day of ——, A. D. 1889, and to bear interest at the rate of six per cent. per annum, in lawful money, payable semiannually, on the —— days of —— and ——, in each year, until the principal sum is paid, and that said bonds be made in the form following; provided, however, said bonds shall not be issued or sold to an amount exceeding the paid-up capital stock of this company:

" 'No. ——. $1,000. United States of America. State of New Jersey. First Mortgage Bond. The Philadelphia & Seashore Railway Company. Know all men by these presents, that the Philadelphia & Seashore Railway Company, a corporation created by the laws of the state of New Jersey, is hereby indebted to the bearer hereof in the sum of one thousand dollars, lawful money of the United States of America, which sum the said company promises to pay to the bearer hereof on the —— day of ——, in the year one thousand nine hundred and thirteen, with interest thereon at the rate of six per centum per annum, payable semiannually at the office of the trustees in the city of Philadelphia on the first day of —— and ——, in each year, upon presentation and surrender of coupons hereto annexed, as they severally become due. This bond is one of a series of nine hundred each, of like date, tenor, amount, and effect, numbered, respectively, from one to nine hundred, inclusive, and amounting in the aggregate to nine hundred thousand dollars; and the payment of each and all of which is equally secured by a deed of trust or mortgage bearing date the —— day of ——, eighteen hundred and eighty-nine, duly executed and delivered by the said railway company to the Guarantee Trust & Safe-Deposit Company, trustee, covering the railroad of the said company, and its equipments, appurtenances, property, franchises, and things in the said deed of trust or mortgage mentioned and described. Provided, however, that in case of nonpayment of any half-yearly installment of interest on this or any of said bonds, which shall have become payable and shall have been demanded, and the continuance of such default for the period of ninety days after any such demand, the principal of this bond shall become due in the manner and with the effect provided in the deed of trust or mortgage securing the payment of the same, hereinbefore mentioned. The commission on business paid to this company from the Philadelphia & Reading Railroad system under the traffic agreement signed March 23, 1889, shall be used for the general purposes of the company, and to that extent lightens the interest charge upon the Philadelphia & Seashore Railway Company. This bond shall pass by delivery, or it may be registered by its owner on the books of the company at the transfer agency of said the Philadelphia & Seashore Railway Company, after a registration of ownership certified thereon by the transfer agent of the company. No transfer, except upon the books of the company, shall be valid unless the last transfer shall have been to bearer, and transferability by delivery thereof restored; but this bond shall continue subject to successive registrations and transfers to bearer, as aforesaid, at the option of the holder. This bond shall not become obligatory until it shall have been authenticated by a certificate indorsed hereon and signed by the trustee named above, or its successors, as such trustee. In witness whereof, the said Philadelphia & Seashore Railway Company has caused its corporate seal to be hereunto affixed, and the same to be attested by the signatures of its president and secretary, and has also caused the coupon hereto annexed to be signed by the treasurer this —— day of ——, in the year one thousand eight hundred and eighty-nine.'

"Resolved, that in pursuance of the author-

Digitized by Google

ity aforesaid, and to secure the payment of said bonds to be made and issued as provided in the above resolutions, this company do make, execute, and deliver to the Guarantee Trust & Safe-Deposit Company, a corporation of the state of Pennsylvania, as mortgagee in trust, a mortgage upon all the railroad and branch lines of this company now in process of construction or hereafter to be constructed, its cars, real estate, and franchises, acquired and to be acquired, to be more fully described in said mortgage, with the hereditaments and appurtenances thereto belonging or appertaining."

The mortgage recites these resolutions, and gives the form of the bonds, and conveys "all the right, title, and interest of the said party of the first part in and to all the railroad and property now owned or hereafter to be acquired by the party of the first part, that is to say, all of its railroad now made or in operation, and constructed and yet to be constructed, including its main line and branch line or lines, and including the right of way, roadbed, superstructure, iron, ties, splices, chains, bolts, nuts, and spikes, all lands and depot grounds, station houses and depots, fences, viaducts, bridges, timber, materials, and property purchased or to be purchased for the construction, equipment, or operation of said road, all machine shops, tools, implements, and personal property used thereon or upon or along the line of said railroad, or at its stations, all engines, tenders, cars, and machinery, all kinds of rolling stock, whether now owned or hereafter purchased by said party of the first part, and all other property of said company, and all its rights and privileges therein or appertaining thereto, and all the revenues, tolls, and income of said railroad and property, and all the franchises and rights of the said party of the first part, and all property and rights acquired by virtue and under authority thereof, now owned or hereafter to be acquired; and together, also, with all and singular the estate, rights, liberties, privileges, hereditaments, and appurtenances whatsoever unto the hereby granted and mentioned premises, estate, property, rights, privileges, and franchises belonging or appertaining, or to belong or appertain, and the reversions and remainders, tolls, incomes, earnings, rents, issues, and profits thereof, accruing or to accrue from the same or any part thereof; to have and to hold the above-described and hereby granted property, rights, franchises, and appurtenances unto the said party of the second part, their successors and assigns, forever, for the only proper use, benefit, and behoof of said party of the second part, their successors and assigns." It also contained a covenant on the part of the mortgagor for future conveyance of subsequently acquired property and for general further assurance.

On the 8th of August, 1889, the 16 gentlemen who organized the Seashore Company, together with John J. O'Neil,—17 in all,—signed articles of association for the incorporation of the Tuckahoe & Cape May Railroad Company, the object of which was to build a railway from Tuckahoe, on the line of the Philadelphia & Seashore Railway, to Cape May, a distance of 25 miles, and the amount of the capital stock was $400,000. The directors named were 12 of the gentlemen named as directors of the Sea Isle City Company, with the addition of Mr. John J. O'Neil. These articles were filed with the secretary of state, and the deposit of $50,000 made with the state treasurer on February 4, 1890. If both these roads had been completed, the result would have been a complete connection by rail from Camden, via Winslow Junction, to Cape May city, as well as to Sea Isle City, which is some seven or eight miles south of Tuckahoe.

On the 16th of December, 1889, Mr. E. R. Wood executed a contract with one E. A. Tennis for the construction of the Tuckahoe branch, as follows: "Articles of agreement made and concluded this 16th day of December, 1889, by and between E. A. Tennis, party of the first part, and the Philadelphia & Seashore Railway Company, by their contractor in chief, party of the second part, witnesseth, that for and in consideration of the payments and covenants hereinafter mentioned, to be performed by the said party of the second part, the said party of the first part doth hereby covenant and agree to construct and finish, in a thorough, workmanlike, and substantial manner, and to the acceptance of the engineer of said party of the second part, all the grading, masonry, and all other work to which prices are affixed, on sections numbered four and five of the said work, to be finished in all respects as described in the following specifications. * * * Sections four and five extend from main line, at Tuckahoe, to Cape May city. * * * The said Philadelphia & Seashore Railway Company reserves the right to make alterations, at any time during the progress of the work, in the alignment or grades; to change the limits of sections; to vary the dimensions and change the location of structures; or to substitute one kind of work for another. * * * In witness whereof the said parties hereto have hereunto set their hands and seals, the party of the first part by his own hand and seal, and the party of the second part by the signature of their authorized agent and contractor in chief, the day and year first above mentioned. E. A. Tennis. Phila. & Seashore Ry. Co., per E. R. Wood. In presence of G. L. Williams."

This contract was not expressly authorized by any recorded action of the directors of the Seashore road, and the evidence fails to show affirmatively that they knew of it at the time of its execution, but they did know of it subsequently. Mr. Wood commenced work by subcontractors on the main line in December, 1889, and Tennis commenced on the Cape May branch shortly after. The work

Digitized by Google

on the main line was pushed with considerable vigor. From the start, Wood had complete control of all the bonds actually handed out by the trust company up to some time in the fall of 1890, when a rupture between him and the directors occurred, and they assumed and acquired control of the unused bonds. The deliveries by the trust company to the railway company, as shown by the trust company's books, were as follows: December 27, 1889, Nos. 1–100; February 6, 1890, Nos. 101–150; April 8, 1890, Nos. 151–200; April 28, 1890, Nos. 201–250; May 17, 1890, Nos. 251–300; June 18, 1890, Nos. 301–330; July 2, 1890, Nos. 331–430; and August 21, 1890, Nos. 431–500. Nos. 466–500, inclusive, were recalled and returned to the trust company on the 3d of September, 1890. This was shortly after the rupture between Mr. Wood and the directors of the company. On the 14th of May, 1891, the trust company delivered 297 bonds (Nos. 466–762) to the directors. These issues, excepting those last named, were used by Wood, sometimes by actual sales, at first at or near par; sometimes by pledging as collateral to loans made on the notes of the railway company; sometimes for construction materials to be furnished to the company; and sometimes as collateral to his own notes. The company's books do not show all of these transactions, and the date when each bond was actually handed out to an actual holder, other than Wood, must be determined, so far as it can be determined, in part by the books, and in part by other evidence. Counting the $60,706 paid in by Wood at and before November 18, 1889, —the date of the filing of the articles of association with the secretary of state and paying the deposit to the state treasurer,—as so much paid on account of capital stock, makes the total paid in for stock account, November 27, 1889, $79,116.50. On that day 900 shares of stock were issued to E. R. Wood, but no further payment on account of stock had been made by him, and in fact no more ever was paid by him, so far as any books show. On the same day (November 27, 1889) the contract for the construction of the railroad, above set forth, was executed. On the 29th of November, 500 additional shares were issued to Wood, but were immediately surrendered to the company for the purpose, as the circumstances indicate and as appears by the entries on the cashbook, of being held in trust by the directors to secure certain of them who had advanced to Wood part of the $60,706 which he had paid in on stock account. On the 10th of December, 1889, there had been paid in on the stock of the company $2,975 additional to the $79,116.50 previously paid, making a total of $82,091. On that day 70 bonds (Nos. 1–70, inclusive) were mentioned on the books as delivered to Mr. Wood, but were not charged to him. These bonds were passed away by Wood to divers individuals, and have all been presented or accounted for except Nos. 37 and 38, the holders of which have not appeared. On January 6, 1890, 13 bonds (Nos. 71–83, inclusive) were delivered to the Fourth Street National Bank of Philadelphia as collateral to a loan on a note of the company for $10,000, actual cash, less discount paid to the company, and entered on the cashbook. On January 31, 1890, 13 bonds (Nos. 84–96, inclusive) were delivered to the New Jersey Trust & Safe-Deposit Company to secure a loan on the note of the company for $10,000, actual cash paid to the company, and entered on the cashbook. At that date there had been paid in on account of capital stock since December 10, 1889, $18,020, making a total of cash paid in on account of stock, January 30, 1890, $100,111. On February 6, 1890, there had been paid in the additional sum of $1,585 on stock account, making a total of $101,696; and on that day 15 bonds (Nos. 97–111, inclusive) were issued to the defendant the Bethlehem Iron Company, as collateral to a contract entered into by that company with the Philadelphia & Seashore Company for furnishing steel rails for its road. This contract was dated September 5, 1889, before the corporate existence was perfected, and executed on behalf of the company by E. R. Wood as treasurer. There is no entry on the minutes of any authority by the directors to execute it. It provided for the delivery, in installments, of 7,000 tons of rails, at $28.25 per gross ton, payable half in cash upon delivery, and the balance in the four-months notes of the railroad company indorsed by Wood, with bonds of the company at 80 per cent. of par value as collateral. This delivery of bonds to the Bethlehem Iron Company was about $10,000 in excess of the amount paid in on stock account at that date. From this time on there were further payments on account of stock until the total amounted to $161,905; but the issues of bonds were always in excess of the amount at the time thereof paid in on account of capital stock, unless there was work done and paid for by Wood, on his contract, in excess of what he had received from the company, which could properly be credited to him as so much cash paid on account of stock issued to him in excess of the payment of $60,706 made by him on stock account prior to November 18, 1889. Whether there was any such excess is a disputed fact in the case.

There were issued to Wood altogether 7,840 shares of stock, of which he still holds 7,580; and there were issued to other parties, prior to the rupture between Wood and the directors, 2,338 shares of stock. Some of this was actually paid for in cash, and as to some there is no evidence whether it was paid for or not. There were also moneys paid in on account of stock subscriptions for which no stock was issued. The total amount paid in on stock account is $161,905, including the $60,706 paid by Wood. All of the 465 bonds delivered to the railway company by the trust company during Wood's control were

Digitized by Google

passed away by him, and are in the hands of parties claiming to be bona fide holders, and have been presented to the complainant with a demand of payment, except Nos. 37 and 38, above mentioned, and Nos. 440-453, inclusive, held by the defendant the Philadelphia Warehouse Company as collateral security for a balance of $577.71, due for money advanced to the Bethlehem Iron Company upon rails. Early in the summer of 1890, the Philadelphia & Seashore road, as far as Tuckahoe, was so nearly finished that trains could be run upon it. About $100,000 had also been paid out in cash or bonds by Wood, claiming to act in behalf of the Philadelphia & Seashore road, sometimes in his own checks, and sometimes in the checks of the Philadelphia & Seashore Company, in procuring rights of way and terminals for and in construction of the Tuckahoe & Cape May road. The construction of the Tuckahoe & Cape May road was not so far advanced as that of the main line, and trains could not be run upon it. No money had been paid in on account of stock of the Tuckahoe road, and no stock or bonds of that road had at that time been issued. Besides the money actually paid out for its construction, as above stated, the Philadelphia & Seashore road was in debt on its (the Tuckahoe & Cape May Railroad's) account for $42,160.73, including therein so many of the rails contracted for from the Bethlehem Iron Company as were intended for use on that road, and yet unpaid for. In addition to this indebtedness, the Philadelphia & Seashore road was also indebted to other parties in the sum of $202,522.04, unpaid claims for work done upon the main line. This indebtedness had been incurred by Wood under the clause in his contract authorizing him to pledge the credit of the company. This state of affairs so embarrassed both the company and Mr. Wood that no more money could be raised, and further work was stopped.

In the month of August, 1890, the board of directors began an investigation of the affairs of the company, and, on the 2d of September, passed a resolution the result of which was to take away the control of the affairs of the company from Mr. Wood, and place it in the hands of a finance committee of the board; and, on the 15th of September, they passed a resolution excluding Mr. Wood from the privilege previously accorded him of attending meetings of the board, and employed counsel to ascertain their rights under the contract of November 27, 1889. On the 7th of October, 1890, report of the condition of the road was made to the board by a committee, and on the 14th of October the board rescinded the contract with Mr. Wood, took the construction of the road out of his hands, and attempted to go on with it themselves by a contract with one Jamison. Shortly after this meeting of October 14th, to wit, on the 25th of October, Mr. Wood filed a bill in this court against the company and the individual directors, asking that the contract might be specifically performed, and that the resolution of October 14th, rescinding the contract, might be declared void, and the directors restrained from issuing any of the stock or bonds of the road, or from doing anything under the contract which the directors had entered into with Jamison, and that the trust company might be restrained from delivering any of the bonds to any person. That bill was answered, and the cause litigated, resulting in the dismissal of the bill in March, 1891, for reasons given in the opinion of Vice Chancellor Bird, reported in 21 Atl. 574 (Wood v. Boney). On the 5th of March, 1891, the Johnson Signal Company filed its bill against the company, as a creditor, asking for the appointment of a receiver; and on that day the chancellor made an order, returnable on the 11th of March, to show cause why an injunction should not be granted, and a receiver appointed, according to the prayer of the bill, and the same order contained interim restraint in these words: "Said defendants and their officers and agents, and each and every of them, do refrain from contracting any debt or receiving any debt, except in the usual and ordinary conduct of their business, due or coming to them, and from paying out or transferring any of their moneys and effects and property, real and personal, except as aforesaid, and from continuing their business, except in the ordinary transaction thereof." The bill and a copy of this order were served upon the company by leaving them at the office of the company (312 Market street, Camden), and a copy of the order was also served at the office of the president of the company. There was no contention that the making of this order did not come at once to the knowledge of the officers of the railway company. The hearing of the matter was postponed on the return day of the order, and a new order to show cause why a receiver should not be appointed was made on the 5th of May, returnable on the 11th of May. The restraining order of the 5th of March, so far as appears, was never discharged. An answer was filed by the company, and depositions were taken on the merits of the application for a receiver. In the meantime, on the 13th day of July, 1891, the Bethlehem Iron Company filed a similar bill, praying for the appointment of a receiver, and the two causes were consolidated on the 20th of July, 1891; and on that day a decree of insolvency was made, and a receiver appointed. On the 5th of May, 1891, the directors of the Seashore Company authorized the officers to enter into a contract with C. T. Hobart & Co. for the completion of the line of its railroad into Sea Isle City, and also, if counsel should advise, for the completion of the line from Tuckahoe to Cape May city, and also passed resolutions calling on the trust company to deliver to them the remainder of the bonds in their hands. On the 9th of May, the president submitted

Digitized by Google

to the board of directors a proposition on the part of Hobart & Co. to finish the Sea Isle section,—that is, so much of the road as lay between Tuckahoe and Sea Isle City, to the center of the town of Sea Isle City,—to procure rights of way and room for terminal stations in that town, and to build stations and abutments at Richland, etc., in consideration of 5,040 shares of stock, fully paid, and 200 of the bonds of the company; and it was thereupon resolved that the company enter into a contract accordingly with Hobart & Co., and that it be executed and delivered by the president, and "that the stock and bonds be issued and delivery thereof made when satisfactory security be given to the president that work will be completed." And it was further resolved that, if Hobart & Co. did not enter into the contract as proposed, "the president is authorized to enter into a contract with such other person or persons as he can to finish the road upon the same terms and conditions." And it was "resolved that the officers of this company issue to Hobart & Co., or to such person or persons as shall contract for the finishing of the road, 5,040 shares of its capital stock, certified and fully paid, and 200 bonds, the full consideration named in the contract approved this day." On the 12th of May, the president reported that he had executed and delivered a contract with Hobart & Co. to finish the road upon the terms and conditions set out; and the contract, being read, was approved, and the officers were authorized to issue a certificate to Hobart & Co. for the stock. Under this contract the 5,040 shares of stock were actually issued to Hobart & Co., and the 200 bonds delivered to them or upon their order.

The history of this stock and these bonds may be further given as follows: Previous to entering into the contract, the directors had procured an estimate to be made of what it would cost to put the road from Tuckahoe to Sea Isle City in running order, including some necessary work upon the bridge at the crossing of their road with the West Jersey road at Richland, and other matters, and found the cost estimated at $27,620; and they also, as testified to by Mr. Gorman, a director, and member of the Philadelphia bar, who acted as their counsel, had procured an estimate of the cost of finishing the road from Tuckahoe to Cape May city; and, according to Mr. Gorman's evidence, they conceived the idea of giving the whole of the remaining stock and bonds of the Seashore Company to anybody who would finish both roads; but, finding legal difficulties in the way of their undertaking to finish the Tuckahoe & Cape May road, they concentrated their energies on the finishing of the Sea Isle City section of the main line, and formed and developed the scheme of having that finished by contract for the precise cost of the job, by pledging a large portion of the unissued bonds and stock for that purpose, but retaining the control of the same; and for that purpose they made a proposition to Hobart & Co., who were represented by Mr. John J. Deery, one of the firm, and also one of the original subscribers to the stock of the company, to finish the road to Sea Isle City on a cash basis, the directors furnishing the money necessary, and issuing the bonds and stock to secure themselves or whoever actually furnished the money. With that view they procured Mr. Conway, a gentleman of some means, engaged in the liquor business in Philadelphia, but having real estate interests at Sea Isle City, to advance a part of the money.

Conway's Claim.

He, in fact, advanced ten thousand and odd dollars of his own money, and borrowed seventeen thousand dollars of Mr. Boney, the president of the company, gave him his note for it, and paid the whole, twenty-seven thousand and odd dollars, to Mr. Deery. With this money in hand, the contract was entered into with Hobart & Co., and passed by the board of directors. A certificate for 5,040 shares of stock was issued to Hobart & Co., and the 200 bonds and the certificate of stock were delivered nominally to them by the hands of Mr. Deery, but were immediately delivered—bonds and stock certificate—to Mr. Conway. He paid the $27,620 to Mr. Deery formally, but Mr. Deery immediately, in pursuance of an arrangement to that effect, handed the money to Mr. Boney, the president of the company, upon the understanding that Mr. Boney was to pay it to Hobart & Co. as fast as they actually did the work on the road, and the money was in fact (less $364) paid to Hobart & Co. on their vouchers, for work actually done and materials actually furnished, without any profit to them. Conway was repaid that money, in part, by three persons,—George H. Becker, Emlen Physick, and Morris Boney. All of those persons except Conway were directors of the company, and Boney was its president. Conway held the 200 bonds in pledge for the amount of money which he advanced upon the understanding that he was to be repaid by some of the directors of the company. After the road went into the hands of a receiver, Mr. Becker, now deceased, Dr. Physick, and Mr. Boney agreed to divide the burden of this $27,620 with Mr. Conway. Dr. Physick and Mr. Becker each paid Mr. Conway $7,000, and Mr. Conway paid to Mr. Boney $10,000 of the $17,000 which he had borrowed of him; so that the matter stood thus: Calling the whole amount, with interest, $28,000, Mr. Boney advanced $7,000 as part of the $17,000 loaned by him to Conway; Mr. Becker and Dr. Physick each advanced $7,000 to Conway direct, who was still out $7,000. While Mr. Boney holds Mr. Conway's note for $7,000, the agreement is that he is not to pay it, but to hold the one-quarter of the 200 bonds for Mr. Boney's benefit. Dr. Physick got 42½ of the 200 bonds,

Digitized by Google

and Mr. Becker's estate holds 42½, which are 85 of the 200 bonds delivered to Hobart & Co. The balance is in the hands of Mr. Conway, for the benefit of himself and Boney. No sworn claim has been put in by either Conway, Physick, Boney, or Becker's estate on account of this payment of $27,620. Their bonds have all been presented to the receiver, and their counsel say that what they ask is a dividend equal to the amount of the money they have actually advanced, viz. $27,620.

Claim of Emlen Physick.

Of the 465 bonds issued in Wood's time, 25 are held by the defendant Dr. Emlen Physick. Of these, 17 (Nos. 54–70, inclusive) are part of the first 70 issued and delivered to Wood, and were handed by him to Dr. Physick. The remaining 8 bonds (Nos. 151–158, inclusive) were delivered to Dr. Physick by the company, on Wood's order, about the 17th of April, 1890. Physick became a director November 20, 1889, immediately after Wood's resignation, and took the place of John J. Deery, who had also resigned at the same time. No stock had been issued to him or Deery at that time, but Physick had paid, on November 9th, $2,500, and, on November 15th, $2,500, on account of stock which he had, presumably, previously subscribed for. As before stated, no actual subscription book or list was produced, and Wood swears, without being contradicted, that Physick's subscription was made for him by his friend Deery, who had subscribed, as before stated, for 500 shares in the original articles of association, by Physick's direction. Subsequently, Physick paid $20,000 additional in installments, and 500 shares of stock were issued to him,—340 on February 17, 1890, and 160 on April 15, 1890. The 25 bonds before mentioned were given to him by Wood, as an inducement or bonus for his taking and paying for 500 shares of stock. The arrangement or contract between Wood and Physick to this effect was made before the company was organized, and on its strength Deery, by Physick's direction, subscribed, as his figurehead, for 500 shares. The mode of building the railroad provided for in the contract of November 27th with Wood—viz. to be paid for by the bonds and stock—was part of the original scheme, which appears to have been wholly devised by Wood, and included, as abundantly appears, the building of not only the main line to Sea Isle City, but also the branch from Tuckahoe to Cape May city. Dr. Physick was a resident of Cape May city, and largely interested in real estate in that neighborhood, and was anxious to have this opposition railway built. The arrangement between him and Wood was that he should put $25,000 into the main line, from Winslow Junction to Tuckahoe and Sea Isle City, and $25,000 into the road from Tuckahoe to Cape May city, and was to receive, in consideration of his advance, $25,000 of stock and $25,000 of bonds for the contribution to the main line, and an equal sum in stock and bonds for his contribution to the Tuckahoe and Cape May line. In effect, he agreed to go in upon the same foundation as Wood did,—to the extent of $50,000 in cash. The installment paid in by Physick, as above stated, on his subscriptions to stock, forms part of the amount above stated to have been paid in on stock account at the time of the pledging of the several batches of bonds with the Fourth Street National Bank, the New Jersey Trust & Safe-Deposit Company, and the Bethlehem Iron Company, and without those payments all those issues were excessive. The delivery of the last 8 bonds to Physick, on or about April 17, 1890, was clearly in excess of the amount then paid in for stock. Physick claims a dividend upon those 25 bonds. He also holds 43 bonds of the 200 issued to Hobart & Co., as hereinbefore stated.

Bethlehem Iron Company.

The Bethlehem Iron Company fulfilled its contract previously mentioned, and delivered thereunder a few pounds only short of the precise 7,000 tons contracted for. They were paid on account of those deliveries, in cash, $98,146.54, and hold the railroad company's notes for an aggregate of $99,603.41, besides interest. As collateral to the notes, they hold 125 bonds of the company, viz. Nos. 97–111, 201–238, 266–287, being 75 bonds of those issued by Wood, and Nos. 711–760, being 50 of the 297 issued by the directors after the rupture with Wood. They were delivered to the Bethlehem Iron Company, May 22, 1891, as collateral for the last of the four notes given, which was for $41,504.23. This note was given under the contract for rails delivered the previous October, and should have been given at or before the delivery, but was not given, owing to the rupture between Wood and the company, which occurred about that time. The Bethlehem Iron Company took legal measures to enforce their demand, and succeeded in procuring the note and collateral bonds just mentioned, on May 22, 1891. They were strictly entitled to them the previous October. Afterwards (July 13, 1891) they filed their bill for a receiver, and under it, after its consolidation with that of the Johnson Signal Company, the receiver was appointed.

Burnham, Williams & Co.

Burnham, Williams & Co., proprietors of the Baldwin Locomotive Works of Philadelphia, agreed on December 25, 1889, to deliver six engines to the company, and did afterwards actually deliver two of the six which came into the hands of the receiver, and were sold by him. The delivery was made subject to a contract, such as they are in the habit of entering into with railroad companies that do not pay cash, by the terms of which the property in the machines was to remain in the builders until the machines were paid for. The question of the right of the claimants to be repaid in

Digitized by Google

solido, out of the fund, the amount which the locomotives produced at the sale, has not been litigated. The question now is as to certain bonds which they hold as collateral. Not receiving any payment from Mr. Wood, they pressed him and the company, and finally succeeded in procuring 10 bonds (Nos. 456–465, inclusive) on August 30, 1890. These were the very last bonds issued by Wood, and were issued at the very last of his having any control over the assets of the company. There was no previous agreement to take the bonds. The creditors never had any promissory note of Wood or of the company, and they simply took those bonds as collateral as the best they could do at the time. The amount due on their claim is $16,000, with interest.

Fourth Street National Bank.

The Fourth Street National Bank holds 42 of the bonds as collateral for two promissory notes,—one for $9,000, dated August 20, 1890; and the other for $9,750, dated September 12, 1890. Of these bonds, 13 (Nos. 71–83, inclusive) were, as above stated, originally issued to the bank on the 6th of January, 1890, to secure a loan of $10,000. That loan was renewed from time to time, and paid or reduced on September 12th by $250, and then stood at $9,750, and the remaining 29 bonds were given as additional collateral for that and another loan, as follows: On August 20, 1890, the railroad company borrowed $9,000 of the bank, and gave them 20 bonds as collateral. One of these bonds was No. 21, of the first issue of 70 bonds of Wood, and was given by him, with others, on the occasion of a renewal of the first note. The bonds held are Nos. 21; 71–83, inclusive; 159–185, inclusive; and 199.

The Manufacturers' National Bank of Philadelphia.

The Manufacturers' National Bank of Philadelphia holds 18 bonds (Nos. 12, 13, 22, 23, 28, 29, 30; 138–141, inclusive; 298–302, inclusive; 322; and 398). They hold these as collateral to a note of $12,000, made August 22, 1892. This note was given as a renewal and consolidation of previous loans made to Wood, the dates of which are not found on the books of the bank, and for which most, if not all, of those bonds had previously been pledged. The bill book of the railway company shows that they borrowed of the Manufacturers' National Bank on the 10th of June, 1890, the sum of $3,000, and gave as collateral five bonds. The numbers of the bonds are not mentioned. Other than that, there is no proof as to the precise origin of the debt, or the time when the bonds were pledged, nor is there any proof that the creditor had any notice of any invalidity in the bonds taken.

Commonwealth National Bank.

The Commonwealth National Bank holds 17 bonds as collateral to a debt of $8,000. The bonds are Nos. 251–265, inclusive; 437; and 438. The debt originated in a loan of $10,000, made on the 7th of June, 1890, on the note of the company indorsed by Wood; and at that time 15 of the bonds were delivered as collateral. Two thousand dollars was paid on that note, and a new note was given on the 13th of September, 1890, for $8,000. In 1891 they received the two additional bonds on a further renewal of the note.

Seventh National Bank.

The Seventh National Bank holds 21 bonds (Nos. 4–9, inclusive; 31–36, inclusive; 321; 391–393, inclusive; 396; 397; 407–409, inclusive), to secure four notes made by E. R. Wood,—one (1) dated April 2, 1891, for $2,600, for which he deposited as collateral, among other things, 11 of the bonds mentioned, and also the note of the Philadelphia & Seashore Railway Company for $1,800; (2) a note dated April 7, 1891, made by E. R. Wood, to the order of himself, for $3,700, and pledging as collateral, among other things, 10 of the bonds above mentioned; (3) a note dated September 13, 1890, made by E. R. Wood, for $3,250, pledging other collaterals; and (4) another note, dated November 12, 1890, for $2,150, made by Wood, and pledging other collaterals. These notes contain a clause that any other collaterals held by the bank for other loans may be applied to the security of these.

New Jersey Trust & Safe-Deposit Company.

The New Jersey Trust & Safe-Deposit Company holds 15 bonds (Nos. 84–96, inclusive; 394; and 395), to secure two notes,—one of $10,000, and one of $1,600. The note for $10,000 is dated July 7, 1890, made by the Philadelphia & Seashore Railway Company, to the order of E. R. Wood, with 13 bonds as collateral. This loan is a renewal of the original loan made on January 31, 1890, as above stated, and is secured by the same collaterals. The note for $1,600 is dated August 25, 1890, made by the Philadelphia & Seashore Railway Company, to the order of E. R. Wood, and is accompanied by two of the bonds (Nos. 394 and 395).

Central National Bank.

The Central National Bank holds bonds Nos. 142 and 143, as collateral to the note of E. R. Wood, dated May 7, 1892, for $4,720. It is the last of a series of renewals of a note made on the 18th of April, 1890, for $4,000, and with that note these two bonds, with other securities, were deposited as collateral. Nothing has ever been paid on it, and the additional $720 represents some additional loan and interest.

First National Bank of Camden.

The First National Bank of Camden holds bond No. 406, as security for a note of E. R. Wood for $575, dated August 1, 1891. That note was given in renewal of a previous note, and the bond was delivered to the bank upon the renewal.

Digitized by Google

Millville National Bank.

The Millville National Bank holds 3 bonds (Nos. 24, 26, and 27). They came into the possession of the bank on or about the 3d of January, 1890, as collateral security to a note of $2,500 discounted on that day for Edward R. Wood. That note has been renewed from time to time, and upon it, at the time of the hearing, there was due $2,000, with interest from the 24th of July, 1893.

Philadelphia & Atlantic City Railway Company.

The Philadelphia & Atlantic City Railway Company, leased by the Reading Railway, holds 25 of the bonds (Nos. 122–124, inclusive; 134; 135; 144; 145; 193; 194; 200; 296; 297; 303; 304; 306; 307; 354; 454; 455; and 420–425, inclusive). These bonds are held as collateral to a balance of about $25,000, claimed to be due the railway for freight and materials shipped over the road, and for some materials furnished, and for car service on the road. The amount due is disputed by the receiver. The bonds were delivered to the railway company in small installments, of one, two, or three at a time, as their numbers indicate, and were given as collaterals for bills of freight and railroad service from time to time as the indebtedness accrued.

Philadelphia Warehouse Company.

The Philadelphia Warehouse Company holds 14 bonds (Nos. 440–453, inclusive), which their counsel at one time said they made no claim under. But the facts are as follows: The railway company, finding itself embarrassed in raising the cash payment necessary to get a delivery of steel rails from the Bethlehem Iron Company, applied to the Philadelphia Warehouse Company for assistance. It will be remembered that the contract of the Bethlehem Iron Company required half the price of the rails to be paid in cash, and, on a consignment of rails, the warehouse company, at the request of the railway company, paid (August 26, 1890) to the Bethlehem Iron Company $29,005.50. They paid that to the Bethlehem Iron Company on the understanding that the rails were to be invoiced to the warehouse company, so that they would become the property of the warehouse company, and they would have a lien upon them for the amount of cash which they advanced. But, before they would take the risk of actually sending the cash to the Bethlehem Iron Company, they required a collateral, and that collateral was the bonds in question. The original number was 58, which included the 14 they now hold. The arrangement was that, as soon as the iron was shipped to them and came into their possession, they were to redeliver the bonds to the railway company or to Mr. Wood, who represented them. The iron did come into their possession, and they did redeliver a quantity of the bonds, and, had all been asked for, all would have been redelivered. But in the meantime litigation arose, and they were compelled to incur expenses, and, when they finally gave up their lien on the rails, they found themselves $577.71 short; and the question is whether or not they have a lien on these 14 bonds for the sum of $577.71.

Richland Improvement Company.

The Richland Improvement Company holds three bonds (Nos. 289–291). The company is a New Jersey corporation, of which Mr. Edward R. Wood is the president and principal stockholder. The bonds were originally pledged to the Guarantee Trust & Safe-Deposit Company, the trustee under the mortgage, with other collaterals, to secure a loan of $5,000. After the trust company had sold the other collaterals, a balance was left due them of $113.17, for which they hold these three bonds. The Richland Improvement Company, by Mr. Wood, president, paid $112.97, as the balance, and thus became possessed of the bonds. The original loan was made in the fall of 1889, and was renewed in the summer of 1890, and these securities were then pledged, they having been received by Mr. Wood, as their numbers indicate, during the summer, on account of his contract.

Sea Isle City Lot & Building Association No. 3.

This is an association of individuals under the general land and improvement company act, which owns land at Sea Isle City, and, in order to increase its value, put money into this railway company. They hold 16 bonds, for which they paid the company, in cash, $16,000. They were also, at and before the time they got the bonds, subscribers to the extent of 320 shares, or $16,000. These sums they paid in good faith to the company. The numbers of the bonds are Nos. 25, 39–44, 147, 149, 187, 240–242, 323, 324, 365; Nos. 25 and 39–44, inclusive, being part of the first issue of 70 to Mr. Wood. The checks by which they paid for these bonds were not produced, being in the hands of Mr. Becker, the secretary of the association, who was also a director in the company, and in whose name the stock was issued. He has since died, and the checks have not been found among his papers, but the original orders of the company to the secretary and treasurer to give the checks to buy the stock were produced, and they are dated as follows, all being stated to be given for stock and bonds: March 19, 1890, $5,500, signed by M. J. Kelly, president; April 3, 1890, $6,500, signed by M. J. Kelly, president; May 8, 1890, $4,000, signed by same; May 26, 1890, $2,000, signed by same; June 10, 1890, $6,000, signed by same; June 19, 1890, $2,000, signed by M. J. Kelly, president (the first five were all drawn to the order of William Gorman, who was solicitor for the association, and a director in the

Digitized by Google

railway company, and its counsel; the sixth one—June 19, 1890—was to the order of E. R. Wood); the seventh is July 10, 1890, for $3,000, signed by the president, to the order of E. R. Wood; the eighth is August 7, 1890, for $3,000, signed by M. J. Kelly, president, to the order of E. R. Wood,—in all, $32,000. The shares of stock were issued in batches to Becker, as secretary of the lot association. A part of the shares issued was given from a surrender of the first batch of stock issued to Wood. The balance appear to be original issues to Becker, as trustee for the company. No credit is given to stock account for any of these issues, except $1,050, and no credit is given to bond account, except one bond (No. 87), credited as cash. The books of the company, however, are not complete in this respect. The whole transaction was in fulfillment of an agreement made between the officers of the railway company and this association to take $16,000 of bonds and $16,000 of stock in the railway company. In point of fact, the bulk of the money went into the hands of Wood, he being supposed to be entitled to it, under the construction contract of November 27, 1889.

Sea Isle City Lot & Building Association No. 4.

This association was an association of precisely the same kind as that called "No. 3," with some little changes in the stockholders, but substantially controlled by the same gentlemen. They hold eight bonds. They made the same sort of agreement as did Sea Isle City Lot & Building Association No. 3, viz. to take $8,000 of bonds and $8,000 of stock. Their bonds are Nos. 195–198, 239, 245, 331, and 353. The first five were paid for in cash to the company, and the checks for the payment are produced. The first is dated March 21, 1890, for $3,500, to the order of the Philadelphia & Seashore Railway Company; the next is dated April 7, 1890, for $3,500, to the order of the Philadelphia & Seashore Railway Company; the next is May 10, 1890, like check, like order, $2,000; the next is June 9, 1890, like check, to the order of E. R. Wood, for $2,000; the next is July 16, 1890, like check, to the order of Edward R. Wood, for $2,000; the next is July 26, 1890, like check, to the order of Edward R. Wood, for $1,000; and the next is August 8, 1890, like check, to the order of Wood, for $1,000,—in all, $15,000. For these payments they hold the 8 bonds above mentioned, and 140 shares of stock. Of the stock issued, part came from Wood, and the balance was direct from the company. The two last bonds issued seem to have been received from Mr. Wood.

Diamond State Iron Company.

The Diamond State Iron Company holds 21 bonds, as collateral to a balance due them on iron bolts, screws, and other track materials delivered to the railway company for the laying of its rails. The iron company is a manufacturer of railroad supplies at Wilmington, Del., with an agent in Philadelphia; and that agent really negotiated the sale of the steel rails to the railroad company by the Bethlehem Iron Company, and at the same time made a contract, of precisely the same nature as that of the Bethlehem Iron Company, for the furnishing by the Diamond State Iron Company of the rail fittings. The contract was to pay half in cash, and one-half in notes, secured by bonds as collateral, at 80 cents on the dollar. The deliveries were made to the railway company, but Wood failed to make the proper payments. Some notes were delivered, and, finally, the fittings were delivered, without either cash or notes, but bonds were given as collateral. Finally, on February 28, 1891, the notes of the railway company, which the iron company held to the extent of upward of $6,000, were surrendered, and the whole indebtedness was consolidated in a note of Mr. Wood of $12,000, and the bonds previously delivered as collateral were held as collateral to that. They are 21 in number, viz. Nos. 127–133, 292–295, 348–352, 399, 413–416. Of these, all but Nos. 127–133, inclusive, appear by the books of the company to have been delivered directly from the railway company to the iron company. The others just mentioned were delivered to Mr. Wood by the railway company.

Estate of George H. Becker.

The estate of George H. Becker holds 52 bonds, numbered as follows: Nos. 246–250, 366, 367, 380–382,—in all, 10 bonds,— out of the 465 which were delivered to Mr. Wood: and they also hold Nos. 538–579, inclusive,—42 in all,—a part of the 297 issued by the directors under Boney's presidency, after the rupture with Wood. The 42 are part of the 200 handed by the directors to Deery under the Hobart contract, and by Deery handed to Conway to secure the $27,620 which he advanced, and presumably by Conway handed over to Becker to secure him for his $7,000 given to Conway as Becker's one-quarter of the $27,000 and upward paid by Conway to Boney to pay Hobart & Co. for the work done by them. Beyond this proof given by Conway, there is not a particle of evidence to show what the first 10 bonds—part of the Wood issue—were given for. Becker was one of the original incorporators and a director in the company.

Louis Blank.

Louis Blank holds three of the bonds (Nos. 377–379, a part of the issue to Wood). His account of them is this: That he is a confectioner in Philadelphia, and had a slight acquaintance with Mr. Becker, who was a director in the company, and a sort of broker and dealer in moneyed securities in Philadelphia; that he was approached by Becker for a loan of $3,000, and offered these 3 bonds and 30 shares of stock; and that he made the bargain with Becker at Sea Isle City on or about the 14th of August, 1890;

Digitized by Google

and that on the 15th of August, in Philadelphia, Becker came to him with the 3 bonds and a certificate for 30 shares of stock made out in his (Blank's) name; and that he then and there gave Becker a check, which is produced, dated August 15, 1890, for $3,000; and that that check was exchanged for the bonds and certificate of stock and paid. He claims it was a loan to the estate of Becker, but he took no note or other memorandum to show that it was a loan. He has made a claim against the estate for the amount of the loan, with interest, and says that he holds the stock and bonds simply as collateral.

Morris Boney.

Morris Boney holds 65 bonds (Nos. 45–47, 114–121, 146, 383–388, 666–710, 761, 762). Eighteen of these (viz. 45–47, 114–121, 146, 383–388) are of the issue made during Mr. Wood's control, and the remainder are part of the issue of 297 bonds made by the directors after the rupture with Mr. Wood. Boney was one of the original directors and organizers of the company. As to the first 18 bonds, which may be classified as bonds of the Wood issue, the facts are as follows: Mr. Boney was one of the original projectors and directors of the railway, was largely interested in real estate in Sea Isle City, and, after the resignation of Mr. Potts, he became the president of the railway company. His subscription in the articles of association was for 10 shares, but he actually subscribed for 50 shares, and paid $2,500 for them. The payments were as follows: September 23, 1889, $250; November 21, 1889, $500; December 28, 1889, $500; February 6, 1890, $500; March 10, 1890, $500; April 5, 1890, $250. These payments were made in pursuance of regular calls for installments on account of his stock subscribed; and immediately after the last payment, to wit, April 8, 1890, he received a certificate for 50 shares of stock. In addition to these payments, he advanced to Mr. Wood, on or about the 7th of November, 1889, $5,000, part of the $60,000 which Wood paid in at the start, and which was used to pay the deposit of $70,000 to the state treasurer. For that $5,000, Wood gave him seven bonds (Nos. 45–47, 114–117). The bonds, however, were not given until some time after the money was paid. At the time of the payment of the $5,000 to Wood (November 7, 1889), Wood gave Boney a receipt as follows: "Received of Morris Boney check for $5,000, money to be used for the Phila. and Seashore Ry. Co., and to be returned to Mr. Boney as it comes back from the state treasurer of New Jersey. Mr. Boney shall be secured for its equivalent in first mortgage bonds of the company." The bonds already mentioned were given to him several months afterwards, and were received in full payment of this advance. Later on, on the 31st of May, 1890, he advanced $5,000, by check to the order of the Philadelphia & Seashore Railway Company, and on the same day a certificate for 100 shares of stock was issued to him. Later on, on the 13th of August, 1890, he gave his check for $5,000, to the order of Wood; and, on the 15th of August, 120 shares of stock were issued to him. These shares were issued directly to Boney from the railway company. At the time of the payment of each $5,000, he got $5,000 in the bonds of the company, and in some way got one in addition, making 11 bonds which he got, with 220 shares of stock, for the two payments of May 31st and August 13th, of $5,000 each. The bonds were delivered to him by Mr. Wood, and the stock was issued directly from the company. The extra 20 shares of stock and the extra bond do not appear to have been paid for. The inference from the evidence is that, with regard to this last transaction, Mr. Boney's position resembles that of Dr. Physick's with regard to his 25 bonds and 500 shares of stock. Besides these bonds and stock, Mr. Boney, as before mentioned, holds 47 of the issue of 297 bonds made by himself as president and the other directors, after the rupture with Wood, and those bonds were delivered to him under the following circumstances: Mr. Boney assumed the financial risk of operating the road after he became its president, and, in so doing, ran behind some $7,000, for which he made a claim against the railroad company, and, to indemnify him against that claim, 45 of the 47 bonds were delivered to him by the board of directors; and, besides, he was to hold them in pledge to secure the counsel fees due by the company to Messrs. Gorman & Pettitt. Two of the 47 bonds were those which were redelivered to the company by the Bethlehem Iron Company, it appearing that they had received that much in number more than they were entitled to under their contract; and no claim is made by Mr. Boney on those 2. The real claim, then, is on 45 bonds received as before stated.

James Campbell.

James Campbell holds one of the bonds (No. 305), for which he paid $900 in cash to the company, through the brokerage firm of Townsend & Steelman. That bond is credited on the cashbook with $1,000; but it does not appear when he paid Townsend & Steelman for it. The credit on the books of the company is June 25, 1890.

J. C. Chance, Executor of William D. Jones.

J. C. Chance, executor of William D. Jones, holds five bonds (Nos. 14–16, inclusive, and 243 and 244). As to Nos. 14, 15, and 16, Mr. Jones paid to E. R. Wood $3,045 on a date not given. As to the other two bonds (Nos. 243 and 244), no proof is offered whatever, except that Mr. Jones resided for much of his time at Cape May city, and was somewhat interested in the prosperity of that city. He appears to be the holder of 30 shares of stock transferred to him April 15, 1890, by Wood.

Digitized by Google

out of the first issue to Wood, and of another certificate, of 20 shares, issued to him directly, June 23, 1890. There is no entry on the books about any of these transactions.

Annie W. Chearis.

Annie W. Chearis is the holder of bond No. 17, which she bought at public sale of the personal representatives of the estate of Samuel A. Whitney, deceased, paying $500 for it. She was interested in his estate.

Estate of T. H. Whitney.

The estate of T. H. Whitney holds two bonds (Nos. 18 and 19), part of the first issue of 70 to Mr. Wood. T. H. Whitney, deceased, and his brother, Samuel A. Whitney, deceased, were the owners of some real estate in Cape May city, and were interested in the building of these railroads. John P. Whitney, in their behalf, made a bargain with Mr. Edward R. Wood to advance him $3,000 for $3,000 of bonds and $3,000 (par value) of stock of the Philadelphia & Seashore Railway Company; and in pursuance of that agreement, between September 28, 1889, and February 4, 1890, by five different payments, the Whitney brothers advanced to Mr. Wood $2,965, and received from him bonds Nos. 17, 18, and 19, and also 60 shares of stock issued on February 4th, the date of the last payment, being a part of the original certificate for 900 shares issued to Mr. Wood. No. 17 was passed to the estate of S. A. Whitney, and sold at auction, and bought by Mrs. Chearis, as above stated. The aggregate of $2,965 is entered on the cashbook as $3,000 cash from John P. Whitney on stock account, and the 60 shares of stock are charged to Mr. Wood. Each of the payments was charged against the treasurer on the cashbook, precisely as made, and Whitney is credited with the payment of $3,000 in full on account of stock.

Charles E. D'Invilliers.

Charles E. D'Invilliers holds two bonds (Nos. 112 and 113). He paid $2,000 cash, with accrued interest, on the 25th of February, 1890, to the treasurer of the company. He was asked to buy the bonds by Mr. Taylor, who was interested in the road, and who was secretary of the company, and a clerk for Wood. Before buying the bonds, he inquired how much stock had been sold, and was informed that $250,000 had been sold. This witness received no stock as a bonus.

Edward J. Etting.

Edward J. Etting holds six bonds (Nos. 326–330, inclusive, and 439). This witness, on April 28, 1890, contracted to sell and deliver to the Philadelphia & Seashore Railway 93 tons, more or less, of second-hand iron rails, 52 pounds to the yard, at $33 a gross ton, including the splice bars, delivered at Winslow Junction. The rails were shipped on the 6th of May, and the whole bill amounted to $2,715.13. He made a further sale on the 16th of May, 1890, of spikes and plates, to the amount of $78.43. Not receiving his payment at the time agreed upon, he demanded and received five bonds (Nos. 326–330, inclusive), and afterwards he received No. 439. These bonds were delivered directly from the treasurer of the company, but were charged to Mr. Wood,—the first five on July 18, 1890, and the last on August 25th.

Robert S. Hand.

Robert S. Hand holds one bond (No. 389). He received it from Mr. James Taylor about the 1st of September, 1890, and gave him for it six shares of the stock of this railway company, and $700 in cash. The stock he had received as an original subscriber for stock, and had paid for it in full,—$300. Taylor got the bond from Wood for services rendered. The claimant was interested in real estate in Cape May, and invested his money partly for the purpose of increasing the value of his property.

Louis L. Hildebrand and Daniel Wolf.

Louis L. Hildebrand and Daniel Wolf, constituting the firm of Hildebrand & Wolf, lock manufacturers, in Philadelphia, are severally owners of real estate in Cape May city. They each hold one bond; that of Mr. Hildebrand being No. 126, and that of Mr. Wolf No. 125. They first subscribed for 20 shares of stock, and paid for it $1,000, in installments, making the last payment on April 8, 1890, and were then entitled to 20 shares of stock. The certificate was actually made out, but not delivered. Immediately afterwards, Mr. Taylor, the secretary of the railway company, approached them, and asked them to buy a bond for $1,000; and they agreed that, if he would give them a bond for the stock they had subscribed and paid for, they would pay $1,000 more, and take two bonds. In pursuance of that agreement, on the 10th of April, they gave Mr. Taylor a check for $1,000, and returned him the scrip receipts for the payments on account of the stock, and he handed them the two bonds. The certificate of stock was transferred to Mr. Wood. Mr. Wood handed them one bond, and they paid $1,000 to the company, and got one bond direct from it. There is no entry of the payment for the extra bond. The payment is for the stock, and not for a bond of $1,000, and the delivery of the other bond is not entered on the books of the company.

Daniel Ireland.

Daniel Ireland holds bond No. 375. This claimant paid $800 cash for this bond to Theophilus Weeks, and appears not to have been a subscriber for or holder of any stock.

Estate of James Mecray.

The estate of James Mecray holds four bonds (Nos. 50–53, inclusive). These bonds came into the hands of the deceased as follows: Mr. Wood desired to purchase from

Digitized by Google

him, for the purpose of the terminal of the Tuckahoe & Cape May Railroad, some real estate which he owned in Cape May city, and bargained with him for a piece of land for a certain sum, to wit, $7,000, and paid him in cash $2,000, and five of the bonds (Nos. 49, 50, 51, 52, and 53). No. 49 Mecray gave to his daughter, Mrs. Mary J. Schellenger, in part discharge of a mortgage which she held upon the property conveyed by him to Wood.

Mrs. Mary J. Schellenger.

Mrs. Mary J. Schellenger holds four bonds (Nos. 1–3, inclusive, and No. 49). No. 49 she received from her father, James Mecray, in the manner hereinbefore stated; and Nos. 1–3 she received directly from E. R. Wood, upon the sale by her to him of land adjoining that sold by her father. The price of the land was $7,500, and she took $3,000 in three bonds (Nos. 1, 2, and 3).

Bernard McGrane.

Bernard McGrane holds bond No. 368. He bought it of Michael J. Kelly, and gave him $1,000 in cash for it on August 18, 1890. Kelly was president of one of the land companies at Sea Isle City. He received the bond October 22, 1890.

J. C. McNaughton & Co.

J. C. McNaughton & Co. hold 16 bonds (Nos. 332–347, inclusive), as collateral security for a judgment debt of $14,670.33, based on two promissory notes, one of $8,000 and the other of $3,672.63, both made by the company on the 18th of July, 1890. The note for $8,000 contains a pledge of 16 of the first mortgage bonds of the Philadelphia & Seashore Railway. The judgment included a balance of $2,640.96 on open account. The consideration for the whole was railroad ties sold to the Philadelphia & Seashore Railway. The $8,000 note was really given as collateral for the $3,672.63, with the expectation that further ties would be delivered. The bonds were delivered on the 18th of July, 1890.

William E. Potter.

William E. Potter holds three bonds (Nos. 417, 418, and 436), which he received from Mr. Wood as partial security for services as his solicitor and counsel. These bonds were all a part of those temporarily pledged with the Philadelphia Warehouse Company.

Richard C. Souder.

Richard C. Souder holds bonds Nos. 136 and 137. He received them from Edward R. Wood, and in consideration gave a credit of $2,000 on a bond which he held against the Malaga Glass Company, secured by a mortgage. Mr. Wood was the president and principal stockholder of the glass company. The bonds were received and credited on the mortgage the 1st of May, 1890, the mortgage being given to secure $6,000. One thousand dollars had been paid in cash before the 1st of May, 1890. Mr. Souder still holds his mortgage against the Malaga Glass Company.

Anthony Steelman.

Anthony Steelman holds bond No. 320. He was a director of the company, and fully familiar with all its transactions from the beginning. He obtained two bonds from Mr. Wood (Nos. 320 and 325). No. 325 he disposed of to Elijah B. Wheaton, and retains No. 320. He paid Wood part cash, and gave him credit for the balance for railroad ties which he bought for Wood, and paid for with his own money. He took the bonds at $950 each, paying in effect $1,900 cash for them. He does not give the details of the transaction.

E. A. Tennis.

E. A. Tennis holds four bonds (Nos. 402, 403, 419, and 435). These, with a good many others, he received from Mr. Wood on account of the contract with the Seashore Railway, signed by Wood, for the building of the Tuckahoe & Cape May branch. He received 33 bonds in all, at the following rates: 12 at par, 10 at 90, and the balance at 80. He received them instead of cash, and before he took them he knew the particulars of the contract between Wood and the company, and that the Tuckahoe road was not a part of the Philadelphia & Seashore road. Tennis did do some work on the main line, and, according to Wood's evidence, he got 13 of the above-mentioned bonds for that work; but which 13 does not appear, and Tennis himself does not testify to that fact.

Theophilus Weeks.

Theophilus Weeks was one of the original corporators and directors of the road. He holds two bonds (Nos. 148 and 376). He was a subscriber in the articles of organization to 19 shares, but he actually took 20, and paid $1,000 in cash. He bought bond No. 148 of Mr. Wood, and paid $1,000 in cash. He bought bond No. 376 of Mr. Tennis, and paid him $800 cash for it. At the same time he bargained for No. 375 for Daniel Ireland, and No. 374 for Mr. Wheaton. Although the bargain was made with Tennis, they were Wood's bonds, and the money was paid to Wood.

Estate of Elijah B Wheaton.

The estate of Elijah B. Wheaton holds two bonds (Nos. 325 and 374). No. 325 he bought of Steelman. No. 374 he bought, through Weeks, of Wood. Wheaton was a stockholder, but not a director, in the railway company, and had nothing to do with the management of the road.

P. M. Wheaton.

P. M. Wheaton holds 10 bonds (Nos. 188–192, 369–373). Five of these he bought of Townsend & Steelman, brokers in Philadel-

Digitized by Google

phia, at 95 cents on the dollar. They are entered on the cashbook as being sold at par, May 28, 1890. The other five he bought through Mr. Tennis, and paid 80 cents on the dollar for them. These were undoubtedly Mr. Wood's bonds. This claimant was a subscriber to 20 shares of the stock, and paid cash for it.

Sabina J. Weightman.

Sabina J. Weightman holds one bond (No. 48). She bought it March 18, 1890, of Mr. Taylor, on his recommendation that it was a good investment, paying $1,023.16. The check was drawn by her as executrix, but the money was her own money.

Estate of Mary and Juliana Wood.

The estate of Mary and Juliana Wood holds nine bonds (Nos. 426–434). Their estate is represented by Richard Wood and George Wood, their trustees. These trustees are brothers of the two cestuis que trustent, and also of Edward R. Wood. Edward R. Wood was also one of the trustees, and he borrowed of the estate $12,000, and put these bonds, with others, among the assets of the estate, as collateral, about the 1st of October, 1890. He used the money for the purpose of building the road. These bonds were actually deposited with the assets of the trust estate in the Philadelphia Safe-Deposit Company. With them was a promissory note dated January 1, 1891, for $3,000, signed by Wood, and payable to the order of the trustees of Mary and Juliana Wood. He owed the estate other moneys besides that $3,000 note. Upon an examination it was found to amount to $17,000. Five thousand dollars was paid in cash, and the amount reduced to $12,000. To secure the $12,000 these nine bonds were retained, and four mortgages were given on real estate of Edward R. Wood, and an extension of time given. Deducting $9,000 from the whole amount of the security ($26,500), there remained $17,500 security, the debt being $13,300.69.

Mary K. Wood.

Mrs. Mary K. Wood, the wife of Edward R. Wood, holds three bonds (Nos. 186, 288, and 412). She owned a house in Philadelphia, and mortgaged it, and raised $10,000, and gave it to her husband, for which she took 14 bonds as security. Afterwards, her husband induced her to part with all except the three bonds. Mrs. Wood also holds about 151 coupons, which her husband handed to her, and which she claims to have either paid the holders, or cut off the bonds which he had in his hands, and from her bonds.

Howard Carrow, for complainant. D. J. Pancoast, for defendants McNaughton & Co. and other judgment creditors. S. W. Pettitt, of Philadelphia, for defendants Conway, Boney, Physick, and Beckers' Ex'rs. William E. Potter, for defendants Fourth St. Nat. Bank, the trustees of Wood, Mrs. Mary K. Wood, and others. S. W. Beldon, for defendants Wheaton, Sea Isle City B. & L. Ass'n, and others. S. W. Pettitt and S. W. Beldon, for defendants Burnham, Williams & Co. and Hildebrand & Wolfe. S. H. Richards, for defendant John P. Whitney. J. M. E. Hildreth, for defendants Mecray, Mrs. Schellenger, Mrs. Weightman, and others. E. A. Armstrong, for defendant New Jersey Trust & Safe-Deposit Co. Thomas E. French, for defendants Roebling, Sons & Co. and other judgment creditors. J. W. Morgan, for defendant Philadelphia & R. Co. T. B. Harned, for defendants Weeks and others. S. H. & M. P. Grey, for defendants Bethlehem Iron Co., several banks, and others. William J. Kraft, for defendants Mrs. Chearis and R. C. Souder.

PITNEY, V. C. (after stating the facts). The mortgage covering the issue of bonds involved in this case is attacked on the ground of the alleged illegality—First, of the whole scheme which was embodied in the contract of November 27, 1889, between Wood and the company; and, second, of that part of the contract which provided for the building of the Tuckahoe & Cape May branch or extension. The various issues of bonds under the mortgage are attacked, as to a great number of them, because not issued for money actually loaned, and, as to another numerous class, because issued in excess of the amount of cash actually paid in for capital stock at the time of their issue. Further, it was earnestly argued that these defects were such as to render the bonds actually void in the hands of bona fide purchasers and holders.

The general corporation act (Revision, p. 175, § 1, subsec. 4) authorizes every corporation in this state "to mortgage its real and personal estate and franchises." That act applies to all corporations, and includes corporations owning railroads, and, in the absence of any limitation found elsewhere, would seem to give full power to such corporations in the premises. But the act of April 2, 1873 (P. L. p. 88; Revision, p. 925), known as the "General Railroad Law," by its twentieth section (Revision, p. 931), provides as follows: "That any company incorporated under this act, shall have power to borrow such sum or sums of money, from time to time, not to exceed in the whole its paid up capital stock, as shall be necessary to build, construct or repair their road, and furnish all necessary engines and other equipments for the uses and objects of said company, and to secure the repayment thereof by the execution, negotiation and sale of any bond or bonds, and secured by mortgage on said land, privileges, franchises and appurtenances of and belonging to the said company; provided, that said company shall not plead any statute or statutes against usury in any court of law or equity in any suit instituted to enforce the payment of any bond or mort

Digitized by Google

gage executed under the provisions of this section; and provided further, that said bonds shall constitute a first lien on the railroad, its cars, real estate and franchises, and the proceeds of said bonds shall be used for the purpose of aiding in the construction of said railroad." A provision somewhat similar to this in the Massachusetts general railroad law was held by the supreme court of that state, in Com. v. Smith, 10 Allen, 448, to be of itself prohibitory of another mode of mortgaging, upon the principle "inclusio unius est exclusio alterius." It was conceded in that case that the railroad company might alien and mortgage its property without legislative authority, but that such power did not include the right to alien and mortgage its franchise. In my opinion the intention of the statute was to regulate the general power of mortgaging by the corporation, and to limit it strictly to borrowing money upon its mortgage bonds, and to the amount of cash that had been paid in on account of subscriptions to its capital stock. Water Co. v. De Kay, 36 N. J. Eq. 548. That such was the intention is set at rest by the proviso added to it by the legislature in 1878 (P. L. p. 20; Supp. Revision, p. 824), amending the section just above quoted by adding these words: "And provided further, that if any person or persons shall issue such bonds to any greater amount than the amount that, at the time of such issue, shall have been actually paid up on the capital stock of such railroad, he, she, or they shall be guilty of a misdemeanor, and shall be punished by a fine of not more than five thousand dollars, or by imprisonment at hard labor not more than three years, or by both, at the discretion of the court." That bonds secured by a mortgage, and issued contrary to the provisions of the statute above cited, are void, as between the parties to the transaction, seems to be thoroughly settled in this state. State v. Board of Chosen Freeholders, 39 N. J. Law, 632; Crampton v. Zabriskie, 101 U. S. 601; Waterworks Co. v. Read, 50 N. J. Law, 665, 15 Atl. 10. The decision in the federal supreme court seems quite in point, and renders unnecessary any discussion here. An elaborate argument, sustained by a formidable array of decisions by the courts of our sister states, was made against this result, of which decisions I deem it necessary to say only that they did not deal with our statute, and cannot affect the rule here established. The object of this enactment is manifest. It is to insure a certain measure of value to securities of this nature, issued by railroad companies organized under the general law of this state. The officials of a railway company incorporated under this act, if possessed of common honesty, will apply all moneys received by them on account of stock and bonds to the construction and equipment of the road. Such is clearly their duty; and if an equal sum is derived from each source, and devoted honestly to such use, the result will be that the holder of the mortgage bonds will have for his security property which has actually cost in cash double the amount of his debt. That he should have such security was the intention of the legislature, and any device which leads to a different result is an evasion of the law. Whether the railroad, when so finished and equipped, will be actually and intrinsically worth more or less than its cost, depends upon a variety of facts and circumstances, which each investor must take into account, and judge of for himself. The road, when built, may turn out to be a paying road, or it may not. The result, in that respect, depends on the amount of business it has to do, and the prices which it is able to charge, and the original cost of the road. It is proper, however, to remark that the mere fact that persons may be found who will take and pay for in cash half the cost of a proposed railroad, subject to a mortgage for the other one-half of such cost, is some guaranty to the persons who advance the money upon the mortgage that the enterprise will prove successful, and this guaranty the legislature intended to give by the statute just quoted. The legislature has not forbidden the giving of a mortgage upon a railroad not yet built,—upon property not yet acquired. On the contrary, I think the language of the section in question plainly contemplates such action. Nor do I think there is anything in the policy of the law which forbids it. If the officers of the company are careful to issue the mortgage bonds no faster than actual payments are made on account of subscriptions to capital stock, and then apply the money so received honestly to the construction of the road, there can be no serious objection to executing the mortgage in advance of the construction. The parties advancing their money on these securities have full opportunity to know by actual observation just what has been done, and is being done from day to day. The line of the railroad, as filed in the office of the secretary of state, is open to their inspection, and they thus can protect themselves in that respect.

The mortgage itself contains nothing to show that it was in any respect illegal, or that an illegal issue of bonds under it was contemplated. On the contrary, it recites the resolutions of both the stockholders and the directors, declaring the purpose and intention to be to issue the bonds for borrowed money only, and to an amount not to exceed the amount at the time actually paid in for capital stock, and to apply such moneys to the construction of the road. In fact, the mortgage itself, on its face, contains what amounts to a solemn promise on the part of the corporation to observe the law in this respect in letter and in spirit.

The mortgage in this case, I conceive, for these reasons, to have been a good and valid contract of pledge at the time it was given, as between the railroad company and future holders of its bonds, if no subsequent infrac-

Digitized by Google

tion of the law just cited had taken place and no fraud had been practiced under it. Both these are charged.

First, it is said that it was part and parcel of the whole scheme, as embodied in the contract of November 27, 1889, made between the company and Mr. Wood, that the stock and bonds should be issued for a greater amount than was actually paid in. The case shows clearly that Mr. Wood was the projector of this road. He and Dr. Physick, through Deery, subscribed for 1,254 of the 1,400 shares of its stock subscribed by the articles of association. He (Wood) was its first secretary and treasurer, and its moving spirit, and he resigned and severed his apparent connection with the direction of the road just before the contract was entered into; but he still retained substantial control, and had for several months the privilege of attending the meetings of the board of directors. The contract was under consideration, and its terms substantially agreed on, November 20th, and resolutions passed to execute it on the same day that Wood resigned. The resolutions authorizing the mortgage were made November 25, 1889, and the contract was made and executed November 27th. That contract gave Wood substantially all the stock and bonds ($900,000 of each) for building the two roads; for he was, under it, entitled absolutely to the proceeds of all bonds sold and stock issued by the company to other parties. The circumstances did not warrant the supposition that a very large part of this $900,000 of stock would be taken by outside parties. On the contrary, it is plain that the contemplation of the parties was that Mr. Wood was to become the substantial owner of the road, so far as that ownership was represented by issues of stock, and the contract, in effect, gave him such control; and it was conceded to and exercised by him up to the 1st of September, 1890. The contract did, indeed, limit him, during its construction, to the receipt of $10,000 of bonds and $10,000 of stock to each mile of road built; but it is clear that when the road was finished to Sea Isle City, and equipped, he was to be entitled to all the bonds and stock up to $550,000 of each, not issued to other parties, and he was also entitled to the proceeds of such as should be so issued to other parties; and after the Cape May branch was built he was entitled to the balance, of $350,000 each, of the stock and bonds. Now, if there had been no stock or bonds issued to any person but Wood and the directors who made the contract, and those bonds had not been made negotiable and the stock assignable, so that they might never have come into the hands of innocent holders, I see no harm in such a contract, since no person could be injured but the immediate parties. If Mr. Wood built the road wholly with his own money, and owned it, nobody else was concerned in the size of the mortgage he saw fit to put upon it to himself, and no one but the individual directors were interested in the question of how much of their own money they chose to nominally invest in stock and bonds, as a disguise for a present to Mr. Wood for building the road. But such was not the case, and we must consider the other element actually present, namely, the fact that the innocent public were expected to invest, and did actually invest, in both the stock and the bonds; the latter being declared to be issued in pursuance of, and with the guaranty of, the statute of this state, above cited. Now, the intrinsic demerit of this contract lies in the fact that there is an entire absence of any serious attempt to limit the aggregate amount of the stock and bonds to be issued, under its provisions, to the actual cost of the road and equipment; nor was there any sufficient detailed specification of the character of the work to be done, and of the materials to be furnished. The width of the right of way to be acquired was not fixed. The amount of land to be acquired for terminal facilities at each station was not fixed. The number of ties to the mile was not mentioned. No sidings or facilities for watering engines were provided for. The size and character of the station buildings were left to Mr. Wood's judgment. No provision was made for equipment for the Seashore Line, unless it was finally extended to Cape May city. No provision was made for any telegraphic equipment. Wood, under the contract, secured the right to build the Cape May branch, but was not obliged to do so. It is impossible to read this contract without observing how completely the company was left at Wood's mercy, and the proofs show that he exercised complete control until about September 1, 1890. The line to Sea Isle City, the terminus of the Seashore Line proper, was a fraction less than 40 miles in length, and with sidings a trifle less than 42 miles; and, for building it, $1,100,000 in stock and bonds was contracted to be given. The proofs furnish materials from which a fair estimate can be made of what each of the roads, fully equipped, ought to have cost. We may get at it in two ways: First, by an ascertaining what was the amount actually expended upon them; and, second, what it would cost to put them in good running order, and equip them. The actual amount of cash paid by the company and by Wood for construction and equipment of the main line to Sea Isle City, including the amount paid Hobart & Co. under the Hobart contract, is $224,751; the amount of unpaid bills for the same line is $202,853; making a total of $427,604,—and this expenditure left the road in fair running order. The expert's estimate of the cost of putting it in complete running order was $23,520, and for its equipment $126,500; making a total of $577,624,—a trifle more than the amount of bonds to be issued against it. The proofs show that the cost of grading and bridges on the Cape May branch

Digitized by Google

was considerably less than on the main line, and that a trifling additional expense for equipment would complete it for use in connection with the other road; so that $300,000 is liberal for the cost of the Cape May branch. An estimate made up from the opinions of the experts sworn at the hearing, in connection with the bills for work done and materials furnished, distributes this cost as follows:

Main Line.

Cost of grading, estimated at $1,500 per mile	$ 60,000
Cost of the bridges (actual)	29,230
Ties, at 2,600 to the mile	60,000
4570 tons of steel rails, 110 to the mile	137,000
Other hardware and fittings	30,000
Laying and finishing	40,000
Station facilities, 10 stations (large estimate)	20,000
Right of way,—most of it was given,—(actual)	2,000
Equipments,—five locomotives	40,000
20 passenger coaches	60,000
Five baggage-cars, 40 freight, construction, and other cars	40,000
Incidental expenses	31,770
In all	$550,000

—Just the amount of the bonds issued for this line.

Cape May Branch.

The Cape May branch, if operated in connection with the main branch, would require one additional engine and ten coaches	$ 60,000
28 miles of road, including sidings, upon which there were few bridges and stations, and very light grading.	250,000
	$ 310,000
Add for contingencies	40,000
	$350,000

—Making altogether, for both roads, $900,000, just the amount of bonds to be issued for both lines.

Mr. Wood, in his dealings with the directors, made up monthly statements of the amount of his work done on the main line, based, not on specifications and measurements, but on estimated proportions which the work already done on both lines bore to the cost of the whole job, to be paid to him in stock and bonds, and for that purpose put separate estimates on the different classes of work, high enough to make the aggregate rate reach $1,300,000. Thus, in his estimate of February 20, 1890, he makes the excavations $155,000, or $2,380 per mile for 65 miles (both roads),—an overestimate of above $1,000 a mile. For bridges he makes an estimate of $86,000. The actual cost of the bridges on the main line was $29,230, and the total estimated cost for both lines was $35,000. His estimate for ties is $200,000, which, at 60 cents per tie (a large price), would purchase 333,333 for 70 miles of road, counting the sidings. The actual number used in 70 miles is 190,000, which leaves a surplus of 143,333 ties. For rails, he estimates $445,000, or $6,350 per mile, while the actual cost is 110 tons per mile, at $30 a ton, or $3,300,—an overestimate of $3,000 per mile. For fittings, he estimates $76,000, or $1,085 a mile, while the actual cost is about $750. For tracklaying and finishing, he estimates $98,000, or $1,400 per mile, while a fair estimate would be $800. For the right of way, he estimates $60,000 or $1,000 per mile, while the actual cost was trifling, most of it having been given, and only $2,200 were paid for the whole right of way from Winslow Junction to Sea Isle City. For terminal lands, he allows $120,000. The actual cost was but trifling. For stations and so forth, he estimated $60,000, while $30,000 would be a liberal estimate. In his estimate of August 1, 1890, he increased the estimate for excavations from $155,000 to $185,000, and that of bridges from $86,000 to $100,000. He increased the estimate for ties from $200,000 to $235,000, and for rails from $445,000 to $500,000; the fittings, from $76,000 to $80,000; tracklaying, from $98,000 to $160,000. In this estimate he includes nothing for right of way or terminals, and reduces the cost of stations from $60,000 to $40,000. The inflated character of these items is manifest. No serious attempt was made to show that these roads would have cost, if carefully built, for prompt pay, more than $900,000, or $550,000 for the Sea Isle road and $350,000 for the Cape May road, both fully equipped, to be operated as one road. Now, this is just the amount of the mortgage bonds to be issued and delivered to Wood for doing this work; to be issued to him under the solemn guaranty of a statute of the state of New Jersey, and with a deliberate statement on their face that they were issued no faster than an equal amount of cash was paid into the company on account of stock subscriptions actually paid, which cash was, with the proceeds of the sales of these bonds, to be honestly used for the construction of the road. In fact, in view of the dealings between Wood and Physick and Wood and Boney, and of the frank statement and elaborate argument of the learned counsel who supported this transaction, it is quite plain that these sums of $550,000 and $350,000 were fixed at the probable cost of each road and their joint equipment. Now, I think that such a contract was a fraud on the act of the legislature, and the issuing of stock and putting out of bonds under it a fraud on those who took either without notice. It is clear that if the issues of bonds and stock were made as contemplated, and the bonds were held to be protected by the mortgage, the stock would be of little or no value, and the bonds would not have more than half the security contemplated by the law, and provided for and promised on their face. I therefore think that all the persons who are participants in the transaction—the directors, on the one hand, and Wood on the other—are chargeable with being participants in the fraud and breach of the law, and debarred, upon plain principles, from deriving any benefit from it, as against innocent sufferers by the fraud and breach of the

Digitized by Google

law. And I come to this conclusion quite independent of another point made against this contract, viz. that it provided for the building of the Tuckahoe & Cape May branch, and was so far ultra vires the contracting railroad company.

The proofs show clearly that all bonds issued, except the first 100 or thereabouts, were so issued in excess of the amount at the time of their issue paid in directly on account of capital stock. An attempt, however, was made to meet this clear result by showing that Mr. Wood had, from time to time, and finally, done work and furnished materials under his contract largely in excess of the amount which he had been paid by the company, or which the company had paid on his account, and that it was plain that for this excess he was entitled, under the contract, to a credit and a corresponding issue of stock; or, in other words, that the excess of his work and materials should be counted as so much paid in on account of stock. In deference to the earnestness with which this view was presented, I have made as careful and thorough an examination as I could of the proofs in the cause, including the mass of checks of both Wood and the railway company, and vouchers for paid claims of every description that were produced,—and all were produced,—with a view of ascertaining how much foundation in fact there might be for this contention. In dealing with this question it is to be observed that Mr. Wood was not, and clearly is not, entitled to credit on either stock or bond account for the whole amount actually put on either of the roads in labor and materials, for the simple reason that such work and materials were not yet paid for in full, and the railway company stood liable to pay for them. The subcontracts and purchases were made in the name of the railway company, and it was liable as paymaster. It would be absurd to issue certificates of paid-up stock of the company to Mr. Wood in payment for work done and materials furnished which the company still remained liable to pay for. And here is the radical error into which the counsel arguing in favor of this position have fallen. They have claimed credit for Mr. Wood for all the work done and materials furnished upon the roads, whether paid for or not, in the face of claims for several hundred thousand dollars put in against the company, and for which the company is liable. All that Mr. Wood could possibly claim credit for in the way contended for was the amount actually paid out and expended in the construction of the road, the object being to ascertain the amount of the actual assets of the company at any particular time desired, in order to ascertain whether or not there was at that time an excessive issue of bonds. In order to arrive at this, we must take the aggregate amount actually paid, whether by the railway company or by Mr. Wood, on construction account, and add thereto the cash on hand and that deposited with the state treasurer at Trenton. Mr. Wood cannot complain of this mode, as all the moneys of the company were disbursed on his order, and under his immediate supervision, and they presumably went to the construction of the road, and in point of fact the vouchers show that they actually did. Having ascertained this value at the dates of the several issues of bonds, we can compare it with the amount of bonds so issued. Unless the amount so ascertained shall be more than double the amount of the corresponding bond issue, the stock cannot be considered as paid up to an amount greater than the issue of bonds to that date; that is to say, the total payments must equal both stock and bonds issued to date, or there will be no surplus to make the issue of stock greater than the issue of bonds. With this premise I proceed to give the result of my examination, giving first the amount of the assets, counting only what had been paid out on account of the main line to Sea Isle City, and the money in cash in hand on account of that line:

1890.			
Mar. 1. No. of bonds issued to date, 113.			
Value back of bonds to date should be		$226,000	
Paid out to date a/c construction	$45,232 00		
Cash at state treasury	30,000 00		
Cash on hand	11 131 86		
		86,363	
Deficiency			$139,637 00
Ap. 28. No. of bonds issued to date, 158.			
Value back of bonds to date should be		$316,000	
Paid out to date a/c construction	$90,109 00		
Cash at state treasury	30,000 00		
Cash on hand	110 00		
		120,218	
Deficiency			$195,782 00
June 25. No. of bonds issued to date, 305.			
Value back of bonds to date should be		$610,000	
Paid out to date a/c construction	$159,044 00		
Cash at state treasury	10,000 00		
Cash on hand	2,301 00		
		171,345	
Deficiency			$438,655 00
Aug. 1. No. of bonds issued to date, 364.			
Value back of bonds to date should be		$728,000	
Paid out to date a/c construction	$173,760 00		
Cash on hand	73 00		
		173,833	
Deficiency			$554,167 00
No. of bonds issued under Mr. Wood's control, 465.			
Value back of bonds to date should be		$930,000	
Total paid by Wood & the Co. a/c construction	$197,495 00		
Cash on hand	503 00		
		197 998	
Deficiency			$732,002 00

This brings us to the end of Wood's administration.

During this period considerable payments were made both by Mr. Wood and by the railway company directly on account of the construction of the Cape May branch or extension. This was clearly unwarranted in law, and an unlawful diversion of the company's funds, which did not entitle Wood in

Digitized by Google

law to a credit on account of payments for stock.

Waiving this difficulty, I will bring into the problem the various totals of payments on account of the extension, and with the following result:

1890.			
Mar. 1. Deficiency on Phila. & Sea Shore Ry. by above statement		$139,637	
Paid a/c T. & C. May Ry. for construction	$21,561		
Cash at state treasury	34,000		
		55,561	
Total deficiency both roads			$84,076
Ap. 28. Deficiency on Phila. & Sea Shore Ry. as above		$195,782	
Paid a/c T. & C. May Ry. for construction	$43,575		
Cash at state treasury	24,000		
		67,575	
Total deficiency both roads			$128,207
June 25. Deficiency on Phila. & Sea Shore Ry. as above		$428,655	
Paid a/c T. & C. M. Ry. for construction	$65,200		
Cash at state treasury	12,000		
		77,200	
Total deficiency both roads			$351,455
Aug. 1. Deficiency on Phila. & Sea Shore Ry. as above		$554,167	
Paid a/c T. & C. M. Ry. for construction	$68,500		
Cash at state treasury	12,000		
		80,500	
Total deficiency both roads			$473,667
End of Wood's time, deficiency on Phila. & Sea Shore Ry. as above		$732,000	
Paid a/c T. & C. M. Ry. for construction	$70,315		
Cash at state treasury	12,000		
		82,315	
Total deficiency both roads			$649,687

The result is that all the Wood issues, except the first 100, were overissues, and invalid as between the parties. The fraudulent and illegal character of the transaction above pointed out did not, however, appear on the face of either the mortgage or the bonds issued under it. Those, as already shown, were honest and lawful on their face, and all persons taking them for value without notice of the defect above pointed out had the right to rely upon the statement they contained, and to suppose that they were in fact issued no faster than the law allowed. The defense that they were issued in violation of law depends upon facts within the knowledge only of the officers of the company. They were not of such a character as that ordinary purchasers of the bonds were chargeable with notice of them. The case is clearly distinguishable from the large class relied upon in the argument, where the legislature has prescribed a condition precedent, the existence of which is a matter of record, open to all. The case of Water Co. v. De Kay, 36 N. J. Eq. 548, decided by the court of errors and appeals, is in all its aspects precisely in point, and the very reasons stated by the learned judge who spoke for the court in that case, as reported on pages 563–568, apply here, and render any further discussion quite unnecessary.

In determining who are bona fide holders for value without notice, I feel constrained to follow the rule laid down in Allaire v. Hartshorne, 21 N. J. Law, 665, which was mentioned with approval in Armour v. McMichael, 36 N. J. Law, 92, and to include as bona fide holders such as have taken bonds as security for previously existing debts without notice, and also without any present parting with property or losing any right of action. The distinction, in this respect, between negotiable commercial instruments (with which must now be classed negotiable bonds secured by mortgage) and equitable or unrecorded legal rights in land and unnegotiable choses in action, was pointed out by Chief Justice Green, in Allaire v. Hartshorne, 21 N. J. Law, 665, at 668, and has since been recognized by the courts whenever the question has arisen.

In passing upon the validity of the several batches of bonds in the hands of their several holders I will deal with the first 465 issued during Wood's control. The application of this rule will, upon the facts, include and allow the following claims: Burnham, Williams & Co., Fourth Street National Bank, Manufacturers' National Bank, Commonwealth National Bank, Seventh National Bank, New Jersey Trust & Deposit Company, Central National Bank, First National Bank, Millville National Bank, Philadelphia & Atlantic Railroad,—that is, the Reading Railroad,—Philadelphia Warehouse Company (the dividend not to exceed the amount due, the receiver to have the option to redeem the bonds and cancel them), Diamond State Iron Company, Louis Blank (upon condition that he subrogates the receiver to his rights against the estate of Becker), James Campbell, Annie W. Chearis, Charles E. D'Invilliers, E. J. Etting, R. S. Hand, Hildebrand & Wolfe, Daniel Ireland, estate of James Mecray, Mrs. Schellenger, Bernard McGrane, J. C. McNaughton & Co., estate of E. B. Wheaton, P. M. Wheaton, S. J. Weightman. I feel constrained to disallow the claim of Dr. Physick on the 25 bonds received by him from Wood as a bonus for paying for the 500 shares of stock for which he had subscribed. He was a party to the whole scheme from the beginning, and stands in the same position as Wood. Besides, he was an active director, and is chargeable with an actual knowledge of all these transactions. He was elected a director November 20, 1889, and was present on November 25, 1889, when the Wood contract was authorized, and attended all subsequent meetings. It is impossible to suppose that he did not know that, if these bonds were issued according to law,—that is, no faster than actual cash was paid for stock,—and the proceeds were honestly applied to the construction of the road, Mr. Wood would hardly be willing to make him a present of a first-mortgage bond of $1,000 for each $1,000 he had paid in on his stock subscription. The transaction speaks for itself, and I am entirely satisfied that Dr. Physick knew that the issue of bonds alone covered the entire probable cost of the road and equipments. Further, I am satisfied that the transaction between him and Wood took the shape it did for the purpose, among others, of using his example as a subscriber to the stock for the purpose of inducing innocent parties to make

Digitized by Google

subscriptions and pay for stock. At first I was inclined to think that as to 17 of the bonds—Nos. 54–70—delivered to him by Wood he was entitled to claim that they were not in fact overissues, being part of the first issues of 70 bonds to Wood, which were legalized by the early payments of cash on account of stock, and therefore intrinsically good and valuable in everybody's hands. But upon reflection I am unable to adopt that view as between Dr. Physick and other innocent holders of the bonds. He was, as before observed, party to the original arrangement by which the holders of these bonds were to be deprived of the full measure of the benefit of payments for stock to which they were entitled. If the two roads had been honestly built and equipped for a cost fairly represented by an equal amount of stock and bonds, that amount would not have exceeded $450,000 of each, giving the bondholders fair security. Instead of this, he assisted in carrying through a plan by which their security would be reduced at least one-half. This consideration is of itself sufficient to deprive him of the right in this court to stand on an equal footing with the victims of what may be justly called his fraud. There is another consideration which weighs against him. He gave nothing for these bonds. He openly subscribed, through his figurehead, Deery, for 500 shares of stock, and when he paid the company for them he simply discharged his just and legal obligation, and was not entitled to any compensation for so doing. Such a fulfillment of his contract cannot form such an equitable consideration for these bonds as to make him a holder for value in any sense. For that reason he can have no better standing as their holder than Wood had. Now those 70 bonds were not issued, in the first place, to Wood for cash advanced. The books show that they were simply delivered to him December 10, 1889, without any entry in the books except in the bond account. The first entry on the cash book and journal is February 20, 1890, when Wood is charged and bond account credited with the amount of them. Wood is on the same date credited with $306,455 on construction account, being the amount of the inflated estimate of his work bearing that date, which I have before set forth. On the 14th of February, Dr. Physick paid an installment on his stock subscription of $5,000, which made the total paid by him to that date $17,500,—$500 more than the 17 bonds he received from Mr. Wood on that date; and it is clearly inferable that the 17 bonds now in question were handed him by Wood February 20th. That would be their first actual issue. Now, if the first 70 bonds are counted as having been issued on December 10th, then, on February 6th, as has been previously shown, there was an overissue, by delivery of bonds to outside parties, of about $10,000. But if these 17 bonds are not counted as having been issued until February 20th, then there was no overissue on February 6th, and the first overissue was in these very 17 bonds; but it would not be great, for in the meantime $8,760 had been paid in on stock account. Subsequently there were very large overissues, and it is clear that Wood is not entitled to make any claim on any bonds. Further, the evidence does not satisfy me that at the time these 17 bonds were charged to Wood and delivered to Dr. Physick their amount was honestly due to Wood from the company. In order to show such indebtedness, credit must be given him for the inflated estimate of work done, before referred to. I can form no reliable estimate from it, or from the books of the real amount of work done at that time, and paid for. As before shown, the fact that it was done does not entitle him to credit unless it was also paid for. But, further, the evidence satisfies me that Wood had very little, if any, free capital to invest in this enterprise, and he was obliged, from the start, as before stated, and throughout, to operate in the name and on the credit of the company. He took full advantage of the clause in the contract giving him that power. He had assumed to bind the company in a contract, quite beyond its power, to build the Cape May branch, and had used the money of the company to pay to the state treasurer the necessary deposit for the organization of that road, and had applied those moneys towards the cost of its construction. In all this he was, in effect, acting as the agent and trustee of the company. This aspect of the affair, and the circumstances, rendered it, in my judgment, a positive wrong for him to give away the assets of the company. These bonds, though they may have been nominally his property, were, in morals, and I think in equity, the property of the company. Certainly he had no right to give them away, or to devote them to any use except the building of the road; and quite as certainly, if they were now in his possession, he could not be permitted to found upon them a claim to share in this fund as against innocent and bona fide holders, and, if he cannot do so, then I am unable to see how Dr. Physick can. I will consider his claim to the 43 bonds, part of those issued to Hobart & Co., further on.

J. C. Chance, Executor of W. D. Jones.

J. C. Chance, as executor of W. D. Jones, holds and presents five of the bonds. Of these Nos. 14, 15, and 16 were bought from Mr. Wood, and paid for in cash at par and accrued interest by Jones to Wood, probably about March 1, 1890. As to them the claimant is entitled to a dividend.

The other two—Nos. 243 and 244—are clearly a part of an overissue, and therefore illegal and void, except in the hands of a bona fide holder for value. No proof is offered as to what, if anything, was paid for them, or under what circumstances they come to Jones' possession. Upon this state

Digitized by Google

of the case I do not see how any claim can be allowed upon them. Their illegality being proven, the burden is thrown on the holder of showing that he paid value for them without notice. This seems to be thoroughly settled in this state. Duncan, Sherman & Co. v. Gilbert, 29 N. J. Law, 521; Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. Law, 513, 517, 7 Atl. 318; 2 Rand. Com. Paper, §§ 566–568, 1027, 1028; Holcomb v. Wyckoff, 35 N. J. Law, 35. The reason of the rule is thus stated by Mr. Justice Depue at page 39, where he says: "The notes sued on were fraudulent and void in the hands of Farrington. He could not have enforced them against the maker. By proof that they were obtained by fraud the burden was cast on the plaintiff of showing a consideration for some one of the subsequent transfers that will defeat the maker's equity. What Bryce paid for the notes does not appear. The probability is that he was a mere agent to effect a disposition of them. In the absence of proof that he gave value, the inference is that he was a holder without value paid. As the case stands with respect to Bryce, he could not have recovered on them at all. He therefore had no title which he could transfer by a sale to the plaintiff, and until they reached the plaintiff's hands the notes continued to be affected by the vice which made them void in the hands of the original holder."

Richard C. Souder.

Richard C. Souder is entitled to a dividend upon his two bonds upon condition that he shall, upon proper terms, subrogate the complainant to his right in equity to revoke the credit he gave for them on his mortgage, and to recover the amount due irrespective of that credit. The bonds are a part of the overissue.

Anthony Steelman.

Anthony Steelman, by reason of his connection, as director, with the company, and his familiarity with its affairs, is chargeable with notice of the illegality of his bond by reason of its being an actual overissue; and he is also chargeable with being a party to the illegal scheme which took shape in the contract of November 27, 1889, and he is therefore not entitled to any dividend.

E. A. Tennis.

E. A. Tennis is not entitled to any dividend on his bonds, by reason of his familiarity with the affairs of Wood and the company, and the mode in which the roads were being built. He is chargeable with knowledge that his contract made with the railway company through Wood was beyond the power of the company, and that payments to him were diversions of the funds of the company from their true purpose. It does not appear which of his bonds were paid to him on account of work done on the main line.

Theophilus Weeks.

Theophilus Weeks is chargeable, being a director, with notice of the illegality of his two bonds. He bought No. 148 from Mr. Wood and paid $1,000 for it; and he also obtained No. 376 from Wood, through Tennis, for $800. He is not entitled to a dividend.

The Trustees of Mary and Julianna Wood.

The trustees of Mary and Julianna Wood are, as I think, entitled to be allowed a dividend on their bonds upon condition that they subrogate the complainant, upon equitable terms, to the right they have to collect the whole of their mortgage from E. R. Wood.

Richland Improvement Company.

The Richland Improvement Company is entitled to a dividend on its bonds, not to exceed the amount paid for them,—$112.97,—the receiver to have the option to pay that sum and cancel the bonds. I arrive at this conclusion upon the authority of Vice Chancellor Van Fleet upon the claim of the two banks in De Kay v. Water Co., 38 N. J. Eq. 158, at page 160. The same rule gives the two building associations—Sea Isle City Lot & Building Association No. 3 and Sea Isle City Lot & Building Association No. 4—dividends on their bonds. Some, but not all, of the directors and stockholders in these associations were directors in the railway company. They seem, however, to have paid for their stock and bonds at par in good faith.

Estate of George H. Becker.

The estate of George H. Becker holds 10 of the Wood issue of bonds, the numbers of which show that they were overissues. Becker was a director from the start, and was familiar with the affairs of the company, and is chargeable with notice of the illegal issue of bonds. Moreover, there is not a particle of proof how or from whom he obtained them, or what, if anything, he paid for them. He cannot, therefore, be allowed for them.

Morris Boney.

Morris Boney holds 18 of the Wood issue. Of these he received 7 from Wood in payment of $5,000, previously advanced by him to Wood to help make up the deposit of $70,000 with the state treasurer. Three of the 7 are part of the first 70 issued. At first I was inclined to think that he might be allowed a dividend upon those 3,—Nos. 45, 46, and 47,—but upon reflection I am satisfied that his connection with the whole scheme, the character of which I have already enlarged upon, ought to debar him from even so small a share. The remaining 4 of the 7 taken by him from Wood are clearly overissues, of which he is chargeable with notice. The remaining 11 of the 18 which he received from Wood he received under circumstances precisely similar to those under which Dr.

Digitized by Google

Physick received his 25, and Mr. Boney must fail for the same reason that Dr. Physick failed.

Estate of T. H. Whitney.

T. H. Whitney was not a director, and there is no proof that he had any knowledge of the illegality of the transactions in question, except what arises from the fact that he got $3,000 worth of bonds and $3,000 worth of stock for the payment of $3,000. This is suspicious, but, upon reflection, I conclude it is not sufficient to debar him. He may have his dividend.

With regard to the three bonds held by William E. Potter, the evidence shows that they were received by him from E. R. Wood as the best security that he could get for professional services previously rendered by him to Wood in the suit of Wood v. Boney. Mr. Potter, with honorable frankness, admits that he had previously become acquainted with the facts relied upon to render these bonds invalid, and hence could not occupy the position of a bona fide purchaser for value without notice. These circumstances compel me, with regret, to come to the conclusion that he is not entitled to a dividend. I say "with regret" because I can see no difference in equity between his standing and that of other parties,—say Burnham, Williams & Co., who received bonds as security for a previous indebtedness without giving up anything for them, either in money or other valuable thing, or the postponement of the right of suit. But the rule as laid down in Allaire v. Hartshorne gives them the position of bona fide purchasers, provided they did not have notice of the defect in question. Mr. Potter did have notice, and therefore cannot participate in the fund.

Mrs. Mary K. Wood is entitled to a dividend upon the bonds held by her, and upon so many of the coupons handed to her by her husband as were detached from bonds upon which dividends are to be made, and which coupons fell due after the actual issue of the bonds, and were actually paid for by Wood with his own money, and not with the money of the company.

There remains to be disposed of the batch of 297 bonds, viz. Nos. 466–762, issued by the directors in the spring of 1891. Of these, 50 went to the Bethlehem Iron Company; 200 to Hobart & Co., and through them to Conway; 45 to Boney; and 2 remain with no claim made on them. With the 200 delivered to Hobart & Co. there were issued 5,040 shares of stock. The certificate for this stock was made out to Hobart & Co., and, with the 200 bonds, was handed to Conway, presumably with an assignment on the back of the certificate. Counsel for the present holders of these bonds at the hearing reduced their claim to a dividend on 27 or 28 bonds, representing the money actually expended upon the road by Hobart & Co., and paid for out of moneys advanced by Conway, the value of which expenditure was estimated by an expert at about $21,371. At first I was inclined to think that the transaction might be shaped into a payment of say $14,000 on account of stock and $14,000 on account of bonds, and a dividend allowed on 14 bonds. The basis in equity for this proposed judicial contrivance was the fact that the other bondholders have received the benefit of the expenditure made in consideration of this issue in an increased value of the road when sold, and that it is no more than fair that they should be compelled to admit these benefactors to share in this benefit. But, upon reflection, I am unable to adopt this view. To do so would be to give judicial sanction to a criminal transaction, and to the guilty parties a benefit from it. The same equity which is so relied on exists in favor of the numerous other persons who have done work and furnished materials for the work without security. This issue of the bonds was absolutely void, and Boney, Physick, and Becker are each and all clearly chargeable with notice of it. In fact, it was their criminal act which made these bonds void. It would be going contrary to every principle of judicial action to give either one of them the least benefit of their own criminal conduct. Moreover, as they were each more or less responsible for the illegal and fraudulent character of the whole scheme which resulted so disastrously to the innocent holders of the other bonds, it is, at most, but a grim justice that their illegal attempt at the last stage of the affair to gain an equal footing with those who paid par for other bonds, by paying a much less sum, should result in a benefit to those they intended to overreach. I would gladly make an exception in favor of Mr. Conway if I could see any solid ground for it, since he was not a director, and not so familiar as the others with the previous history of the enterprise. He was, however, aware of the desperate condition of the finances of the concern at the time he intervened, and he could not have mistaken the intrinsic nature of the transaction which he consented to carry through. The facts spoke for themselves. He received a large certificate for stock and a large batch of bonds, which were issued without any foundation whatever, and could have no validity except what arose from the money which he advanced upon them. He is, moreover, clearly chargeable with notice of the terms of the law which forbade the doing of what was done. Granting that he was ignorant, and that he was misled by bad advice, still, the maxim, "Ignorantia legis neminem excusat," applies, and he must bear the consequences. If these people wished to have the road finished, and to be secured for the money necessary to accomplish it, they should have applied to the court for its direction and assistance. Instead of that, they took the risk, not only of disregarding the restraining order of this court, but of breaking a general and wholesome law of the state. The same con-

Digitized by Google

sideration applies to the bonds held by Mr. Boney to secure him for the expenses he incurred in operating the road. The result is that none of the bonds numbering beyond No. 465 will be allowed, except those held by the Bethlehem Iron Company.

The position of the Bethlehem Iron Company and the Diamond State Iron Company, with regard to their several bonds, differs somewhat from that of the others. I think they are clearly entitled to the benefit of the fact that the mortgage was valid on its face, and proposed to keep strictly within the letter of the law. Their several contracts provided for the delivery of the materials specified in installments, and only upon payment in cash and notes secured by deposit of bonds. That part of the contract clearly must be construed as meaning bonds lawfully issued, and the railway company had no right to make a demand for a delivery of rails or tracking materials until they were in a position to deliver the bonds without breaking the law. In effect, the deliveries were made only upon the demand of the railroad company at its option. The time fixed in the contract for delivery of the rails was not observed, and probably was not intended to be observed, except to prevent the railway company from demanding the rails faster than the time therein limited. It follows, as it seems to me, that each demand of rails or materials was, in effect, a declaration and assertion by the officials of the railway company that the bonds to be delivered as security for the notes given would be legally issued, and based upon corresponding payments on stock account as required by law. I think the rail-making company and the material men were entitled to so consider it, and to rely upon it. They were not obliged to receive bonds unlawfully issued; and the demand for rails and materials, as before remarked, was an assertion by the railway company's officers, who alone knew the truth, that the bonds were lawfully issued. This short reason covers all except the 50 bonds of the Hobert issue delivered to the Bethlehem Iron Company in May, 1891. That company may be, and probably is, chargeable with notice that this issue was, or might be, illegal. But such notice, if admitted, is not necessarily fatal to their right to a dividend upon them. In determining that right we must bear in mind that they were entitled to these bonds the previous October, when the last delivery was finished. There is no proof that they then had notice of any irregularity. Just how Wood managed to procure the final delivery of the rails without a contemporaneous delivery of notes and bonds does not appear. In fact, the accounts of the company show that the last note—$41,504.23—was given for the one-half payment on deliveries of rails commencing on the 11th of September and ending on the 15th of October,—15 deliveries in all,—when, on the last delivery, a note was given for the balance, and this may account for what actually happened. Whatever may have been the facts, it must be held, for present purposes, that there was no waiver by the rail company of its right, under the contract, to its bonds, for it appears that it pushed its claim vigorously by litigation, and obtained the bonds as the result of the suit. This seems to me to place the rail company where it would have stood if the bonds had been delivered strictly according to the contract, and entitles it to a dividend. In coming to this conclusion I must not be understood as assenting to the doctrine advanced at the hearing that the delivery of the bonds in Pennsylvania was not a crime, and therefore not forbidden by the statute. I think that doctrine unsound. The overissue was illegal and void, because so declared by the legislature. Such declaration is, indeed, not made in terms, but by necessary implication from the imposition of a penalty for the act. This result cannot be affected by the ability of the wrongdoer to escape punishment by reason of the commission of the act in a foreign jurisdiction.

NOTE BY THE VICE CHANCELLOR. Since the publication of the foregoing opinion my attention has been called to two or three mistakes of fact affecting the right to a dividend on a few of the bonds dealt with. Several bonds which had not been presented at the final hearing have since been presented and proved, and as well as those as to which I fell into error of fact are dealt with in the decree. I do not deem it necessary to give any reasons for such action.

TAYLOR v. HUEY et al.

(Supreme Court of Pennsylvania. March 5, 1895.)

GARNISHMENT—MORTGAGE—COLLATERAL.

A mortgage debt cannot be garnished by proceedings against one who holds the mortgage as collateral security.

Appeal from court of common pleas, Chester county.

Action by Edwin O. Taylor against William Huey. A garnishment summons to R. Haines Passmore was issued, and after he had answered, and the evidence had been taken, a verdict was directed for the garnishee, and judgment was rendered in his favor, and plaintiff appeals. Affirmed.

The following is the garnishee's answer:

"About December 14, 1886, I bought of the said William Huey a farm in Birmingham township, Chester county, the purchase money for which was settled and paid when said deed was delivered. Said farm, however, was subject to a charge in favor of Rachel P. Huey of an annuity of twenty-five dollars during her life, which the said Huey undertook to pay, and to indemnify me against having the same to pay, and on December 14, 1886, entered into an agreement in writing with me, a true copy of which is hereto attached and made part of this an-

Digitized by Google

swer, whereby he agreed to deposit with me the mortgage of James W. Hixson, therein named, as a pledge for the payment of said charge, and as indemnity against having to pay the same. I received said mortgage under and pursuant to, and for the purposes specified in, said agreement, and I held the same until about March 17, 1892, when the mortgage of Fred Deifenbacher and wife upon lots in Eden Park, additions to the city of Chantee, Neosho county, Kansas, for $300 payable March 19, 1897, with interest at 8 per cent., payable semiannually, was substituted for said Hixson's mortgage under said agreement, and for the same purposes. This mortgage was given to Lucius M. Bedall, and was assigned by him in blank, and the same is now, and was at the time said attachment was served upon me, in my possession, as a pledge for the purposes stated in said agreement. I have received the interest on the said two mortgages as the same fell due, and have paid said annuity to Rachel P. Huey. A copy of my receipts and payments on said account is hereby appended, and made part of this answer, and, as appears by the same, there is now due me from the said William Huey, on said loan, the sum of twenty dollars and sixty-seven cents, for which I hold said mortgage as security. The said Rachel P. Huey died September 14, 1892.

"To the third interrogatory: There was no balance in my hands in favor of the said William Huey when said attachment was served, or at any time since.

"To the fourth interrogatory: I had not, when said attachment was served on me, or at any time since, any goods, merchandise, moneys, effects, or property of any kind, except as stated in my answer to the second interrogatory.

"To the fifth interrogatory: I was not indebted when said writ was served on me, or at any time since, to the said William Huey."

C. Wesley Talbot, for appellant. Alfred P. Reid, for appellees.

PER CURIAM. The answer of R. Haines Passmore, the garnishee, contains no admission of attachable assets in his hands, or of money due by him to the defendant William Huey, nor was there any testimony tending to sustain the plaintiff's contention. The Deifenbacher mortgage, which, by agreement of the parties, was substituted for the Hixson mortgage, and for the same purpose, was held by the garnishee as indemnity against the annuity. It was a mere chose in action, or security for the debt recited therein, and could only be attached by bringing in the mortgagor as garnishee. The defendant's debtor, and not the person who holds the evidence of indebtedness, must be made the garnishee. Raiguel v. McConnell, 25 Pa. St. 362; Gilmore v. Carnahan, 81 Pa. St. 217. In the absence of either admission or proof of anything attachable in the hands of the garnishee, the learned court was clearly right in discharging the rule for judgment on the garnishee's answer, and in subsequently refusing to submit the case to the jury. The first and second specifications are therefore dismissed. The third and last specification is not according to rule, and therefore not entitled to notice. The record discloses no error in the judgment. Judgment affirmed.

EHRET v. GUNN et al.

(Supreme Court of Pennsylvania. Feb. 18, 1895.)

EASEMENTS—CREATION—RIGHT TO USE OF ALLEY.

Where a landowner conveys part of it, and afterwards lays out an alley bounding partly on the land conveyed and on that retained by the grantor, the grantee and those claiming under him are entitled to the use of such alley as against a subsequent grantee of the balance of the land by deeds which recite that he is entitled to "the free use and privilege of said alley in common with" the first grantee, "his heirs and assigns, owners, tenants, and occupiers of the other lots of ground bounding thereon."

Appeal from court of common pleas, Philadelphia county.

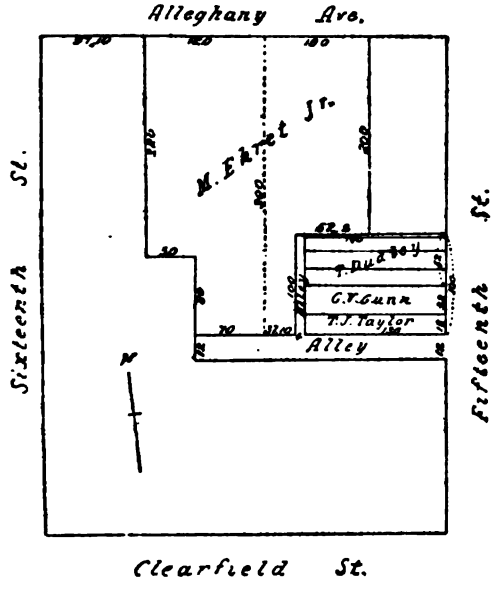
Bill by Michael Ehret, Jr., against George V. Gunn and others, for an injunction. From a judgment dismissing the bill, plaintiff appeals. Affirmed.

The opinion of the court below is as follows:

"This case, which was heard on bill and answer, was brought to determine a controversy which has arisen between the plaintiff and the defendants relative to the right of the latter to the use of a certain twelve-foot wide alley way, which furnishes the only means of entrance to and exit from the rear of their several lots on Fifteenth street south of Allegheny avenue. If the defendants are cut off from the use of the alley way, they have no other means of entrance to or exit from the rear of their several properties, and everything brought into or carried out of their respective houses must go by the front door. It appears that one Hiram Miller was originally the owner of the whole property now belonging to the plaintiff and the defendants. He also owned the land in the rear of the plaintiff's lots, extending from Fifteenth to Sixteenth street, over which he laid out the twelve-foot alley, now in dispute, before he made any conveyance to the plaintiff, and after he had conveyed to the grantor of the defendants. On August 2, 1872, Hiram Miller conveyed to Eli Hess a lot of ground on the west side of Fifteenth street, two hundred feet south of Allegheny avenue, containing one hundred feet on Fifteenth street. This lot came subsequently, by several mesne conveyances, to George V. Gunn, who cut it up into five smaller building lots, three of which

Digitized by Google

he conveyed to Thomas Dudley, one to Thomas J. Taylor, and retained one for himself. Subsequent to the conveyance to Hess, Hiram Miller laid out a twelve-foot wide alley on the south of the lot conveyed to Hess, bordering on the Hess property, and running back from Fifteenth street to the rear of Ehret's property, which fronts on Allegheny avenue. This alley was recited in the deeds to the plaintiff for the lots on Allegheny avenue (which were conveyed to the plaintiff by Miller by two deeds, dated, respectively, May 19, 1882, and June 13, 1883) as having been 'laid out for the use of those lots and the other lots bounding on said alley,' and is described in the plaintiff's deed thus: 'Together with the free use and privilege of the said alley as a passageway and water course, and for the use of horses, carts, and carriages, in common with the said Hiram Miller, his heirs and assigns, owners, tenants, and occupiers of the other lots of ground bounding thereon, at all times hereafter, forever.' The lithographic plan attached to the plaintiff's bill shows very clearly the location of the twelve-foot wide alley thus laid out by Miller for the accommodation of the several lots bounding upon it.



"The plaintiff contends that, inasmuch as Miller's conveyance to Hess was made anterior to the laying out of the twelve-foot alley, neither Hess nor any of the subsequent grantees claiming under him have any right to the use of the alley. I cannot agree with the plaintiff in this contention. I think it is clear that it was the intention of Miller, when he laid out the twelve-foot alley, that all the properties bounding upon it should have the use of it. It is so declared in the plaintiff's deeds from Miller, where it is explicitly stated that the alley was laid out for the use of the lots granted to Ehret, 'and the other lots bounding on said alley,' and the grant to Ehret in both deeds is 'with the free use and privilege of said alley, in common with the said Hiram Miller, his heirs and assigns, owners, tenants, and occupiers of the other lots of ground bounding thereon.' It makes no difference, in my opinion, that Hess, who was one of the 'assigns, owners, tenants, and occupiers of the other lots of ground bounding thereon,' derived his title by assignment from Miller before the way was laid out, for it was the plain intention of Miller in laying out the alley to reserve the use of it for all who owned lots bordering upon it. It was competent for Miller, as owner of the land, to dedicate it to the use of all owners whose lots bordered upon it, whether their titles originated before or after the laying out of the alley; and that he intended to do so is, I think, plain from the language used in the deeds, which is of the broadest description,—'for the use of the lots granted and the other lots bounding on said alley,' which means all lots bounding thereon. To undertake to restrict the grant to the subsequent grantees of Miller would be, in my opinion, to defeat the purpose which he had in view in laying out the alley, which was, by the plain language which he used, to devote the alley to the common use of all persons owners of lots bounding upon it, without distinction as to the time at which they acquired their several titles from him. He doubtless foresaw that the large lot which he had conveyed to Hess, and which was bounded on three sides by other ground belonging to himself and on the other side by Fifteenth street, would be cut up into building lots, and that the occupants of houses built upon these lots would have no outlet whatever, except by their front doors, unless by means of the alley intended for the benefit of all owners bordering upon it; and he, therefore, in the reservation of the way, used language broad enough to secure the right of user for all owners whose lots bounded upon the alley, and that without regard to the time at which their titles might have been acquired. I am therefore clearly of the opinion that the way laid out and reserved by Miller was a way intended to be appurtenant to all the lots bounding upon the alley, whether acquired before or after the alley way was laid out, and that consequently the defendants have an equal right with the plaintiff to the use of the twelve-foot wide alley. The law is well settled that a right of way appurtenant to land is appurtenant to every part of it, and, if the owner divides it into several lots, the grantee of each lot, however small, has an equal right over the servient land. Watson v. Sioren, 1 Serg. & R. 227; Underwood v. Carney, 1 Cush. 285; Lansing v. Wiswall, 5 Denio, 218; Myers v. Birkey, 5 Phila. 167; Walker v. Gerhard, 9 Phila. 116. The plaintiff having accepted the deeds which reserved the use of the alley for 'all occupiers of lots bounding upon it,'

Digitized by Google

and the Hess lot being one of those which bounded upon it when the alley was laid out and reserved for the common use of all, the plaintiff is estopped from denying the right of the defendants, who derived their title from Hess. Watson v. Bioren, 1 Serg. & R. 227.

"This view of the case renders it unnecessary to consider the effect of the agreements made between Miller and Gunn, dated, respectively, March 6, 1893, and January 19, 1894, and the conveyance of the soil of the alley by Miller to Taylor, January 20, 1894. These papers were evidently made with the view of strengthening the title of defendants,—a title which, in my opinion, was good enough before their execution, and did not require their support. I may add that the affirmance of the title of the defendants to the use of the alley way plainly works no injury to the plaintiff. No one can pretend that the use of the alley by the defendants impairs or injures in any manner the plaintiff's enjoyment of it. The only effect of the decree will be, so far as he is concerned, to prevent him from speculating upon the necessities of his neighbors. Ordered that the bill be dismissed, the plaintiff to pay the costs."

John R. Read, Silas W. Pettit, and H. B. Gill, for appellant. George W. Norris, for appellees.

PER CURIAM. The judgment in this case is affirmed, on the opinion of the learned court below.

COMMONWEALTH v. PITTSBURGH & W. RY. CO.

(Supreme Court of Pennsylvania. March 4, 1895.)

TAXATION OF CORPORATIONS — VALUE OF CAPITAL STOCK—HOW ASCERTAINED.

Under Act June 8, 1891, taxing corporations, and providing that "the capital stock shall be appraised at its actual value in cash, not less, however, than the average price that such stock sold for during said year, and not less than the price or value indicated or measured by net earnings, or by the amount of profits made and either declared in dividends or carried into surplus or sinking fund," the actual value is not necessarily a sum, 6 per cent. of which is equal to the net earnings, but other circumstances affecting the actual value may be considered. 30 Atl. 125, followed.

Appeal from court of common pleas, Dauphin county; J. W. Simonton, Judge.

Action by the commonwealth against the Pittsburgh & Western Railway Company to recover the tax on defendant's capital stock. There was a judgment for defendant, and the commonwealth appeals. Affirmed.

W. U. Hensel, Atty. Gen., for the Commonwealth. L. D. Gilbert, for appellee.

PER CURIAM. This case presents about the same facts as were found in Com. v. Edgerton Coal Co. (No. 21, June term, 1893, of same court) 30 Atl. 125. The capital stock of the company was $12,000,000; its net earnings for the year 1892 were $308,960.12. No dividend was declared for the year, nor were any additions made to sinking or surplus fund. The average price at which the stock had sold during the year was $11.50 per share. The president and treasurer of the company, under oath, appraised the entire value of the stock at $2,660,000. The auditor general and state treasurer, not being satisfied with this, reappraised it for taxation at $5,149,335.33. The only basis for thus raising the value was that 6 per cent. on this sum would produce the net earnings. The learned court below, as in Com. v. Edgerton Coal Co., supra, held this to be error, and adopted as the value for taxation the appraised value returned by the officers. We affirmed the judgment in the case mentioned, and see no reason, in affirming this judgment, to add anything to the reasons therein given. The judgment is affirmed, and the appeal is dismissed, at costs of appellant.

COMMONWEALTH v. WOODLEY.

(Supreme Court of Pennsylvania. March 4, 1895.)

HOMICIDE—DEFENSE—INSANITY—MEASURE OF PROOF—APPEAL—HARMLESS ERROR.

1. Where the defense is insanity and intoxication, it is not error to charge, in effect, that mental incapacity is to be established by the weight of evidence, and that an act is presumed to have been done sanely until the contrary appears by the evidence.

2. Where the defense is insanity, it is harmless error to charge that defendant should be held responsible "until the fact is positively proved that he is not responsible," where in other parts of the charge the jury are told that want of capacity should be proved by the weight or fair preponderance of the evidence simply.

Appeal from court of oyer and terminer, Allegheny county.

Albert W. Woodley was convicted of murder in the first degree, and appeals. Affirmed.

Rody P. Marshall and Thos. M. Marshall, for appellant. Clarence Burleigh, Dist. Atty., for the Commonwealth.

FELL, J. The appellant was convicted of murder in the first degree. The testimony and his admissions leave no doubt of his guilt. The killing and the motive which prompted it were clearly established. The only grounds of defense were insanity and intoxication. There was no evidence of either which would have justified a verdict in his favor, or a finding reducing the degree below that of which he was convicted. He had a full, fair, and impartial trial.

The first eight assignments of error relate to the parts of the charge in which the testimony was referred to, and its bearing and effect pointed out. We see no reason to doubt the accuracy or impartiality of what

Digitized by Google

was said. These comments were fair to the commonwealth and to the prisoner, and they were necessary to the proper submission of the case. The prisoner had made the facts which indicated his guilt and led to his conviction. The conclusions to be drawn from them were so clear and irresistible that any reference to them was an argument against him; but no undue prominence was given in the charge to the commonwealth's testimony, and that in his favor, intended to excuse or lessen the degree of his crime, was treated with entire fairness. The qualifications to the affirmative answers to the second and fifth points correctly stated the law, and it was eminently proper that they should have been made. They were in effect an instruction that mental incapacity is to be established by the weight of the evidence, and that an act is presumed to have been done sanely until the contrary appears by the evidence. These were explanations proper to be made in connection with the affirmance of the points. They did not tend to weaken the effect of statements of the law in the prisoner's favor, to which he was entitled, but to make the points tell the whole truth, and not a part of it only. Mental capacity and sanity are to be presumed as normal conditions, and the presumption stands until overcome by fairly preponderating evidence.

Our attention has been called to a sentence in the charge, which is not, however, assigned as error, in which it is said that the prisoner should be held responsible for his acts "until the fact is positively proved that he is not responsible." This held the defense to too high a measure of proof, as was pointed out in Com. v. Gerade, 145 Pa. St. 289, 22 Atl. 464. The proper rule was given to the jury later in the charge, when it was said: "Are you satisfied, not clearly, but by the weight of the evidence simply, because he is not bound to prove it except by the weight of evidence,—the fair preponderance of evidence?" This rule was stated and enforced in other parts of the charge, and the language referred to, not being the subject of an assignment of error, need not be noticed further than to say that it is manifest that it did no injustice to the prisoner. The case was submitted in a charge, which fully and accurately reviewed the testimony, and stated the law applicable thereto. The assignments of error are not sustained. The judgment is affirmed, and the record is remitted for the purpose of execution.

In re JOHNSON'S LICENSE.

(Supreme Court of Pennsylvania. Nov. 13, 1894.)

INTOXICATING LIQUORS — LICENSE — REFUSAL — WHEN PROPER—MANDAMUS TO COURT —WHEN WILL LIE.

1. It is sufficient grounds for refusing a distiller a license to sell liquors at wholesale in a certain city that his distillery is not located in such city; that the distillery's former occupants violated the liquor laws; and that, in the judgment of the court, the distillery is not necessary, does not do a legitimate business, and has not been properly conducted.

2. Where the court of quarter sessions has refused to grant an applicant a license to sell liquors, mandamus will not lie to the judge of the former court commanding him to grant such license or show cause why he should not do so.

Petition by David D. Johnson for a writ of mandamus to Nathaniel Ewing, presiding judge of the court of quarter sessions of the county of Fayette, Pa., to compel such judge to grant petitioner a license to sell intoxicating liquors, or show cause why he should not do so. Writ refused.

A. F. Cooper and J. Q. Van Swearingen, for petitioner.

WILLIAMS, J. The petitioner was an applicant for a license to sell liquors in the county of Fayette, and his application came up at the March sessions, 1893. No remonstrance was presented to the court against the license, and no evidence was offered in opposition to it, but when it was reached it was refused. The petitioner then applied to this court for relief, alleging, in substance, that his application had been arbitrarily refused without a hearing. The order refusing the license was set aside for this reason, and a procedendo awarded. 26 Atl. 1066. Thereupon the court below took up the case again on the 3d day of October, 1893, and again refused the application, placing the reasons therefor on the record. An examination of these reasons shows that the distillery of the applicant is not located in a city or town, but in the township of Wharton, in Fayette county; that its former occupants have violated the liquor laws, and this after repeated promises made to the court whenever a license has been granted for the place; that, in the judgment of the court, it is not necessary, does not do a legitimate business, and has not been properly conducted. These reasons are amply sufficient to justify the order made. The petitioner, after this action by the court of quarter sessions, comes again into this court, with the petition now before us, and asks us to issue a writ of mandamus "commanding him, the said Nathaniel Ewing, judge of the court of quarter sessions of Fayette county, Pennsylvania, to grant said license or show cause why he should not do so." This brings us to consider briefly the nature and object of a writ of mandamus. It is a command to some official or other officer to proceed to the discharge of some official duty. When that duty is deliberative, or depends upon the exercise of official discretion, the purpose of the writ is to quicken the action of the officer, and require him to proceed to hear, to deliberate, to exercise his discretion. It does not lie to revise the decision of any person clothed with judicial, deliberative, or discretionary powers. Dech-

Digitized by Google

ert v. Com., 113 Pa. St. 229, 6 Atl. 229; Raudenbusch's Petition, 120 Pa. St. 328, 14 Atl. 148. If a judge declines to hear, or delays a hearing unreasonably, a mandamus is the appropriate remedy. It commands him to proceed to a hearing and decision; but it is not a substitute for an appeal, and it does not bring up for review the soundness of the discretion used, or the correctness of the conclusion reached. Newlin v. Indiana Co. (Pa. Sup.) 16 Atl. 737; Petition of Collarn, 134 Pa. St. 551, 19 Atl. 755; Wolff's Petition, 138 Pa. St. 316, 22 Atl. 22; Goldman's Petition, 138 Pa. St. 321, 22 Atl. 23. This rule is applicable to petitions for licenses to sell at wholesale as well as to those for licenses to sell at retail. McNulty's Petition, 142 Pa. St. 475, 23 Atl. 202; Ostertag's Petition, 144 Pa. St. 426, 22 Atl. 915. The general rule that courts will not undertake a supervisory control over the exercise of discretionary powers upon mandamus was restated and applied during the last year in Com. v. Jenks, 154 Pa. St. 368, 26 Atl. 371, and is too well settled to require discussion. In a clear case of an abuse of discretion a certiorari to bring up the record for review might enable us to reach the difficulty, and possibly it might be reached in some cases on a petition for a writ of mandamus; but the general rule is as stated in the cases cited above.

It is just to the writer of this opinion to state that this case was decided before the close of the October term of last year, and an opinion written, which seems never to have reached the files. Our attention having been called to the state of the record during the present term, we now put the decision formally upon the files, and with it this brief statement of the rule by which our action is controlled. The petition is dismissed.

FITZWATER v. ROBERTS et al.

(Supreme Court of Pennsylvania. March 4, 1895.)

REPLEVIN—SUFFICIENCY OF EVIDENCE.

In replevin of a carriage, defendants claimed the right to retain it for storage charges, and as security for a debt owing them from plaintiff's husband. Plaintiff testified that it was left with defendants under an agreement that no charges should be made for storage, and her husband denied that an agreement was made that it should be held as security for his debt. Five months before suit was brought, plaintiff authorized defendants to sell it for a certain price, and retain the sum due from her husband. The authority was not for an indefinite time, and, if plaintiff's testimony was true, it was revocable at her pleasure. *Held*, that a judgment of nonsuit was erroneous.

Appeal from court of common pleas, Philadelphia county.

Action of replevin by Emma C. Fitzwater against H. G. Kirk and Harry Roberts, trading as Roberts & Co. From a judgment of nonsuit, plaintiff appeals. Reversed.

Charles L. Smyth, for appellant.

FELL, J. The plaintiff brought replevin for a carriage which was in the possession of the defendants, and had been left with them as keepers of a livery stable. The defendants claimed a right to retain possession of the carriage for storage charges, and also by reason of an agreement that it should remain in their possession as security for a debt due them by the plaintiff's husband for keeping a horse. Both grounds of defense were controverted. It was testified by the plaintiff that the carriage was left with the defendants under an agreement that no charges should be made for storage, and it was denied by her husband that an agreement had been made that it should be held as security for his debt. That the plaintiff, after the removal of the horse, authorized the defendants to sell her carriage for a price named, and to retain from the money received the amount they claimed to be due by her husband, did not defeat her right to recover in the action. This authority was given five months before the writ issued. It was not for an indefinite time, and it was to sell, not to retain, the carriage; and, if her testimony was correct, it was revocable at her pleasure. The testimony was not presented in an orderly manner, and was far from being clear or convincing; but we are of opinion that it raised an issue of fact for the jury, and that a nonsuit should not have been granted. The judgment is reversed, and a venire de novo awarded.

PHILLER et al. v. JEWETT et al.

(Supreme Court of Pennsylvania. March 4, 1895.)

BANKING—CLEARING HOUSE—SECURITY—SET-OFF.

1. Securities deposited by a bank, belonging to a clearing-house association, with the clearing-house committee, and pledged, according to the clearing-house regulations adopted by the associated banks, first for payment of its daily balances, and next as security for other indebtedness due to members of the association, will be held, after payment of daily balances, to meet a deficiency in other securities given by it to the clearing-house committee, to provide for payment of clearing-house certificates issued to aid in maintaining its credit.

2. A note deposited before maturity by a bank with a clearing-house committee, to secure payment of the bank's daily balances and other indebtedness due from the bank to other members of the clearing-house association, is not, in the hands of the committee, subject to set-off by the maker of any sum due him from the bank.

Appeal from court of common pleas, Philadelphia county.

Action by George Philler and others, clearing-house committee of the clearing-house association of banks of Philadelphia, against Abner A. Jewett & Co., on a note. Judgment for plaintiffs. Defendants appeal. Affirmed.

Alfred D. Wiler and Wm. W. Wiltbank, for appellants. A. T. Freedley, for appellees.

Digitized by Google

WILLIAMS, J. The defendants are the makers of a promissory note which was discounted for them, in due course of business, by the Spring Garden National Bank. This bank was one of the associated banks of Philadelphia that had united to organize the clearing house, as a convenient and expeditious instrument for making daily settlements with each other. To facilitate the transaction of the business for which it was created, the associated banks placed in the hands of the clearing-house committee a considerable fund, to be used in paying daily balances due from debtor banks. This was contributed in cash or good securities at an agreed rate, fixed by reference to the capital stock of each bank. The Spring Garden National Bank deposited securities, instead of money; and these securities were pledged, under section 4 of article 17 of the regulations for the clearing house adopted by the associated banks, first for the payment of daily balances, and next as security "for other indebtedness due to members of the association." The Spring Garden National Bank needed and had received aid in maintaining its credit much beyond the sum it had secured by its deposit to provide for daily balances. This aid was extended by the issue of clearing-house certificates in its behalf for quite a large sum, and, to provide for their payment, the bank had deposited other securities with the clearing-house committee. After the bank failed, the current daily balance was paid out of the proceeds of the securities deposited for that purpose, and there was, in the language found in the regulation, in article 17, § 4, "a surplus remaining." The additional securities deposited to cover the certificates proved insufficient for that purpose, leaving a balance of debt unprovided for, amounting to about $70,000. The plaintiffs claim to hold the surplus from the first batch of securities to meet, pro tanto, the deficit in the last. This is clearly within the contract under which the securities were deposited, and within the intention of the parties. The defendants have a claim against the Spring Garden Bank, which they would be entitled to set off upon the note if the bank was still the holder; but it is not. It parted with the note before its maturity, and for full value. It could not reclaim it from the clearing house without the payment of its entire indebtedness to that institution, and the defendants stand in no better position than the bank. Their set-off cannot be made available unless the bank is the owner. But, as we have seen, the title to the instrument passed from the bank to the plaintiffs, who are bona fide holders, and their right to recover upon it is clear. The learned judge of the court below was right, therefore, in giving to the jury a binding instruction on this subject; and the judgment is now affirmed.

PHILLER et al. v. KEELER.

(Supreme Court of Pennsylvania. March 4, 1895.)

Appeal from court of common pleas, Philadelphia county.

Action by George Philler and others, clearing-house committee of the clearing-house association of the banks of Philadelphia, against Isaac Keeler, on a note. Judgment for plaintiffs. Defendant appeals. Affirmed.

Alfred D. Wiler and Wm. W. Wiltbank, for appellant. A. T. Freedley, for appellees.

WILLIAMS, J. This case involves the same question that has just been decided in Philler v. Jewett, 31 Atl. 204. For the reasons given in the opinion filed in that case, the assignments of error are not sustained. The judgment is affirmed.

COMMONWEALTH TITLE INSURANCE & TRUST CO. v. BROWN et al.

(Supreme Court of Pennsylvania. March 4, 1895.)

FRAUDULENT CONVEYANCE—BY HUSBAND TO WIFE—CONSIDERATION.

A financially embarrassed man conveyed land, on which were uncompleted houses, several mortgages, and mechanics' liens, to one of the mortgagees, who was to pay off the liens, complete the houses, and after sale thereof account to the grantor for any balance after deducting his indebtedness. *Held* that, in the absence of evidence that the property had any value above the incumbrances, the joinder of the grantor's wife in the conveyance was not, as against his creditors, a valid consideration for his conveyance of other property to her.

Appeal from court of common pleas, Philadelphia county.

Action by the Commonwealth Title Insurance & Trust Company against Charles O. Brown, defendant, and the Camden National Bank, garnishee. Judgment for plaintiff. Garnishee appeals. Affirmed.

R. O. Moon, for appellant. Edw. H. Bonsall (Rowland Evans, of counsel), for appellee.

FELL, J. The money in the hands of the garnishee at the time of the service of the attachment was a deposit to the credit of the wife of the defendant in the judgment. It was derived from the sale of real estate which her husband had conveyed to her. The consideration for the conveyance was her joining with him in the conveyance of a number of properties to the plaintiff to secure an indebtedness then due it. The defendant had borrowed money of the Commonwealth Company, the plaintiff, on a mortgage secured upon a number of pieces of real estate upon which he was erecting buildings. He became unable to complete the building operation, and in order to secure the loan the company advanced money to pay mechanics' liens and finish the houses. To secure these advances as well as the original indebtedness, the properties were conveyed to a third party, who held the title

Digitized by Google

for the company. Nearly all of the real estate conveyed was subject to other mortgages, and the mechanics' liens amounted to about $25,000. It was agreed that after the sale of the properties the plaintiff should account to the defendant, and pay to him any balance remaining after deducting the amount of his indebtedness. The conveyance by the defendant to the agent of the plaintiff was made June 30, 1890. The conveyance of the property from the sale of which the fund in question arose was made to the defendant's wife in September, 1890, in fulfillment of a promise made to her by her husband before she signed the deed of June 30th. She sold the property in October, 1890, for $3,800.

The only question at the trial was whether the money in possession of the garnishee belonged to the defendant or to his wife. It was derived from the sale of real estate which he had conveyed to her. Her title could be sustained only as a gift or as a conveyance founded upon a valid consideration. If it was a gift, it was incumbent upon her to show that her husband was solvent at the time; if it was a purchase, that she gave a valid consideration. She met neither of these requirements, and a verdict was properly directed for the plaintiff. There was no attempt to establish a gift, and there was no evidence which would have sustained one against her husband's creditors. The consideration alleged was her joining in the conveyance of real estate to the plaintiff. Her husband at the time, if not insolvent, was indebted for a large amount, and was pecuniarily embarrassed. He was unable to pay the debts which were liens upon the property conveyed, or to complete the houses which were in the course of erection. He could not discharge or otherwise secure his obligations, nor complete his building operations and carry his houses for a better market. The purpose of the conveyance was to secure his indebtedness and to save his property from an immediate sale by his creditors. The consideration set up for the conveyance by the wife was, at most, her inchoate right of dower in incumbered real estate conveyed to her husband's creditors to secure his debts. There was no evidence which would have sustained a gift to her of any part of his estate, and it is difficult to see upon what ground a conveyance of a part to her, in consideration of her assent to the transfer of the remainder to his creditors as a security, can be sustained. As between the parties, the conveyance was, in effect, a mortgage, and he could have mortgaged the land without her consent. She had no right which could have been successfully asserted against the creditors. As a sale made under the then existing mortgages and liens would have divested her dower, she gave up nothing which they could not have taken without her consent. There was no satisfactory evidence that the property conveyed had any value above the incumbrances. The possibility of such a value depended upon her husband's effecting a settlement by the conveyance in which she joined. Her inchoate right to this bare possibility was not, as against her husband's creditors, a valid consideration for the conveyance to her of a property worth $3,800. This was not to be determined by the jury as a question of fact, but by the court as a question of legal policy. The judgment is affirmed.

STATE v. SMITH.

(Supreme Court of Errors of Connecticut. Dec. 1, 1894.)

CRIMINAL LAW—INSTRUCTIONS—FAILURE TO CHARGE.

1. Where the jury is instructed that the state must prove defendant's guilt beyond a reasonable doubt, the failure to charge on the presumption of innocence, in the absence of a request, is not error.

2. It is not error, in the absence of a request, to fail to explain in the charge the meaning of the term "reasonable doubt."

3. It is not error to state in the charge, without comment, the claims made both by the state and by defendant.

Appeal from superior court, New Haven county.

James F. Smith was convicted of robbery, and appeals. Affirmed.

Levi U. Blydenburg, for appellant. Tilton E. Doolittle, for the State.

FENN, J. The appellant, at the April criminal term, 1894, of the superior court, New Haven county, was convicted of the crime of robbery. No exception to rulings upon evidence were taken upon the trial, and no requests to charge the jury were made by the accused. In the reasons of appeal, it is asserted that the court erred in failing to give such instructions to the jury, in reference to reasonable doubt and the presumption of innocence in favor of the accused, as the law requires, in the absence of requests, because they are principles not based upon the special case, but applicable to all criminal cases. By reference to the charge, it appears that the court, after stating the claims of both sides, and in conclusion, said: "Now, gentlemen, all the evidence is before you, and it is for you to determine the facts. It is for you to say where the truth lies. It is for the state to satisfy you, beyond a reasonable doubt, of the guilt of this defendant. It is for you to say whether the state has done that, and if, after a careful examination of all the evidence, you are satisfied by it, beyond a reasonable doubt, that the defendant is guilty of the offense with which he stands charged, it will be your duty to return a verdict of guilty; but if, after a careful examination and consideration of all the evidence, you are not satisfied by it.

Digitized by Google

beyond a reasonable doubt, that this defendant is guilty as charged in this information, it will be your duty to return a verdict of not guilty." This language, at first view, would seem to leave no ground of complaint to the appellant. He, however, does complain: First. That the court omitted to say that the accused was presumed to be innocent until he was proven guilty, and that the presumption of innocence continues, and was entitled to weight, until the evidence offered by the state had overborne that presumption, and proved the accused guilty beyond a reasonable doubt. Second. That the court failed "to charge the jury upon the question of what a reasonable doubt is, and leaves the jury without instructions upon that question."

We do not think these assignments of error well grounded. The statement so often made in reference to the legal presumption of innocence in favor of every person accused of crime is but a form—sometimes, perhaps, a misleading one—of stating, concerning criminal cases, a general, positive rule of law, based on expediency as well as justice, which regulates the introduction of evidence in all cases, whether civil or criminal, namely, that "whoever desires any court to give judgment as to any legal right or liability, dependent on the existence or nonexistence of facts which he asserts or denies to exist, must prove that these facts do or do not exist." Steph. Ev. art. 93; Greenl. Ev. (14th Ed.) § 34, and note a. Therefore, if the state desires a court to pronounce a person liable to a certain punishment, it must give evidence to prove the facts constituting his guilt. Steph. Ev. art. 94. In regard to the weight and sufficiency of such evidence, it has further and wisely been established that it must be sufficient to overcome and satisfy all reasonable doubt. Even if this last requirement were based upon any natural presumption—that is to say, probability—of innocence, it would necessarily, if fulfilled, overcome the presumption, as also proof of good character, if affirmatively shown in behalf of the accused, for he who by the evidence is proved, beyond a reasonable doubt, to be guilty of a crime, is necessarily shown to be so, no matter how improbable it might have seemed at the outset of the trial, or at any later stage, that he should have committed such an offense. "Presumption of innocence" casts the burden of proving guilt upon the state,—a burden requiring for its discharge sufficient evidence to remove all reasonable doubt. It cannot add an additional burden to this. Its function is exhausted in putting such burden of proof on the state. It has no weight as evidence in the trial. It calls for evidence from the state, but is not itself evidence for the accused.

But it is further said that the court should have defined the expression "reasonable doubt" to the jury. We do not think it is customary for courts to undertake such a task. Miles v. U. S., 103 U. S. 304; Costley v. Com., 118 Mass. 1; Com. v. Tuttle, 12 Cush. 502; Com. v. Cobb, 14 Gray, 57. The reason why courts are generally disinclined to enter into an explanation of the term is that, while the expression is itself well calculated to convey to the jurors a correct idea of what is expected of them, any effort at further elucidation tends to misleading refinements. To attempt to give a specific meaning to the word "reasonable" would be "trying to count what is not number, and to measure what is not space." Steph. Cr. Law, p. 62. See, also, State v. James, 37 Conn. 361.

The appellant further insists that the court erred in "adopting the practice" of stating the claims made, which, it is asserted, is vicious, and liable to mislead. We think there is no merit in this criticism. It is not, and presumably could not be, said that the court stated any claim as having been made by the state that was not made, or omitted to refer with equal fairness and fullness to every claim made in behalf of the accused. It was further left to the jury, for them "only to decide," whether such claims were based upon truth, and proper to be made. In many cases, including that before us, we can conceive of no better way in which the court, having stated its opinion to the jury upon all questions of law arising upon the trial, could discharge its remaining duty of submitting "to their consideration both the law and the facts without any direction how to find their verdict," than by repeating, but without argument, the legitimate claims of both parties, based upon what such parties, on the evidence offered and received, respectively, claimed the facts to be, and upon the law properly applicable to such claimed facts, thus setting before the jury, in the plainest and most natural manner,—the one least liable to misapprehension,—the matters pertinent to a proper examination and determination of the case, and to a just verdict. There is no error in the judgment complained of. The other judges concurred.

POOLE v. ANDERSON.

(Court of Appeals of Maryland. Feb. 28, 1895.)

TESTAMENTARY POWERS.

1. A testator has power to require a power of sale to be exercised jointly by the executors and trustees, and such intention must be given full force and effect.

2. Where, in various clauses of his will, testator joins the trustee with the executor, for the performance of duties imposed in effecting sales and otherwise, it was his intention that they should be joined in executing a power of sale.

Appeal from orphans' court of Baltimore city.

Robert Poole excepts to an order of the orphans' court of final ratification of a sale of land to him by James T. Anderson, executor. From an order overruling excep-

Digitized by Google

tions taken by him, exceptant appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, PAGE, ROBERTS, BRISCOE, BOYD, McSHERRY, and FOWLER, JJ.

Rand, Barton and H. B. Stimpson, for appellant. Thomas Ireland Elliott, for appellee.

FOWLER, J. This is an appeal from the orphans' court of Baltimore city, and the only question presented is whether the sale of certain real estate already made, and reported to that court, shall be ratified, or whether it shall be set aside, and the property resold, in order that the trustee under the will shall join the executors in executing the power of sale conferred by the will of the late Thomas D. Anderson, of Baltimore city. The solution of this question depends entirely upon the construction of the will. If the doubt now suggested existed when the sale was made by the executor alone, it is to be regretted that the trustee under the will was not joined in executing the power of sale, for the sake of avoiding the delay and expense of this litigation. But, as the question is presented, we must dispose of it, and we will do so briefly.

By the first clause of the will, and indeed generally wherever the testator gives authority or power to the executor over the real estate, he appears to have joined the trustee with the executor. Thus, in the first clause: "I give, devise, and bequeath to my executors and trustees," etc., "all my estate, real, personal," etc., "with full power and authority to do whatever may be proper and necessary in the performance of the duties hereby imposed on them, either in effecting sales * * * or otherwise." And in the eighth clause his "executors and trustees" are authorized to change investments, or to sell, lease, or otherwise dispose of his house and lot on Druid Hill avenue. And likewise, in the ninth clause, both the executors and trustees are authorized to execute and acknowledge such conveyances as may be necessary to change certain investments. It would seem, therefore, except for the ingenious suggestions as to what might have been the intention of the testator, that the plain and simple meaning of the language used by him is that both the executors and trustees were to join in the sale; and inasmuch as it is entirely immaterial, so far as the object of this proceeding in concerned,—namely, the securing of a good title,—which view shall be adopted, we prefer that which appears to us to be indicated by the language of the will. We cannot assent to the view that the testator had no power to require the power of sale to be exercised jointly by the executors and trustees. If such were his intention, "that intention, if not contrary to public policy," or in violation of any rule of law or statutory provision, must have full force and effect. Abell v. Abell, 75 Md. 44, 23 Atl. 71, and 25 Atl. 389. Deeming it unnecessary to comment upon the authorities cited, and basing our conclusion altogether upon what we think appears to be the intention of the testator as disclosed in his will, the order appealed from will be reversed; costs to be paid out of the proceeds of sale. Decree reversed, and cause remanded.

BALTIMORE & E. S. R. CO. v. SPRING.

(Court of Appeals of Maryland. Feb. 28, 1895.)

RAILROAD AID BONDS—CONSTITUTIONAL LAW.

Act 1892, c. 295, authorizing county commissioners to issue bonds to pay the county's subscription to the capital stock of a railroad company, and providing that, before any of the money is paid over to the company, all bona fide claims held by residents of the county against the company shall be first paid, is unconstitutional where, before the passage of the act, the railroad, after having been completed, had become insolvent, and there had been in fact no subscription by the county, and it was merely an act to pay the individual claims of certain creditors of the company at the expense of the taxpayers of the county.

Appeal from circuit court, Talbot county, in equity.

Bill by Preston B. Spring, in behalf of himself and others, against the county commissioners of Talbot county, to enjoin them from issuing bonds for the purpose of constructing and operating the Baltimore & Eastern Shore Railroad Company. The Baltimore & Eastern Shore Railroad Company intervened, and from an order of the circuit court continuing an injunction, theretofore issued by it, until final hearing, the Baltimore & Eastern Shore Railroad Company appeals. Affirmed.

Argued before ROBINSON, C. J., and McSHERRY, FOWLER, BRYAN, ROBERTS, and PAGE, JJ.

John P. Poe and Jos. B. Seth, for appellant. Wm. H. Adkins and Thos. B. Mackall, for appellee.

PAGE, J. This is an appeal from an order of the circuit court for Talbot county directing a writ of injunction to be issued, restraining the county commissioners of that county from issuing the bonds mentioned in chapter 295 of the Acts of the General Assembly of 1892, and in chapter 152 of the Acts of 1894. The bill was filed by a taxpayer and citizen of Talbot county on behalf of himself and other citizens and taxpayers of that county. It is alleged that these "acts are unconstitutional, and for other reasons invalid, null, and void." Such of the facts appearing by the record as are requisite to be stated for the purposes of this opinion may be thus briefly set forth: The Baltimore & Eastern Shore Railroad Company was incorporated by the general assembly in the year 1886, for the purpose of

Digitized by Google

constructing and operating a railroad through Talbot and other counties of the state of Maryland. At the same session, by chapter 509, the commissioners of Talbot county were authorized to indorse the bonds of the railroad company to an amount not exceeding $50.000, after it had been sanctioned by the voters of Talbot county. Such bonds were to be secured by a mortgage which should be second to a mortgage to the city of Baltimore. This act, which authorized only an indorsement of bonds, and not a subscription to the stock of the railroad, though voted upon favorably by the voters of Talbot county at the general election of 1887, it is conceded, became inoperative, for the purpose of authorizing the proposed indorsement, for reasons not necessary to be now stated. By the act of 1890 (chapter 158), the county commissioners of Talbot county were authorized to subscribe to the capital stock of the company to the amount of $25,000. This act, however, was not published as required by article 3, § 4, of the constitution, and for that reason became invalid. Soon after its incorporation, in 1886, the railroad company proceeded to construct its road, and, having fully completed it, operated it until the 21st of April, 1891, when, having become totally insolvent, its property rights and franchises passed into the hands of a receiver appointed by the circuit court of the United States for the district of Maryland; and since that date, under the decree of that court, all of its property and franchises have been sold to other parties. So that in 1892, when Act 1892, c. 295, which will be the subject of our examination, was passed, the road was entirely constructed, and, after having been operated for a short time, had experienced all the results of insolvency, up to the point of having its affairs administered by a receiver for the benefit of its creditors. From this recital, it is clear that prior to 1892 there had never been any valid power conferred upon the county commissioners either to indorse the bonds of the company, or subscribe to its stock, nor is it pretended that they ever undertook to exercise such power. In the agreement of parties, found in the record, it is stated that the commissioners "never passed any resolution to indorse the bonds, * * * or to subscribe to the stock." The statement, therefore, contained in the preamble of the act of 1892 (chapter 295), also in the body of the act, and also in the act of 1894 (chapter 152), to the effect that the authority to issue bonds was conferred for the purpose of raising money to "pay the county's subscription" to the capital stock of the railroad company, was wholly unfounded in fact. The county commissioners never did, and never had the power to, make such subscription. There is no question in this case, therefore, of good faith on the part of the county; no contractual element to embarrass the court in determining the strictly legal effect of the act of 1892 (chapter 295), and the confirmatory act of 1894 (chapter 152).

What, then, are the provisions of these acts? By the first section of the act of 1892, the commissioners are authorized to issue the bonds of the county to the amount of $25,000; by the second, it is provided that they "shall sell said bonds, * * * and, with the proceeds thereof, pay said subscription of said county, to said railroad company, provided, however, that before any bonds shall be issued under this act, the said railroad company * * * shall file, in the office of the county commissioners of Talbot county, an agreement, in writing, authorizing the said county commissioners of Talbot county, to first pay and satisfy all proper and legal claims and demands held by bona fide residents of Talbot county on the twentieth day of April in the year 1891, against said railroad company, out of the proceeds arising from the sale of said bonds, and the balance, if any to apply under the order and direction of Joseph B. Seth, the president of said railroad company." If the claims thus provided for should prove to be in excess of the $25,000, it is enacted by the third section that they shall be paid pro rata; and the receipt of persons holding such claims, and of the president of the company, in the event of any balance remaining after the payment of the claims, shall be good against the railroad and all others claiming under it; and by the fourth section a "committee" of three are appointed, with "full power and authority" to determine the amount of each claim, and who are entitled to be paid, and their decision is to be final, and without appeal. To comprehend these provisions thoroughly, it must be borne in mind that the railroad company, at the date of the passage of the act, had fully constructed its road. It had also become insolvent, and on the day after the date mentioned in the act—that is, on the 21st April, 1891—it had passed into the hands of a receiver. No doubt, it had many creditors. In Talbot county there were claims exceeding, in the aggregate, the entire amount of the proposed subscription; and the record shows there was a bonded debt of $1,600,000, secured by a mortgage upon all the property of the company. Subsequent events have shown that its insolvency was hopeless,—such as could only terminate, as it did, in a sale for the benefit of its mortgage creditors. Under these circumstances, it was plain, there was little probability that these creditors in Talbot county, unsecured as they were, could ever hope to have their claims paid in the ordinary way. Now, as was said by this court in City of Baltimore v. Gill, 31 Md. 387: "We must not forget that we are dealing with the substance, not with form. It is the thing done, or sought to be accomplished, which must determine the question of the power." The purpose of this act was not to aid in the construction of the road, because the road

Digitized by Google

was then completed, nor even to pay debts incurred in the construction, for the beneficiaries of the act were all those who, being residents of Talbot county, held "proper and legal claims" against the company, and this included all claims, whether incurred by the company in constructing the road, or otherwise. That the subscription was to be made to enable the county to discharge an obligation imposed upon it by the requirements of good faith was, as we have seen, founded upon an assumption, and absolutely false. The conclusion seems to be inevitable that the effect and scope of the act are simply to levy a tax upon the property of the citizens of Talbot county to pay to certain residents of that county the claims due to them by an insolvent railroad company. This is a private purpose, and not one of the objects of taxation. By the declaration of rights (article 15), as well as by the fundamental maxims of a free government, taxes can only be imposed to raise money for public purposes. "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes." Cooley, Const. Lim. 479. If it be necessary to cite authorities to maintain this thoroughly established principle, the following may be mentioned: Citizens' Sav. & Loan Ass'n v. Topeka City, 20 Wall. 655; Cole v. La Grange, 113 U. S. 1, 5 Sup. Ct. 416; Cooley, Const. Lim. § 488, and authorities there cited; Lowell v. City of Boston, 111 Mass. 454; Sharpless v. Mayor, etc., 21 Pa. St. 168; Brodhead v. Milwaukee, 19 Wis. 652; Industrial School v. Brown, 45 Md. 335.

Nor can this act be supported under the fifty-fourth section of article 3. The object of this section was not to extend the power of taxation. It is, in fact, "a limitation of power, not only of the local authority, but of legislative power itself." Pumphrey's Case, 74 Md. 111, 21 Atl. 559. Counties have "no inherent power of taxation." What power of taxation they exercise must be delegated to them by the legislature. The legislature, however, cannot delegate a power prohibited by the constitution. Therefore, the taxing power, when exercised by the county authorities, as was said by this court in the case of Daly v. Morgan, 69 Md. 468, 16 Atl. 287, "is but the exercise of the taxing power of the legislature delegated to them, and is subject to every constitutional limitation to which the taxing power of the legislature is subject." Industrial School, etc., v. Brown, 45 Md. 333.

Being of the opinion that the object and effect of this act are not to subserve a public purpose, but to pay certain individuals by taxing the property of the people of Talbot county for their benefit, we must pronounce the act itself unconstitutional and void. Inasmuch as what we have said disposes of the case, we deem it unnecessary to consider the other questions raised at the argument. Order affirmed.

HEMSLEY v. BEW et al.

(Court of Chancery of New Jersey. Feb. 26, 1895.)

PRELIMINARY INJUNCTION — IRREPARABLE INJURY.

Apprehension of irreparable injury, grounded upon theories which rest in conflicting and indeterminate evidence, will not justify the issuance of a preliminary injunction, especially where it appears that, by the denial of such injunction, adequate relief, upon final hearing, will not be defeated.

(Syllabus by the Court.)

Bill by Frederick Hemsley against Richard Bew and others. Order to show cause why injunction should not issue. Heard on bill and affidavits. Order to show cause discharged.

Atty. Gen. John P. Stockton and Samuel E. Perry, for complainant. David J. Pancoast and Clarence L. Cole, for defendants.

McGILL, C. The complainant seeks an injunction to restrain the completion of a jetty or dike which is to extend into the ocean, a few feet below low-water mark, in front of the defendant's upland, at Atlantic City, and within the limits of a grant to the defendant by the riparian commissioners of this state, on the ground that the jetty or dike will create a continuing nuisance, which will work irreparable injury to him. The injury, he insists, will be caused by obstruction of the natural flow of the ocean tides and littoral currents, resulting in eddies and new currents which will wash away the beach in front of his property, adjacent to the jetty or dike, and undermine structures upon his land. It is unnecessary, in the disposition of this motion, to decide the question, to some extent discussed by counsel, touching the complainant's right under his riparian grant. Admitting, for the purposes of the motion, that the jetty constitutes a purpresture and public nuisance, it is borne in mind that the complainant may not invoke the interposition of this court unless he suffers or will suffer some private and material damage from the nuisance, distinct from that which is suffered by the public at large. By his bill he recognizes this well-established rule. In equity procedure it is also settled that an injunction to restrain a nuisance will issue only in cases where the fact of nuisance is made out upon determinate and satisfactory evidence. If the evidence be conflicting, and the injury be doubtful, that conflict and doubt will be a ground for withholding injunction. And where interposition by injunction is sought to restrain that which it is apprehended will create a nuisance, of which the complainant may complain, the proofs must show an apprehension of material and irreparable injury, well grounded, upon such a state of facts as will manifest the danger to be real and immediate. Aqueduct Board v. Passaic, 45 N. J. Eq. 393, 402, 18 Atl. 106. I have care-

Digitized by Google

fully examined the testimony which has been taken in this matter, and find that it, at least, is conflicting, and, as well, indeterminate; that the complainant has well-grounded apprehension of such injury as he may ask to have avoided by this court. That the jetty or dike will affect the beach about it is conceded by all witnesses, but precisely how it will affect the property of the complainant—whether injuriously or beneficially, or materially, one way or the other—is problematical. It does not appear that denial of the present application will deprive the court of ability to afford him relief at final hearing, if time or further proofs shall verify the theories upon which his present apprehension of damage is largely grounded; and hence the doubt I now entertain as to the essential fact—special injury—must defeat the present application. Manufacturing Co. v. Wattles, 49 N. J. Eq. 97, 23 Atl. 123; Citizens' Coach Co. v. Camden Horse R. Co., 29 N. J. Eq. 299; Stitt v. Hilton, 31 N. J. Eq. 285; Delaware, L. & W. R. Co. v. Central Stock-Yard & Transit Co., 43 N. J. Eq. 605, 12 Atl. 374, and 13 Atl. 615; Hagerty v. Lee, 45 N. J. Eq. 255, 17 Atl. 826; Aqueduct Board v. City of Passaic, 46 N. J. Eq. 553, 20 Atl. 54, and 22 Atl. 55. The order to show cause will be discharged.

WIEDEMANN v. SANN et al.

(Court of Chancery of New Jersey. Feb. 26, 1895.)

INJUNCTION—FORECLOSURE OF CHATTEL MORTGAGE—RECEIVER.

In case a chattel mortgagee files his bill in the court of equity to foreclose his mortgage, and an attaching creditor of a person not the mortgagor seizes upon the same goods and chattels, and by an auditor offers them for sale, the court will, upon application by the complainant mortgagee, not only restrain the attaching creditor from selling, but will also appoint a receiver with authority to make sale of said goods and chattels in order to avoid a multiplicity of suits, and to preserve the value of them until the rights of the parties can be determined.

(Syllabus by the Court.)

Bill by Frank W. Wiedemann aginst Annie Sann and others to foreclose a mortgage, and for an injunction, and for appointment of a receiver. Receiver appointed.

Gilbert & Atkinson, for complainant. H. Budd, for defendants.

BIRD, V. C. The bill in this case is filed to foreclose a mortgage of chattels given by Annie Sann, asking for an injunction against an attaching creditor, whose attachment issued against Charles Sann, and also asking for a receiver. The chattel mortgage bears date January 11, 1895, and was duly recorded on the same day. It was given to secure the payment of $550, money loaned to the mortgagor. The whole of the said loan, together with interest, is claimed to be due to the complainant. The bill states that on the 9th day of January, being two days before the execution and delivery of the chattel mortgage aforesaid, one Sarah M. Hall procured to be issued a writ of attachment out of the circuit court of the county of Burlington against one Charles Sann on the demand for $650, under which writ of attachment an auditor has been appointed, and that the said auditor has been ordered by the said circuit court to sell all of the said goods and chattels as perishable property, and that the said auditor has advertised all of the said goods and chattels for sale, in his advertisement or notice of sale giving assurance to bidders that he will sell the said goods and chattels free from all liens or incumbrances. The complainant, having obtained an injunction restraining the auditor from selling, now asks for the appointment of a receiver with authority to sell the said personal property. This is resisted by the plaintiff in the attachment. It will be perceived that the complainant claims that these goods and chattels were the goods and chattels of Annie Sann, and that the plaintiff in the attachment claims them as the goods and chattels of Charles Sann. Charles Sann is the husband of Annie Sann. The complainant rests his case upon the rule laid down by Chancellor Green in Smithurst v. Edmunds, 14 N. J. Eq. 408. The case in hand is not like that. In that case the property which execution creditors offered for sale was not claimed by such creditors as the property of another person than the mortgagor of the same goods. As to that there was no dispute. Hence the question now before me is, can this court appoint a receiver in a foreclosure case to take charge of and sell personal property for the purpose of preserving it, covered by the mortgage sought to be foreclosed, when that same property has been attached by the creditor of another person, as the property of that other person, and has been advertised to be offered for sale by an auditor appointed in said attachment proceedings? In Moore v. Diament, 41 N. J. Eq. 612, 7 Atl. 509, in the court of errors and appeals, a question somewhat like the present was before the court. In that case Hammell confessed judgment to his creditors, who levied upon certain goods and chattels. Moore filed a bill in this court, alleging that he had been in partnership with Hammell, and that Hammell became indebted to him as partner, and that, to satisfy such indebtedness, Hammell had made to him a bill of sale of all his interest in these goods and chattels, and asked for and obtained an injunction restraining the execution creditors of Hammell from proceeding to a sale. A receiver was appointed in that case, and, upon Moore's offering to give a bond to take care of the property, and to return it or to pay the value thereof, except in case of unavoid-

Digitized by Google

able accident, such bond was accepted. From this brief statement it will appear that execution creditors claimed a lien upon the property as the property of one man,—Hammell, their debtor,—while Moore claimed it as his own individual property absolutely, by virtue of a bill of sale made to him by Hammell, and that a receiver was appointed. The question involved in that case was one of title to personal property; Moore, the complainant, claiming the title was in himself, while the creditors of Hammell claimed that the title was in Hammell, and that they, as his creditors, by virtue of their judgments and executions, had a right to sell the same. It is claimed in this case that the question involved is purely a question of title to personal property, strictly legal in its nature, and can be determined by an action of replevin, and that consequently a court of equity has no jurisdiction. The case cited seems to present the same characteristics. Moore filed his bill, and claimed the property levied upon by virtue of a bill of sale, praying an injunction against such sale under the executions at law. Clearly, in such case, the principal question to be decided was whether the title was in Moore or Hammell. In the case now under consideration the question to be determined is whether the title to the property named in the chattel mortgage was in Annie Sann or in her husband, Charles Sann. If that were all, it might well be said that in neither case would this court be justified in assuming jurisdiction. But in the case cited, if the property which Moore claimed were to be sold by the execution creditors, with the conflicting claims of title thereto, he might, in a variety of ways, suffer great loss; which view is, in every sense, applicable to the case before me. In that case it was distinctly held in the court of errors and appeals that this court had the right to proceed to settle the rights of the parties by virtue of the bond given, notwithstanding a decree dismissing the bill of complaint. In this case the complainant claims a lien upon the goods and chattels by virtue of her mortgage. She undoubtedly has a right to file her bill to foreclose such mortgage, which beyond question gives the court jurisdiction.

But still the further question arises, can this court, because it is the only tribunal authorized to foreclose a mortgage upon goods and chattels, appoint a receiver to take charge of and sell such goods and chattels, when they are claimed by and under attachment by the creditors of another person than the mortgagor, and offered for sale by an auditor appointed in such attachment proceedings? There is a well-settled rule that courts of equity have the right and power to take possession of property about which are conflicting claims, for the purpose of preserving it until the rights of the respective parties thereto have been settled. May this rule be applied to the present case? It is evident, if the auditor makes sale of the goods and chattels because they are perishable, they will be likely to sell for a nominal price only, and will also be likely to go into the possession of many different persons. The fact that the complainant makes claim in the manner in which he does will cast such a shadow upon the title as to deter prudent men from bidding. The fact that they will in all probability go into the hands of many different persons would make it obligatory upon the complainant, if it should turn out that the title thereto be in him, to bring as many actions at law as there are purchasers. High, Rec. § 192. "A court of equity, appointing a receiver to take possession of property pending a litigation concerning the rights of the parties thereto, is vested with the power to sell the property in the receiver's hands, whenever such course becomes necessary to preserve the interest of all the parties." Id.; Crane v. Ford, Hopk. Ch. 114. When a court of equity properly acquires jurisdiction of the parties and of the subject-matter in a cause, and appoints a receiver therein, and orders him to sell the property in controversy, such order, although irregular and improvident, cannot be assailed or questioned in a collateral action, and such action will not lie to set aside the order of sale and proceedings thereunder. High, Rec. § 196; Libby v. Rosekrans, 55 Barb. 219; Brande v. Bond, 63 Wis. 140, 23 N. W. 101. It being evident that the auditor cannot make sale of these goods except under great disadvantage, and that, if it should ultimately appear that the title is in the chattel mortgagor, and it also appearing that since the mortgagee was justified in filing his bill in this court, thereby acquiring jurisdiction of the subject-matter, and the court unquestionably having the authority to appoint a receiver, and it being the constant practice, when a receiver is appointed, to take possession of the perishable goods and chattels which are the subject of litigation, to make sale thereof for the purpose of preserving the value of them for the parties who may ultimately appear to be entitled thereto, I conclude that it is my duty to advise the appointment of a receiver in this case, with authority to make sale of the goods and chattels in question. The defendant, the attaching creditor, offered to give bonds for the value of the goods. A bond was offered and accepted in the case of Moore v. Diament, supra, but in that case the person who gave the bond did not propose to sell them, as in this case the auditor proposes to do. I will advise accordingly.

Digitized by Google

MARTIN v. INSURANCE CO. OF NORTH AMERICA.

(Supreme Court of New Jersey. March 4, 1895.)

ACTION ON INSURANCE POLICY—DECLARATION ON WRITTEN CONTRACT.

1. A policy declared that it should be void "if the subject of insurance was a building on ground not owned by the insured in fee simple." In his declaration the insured set up that the agent of the insurer fraudulently inserted this clause, and knew at the time that plaintiff did not own the ground on which the building stood. *Held*, that an unambiguous written contract, when sued on in a court of law, is unalterable.

2. *Held*, also, that a declaration in a written contract is bad if it set up matter which, if true, has the legal effect of destroying the contract sued on.

(Syllabus by the Court.)

Action by Alexander Martin against the Insurance Company of North America. Judgment for defendant on demurrer.

Argued February term, 1894, before BEASLEY, C. J., and VANSYCKEL, LIPPINCOTT, and GARRISON, JJ.

A. Simpson, for plaintiff. Erwin & Keller, for defendant.

GARRISON, J. An issue of law is raised by this demurrer to the plaintiff's declaration upon a policy of insurance. The property insured consisted of a two-story frame building and certain chattels contained in it. The plaintiff, who was the insured, owned the building, but not the land on which it stood. The pleader has set out in his narr. the language of the policy in these words: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the subject of insurance be a building on ground not owned by the insured in fee simple." This stipulation is fatal to the plaintiff's action, unless its plain force and meaning be destroyed. This the pleader attempted to do by showing, not the indorsement upon or addition to the policy of some provision otherwise, or even by the allegation that some different agreement was made or attempted to be made between the insurer and insured, but the allegation that the insured did not know that the policy contained this provision, and that the agent of the insurer knew that plaintiff did not own the land on which his building stood, and "surreptiously inserted" in the policy the above clause, for the purpose of cheating him.

A court of law deals with the written contracts of parties as the conclusive evidence of their agreements. If the language employed is free from ambiguity, the writing will be enforced in accordance with its terms. If, by reason of fraud or mutual mistake, the real agreement of the parties is unexpressed, the instrument may be reformed, upon proper proofs, in a court of equity. But, as an expression of the intention of the parties, an unambiguous written agreement, when sued on in a court of law, is unalterable by oral testimony. Nor is it perceived that the plaintiff's position is in any wise bettered by the allegation that the policy was a fraud; for, if this be true, the plaintiff is declaring upon an unreformed contract, which he says is not and never was the agreement of either party.

We have looked to see whether the suit might not go on as to the chattels contained in the building. The words of the written contract are: "This entire policy, etc., shall be void if the subject of insurance is a building," etc. This language is plain, and must control. The circuit court is advised that judgment should be for the defendant on its demurrer.

KITBY et al. v. STATE.

(Supreme Court of New Jersey. Nov. 8, 1894.)

EXTORTION—BY PERSONS NOT OFFICERS.

The incumbent of an office which an unconstitutional statute purported to create cannot be guilty of extortion, as he is neither a de jure nor de facto officer.

(Syllabus by the Court.)

Charles E. Kitby and others were indicted for extortion, and move to quash the indictment. Motion granted.

Argued June Term, 1894, before DIXON, ABBETT, and REED, JJ.

John S. Mitchell, for the motion. Wm. A. Logue, opposed.

REED, J. This indictment is for extortion. It sets out that Kirby Richman and Westcott constituted the board of license commissioners of Cumberland county, and, as such, were officers of this state, duly empowered to grant licenses to sell liquor, and being such officers, with such power, did by color of their said office, extortionately demand and receive from one Taylor a certain sum of money as a fee or reward for doing their office.

Extortion, technically, is an official misdemeanor. While, in its larger sense, it signifies any oppression under color of right, in its strict sense it signifies the taking of money by an officer, by color of his office, where none, or a part only, is due. 1 Hawk. P. C. p. 418; 2 Bish. Cr. Law, § 392; Revision, tit. "Crimes," p. 230, § 23. The offense consists in the oppressive misuse of the exceptional power with which the law invests the incumbent of an office. It is thus apparent that the crime of extortion is committable only by an officer. The officer need not possess a legal title to the office whose functions he executes. A person who serves as an officer, and claims to be one is estopped to deny his official appointment. 2 Bish. Cr. Law, § 392. So it appears that a de facto as well as a de jure officer is punishable for extortion, as he is for any other malfeasance in office. But an official character,

Digitized by Google

either de facto or de jure, is essential. The indictment is drawn in the usual form, and charges that the defendants were officers, and, by color of their office, extorted. This is a material averment, proof of which is absolutely required to support a conviction. The fatal defect in this indictment is not in its form, but is to be found in the circumstance that it must be now concluded, as a matter of law, that these defendants were never the officers they are charged to have been, and therefore could not, as such, have extorted. This inexorable legal conclusion is the result of the unconstitutionality of the statute which created the offices of license commissioners in certain counties, which offices the defendants are charged with using for extortionate purposes. Since the finding of this indictment this court has, in the case of State v. Bradshaw, 27 Atl. 939, decided that the act was opposed to the constitutional prohibition of special legislation regulating the internal affairs of counties. In the subsequent case of State v. City of Camden, 56 N. J. Law, 244, 28 Atl. 82, it was held that a license certificate issued by commissioners appointed under this act was a nullity. The ground of decision was that the statute creating the offices, being unconstitutional, was to be regarded as if it had never been passed; that there never were such offices in existence; and that without an office there could be no officer, either in law or in fact. The decision in that case refused to accord any efficacy to their pretended official acts, because they had no official existence. It appears, therefore, from this statute, and its construction by this court, that the foundation upon which this indictment rests, namely, that these defendants were officers, does not exist. This conclusion does not mean that these defendants are entirely dispunishable for the act of taking, by color of their assumed official character, money to which they would not have been entitled, had the statute mentioned been valid. It means that they cannot be punished under the present form of indictment. The motion to quash must prevail.

STATE v. PARKER.

(Supreme Court of New Jersey. Nov. 8, 1894.)

CONSTRUCTION OF ACT — PROTECTION OF OYSTERS IN COUNTY—EXTENSION OF COUNTY—EFFECT.

An indictment charged defendant with committing acts in the township of Little Egg Harbor, in the county of Ocean, which would be misdemeanors under the "Act to protect the planting and cultivating of oysters in the tide waters of the county of Ocean," approved May 11, 1886, if that act applies to that township. At the passage of that act, that township was in the county of Burlington. It was annexed to the county of Ocean by an act approved March 30, 1891. *Held*, that the purpose of the act of 1886 was to grant special privileges to all citizens of this state to be exercised within the tide waters of a locality described as the county of Ocean, and that those privileges were not extended to be exercised within the tide waters of the annexed township by the act of 1891.

(Syllabus by the Court.)

Certiorari to court of oyer and terminer, Ocean county.

Norwood Parker was indicted for violation of an act protecting the cultivation of oysters, and the indictment was removed by certiorari. Indictment quashed.

Argued June term, 1894, before GARRISON and MAGIE, JJ.

Charles E. Hendrickson, for the motion. Isaac W. Carmichael, opposed.

MAGIE, J. An indictment was presented by the grand jury of Ocean county against Norwood Parker, for acts done in the township of Little Egg Harbor, in that county, which are misdemeanors under the provisions of the "Act to protect the planting and cultivating of oysters in the tide waters of the county of Ocean," approved May 11, 1886 (Supp. Revision, p. 122), if that act applies to that township. The indictment was removed to this court by certiorari, and Parker now moves to quash the same upon various grounds. It is unnecessary to consider any of the grounds but one, for on that ground, we think, the motion must prevail. The plain purpose of the act above cited was to grant certain privileges to the citizens of this state, to be exercised within the tide waters of a certain locality. If the legislature possessed constitutional power to grant such privileges, it could have defined the territory in which they were to be exercised by metes and bounds. But it deemed it wise to indicate the locality by reference to a county,—a political division of the state, —the metes and bounds of which were already fixed. Such a grant did not affect the local government or the corporate powers of the county of Ocean. The name of the county was used simply as descriptive of a locality in the tide waters lying within which the legislature intended to grant certain privileges. At the time of the passage of that act, the township of Little Egg Harbor constituted a part of the county of Burlington, and the tide waters within that township were consequently not affected by the act, and no one could acquire special privileges therein under its provisions. By "An act to annex the township of Little Egg Harbor, in the county of Burlington, to the county of Ocean," approved March 30, 1891 (Laws 1891, p. 538), the township in question was taken from Burlington county, and made a part of Ocean county. The act declared that it should thereafter be subject to the laws applying to Ocean county, and should have the privileges and immunities of the other portion of that county. The purpose of this act was to increase one of the political subdivisions of the state, and its language was aptly chosen to express

Digitized by Google

the legislative intent that the newly-added portion should stand on an equality of political and corporate rights and privileges with the other portions of the municipal corporation to which it was annexed. But I fail to find in this language or any other part of the act the least indication of a legislative intent to extend the privileges granted to all the citizens of the state by the act of May 11, 1886, in the tide waters of the locality called "Ocean County" to the tide waters included in this township. The act certainly contains no express extension of such privileges. If it be admitted that they could be extended by implication, which is very questionable, there is nothing to justify any implication that such was the legislative intent.

Judicial notice must be taken that the township of Little Egg Harbor, in 1886, was in Burlington county, and its tide waters were not affected by the act of May 11, 1886. As that township has not, by subsequent legislation, been included in the locality within which the privileges granted by that act are to be exercised, an indictment charging an offense against that act committed within that township cannot be sustained. Let the indictment be quashed.

STATE (PEACOCK, Prosecutor) v. BINDER et al.

(Supreme Court of New Jersey. Nov. 8, 1894.)

INFANCY—RATIFICATION OF CONTRACT.

A ratification after majority of a contract made during infancy may be qualified, and upon conditions. In an action on such a contract, such a conditional ratification will not avoid the defense of infancy, unless there is proof of the happening of the conditions annexed thereto.

(Syllabus by the Court.)

The state, on relation of Lawrence K. Peacock, brings certiorari against Horace Binder and B. L. Kelly, to review a judgment against the prosecutor. Reversed.

By the return and a state of the case agreed on, it appears that the action was brought upon a promissory note made by prosecutor, when not of full age, to defendants. The note was given for goods, which were not necessaries, sold by defendants to prosecutor. After prosecutor came of age, he wrote the following letter in response to requests for payment of the note: "Atco, N. J., 2, 25, 92. Messrs. Binder & Kelly—Gentlemen: I propose to, if possible, settle June 1st, and, if not in full, what I can, equally with all. Very truly yours, L. K. Peacock." The ability of prosecutor to pay the note, or a part of it, upon June 1, 1892, was not shown. The judgment was for the whole amount of the note, with interest.

Argued June term, 1894, before GARRISON and MAGIE, JJ.

John W. Wartman, for prosecutor.

MAGIE, J. (after stating the facts). As it appears that prosecutor interposed the defense of infancy in the trial below, it is obvious that the sole question presented by this certiorari is whether proof of his letter of February 25, 1892, avoided that defense. The contract proved to have been made during prosecutor's infancy was a voidable contract. Patterson v. Lippincott, 47 N. J. Law, 459, 1 Atl. 506. It was therefore capable of being ratified by him after he attained full age. In my judgment, it is unnecessary to decide in this case whether a contract made during infancy can be established only by proof of an express promise made after majority, or also by proof justifying the inference of a promise or of an intent to recognize the binding force of, and to perform, the contract. For such a ratification, established by any such proof, may obviously be qualified by conditions. As the adult may wholly avoid the contract made during infancy, he may avoid it in part, or may undertake a conditional performance of it. Chit. Cont. 47; Thompson v. Lay, 4 Pick. 47; Proctor v. Sears, 4 Allen, 95; Everson v. Carpenter, 17 Wend. 419. In this respect the ratification after majority of an infant's contract resembles the acknowledgment of a contract barred by the statute of limitations. Parker v. Butterworth, 46 N. J. Law, 244. If prosecutor's letter in any way established a ratification of his voidable contract, it was plainly a qualified ratification, dependent upon his ability to pay the whole or some part of the note, payment of which had been requested. Under such a ratification, defendant's right to avoid the defense of infancy could only arise upon further proof that the conditions annexed to the ratification had happened. As there was no proof whatever on this subject, the defense of infancy was an absolute bar to the action, and judgment should have been rendered for prosecutor. For this reason the judgment in favor of defendants must be reversed, with costs.

STATE (FARROW, Prosecutor) v. SPRINGER.

(Supreme Court of New Jersey. Nov. 19, 1894.)

CERTIORARI—ISSUE OF SEARCH WARRANT.

The action of a magistrate in issuing a warrant, commonly called a "search warrant," upon complaint, will not be questioned or reviewed by certiorari.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of David J. Farrow, against Lena Springer, to review an action of a police justice in the city of Camden, in granting a search warrant. Writ dismissed.

Argued February term, 1894, before DEPUE, REED, and MAGIE, JJ.

Mr. Wartman, for prosecutor.

MAGIE, J. Prosecutor seeks by this writ to procure a review of the act of a police jus-

Digitized by Google

tice in the city of Camden, in issuing a warrant, commonly called a "search warrant," upon a complaint made under oath to him. He alleges various insufficiencies in the complaint, and errors and omissions in the warrant.

Proceedings whereby stolen goods may be searched for, and, if found, seized and placed in official custody, have been known to the criminal law from a very early period. Notwithstanding some doubts expressed by Lord Coke as to their legality (4 Inst. 176), the practice of issuing search warrants for stolen goods has been recognized and approved by innumerable cases, and by all other text writers, as within the lawful powers of magistrates acting as conservators of the peace. 2 Hale, P. C. 113; Burn, J. P. tit. "Search Warrants"; 1 Chit. Cr. Law, 64; 1 Bish. Cr. Proc. § 665; Cooley, Const. Lim. *p. 300; 21 Am. & Eng. Enc. Law, 958; Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524; Entick v. Carrington, 11 Harg. St. Trials, 321. Such proceedings are of a criminal nature. The warrant can issue only upon complaint on oath, and it commands the officer to whom it is directed, if the stolen goods described are, upon the search, found, to bring them, and the person in whose custody they were found, before the magistrate. Upon its return the magistrate is to examine the matter. If it appears the goods were not stolen, the person in whose custody they were found is to be discharged, and the goods redelivered. But, if it appears that the goods were stolen, they are to be deposited with some officer, so that the party robbed may, by indicting and convicting the offender, have restitution of them; and the person in whose custody they were is to be held to answer, if he appears to have been criminally connected with the theft. 2 Hale, P. C. 150. The proceeding differs from the ordinary complaint, warrant, examination, and commitment, used to bring accused criminals to answer, in no respect, except that it gives authority and direction for the search of suspected places, described, for certain stolen goods. Will this court, by the writ of certiorari, stay a magistrate's proceedings in such a case, and review his action in issuing a warrant upon a sworn complaint? If it can do so, it is conceived that the writ will lie to review any warrant for assault and battery or larceny, or other crime charged on oath; and the complaints and warrants which, by our criminal procedure, are to be laid before the grand jury, will be thus drawn into this court. For there is no perceptible difference between the violation of a man's liberty by his arrest on a criminal charge, and the violation of his right of property by a search for goods, the possession of which has been obtained by crime. There is no ground of distinction which would justify a review in one case that would not justify it in another. Doubtless, this court may, by this writ, review the actions of inferior courts of all kinds. It was an ancient practice of the king's bench to remove by certiorari into that court indictments found in the sessions. 1 Chit. Cr. Law, 371. Such has always been the practice of this court, and the practice is regulated by statute. Revision, 98. When indictments are thus removed, the defendant is brought before this court, and proceedings thereon may be continued to a final determination, although, by more recent legislation, the proceedings may be remanded to the court from which they came, and to be there prosecuted. But my search has not disclosed any trace of the use of the writ of certiorari to remove the warrants of magistrates in criminal cases, or the proceedings thereunder, prior to the finding of an indictment; and the writ is then obviously used, not for the purpose of review, but to remove the record, with the object of proceeding upon it in this court. In my judgment, the earlier use of the writ is opposed to settled rules. When thus issued there exists no final determination to be reviewed, and the proceeding cannot be pursued in this court. In Hoxsey v. Woodruff, 39 N. J. Law, 72, this court declared the rule to be that the writ of certiorari could not properly be used to remove for review steps in a procedure preliminary to final decision, except where the court issuing the writ could continue the proceeding to completion. In the court of errors (Id. 489) this rule was declared not to have universal force, and it was held not to apply to writs of certiorari, the object of which was to review municipal action. The rule has been applied to proceedings of associations and of military courts. Elder v. Society, 35 N. J. Law, 200; Watson v. Society, 38 N. J. Law, 377; Drake v. Plume, 44 N. J. Law, 362. It was also held applicable to summary proceedings under the vice and immorality act. Stokes v. Early, 45 N. J. Law, 478. In Mowery v. Camden, 49 N. J. Law, 106, 6 Atl. 438, it was held that a certiorari might issue to bring up the action of a special tribunal proceeding summarily in a matter over which it had not acquired jurisdiction; but the learned judge who pronounced the opinion pointed out that in this state such a writ was deemed appropriate in criminal matters only when the object was to remove a cause to be continued in this court.

My conclusion is that a certiorari ought not to be allowed to bring up a warrant of a magistrate issued upon a complaint of a criminal nature. The determination to issue the warrant is not a final determination of the matter put in litigation by such a complaint. Nor can that matter be pursued in this court at that stage of the proceeding, but only before the grand jury of the proper county. If such a warrant has been issued by a magistrate in a matter neither really nor colorably within his jurisdiction, the person aggrieved thereby may recover damages from him in a civil action. Grove v. Van

Digitized by Google

Duyn, 44 N. J. Law, 654. If the matter be colorably within his jurisdiction, the person affected by his action must await the action of the grand jury upon the complaint which gives color to the jurisdiction. The result is that this writ should be dismissed, and no opinion will be expressed as to the sufficiency of the complaint, or the correctness of the warrant.

FEENEY v. RUEGER.

(Supreme Court of New Jersey. Nov. 8, 1894.)

COURT OF COMMON PLEAS—JURISDICTION—APPEAL FROM DISTRICT COURT—ABSENCE OF STATE OF CASE.

The court of common pleas did not acquire jurisdiction to try de novo a case appealed from a district court under the act approved February 11, 1888 (Laws 1888, p. 24), merely from the absence of a state of the case settled by the district judge. Its jurisdiction to retry the case only arose, under that act, upon the absence of a state of the case agreed on by the parties, and its being made to appear that the district judge, being duly applied to, had failed to settle a case for the period limited in that act.

(Syllabus by the Court.)

Certiorari to court of common pleas, Essex county; Kirkpatrick, O'Gorman, and Ledwith, Judges.

Action by Ellen Feeney against John Rueger. A judgment was rendered for defendant on appeal from the district court, and plaintiff prosecutes certiorari. Reversed.

Argued June term, 1894, before GARRISON and MAGIE, JJ.

Howard W. Hayes, for prosecutor. Frank E. Bradner, for defendant.

MAGIE, J. It appears by the record returned that prosecutrix obtained a judgment against defendant in the First district court of the city of Newark, and that defendant took an appeal therefrom, which was perfected by the approval and filing of an appeal bond on February 24, 1892. On December 14, 1892, the common pleas ordered on the appeal for trial. Prosecutrix moved to dismiss the appeal for want of prosecution, and the motion was denied. For failure to move the case, prosecutrix was then nonsuited. The judgment of the district court was reversed, and the record remitted to that court, to the end that a judgment of nonsuit should be there entered. Prosecutrix contends that the common pleas erred in the ruling and judgment above stated.

The appeal having been taken on February 24, 1892, the act approved March 24, 1892 (Laws 1892, p. 257), did not apply to it. The power of the common pleas to deal with the appeal must depend on the laws applicable at the time it was taken. Prior to 1888, the appeal to the common pleas from a district court was wholly upon matters of law, and no power existed in the appellate court to retry the case. Dale v. See, 51 N. J. Law, 378, 18 Atl. 306, and cases cited. Questions arising on appeal were presented by a state of the case agreed on by the parties, or, in case of their disagreement, settled by the district judge. Failure of the parties to agree cast upon the appellant the duty to have the case settled by the judge, and, if he failed to present an agreed case, or to apply to the judge for a settlement of the case, it was ground for dismissal of his appeal. Loftus v. Board, 43 N. J. Law, 357. By an act approved February 11, 1888 (Laws 1888, p. 24), it was enacted that whenever, upon any such appeal, the district judge should fail for any reason "to settle and sign the case as required by law" within three months from judgment, the common pleas should try the case de novo. In the case before us it is obvious that the common pleas considered that it had power to try de novo the case presented by the appeal, and nonsuited prosecutrix, because she did not present evidence, and proceed with the trial. The record shows no state of the case agreed on by the parties or settled by the district judge. In the absence of other proof, it would be presumed that appellant had either not applied to the other party to agree on a case, or, having sought an agreement unsuccessfully, had not applied to the judge to settle a case; for upon such an application the presumption would be that the judge would have performed his duty, and settled a case. The presumption does not stand alone in this case, for the record shows that the district judge, in response to rules of the common pleas, certified that he had not settled a case, and had no recollection of ever having been requested to do so. This response requires the inference that he had not been requested to settle a case, for the presumption, as before stated, would be in favor of the performance of official duty on request. There having been no state of the case before the common pleas, it was plainly their duty to dismiss the appeal, unless the appellant showed reasonable excuse for not presenting the state of the case, or unless the court had jurisdiction to try the case de novo under the act of 1888. The common pleas evidently determined in favor of its jurisdiction to retry the case upon the absence of a state of the case settled by the district judge. But this determination rests on an erroneous construction of the act of 1888, for by the terms of that act its jurisdiction to retry the case depends, not on the mere failure of the district judge to settle the case, but on a failure to settle the case as required by law. By the district court acts the district judge is not required to settle a case until the parties have failed to agree on a case, and he has been informed of the disagreement, and requested to act. It follows that the common pleas would not acquire jurisdiction to try a case on appeal de novo until it appeared that no case could be agreed on by the parties, and that the

Digitized by Google

district judge had been regularly applied to to settle the case, and had failed to do so for the period named in the act of 1888. The construction given to the act of 1888 by the common pleas would confer jurisdiction on that court to try an appealed case de novo even where the parties had agreed upon a state of the case. This meaning could not be given without violence to the plain intent of the act, which was to furnish an appellant a way to dispose of his appeal speedily, and notwithstanding failure and delays on the part of the district judge. As the facts necessary to authorize the common pleas to retry the case did not appear before that court, it was error for it to nonsuit prosecutrix for not bringing the case to trial. As defendant failed to present a case agreed on by the parties or settled by the district judge, or to show that the district judge had been duly applied to to settle the case, and had failed to do so for three months from judgment rendered, it was clear that he had not properly prosecuted his appeal, and it should have been dismissed. The result is that the judgment of the common pleas should be reversed, with costs, and the cause be remitted to that court, to the end that the appeal may be dismissed in accordance with this opinion.

STATE ex rel. DAVIS et al. v. DAVIS et al.

(Supreme Court of New Jersey. Jan. 4, 1895.)

QUO WARRANTO—TITLE TO OFFICE—FINE ON USURPER.

1. By force of the statute of this state relating to informations in the nature of a quo warranto, it is the defendants' title that is alone put in issue.

2. When a public office has been intruded into, without color of right, the court will impose such a fine upon the usurper as shall appear, under the circumstances, to be condign.

(Syllabus by the Court.)

Quo warranto by the state, on the relation of John B. Davis and others, the board of chosen freeholders of the county of Camden, against William H. Davis and others. Judgment for relators.

Argued November term, 1894, before BEASLEY, C. J., and DEPUE and VAN SYCKEL, JJ.

J. Willard Morgan, for relators. A. Hugg, for respondents.

BEASLEY, C. J. This case, in its present respect, is before this court on demurrer to the information. Originally a plea was filed, but this was stricken out, on motion, as frivolous. The controversy is conditioned as to facts in this wise, viz.: The defendants were duly elected as chosen freeholders by virtue of the act of 1892, and the relators to the same office under the more recent act of 1894, and which, in plain terms, repeals the older one, and vacates the offices of those who had been elected in pursuance of its provisions. It appears from the information before us that the relators have exhibited, upon the record, their title; and the demurrer, admitting, of course, the fact that the defendants themselves are holding the office in question by wrong and usurpation, seeks to put to the test the right that their adversaries have thus displayed. But the futility of such an attack is conspicuous. No issue of this character can be raised or decided in this procedure. The only question in these informations is whether the defendant is in wrongful possession of an office or franchise. That is the sole inquiry and subject for judgment. It is true that the present action has been taken in accordance with the supplement to the quo warranto act, passed in 1884 (Supp. Revision, p. 819, § 1); but that modification of the method of procedure has not altered the law in the respect now in question. It has not in any degree whatever modified or affected the subject of the judicial inquiry. All that it does is to enable a certain class of persons to initiate these proceedings at will, and without the permission of the court. Its language is as follows, viz.: "That whenever it is alleged that any person or persons, usurp, intrude into or unlawfully hold or execute any municipal office or franchise within this state, it shall and may be lawful to and for any citizen of this state, who believes himself lawfully entitled to such office or franchise, to file in the office of the clerk of the supreme court an information, or informations in the nature of a quo warranto, at the relation of the said citizen, and who shall be mentioned in such information to be the relator, against such person or persons as defendant or defendants, for usurping, intruding into or unlawfully holding or executing any such office or franchise and to proceed therein in such manner as is usual in cases of informations in the nature of a quo warranto," etc. The purpose and effect of this statutory provision are plainly expressed in its terms, and it is manifest that it does not lend the least countenance to the notion that a relator, by force of its adjustments, can put his own title in issue, and have its legality adjudicated. So clear is the legislative expression on this point that it does not even make the possession of title in the relator a prerequisite to his right to become the actor in the procedure, for it bestows that privilege on "the citizen who merely believes himself lawfully entitled to such office." In point of fact, he may not have title, but he is qualified by the statute to proceed in the manner stated if he has an honest faith in the legality of his claim. It indubitably follows that he need neither state nor prove his title. That this is the status of such a relator is further evident from the statutory privilege conferred upon him, which is "to file an information in the nature of a quo warranto" against a person usurping or intruding into a public office. This is the entire scope of the power conferred, and, on

Digitized by Google

the accusation thus authorized, it is obvious that the sole subject of judicial inquiry is the guilt or innocence of the defendant. The title of the relator is in no wise pertinent to such an investigation. The result is that this demurrer before the court has no other effect than to admit the usurpation of the defendants of the office in question.

Before leaving this subject, it is proper to say that while the statutory provision above stated has the effect already ascribed to it, and enables a relator of the class mentioned to file, ex mero motu, one of these informations, it is not to be understood that the procedure thus initiated is removed from the control of this court. It is deemed that such is not the effect of this law. If, on a motion to quash an information thus exhibited, it should be made to appear that it had been presented in bad faith, or that, in its result, it would prove injurious to the further interests, there can be no doubt that it would be within the competency of this court to control or arrest such a course of law. The judicial supervision over such subjects is one of the prerogatives of this court, and it does not seem that such an authority could be materially diminished by legislative action; but, without deciding that question, it is enough to say that in the law that has been above construed we do not perceive any trace of such an invasion.

In the present case the defendants stand before us as self-confessed wrongdoers. They are usurpers of a public office, and, by their misconduct, have occasioned disorder and confusion in the affairs of local government. This conduct has been so plainly illegal that it is not possible to believe that, in retaining their positions, they had the faintest belief that they were right in so doing. It is to be remembered that such a malfeasance as this is an indictable offense in both those who advise it and in those who execute it. It is not proper for this court to pass such a wrong as this without rebuke, and it is therefore ordered that judgment be entered that due process of law issue to remove these defendants from the offices into which they have intruded, and also that a fine of $200 be laid on each of said defendants for his malfeasance.

ALLEN et al. v. COMMISSIONERS OF TAXATION FOR BERNARDS TP. et al.

POST et al. v. SAME.

(Supreme Court of New Jersey. Nov. 8, 1894.)

COMMISSIONERS OF TAXATION—POWERS—ENLARGEMENT OF TAX LEVY—CURATIVE ACT.

1. By force of our constitutional provision, requiring the object of every law to be expressed in its title, the title limits the sphere within which the enacting clauses can operate.

2. Under the commissioners of taxation act (Supp. Revision, p. 614), the power of the commissioners is confined to cases where the local authorities or officers were bound by law to provide for the performance of those public duties to which the title refers, and they have failed so to do.

3. Where the amount to be raised for the discharge of those public duties is by law committed to the discretion of the local authorities, and they have lawfully exercised their discretion, commissioners of taxation have no power to change the amount so ordered.

4. The rule of statutory construction that language which will have full force if applied to the future only shall not have retroactive effect governs in the interpretation of the title as well as of the enacting clauses.

5. Chapters 46 and 55 of the Acts of 1894 are not intended to legalize taxes levied by a body having no authority to impose them.

(Syllabus by the Court.)

Certiorari, on the relation of Anna Skinkle Allen and others, against the commissioners of taxation for the township of Bernards and others, to set aside certain tax levies. Certiorari, on the relation of George B. Post and others, against the same. Judgment for relators.

Argued June term, 1894, before REED, ABBETT, and DIXON, JJ.

Mr. Marsh and Mr. Allen, for prosecutors. Mr. Lindabury, for defendants.

DIXON, J. By these certioraris the prosecutors seek to set aside certain taxes levied upon them in the year 1893 by commissioners appointed by the governor of the state, in pursuance of an act passed March 20, 1884, having the following title: "An act to provide for and secure the raising of revenue for the execution of the public duties of maintaining public schools, preventing the destruction of property by fire, preserving the public health, supporting the poor, maintaining police and keeping the highways and streets in a safe condition for public use within the limits of incorporated cities, towns and municipalities, in cases where the local or municipal authorities or officers fail to provide for the performance of such duties." Supp. Revision, p. 614. By force of our constitutional provision requiring the object of every law to be expressed in its title, the title limits the sphere within which the enacting clauses can operate. Hendrickson v. Fries, 45 N. J. Law, 555, 563; Dobbins v. Northampton Tp., 50 N. J. Law, 496, 14 Atl. 587. Hence, under the title above recited, the provisions of the act for the raising of revenue must be confined to cases where the local or municipal authorities or officers have failed to provide for the performance of those public duties to which the title refers Public duty resting upon the local authorities, and failure to discharge it, form a condition precedent to the exercise of power by the commissioners whom the governor appoints. Reid v. Wiley, 46 N. J. Law, 473. With this guiding principle, we come to consider the case before us.

At the annual meeting of the inhabitants of Bernards township, in Somerset county, held March 14, 1893, the sum of $1,200 was ordered to be raised by tax for the support of the poor, $4,000 for roads, and $500 for removing snow. It is not questioned that

Digitized by Google

there were the proper township officers for assessing and collecting taxes to meet these appropriations, and that they were regularly proceeding with the execution of those duties. On August 26, 1893, the commissioners appointed by the governor resolved to levy, on the taxable property in the township, $2,000 for the protection and maintenance of the public health, $3,300 for the maintenance and support of the poor, $324 for the support and maintenance of a police force, $14,000 for keeping the highways and street in a safe condition for public use, and $1,700 for the expense of assessing and collecting such taxes and to meet deficiencies. These sums were accordingly levied by the commissioners, and the prosecutors complain of so much as is charged against them beyond their due share of the sums voted at the town meeting.

We think it cannot be held that there was any failure on the part of the local authorities to provide for supporting the poor or keeping the highways in safe condition. Under the general township act (Revision, p. 1194, § 11), the amount to be raised for these purposes in each township is determined by the vote of the town meeting. As in every township there are roads to be maintained and paupers to be cared for, it is doubtless incumbent on the town meeting to vote money for these objects; but, when such a vote has been lawfully and honestly taken, we cannot say that there has been any failure to discharge public duty in these respects. Our judgment is that the authorities of Bernards township had performed their duty in relation to the poor and the roads of the township, and consequently that the commissioners of the governor had no power to levy taxes for these purposes.

For a somewhat different reason, they were likewise unauthorized to levy taxes for the support of a police force. There was at the time of their action no police force in the township, nor had there been at any town meeting any vote to employ a police force or to raise money therefor. Whether a police force should be employed is a question which the law submitted to the discretion of the voters in each township (Supp. Revision, p. 1042, pars. 74, 76); and without such a vote there was no delinquency to be supplied by the appointment or action of commissioners. Chapter 68 of the Laws of 1887 (P. L. 1887, p. 80, § 10) requires that there shall be a board of health in every township of this state; and an examination of the numerous statutes prescribing the duties of such boards indicates that their duties cannot be properly discharged without the expenditure of money. It was therefore the duty of the voters at the town meeting in Bernards to provide for raising the funds necessary to meet this probable expenditure, and their failure to do so furnished a legal occasion for the resolution of the commissioners that $2,000 should be levied for the protection of the public health. With this levy, therefore, we cannot interfere.

The other levy ordered by the commissioners is for $1,700, to meet the expense of assessing and collecting the taxes imposed by them. Although this object is not expressly mentioned in the title of the act, yet it is incidental to the object there declared (Payne v. Mahon, 44 N. J. Law 213), and is within the enacting clauses. A levy for such a purpose is therefore legitimate. But the statute limits the amount therefor to 10 per cent. of the sum required to be raised,—i. e. lawfully levied by the commissioners for other purposes; and consequently, according to the views already expressed, the $1,700 must be reduced to $200. The legislature, in 1894, passed two statutes on which the defendants rely in vindication of the assessments under review. One of these is a supplement of the act we have been considering (P. L. 1894, p. 67); the other is a supplement to "An act authorizing the incorporated cities, towns and townships of this state to renew matured and maturing bonds" (Id. p. 57). But neither of these supplements reaches the desired end. In the first place, there is nothing in the title of either of them to suggest that their provisions are to have retroactive operation; and, under a well-settled rule of statutory construction, such a purpose is not implied in language which has full force if applied to the future only. Williamson v. Railroad Co., 29 N. J. Eq. 311, 333; Gaslight Co. v. Alden, 44 N. J. Law, 648, 653. Such language in the title of an act cannot be said to express a design to validate past transactions. Secondly, these supplements do not purport to legalize taxes levied by a body having no authority to impose them; their professed aim is solely to cure irregularities and excesses in the acts of competent officers. Whether the legislature can, by a retrospective statute, give validity to property taxes previously levied in particular localities by persons not clothed with power to impose such taxes, we need not now decide. Such legislation seems closely akin to, if it be distinguishable from, a special law for the assessment of taxes on property, which the constitution forbids.

So much of each prosecutor's tax as is in excess of his quota needed to raise the $5,700 voted at the town meeting and the $2,300 lawfully levied by the commissioners is illegal, and must be set aside.

STATE (TIDE WATER PIPE CO., Limited, Prosecutor) v. STATE BOARD OF ASSESSORS.

(Supreme Court of New Jersey. Feb. 21, 1895.)

TAXATION—PARTNERSHIP ASSOCIATIONS—CORPORATION TAX.

1. "Partnership associations" organized under the Pennsylvania statute of June 2, 1874, are invested with the essential characteristics

Digitized by Google

of corporations, and may be taxed as corporations in this state.

2. Such an association doing business in New Jersey is taxable under our corporation tax act.

3. The tax imposed by our corporation tax act on foreign pipe-line companies engaged in the transportation of oil from points in Pennsylvania and New York to points in New Jersey is not an unconstitutional interference with interstate commerce. Maine v. Railway Co., 12 Sup. Ct. 121, 163, 142 U. S. 217, followed.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of the Tide Water Pipe Company, Limited, to set aside a tax levied by the state board of assessors. Tax affirmed.

Argued November term, 1894, before MAGIE, LIPPINCOTT, and DIXON, JJ.

A. A. Clark, for prosecutor. Wm. Y. Johnson, for defendant.

DIXON, J. The Tide Water Pipe Company, Limited, having been taxed in the year 1888, under our corporation tax act (Supp. Revision, p. 1016), has sued out this writ of certiorari to have the tax set aside. Its first contention is that it is not a corporation. It was organized under a statute of Pennsylvania entitled "An act authorizing the formation of partnership associations, in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances," approved June 2, 1874. Although associations formed under this act are called in Pennsylvania "joint-stock companies," and as such are probably included in the term "corporations" for the purposes of article 16 of the Pennsylvania constitution, yet they do not seem to be regarded by the courts there as corporations, for in Pipe Co. v. Kitchenman, 108 Pa. St. 630, the supreme court, speaking of the present prosecutor, said, "It is not a corporation, but a limited partnership, organized under the act of June 2, 1874." Even if this view be entertained in the domestic forum, it is not conclusive upon foreign jurisdictions; and, if the association is invested, by the laws under which it came into being, with the essential characteristics of a corporation, it may be treated as one in other states where it assumes to exercise corporate powers. Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566. This association exists under legislative authority. It has a name of its own, under which it can hold, own, and convey real and personal property, transact business, sue and be sued. It can adopt and use a common seal. It can make by-laws and appoint officers for the management of its affairs. Its members are not responsible for its obligations, except to the extent of their unpaid subscriptions to its capital. Their interest in the association is personal estate, whatever be the nature of the company's property, and can be transferred to strangers without dissolving the association; and the association will continue during the term mentioned in its certificate, unless sooner dissolved by the vote of its members. Purd. Dig. p. 937. These powers comprise the substance of the general powers of corporations under the laws of Pennsylvania (Purd. Dig. p. 335), and also under the laws of New Jersey (Revision, p. 175). The association having come into this state to exercise its statutory privileges, it should be deemed a corporation within the meaning of our corporation tax act. Pipe-Line Co. v. Berry, 52 N. J. Law, 308, 19 Atl. 665.

The next objection to the tax is that the statute provides for a tax only against corporations doing business in this state, and the prosecutor, it is insisted, does no business in New Jersey, because its principal office is in Pennsylvania, and all the pecuniary proceeds of its business are received in Pennsylvania or New York. But, plainly, the company does business in New Jersey. Here it owns, maintains, and operates a pipe line across the state, a pumping station at Changewater, storage tanks, distributing apparatus, and a business office in Bayonne. All this it does as an artificial entity, distinct from the personal members who brought it into being, claiming the attributes which its Pennsylvania charter confers, and which, in our opinion, give it a corporate character. By taxing it as a corporation, the authorities of New Jersey acquiesce in this claim, but require the company to comply with the condition of such acquiescence. In this respect the company clearly comes within the intent and meaning of the statute.

The last objection is that the imposition of the tax is an unconstitutional interference with interstate commerce. According to the facts agreed upon, the entire business of the company consists of the transportation of oil or petroleum from points in New York and Pennsylvania to points in New Jersey, and of matters incidental thereto, and consequently it seems to be merely interstate commerce. The tax levied is designated by the statute as "an annual tax, for the use of the state, by way of a license for its corporate franchise," and consists of eight-tenths of 1 per centum of "the gross amount of its receipts from the transportation of oil or petroleum through its pipes or in and by its tanks and cars in this state" during the year preceding the levy, the said gross amount being such proportion of its gross receipts for transportation of oil or petroleum over its whole line as the length of its line in this state bears to the length of its whole line. The question thus raised is one to be decided according to the views of the supreme court of the United States. Those views have been recently expressed in a case which appears to be on all fours with the present case. I refer to Maine v. Grand Trunk Ry. Co., 142 U. S. 217, 12 Sup. Ct. 121, 163, which is so apposite for present purposes as to preclude the need or the utility of further investigation. Upon the authority of that decision I think the objection stated must be overruled. The tax should be affirmed, with costs.

Digitized by Google

STATE (GRIFFIN et al., Prosecutors) v. WANSER, Mayor, et al.

(Supreme Court of New Jersey. Feb. 21, 1895.)

CITIES—DIVISION INTO WARDS.

Commissioners appointed in any city, under the provisions of the "Act providing for the formation and establishment of wards in cities of the first class in this state," passed May 16, 1894 (Laws 1894, p. 387), are required to make division of the city into wards, with regard to equality of population. *Held*, that a division which appears to have been made with regard to the equality of the average total vote of the new wards is not in compliance with the requirements of the act.

(Syllabus by the Court.)

A certiorari, allowed upon the prosecution of John Griffin and others, was directed to Peter F. Wanser, mayor of Jersey City, John E. Scott, clerk of said city, and Henry H. Holmes and four other persons, commissioners appointed under the provisions of the "Act providing for the formation and establishment of wards in cities of the first class in this state," passed May 16, 1894 (Laws 1894, p. 387), and commanded them to certify into this court the appointment of said commissioners, and the maps and reports filed by them, with all proceedings thereunder. The mayor and city clerk have returned the appointment of said commissioners, their oaths of office, one map showing the lines of wards, and another map showing the lines of election precincts, with the certificate of three of the commissioners upon each, a description of the ward boundary lines, and a description of the election precinct boundary lines, each signed by the same commissioners. The defendants the commissioners have returned their acts and proceedings as they appear in the minutes of their meetings, attested by their secretary. Certificates and attestations vacated.

Argued November term, 1894, before DIXON, LIPPINCOTT, and MAGIE, JJ.

William D. Edwards, for prosecutors. Spencer Weart and Gilbert Collins, for defendants.

MAGIE, J. (after stating the facts). Several of the reasons filed by prosecutors attack the validity of the proceedings brought before us by this writ, upon the ground that the "Act providing for the formation and establishment of wards in cities of the first class in this state," passed May 16, 1894, was obnoxious to constitutional prohibitions, or had been repealed before these proceedings were taken. Objections precisely similar have heretofore been considered by this court, and declared to be without substance. State v. Mayor, etc., of City of Newark (N. J. Supp.) 30 Atl. 543. Therefore those now made cannot prevail.

Of the remaining reasons filed by prosecutors only one need be considered. That questions the validity of the acts of the commissioners in respect to wards, upon the ground that they, "in dividing Jersey City into wards, have not had regard to equality of population." The above-mentioned act of May 16, 1894, gives authority to a mayor of any city of the first class to appoint five commissioners, whose duty shall be, after having taken a prescribed oath, to divide such city into wards. It expressly enacts that "all such wards shall be formed of contiguous territory, and in dividing the same the said commissioners shall have regard to equality of population." The act further provides that the action of the commissioners is to be evidenced by maps defining the lines of wards, to be made and filed by the commissioners in the office of the city clerk, with a description of such lines, all to be attested and certified by the commissioners, and to these remain of record. The reason under consideration does not question the validity of the attestations and certificates of the commissioners on the ground that they fail to show that the division of the city into wards had been made in accordance with these requirements of the act. As these commissioners were empowered to do certain acts in a prescribed mode, the well-settled rule, which requires such persons, when their acts are only to be authenticated by their certificates, to show on the face thereof that they have strictly pursued their authority, may be applicable. The rule is applied to the condemnation of lands (Vanwickle v. Railroad Co., 14 N. J. Law, 162); to municipal acts and assessments (State v. Mayor, etc., of Jersey City, 25 N. J. Law, 309; Id., 26 N. J. Law, 444; Wilkinson v. Inhabitants of City of Trenton, 36 N. J. Law, 499); to tax adjudications (State v. Warford, 32 N. J. Law, 207); and to the orders and returns in laying out roads (State v. Van Gelson, 15 N. J. Law, 239; State v. Bergen, 21 N. J. Law, 342); and it would not be easy to discover a reason for not applying a similar rule to the case in hand, where the certificates of the commissioners furnish the only record of their acts. If this rule is applicable, it is obvious that the attestations and certificates of the commissioners appearing in the return are defective, and, upon proper objection, ought to be vacated on that ground, for they are entirely silent as to the principle on which the division into wards was made, and do not show that in making such division the commissioners had any regard to equality of population. But, as before stated, this reason seems not to present this objection, but rather to assert that the commissioners, in making such division into wards, did not, in fact, have regard to equality of population, as required by the act. Defendants insist that it thus presents a question of fact, and, as prosecutors have taken no affidavits to establish the alleged breach of duty on the part of commissioners, that it cannot prevail. But proof by affidavits is unnecessary if the fact is otherwise established. In the minutes of the commission

Digitized by Google

ers, kept by their secretary, and returned in obedience to the command of this certiorari, it appears that at a meeting on July 26, 1894, they unanimously adopted the following resolution: "Resolved, that for the purpose of conforming to the aldermanic requirements, the ward lines be drawn so as to form twelve wards, as compactly and of as nearly an average total vote as possible." No other action indicative of a change in the purpose declared in that resolution appears, and the division was made into 12 wards. It thus appears that the ward lines were drawn so as to give to each ward, as nearly as possible, an equal average vote. This may have been a commendable purpose, inasmuch as it tended to produce equality of representation. But that was not the duty laid upon the commissioners by the act of the legislature. They were required to make their division with regard to equality of population, and that duty was not performed by making the division with regard to equality of votes. It may be true, as argued, that the average vote of a locality bears some relation to its population, but that relation is not so certain or accurately known as to justify reliance upon it in determining the population of the locality. The result is that the certificates and attestations appearing in this return must be vacated and set aside, with costs.

STATE (HULICK, Prosecutor) v. CASLER.

(Supreme Court of New Jersey. Feb. 23, 1895.)

CERTIORARI BY ONE OF TWO JUDGMENT DEBTORS —PARTIES.

One of two joint judgment debtors, who wishes to prosecute a writ of certiorari to reverse such judgment, on the ground that process was not served upon him, must summon the other defendant, and, if the latter refuses to join in the prosecution, procure an order permitting him to prosecute the writ alone.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Charles L. Hulick, against Rufus Casler, to review a judgment of a justice of the peace. Dismissed.

Argued November term, 1894, before GARRISON and REED, JJ.

R. T. & A. B. Stout, for prosecutor. John Steen, for defendant.

REED, J. The record discloses that the summons was sued out against two defendants,—Charles L. Hulick, the prosecutor, and Charles Smock. The constable made a return of a personal service on the two defendants at their place of business in Asbury Park, by reading the same, and leaving a true copy thereof. On the return day of the summons, a motion was made to nonsuit the plaintiff, on the ground that no copy of the summons was served. This motion was refused. The justice received in evidence a note signed Hulick & Smock, and entered judgment against the defendants for the amount of the note. It appears from the testimony taken to be used upon this argument that the paper left with Hulick as a copy of the summons had upon it no name of a justice of the peace. No appearance was entered by the defendants, except specially to object to the sufficiency of the service of the writ.

An insuperable obstacle shuts out any consideration of the merits of the grounds assigned for reversal. The suit, as already observed, terminated in a joint judgment against the prosecutor and another. He alone has prosecuted this writ. There has, so far as appears, been no summons to the other defendant, and, of course, no severance of their joint right to prosecute the writ of certiorari. Unless this be done, the other defendant will retain his right to sue out his writ after a judgment upon the present writ, and so the plaintiff below be harassed by successive writs. Bradshaw v. Callaghan, 8 Johns. 558–566; Cox v. Haines, 3 N. J. Law, 687. Both defendants were returned served; so the case cannot be brought within the doctrine of the case of Pharo v. Parker, 21 N. J. Law, 332, as limited by the subsequent case of Van Buskirk v. Railroad Co., 31 N. J. Law, 337. The exception to the rule requiring summons and severance was by the last case restricted to a writ sued out by one of two joint debtors, against both of whom judgment had been entered, under the statute respecting joint obligations, by force of a service of process upon the prosecutor of the writ only, the return as to the other defendant being "Not found." The practice in cases like the present is to sue out the writ in the names of all the joint defendants; and upon the return, if any refuse to come in and join in, filing reasons and prosecuting the writ, they must be summoned and severed. The procedure is pointed out in Archbold's Practice (page 211). The writ is dismissed.

STATE (INHABITANTS OF EWING TP., Prosecutor) v. INHABITANTS OF CITY OF TRENTON.

(Supreme Court of New Jersey. Jan. 26, 1895.)

LOCAL STATUTES—NOTICE OF INTENT TO APPLY.

A court can inquire whether the notice of intention to apply for the passage of a private, local, or special act, required by article 4, § 7, par. 9, of the amended constitution, has been given.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of the inhabitants of the township of Ewing, against the inhabitants of the city of Trenton.

This writ brings up the action of the common council of the city of Trenton, directing the city assessors to assess all property in a part of Ewing township annexed to said

Digitized by Google

city by the terms of an act entitled "An act to annex to the city of Trenton in the county of Mercer, certain parts of the township of Ewing, in said county." Pamph. Laws 1894, p. 595. Assessments set aside.

Argued November term, 1894, before GARRISON and REED, JJ.

Howell & Bro., for township of Ewing. John Relstab, for city of Trenton.

REED, J. The legality of the municipal action attacked rests upon the validity of the statute of 1894, purporting to annex a portion of the territory theretofore within the township of Ewing to the city of Trenton. The act is special. Assuming that the boundaries of municipal corporations can be changed by special legislation, the counsel for the prosecutor challenges this act as one passed in contravention of the provisions of the constitution. The ground taken is that the notice of the intended enactment was not given in conformity with article 4, § 7, par. 9, of the amended state constitution. This paragraph of that instrument provides that "no private, special or local bill shall be passed, unless public notice of the intention to apply therefor, and of the general object thereof shall have been previously given. The legislature, at the next session after the adoption hereof, and from time to time thereafter, shall prescribe the time and mode of giving such notice, the evidence thereof, and how such evidence shall be preserved." The legislature prescribed, by the act of 1876 (Revision, p. 1125, § 37), for the giving and recording of such notices in all cases in which notices were required by the constitution. By an act (Pamph. Laws 1894, p. 595), the manner of publication of notices of acts for the annexation or consideration of any town or township to and with any city or other municipality was prescribed. The requirement of this act is that the notice shall be published in a daily newspaper published in the municipality with which such town or township is proposed to be annexed or consolidated, for at least five days prior to the introduction of the bill. The record shows that the notice of the intention to apply for the legislation now attacked was published on May 4, 5, and 7, and the act was introduced on May 8, 1894. The notice did not conform to the legislative requirement. It follows, as a matter of course, that if this absence of the requisite preliminary notice is cognizable by this court, the statute must be pronounced a nullity. If, however, the enrolled statute carries with it such conclusive evidence of its authenticity as to shut off all inquiry into the conditions which preceded or attended its enactment, in this respect its legality is unquestionable. The existence of the judicial power of inquiry, in respect to the notice of the introduction of special acts, was under consideration in the case of Freeholders of Passaic v. Stevenson, 46 N. J. Law, 173. In that case it seems that the supreme court had held that the act then attacked was a special act, and that because it was admitted that no notice of its introduction had been given, or of its passage, it was held to be unconstitutional. The court of errors affirmed the judgment of the supreme court. The affirmance, however, was, by a part of the court, put upon the ground that the statute then in question was a special act regulating the internal affairs of a county. Upon the point whether it was permissible for the court to inquire into the existence of the preliminary notice, there was no deliverance by a majority of the court for or against the existence of such power of judicial inquisition. We are of the opinion that the constitutional prescription, not only that the legislature shall fix the time and mode of giving the notice, but that it shall also prescribe what shall be evidence of the notice, and how such evidence shall be preserved, leads to the conclusion that such evidence was to be preserved for a purpose other than mere legislative convenience. We think the intent to be deduced from the constitutional language is that resort can be had to this evidence, whenever it becomes necessary to determine, in a court, whether this condition precedent to a constitutional special statute, has an existence. We adopt the reasoning of Mr. Justice Van Syckel in his opinion delivered in the case of Freeholders of Passaic v. Stevenson, supra, when that cause was in the court of errors. The assessments brought up, therefore, rest upon an unconstitutional statute, and are set aside.

STATE (HUTCHINSON, Prosecutor) v. WOODRUFF, Judge, et al.

(Supreme Court of New Jersey. Feb. 21, 1895.)

WRIT OF CERTIORARI—FAILURE TO SERVE ON INTERESTED PARTIES—ELECTION UNDER BOROUGH ACT—VALIDITY—TIME FOR OPENING POLLS.

1. A certiorari was directed to a judge of the common pleas who had received a petition for an election under the borough act of 1878 (Supp. Revision, p. 44), and made an order thereon; to the county clerk who had filed the order; and to the petitioners who had presented the petition. No command was addressed to petitioners. *Held*, that a return by petitioners was irregular, and not to be noticed, but that the writ should not be quashed because thus directed to them.

2. When the certiorari was allowed before the day fixed for election, and by a special allocatur the election was allowed to be held, but all subsequent proceedings were stayed, *held*, that an order which substantially departed from the requirements of the act, in that it required the polls to be open for one hour less than prescribed, was fatally defective, although the result of such election may not have been affected thereby.

(Syllabus by the Court.)

Certiorari, on the prosecution of George A. Hutchinson, against Robert S. Woodruff and others, to review a certain order, providing

Digitized by Google

for the holding of a borough election. Order set aside.

Argued November term, 1894, before DIXON, LIPPINCOTT, and MAGIE, JJ.

Mr. Lanning, for prosecutor. Mr. Rusling, for defendants.

MAGIE, J. The writ in this cause was directed to Robert S. Woodruff, Jr., judge of the court of common pleas of the county of Mercer; Barker Gummere, clerk of said county; and Andrew K. Rowan and 16 other persons. It commanded the judge and clerk to whom it was addressed to certify into this court a petition presented to said judge by Rowan and the 16 other persons named, praying for an election to be held within a part of the township of Hamilton, in said county, to determine whether or not a borough government should be therein established, and also all orders, notices, and proceedings thereon had or made by them. There was no command addressed to petitioners. The writ has been returned by the judge and clerk, with the petition, and a notice or order for holding the election prayed for, signed by the judge, and filed by the clerk. Rowan and the other petitioners have also made a return to the writ, containing not only the petition and order, but also subsequent proceedings terminating in an election, the result of which was favorable to incorporation as a borough. These subsequent proceedings took place under a special allocatur which provided that the writ, which was tested before the day fixed for the election, should not stay the holding of the election, but should "stay all proceedings under and subsequent thereto."

The only return which can be noticed is that made in obedience to the command of the writ. The return made by petitioners is obviously irregular, and cannot be considered, because (1) they were not commanded to make return; (2) they had not the custody of some of the proceedings returned; and, (3) if they had the custody of others, such proceedings were taken after the allowance of the writ.

But petitioners move that the writ be quashed, either wholly, or at least as to them. The ground alleged for quashing the whole writ was presented on a similar motion made before the judge who allowed it, and was there disposed of by a proper amendment. The contention that the writ should be quashed as to petitioners is rested upon the action of this court in Kirkpatrick v. Commissioners, 42 N. J. Law, 510. But the cases are not parallel. In that case the writ was directed to two corporate bodies, representing the people of a municipality. It commanded both to certify proceedings that were in the custody of only one of them. The writ was quashed as to the body which did not have custody of the record to be certified, because of that fact, and because the other body was, in respect to the proceedings in question, the guardian of the rights of the municipality. In this case, petitioners are not commanded to return anything, and they are the persons interested in maintaining the order made on their petition. In the case last cited, it was said that, when it was proper to make persons interested in maintaining an order or judgment brought into this court by certiorari parties to the proceedings, it might conveniently, "though perhaps inartistically," be done by directing the writ to them, and serving it upon them. The older practice seems to have been to direct the writ to those persons who were commanded to certify the judgment, or order to be reviewed, and to indorse it with the names of those interested in sustaining such judgment or order, as defendants, and serve it upon them. State v. Kirby, 5 N. J. Law, 835; State v. Hanford, 11 N. J. Law, 71; Griscom v. Gilmore, 15 N. J. Law, 475; State v. Justice, 24 N. J. Law, 413. They thus acquired knowledge of the removal for review to this court. The insertion of the names of persons interested, in the body of the writ, and serving it upon them, obviously gives them notice as effectually as if the former practice is followed. When the writ lays no command upon them, the insertion of their names does them no injury, and is not a ground for quashing the writ as to them. The motion cannot prevail.

Prosecutor has presented several reasons for setting aside the proceedings brought here by this writ. As one of them discloses a defect in the order which is deemed fatal to its validity, the others need not be considered. The reason in question objects to the order of the judge because it directed the election to be held between the hours of 7 o'clock in the morning and 7 o'clock in the evening. The petition before us was made under the "Act for the formation of borough governments," approved April 5, 1878 (Supp. Revision, p. 44). That act expressly requires that, at elections ordered upon such petitions, the polls shall open and close at the same hours as at general elections. By a supplement to the election law, approved January 28, 1889 (Laws 1889, p. 11), polls are required to be open from 6 o'clock in the morning to 7 o'clock in the evening, at all elections, whether general or local. The order is therefore obviously not in accord with the express requirements of the act under which it was made. Defendants, the petitioners, have taken affidavits by which it appears that at the election a large majority of the voters were in favor of incorporation, and it may perhaps be inferred that the opening of the polls one hour later than required by law did not affect the result. It is thereupon stenuously argued that the rule that elections will not be invalidated by reason of informalities or irregularities which do not affect the result should be applied. But in my judgment the argument is not

Digitized by Google

applicable to the case before us. Had the officers of the election been permitted to file in the office of the county clerk their certificate of its result, the inhabitants of the borough would have become a body corporate, in fact and in law, by the express terms of the act of 1878. Thereafter, no one could question by certiorari the preliminary proceedings, but the corporation created thereby could only be dissolved by quo warranto. Campbell v. Wainright, 50 N. J. Law, 555, 14 Atl. 603. Upon an application for a quo warranto, in such a case, the argument now addressed to us might not be inappropriate. The court might also exercise a discretion as to the allowance of a writ which would disturb the incorporation founded on such an election. State v. Tolan, 33 N. J. Law, 195. On the other hand, the court might distinguish between an informality occurring in an election held under an existing charter, and a lack of conformity to the terms prescribed by law for an election to constitute a municipality. But prosecutor applied for and was allowed this writ before the time fixed for holding the election. It was a proper exercise of discretion to permit the election, of which notice had been given, to proceed; for, if the order should have been affirmed, it would prevent the necessity of a new order and notice. Having sought his remedy promptly, prosecutor is entitled to have the proceedings reviewed and adjudicated upon without reference to the result of the election which, ex gratia, was permitted to be held. In my judgment, it would establish a dangerous precedent to sustain an order of this sort, containing a substantial departure from the requirements of the act, upon the ground that no harm might be done thereby. If the judge may shorten the voting period one hour, it is difficult to see why he may not further reduce it, if he deems a less time sufficient. As only 54 votes were cast in this case, it is obvious that they could have been cast in a very short time. But the law has expressly provided for a fixed period of time during which votes may be cast. It will not support an order providing for less time to say that such time might be, and proved to be, sufficient. When challenged, as in this case, such an order must be condemned because it is not in conformity with the law, and might prove injurious. The result is that the order must be set aside and vacated, with costs.

STATE (MULCAHY, Prosecutor) v. MAYOR, ETC., OF CITY OF NEWARK.

(Supreme Court of New Jersey. Feb. 21, 1895.)

MUNICIPAL ORDINANCE—LICENSING DOGS.

1. The act providing for the licensing of dogs, approved March 15, 1893 (P. L. 1893, p. 328), supersedes any power of exacting license fees for dogs which the city of Newark possessed under its charter.

2. The act mentioned confers the licensing power as a means of raising revenue.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Dennis D. Mulcahy, against the mayor and common council of the city of Newark, to review an ordinance. Ordinance held illegal.

Argued November term, 1894, before MAGIE, LIPPINCOTT, and DIXON, JJ.

Mr. Kenny, for prosecutor. Mr. Riker, for defendant.

DIXON, J. This certiorari brings up an ordinance passed June 16, 1893, by the common council of the city of Newark, "to regulate and prevent the running at large of dogs, to authorize their destruction, and the imposition of taxes or license fees upon the owners or possessors of the same." The validity of the ordinance depends upon the city charter (P. L. 1857, p. 116), and "An act providing for the licensing of dogs," approved March 15, 1893 (P. L. 1893, p. 328). The city charter (section 31, par. 15) gives the council power "to regulate and prevent the running at large of dogs, to authorize the destruction of dogs running at large, and to impose taxes on the owners of dogs." The act of 1893 empowers the governing body of every municipality in the state, on or before the 1st day of May in each year, to provide, by resolution, the amount of a license fee for the ensuing year, to be paid by the owner of every dog. It directs that the amount of such fee shall be assessed and collected at the same time and in the same manner as other taxes, and shall be applied towards the payment of the general expenses of the municipality. The act also declares that all inconsistent acts shall be repealed, but that it shall not be construed to limit or abridge any other or greater power possessed by the governing body of any municipality respecting the licensing of dogs. Under the rule laid down in Haynes v. City of Cape May, 52 N. J. Law, 180, 19 Atl. 176, the power conferred by this general act of 1893, to impose a license fee to be paid by the owners of dogs will supersede and annul the power over the same subject delegated by the special charter, unless the latter power is an "other" (i. e. different) or "greater" power, and so saved from abridgment by the express words of the general law. We must therefore consider whether the chartered power "to impose taxes on the owners of dogs" is other or greater than the power given by the general statute. If the chartered power be one to tax dogs as property, then we need not now concern ourselves with it, for the ordinance under review does not attempt to exercise such a power. But, if it be one to impose a license fee, then I think an examination of the act of 1893 will show that the power to impose

Digitized by Google

such fees which that act delegates is at least as great as the chartered power. Authority to exact license fees may be classified either under the police power or under the taxing power. In the absence of any indication to the contrary, it is deemed a branch of the police power, and, as such, it warrants the exaction of no fees beyond the reasonable expense of issuing the license and regulating the thing licensed. North Hudson Co. Ry. Co. v. Mayor, etc., of City of Hoboken, 41 N. J. Law, 71; Muhlenbrinck v. Commissioners, 42 N. J. Law, 364; Clark v. Mayor, etc., of New Brunswick, 43 N. J. Law, 175; In re Wanyin, 22 Fed. 701. But, if the legislature manifest an intention to delegate the licensing power as a revenue measure, then it may be exerted for that purpose as a branch of the taxing power. North Hudson Co. Ry. Co. v. Mayor, etc., of City of Hoboken, 41 N. J. Law, 71; Morgan v. Orange, 50 N. J. Law, 389, 13 Atl. 240. Such an intention may be deduced from a legislative declaration that the amount of the license fee shall be at the discretion of the municipality, or that the proceeds of licenses shall be appropriated to municipal uses beyond the expenses of licensing and regulating the thing licensed. City of Boston v. Shaffer, 9 Pick. 415; Chilvers v. People, 11 Mich. 43; Adams Exp. Co. v. City of Owensboro, 85 Ky. 265, 3 S. W. 370.

In the light of these principles, the authority granted by the act of 1893 clearly appears to be conferred as a means of raising revenue. The municipality is expressly authorized to fix the amount of the fee; the amount so fixed is to be assessed and collected with "other taxes"; and the proceeds are to be applied towards the payment of the general expenses of such municipality. So viewed, the power is as large as the power to impose license fees can be, and hence the chartered power on the same subject cannot be "other or greater," within the meaning of the general statute, and must be superseded and annulled. It follows, therefore, that the validity of the ordinance under review, so far as it relates to the imposition and collection of license fees for dogs, will depend upon its conformity with the act of 1893. A lack of harmony between the two exists in the following particulars: The statute requires the amount of the fee to be fixed on or before the 1st day of May in each year. The ordinance was passed in June, and is perpetual. By the statute, the fee covers the year from May 1st to May 1st. By the ordinance, it covers the year from August 1st to August 1st. By the statute, the fee is to be collected at the same time and in the same manner as other taxes. By the ordinance, the fee is to be collected by the dog warden, and various provisions are made for enforcing payment of the fee which could not be legally applied to other taxes. In all these respects the ordinance is illegal, and must be set aside. It must be assumed, also, that the compensation of the warden was fixed in the ordinance upon the idea that he could lawfully be required to render the service therein assigned to him. This idea being erroneous, that feature of the ordinance also should be set aside. The prosecutor is entitled to costs.

HOLMES v. SEASHORE ELECTRIC RY. CO.

(Supreme Court of New Jersey. Feb. 21, 1895.)

PLEADING—REPLICATION.

1. A replication which merely alleges a conclusion of law, without disclosing facts upon which such conclusion can be based, is demurrable.

2. A replication which sets up a new and independent promise, different from that laid in the declaration, is a departure in pleading.

(Syllabus by the Court.)

Action by George Holmes against the Seashore Electric Railway Company. Heard on demurrer to replication. Sustained.

Argued November term, 1894, before the CHIEF JUSTICE, and DEPUE and VAN SYCKEL, JJ.

Randolph, Condit & Black, for plaintiff. Flavel McGee, for defendant.

VAN SYCKEL, J. This suit is brought to recover the amount due upon coupons cut from bonds secured by a mortgage on the lands and franchises of the defendant. The defendant pleaded that these bonds and the said coupons attached thereto were secured by a mortgage on lands in this state, and that no suit could be maintained on said coupons before foreclosure of the mortgage according to our statute. This plea was demurred to, and was held good. This court decided that these bonds and coupons could not be sued on before foreclosure, by force of the statute. The plaintiff now replies these facts:

1. That he is not, and never was, the owner or holder of the mortgage, or any of the bonds. This statement is not pertinent. If ownership of the bonds or mortgage was essential to support the defense, it was necessary to set it forth in the plea, and then it could have been traversed. The plea has been sanctioned by the court, although it contains no such averment.

2. That plaintiff cannot compel the trustee to foreclose. This is a mere allegation of a legal conclusion, and is inconsistent with the admitted fact that the mortgage was given to secure the principal and interest of the bonds. As the facts appear, the trustee could be compelled to foreclose.

3. That the mortgage is not a subsisting lien, and has been canceled. This, again, is a mere allegation of a legal result. It is not shown how the cancellation was effected, or by whom authorized. The facts must

Digitized by Google

be stated. An unauthorized cancellation would not deprive bondholders of their remedy.

4. That coupons have not been canceled, and were not intended to be. This, again, is a legal inference from facts which are not disclosed in the replication.

5. That the defendant, on or about January 1, 1892, promised to pay the said coupons according to the tenor and effect thereof. This is a new promise, different from that laid in the declaration, and is therefore a departure in pleading.

6. The conclusion to the country is erroneous. The demurrer should be sustained.

STATE (GREEN, Prosecutor) v. SKOQVIST.

(Supreme Court of New Jersey. Feb. 23, 1895.)

CROSS-EXAMINATION.

Where a plaintiff had testified upon direct examination that defendant's cattle had committed several trespasses upon his land, and injured his crops, his damages amounting to a certain amount of money, it was proper to ask him upon cross-examination whether, during the period covering these trespasses, the cattle of other persons had not also trespassed, and injured his crops.

(Syllabus by the Court.)

Certiorari to court of common pleas, Middlesex county; Rice, O'Gorman, and Freeman, Judges.

Certiorari by the state, on the prosecution of Albert Green, against Lars Skoqvist, to review a judgment in favor of Skoqvist. Reversed.

Argued November term, 1894, before GARRISON and REED, JJ.

C. T. Cowenhoven, for prosecutor. H. B. Cook, for defendant.

REED, J. This action was brought by Skoqvist to recover damages resulting from the trespasses of defendant's cattle, by reason of which trespasses plaintiff's crops were ruined. On the trial, Skoqvist, the plaintiff, testified on direct examination to the trespasses, to the degree of injury to his crops, and to the money value of the damages done. On cross-examination he was asked by defendant's attorney whether he did not know that during the time whereof he had complained of the defendant the cattle of other people than the defendant had entered upon those fields, and damaged the crops. He was also asked whether he did not know that one Coudert's cattle had trespassed upon the lands, and for which he received damages from Coudert. These questions were objected to as not a proper cross-examination. The questions were overruled, the court remarking that the defendant would have an opportunity to establish this upon his defense. We think that in so ruling the court committed error. The questions propounded on cross-examination were directly related to the subject-matter of the testimony of the witness, delivered upon his direct examination. The witness had testified to the kind and degree of damage done to his crops by the several trespasses of defendant's cattle. The questions asked on part of the defendant were to show that during the period covered by these trespasses the crops had been injured by other trespasses. This was relevant for the purpose of raising an inference that a part of the injury attributed to the defendant's cattle was in fact done by the cattle of others. The court, in announcing that the defendant would have an opportunity to establish this upon his defense, properly recognized the relevancy of the testimony. If it was relevant at all, it was certainly proper to establish it by the plaintiff, who had sworn to all the elements that went to make out his case, namely, the trespasses, the injury, and the amount of damages. The cross-examination was directed to the question of damages, and was entirely proper for the purpose of modifying the force of the direct testimony of the witness upon that point. Judgment must be reversed, and the case remitted to the common pleas.

STATE (DE WITT et al., Prosecutors) v. MAYOR, ETC., OF BOROUGH OF RUTHERFORD.

(Supreme Court of New Jersey. Feb. 23, 1895.)

PUBLIC IMPROVEMENTS—ASSESSMENT—NEGLIGENT EXECUTION.

The expenses incurred in unsuccessfully defending suits brought against a borough, because of its illegal and negligent acts in executing a public improvement, cannot be specially assessed as a part of the cost of such improvement.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of James M. De Witt and others, against the mayor and common council of the borough of Rutherford, to review an assessment for the cost of grading Sylvan street from Park avenue to Pierpont avenue. Assessment modified.

Argued November term, 1894, before GARRISON and REED, JJ.

Addison Ely, for prosecutors. Shafer & Miller, for defendant.

REED, J. The attack upon this assessment is confined to the right of the mayor and common council to include, in the amount of cost assessed, certain items of expense. The power under which the present assessment was made is found in the Laws of 1887 (page 126). Section 4 of a supplement to "An act for the formation of borough governments" provides that the mayor and common council shall ascertain the whole amount of the cost and expenses of an improvement, and shall cause to be

Digitized by Google

made a just and equitable assessment thereof upon the lands benefited. It provides that the excess of cost over special benefits shall be paid out of the general road tax. In making up the aggregate sum of the cost of the present improvement, we think that the mayor and common council have included items which were not legitimate expenses. First, the borough attempted to open Sylvan street across the lands of one Poillon, without taking proceedings to condemn. This resulted in a suit in chancery to restrain the borough, which suit was dismissed after the borough purchased from Poillon the right to open the street across his lands. The sum of $51.75, paid by the borough to a lawyer for his services in said suit, is included as a part of the cost of the improvement. Again, the borough was unsuccessful in a litigation growing out of the making this improvement with one Anna R. Ware. The expenses of this litigation, consisting of counsel fees, costs, and disbursements, were included in the estimate of costs, amounting to $394.87, with an additional $75.26 for the plaintiffs, costs paid by the borough. In addition to this expense growing out of this suit, there was put in the estimate the sum of $54 for other disbursements and work made necessary by it. Again, the litigation rendered entirely useless an excavation of 2,000 cubic yards, at an expense of $360. Again, it is agreed that $94 represented the expense of all the engineering work necessary had there been no litigation. We think all this litigation had its origin in the illegal and negligent acts of the borough authorities, and the expense arising from their fault cannot be visited upon the owners of property in the way of special assessments. These disbursements were not a part of the legitimate cost and expenses of the improvement. The expenses for engineering in excess of $94, and all of the items for counsel fees, costs, disbursements, and expenses already mentioned, should be stricken from the amount to be assessed. The other items to which objections were made,—namely, the expense for grading the squares where Sylvan street was intersected by cross streets, and the charge for the services of the commissioners,—we think, are unobjectionable.

I may remark that the point made upon the argument by the counsel of the borough that the petitioners for this improvement were estopped by the presentation of such petition from questioning the items now stricken out is without any substance. They petitioned for an improvement to be executed and paid for in the statutory method, and they stand upon the same footing as any unpetitioning landowner in respect to their right to test the legality of the amount which they are called upon to pay. There should be deducted from the entire amount assessed the totality of the above sums improperly included. Inasmuch as the entire amount was specially assessed, and so, in the judgment of the commissioners, the properties were specially benefited to the amount assessed, and inasmuch as there seems to be no question as to equitable apportionment of said sum to the several pieces of property assessed, it follows that a proportionate abatement from each assessment of such amounts as will, in the aggregate, equal the totality of the items improperly included in the assessment, will preserve the rights of all parties. This is a matter of mere computation, and, unless agreed upon, it will be referred to a commissioner to ascertain and report.

MURPHY v. BOARD OF CHOSEN FREEHOLDERS OF MERCER COUNTY.

(Supreme Court of New Jersey. Dec. 31, 1894.)

DEATH BY WRONGFUL ACT—SUIT AGAINST BOARD OF CHOSEN FREEHOLDERS—DEFECTIVE BRIDGE.

1. The term "corporation," as contained in the first section of the act entitled "An act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect or default," approved March 3, 1848 (Revision, p. 294), includes within its meaning the boards of chosen freeholders of the respective counties of this state, as public corporations, having, by the act of 1860 (Id. p. 86, § 1), imposed upon them a liability for damages for personal injuries occasioned by their neglect to erect, rebuild, or repair bridges in such manner as not to be dangerous to public travel over them, and that by reason of such neglect such boards become liable in damages whenever the death shall be caused by such neglect.

2. The act of 1848, to which reference is made, called the "Death Act," was intended to give a right of action thereunder against persons or corporations upon whom a liability was imposed if death had not ensued; and in the absence of any language in the act which, either expressly or impliedly, excludes public corporations, it is upon principle clear that they are included within the provisions of the statute, which, being remedial, must, in its nature, be liberally and beneficially interpreted.

(Syllabus by the Court.)

Action by Catharine Murphy, administratrix, against the board of chosen freeholders of the county of Mercer. Demurrer to declaration overruled.

Argued at February term, 1894, before the CHIEF JUSTICE, and VAN SYCKEL, GARRISON, and LIPPINCOTT, JJ.

W. D. Holt, for plaintiff. Edwin Robert Walker, for defendant.

LIPPINCOTT, J. This is a suit by the plaintiff, as administratrix of her deceased husband, against the defendant, to recover damages for his death, alleged to have arisen by reason of the negligence of the defendant as a public corporation. The declaration avers that on the 31st day of October, 1891, the deceased, while a traveler on Olden avenue, in the city of Trenton, passed off a drawbridge maintained by the defendant on said avenue, which is a public street or highway

Digitized by Google

over the Delaware & Raritan Canal, and fell into the canal, and was drowned; and that the cause of such death was that the said bridge was so constructed and maintained that the connection formed by the bridge (said bridge when closed forming a part of the highway across said canal) between the two parts of Olden avenue became and was removed, and that, when said bridge was swung around to allow such vessels as navigated the canal to pass, part of the said bridge projected over the water in said canal, so that passengers on the said part of the said bridge passing towards the said canal, if they passed to and off the end of the said part over the said canal would fall into the canal, and that the said defendant in the nighttime, when the said bridge was opened for vessels to pass the said bridge, negligently suffered the end of said bridge, where it projected over the said canal, to be without a parapet, railing, fence, or contrivance to prevent persons passing along and over said bridge, towards the said canal, from passing off the same into said canal, and without any light, watch, or contrivance to warn persons passing along and over said bridge, and along said highway, of the disconnection of the said bridge and the said highway, caused by the opening of said bridge, by means whereof the decedent, on October 31, 1891, passed to the end and off the said part of said bridge into the said canal, and was thereby drowned. The defendant demurs to the declaration upon two grounds: First, that in form the declaration does not state a cause of action; and, secondly, upon the ground that the defendant, being a public corporation, is not liable for damages arising from an immediate death resulting from the negligent conduct of such corporation.

It is clear that it was the duty of the board of chosen freeholders of the county of Mercer to construct, maintain, and keep this bridge over this canal in a safe condition for public travel over it. This is conceded by the defendant. The general statute (Revision, p. 86, § 9) provides that "in all cases where a township or the board of chosen freeholders of a county are chargeable by law with the erection, rebuilding, or repair of any bridge or bridges, and the said township, or board of chosen freeholders shall wrongfully neglect to erect, rebuild, repair the same, by reason whereof any person or persons shall receive injury or damage in his or their persons or property, he or they may bring his or their action of trespass on the case against the said township, or said board of chosen freeholders, as the case may be, and recover judgment against them to the extent of all such damage, sustained as aforesaid, which said judgment shall be paid by the township or county as the case may be." Under this statute, the defendant would be liable for neglect in the erection or rebuilding of said bridge, and also under this act liable for any negligent want of repair, or for any neglect to keep the same in a safe condition for public travel. The declaration here shows the respect in which the defendant neglected to keep the bridge in a safe condition, and whether that negligence consisted in a faulty construction of the structure or want of proper repair would be of little materiality, save in the manner of proof to demonstrate the nature of the negligent conduct of the defendant; therefore no question arises here in relation to the duty of the defendant to construct and maintain this bridge in a safe condition for public travel. The defendant, as a public corporation, was bound to build, rebuild, and keep in repair this bridge with a view to the safety of persons and property, and its liability for damages ensued whenever it neglected the duty imposed upon it by the statute. It has been held that it is not necessary that actual notice should have been given of the unsafe condition of a bridge to the authorities charged with the duty of its repair, or that they should have actual knowledge of the dangerous condition of the bridge, in order that liability to damages be established. If it was originally a faulty or negligent construction, the defendant would have been responsible, without other notice; and, if a repair was necessary in order to render it safe, the defendant was bound by the rule of law that if, by the exercise of ordinary care and due diligence, the defect could have been discovered, it is sufficient to cause liability for damages by reason of the neglect to repair. Ripley v. Freeholders, 40 N. J. Law, 45; Jernee v. Freeholders Monmouth Co., 52 N. J. Law, 553, 21 Atl. 295; Freeholders of Morris Co. v. Hough, 55 N. J. Law, 628, 28 Atl. 86, and cases cited. The declaration, therefore, so far as its formal averments are concerned, disp'ays a sufficient cause of action.

But a more important question arises upon this demurrer. It is insisted that the defendant, as a public corporation, is not answerable for damages, by reason of this death, to the plaintiff herein. It is insisted by the defendant that the word "corporation," used in the act entitled "An act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect, or default," approved March 3, 1848 (Revision, p. 294, § 1), has no application whatever to, and does not include within its meaning, public, municipal, or quasi municipal corporations; and that the defendant, being a quasi public corporation, is not within the provisions of the act; and that, therefore, it is not liable in damages on account of the death of the plaintiff's intestate, no matter what its negligence in the respect charged may have been. It is insisted that only private corporations are within its provisions. This question arising under this statute does not appear to have been judicially discussed or determined in this state. The first section of this statute provides: "Whenever the

Digitized by Google

death of a person shall be caused by wrongful act, neglect or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as amount in law to felony." In the case of Pell v. Mayor, etc., of Newark, 40 N. J. Law, 76, Mr. Justice Van Syckel, in giving construction to the amended constitution of this state, held that the word "corporation," as used in article 1, par. 19, was used and intended in the sense of a private corporation; but this construction was, in view of other clauses of the constitution, expressly referring to public corporations, and which demonstrated clearly that the two classes of corporations, public and private, were dealt with in express terms, as distinct from each other, and such provisions were made as to both as were deemed necessary and desirable, and thus there remained no reason for construction as to the meaning of the term "corporations," as used in that connection. The case of Grosso v. Railroad Co., 50 N. J. Law, 317, 13 Atl. 233, is insisted upon as an authority contrary to the position of the plaintiff here, that the language of the act, in the use of the word "corporation," extends its provisions to such public corporations as boards of chosen freeholders of the respective counties. In that case Mr. Justice Magie has given a thorough examination of the question whether, at common law, an action would lie for damages caused by an immediate death of a human being; and concludes that no such action could be maintained, and that the rule of the common law had been adopted in this country, and that whatever was its original reason, or whether it had ceased or not, it could not now be disregarded or annulled by the courts, but if injurious its repeal or modification must be sought from the legislature. The exact question in that case was whether, under the statute, an action would lie for an injury or damages suffered by the husband by reason and as the result of an immediate killing of the wife; and it was held that the right of action was given for the benefit of the widow and the next of kin, but not for the benefit of the husband, and that any right of action for the benefit of the husband, by reason of the immediate death of the wife, was omitted by the language of the act, and therefore not given, and that its omission was no indication of the existence of the right at common law. It will at once be perceived that the principles laid down in that case can have no application to the question here presented. The statute (Revision, p. 86, § 9) provides for a liability of the boards of chosen freeholders, arising from neglect to erect, rebuild, or repair a bridge, which burdens are imposed by this statute upon these public corporations, and regard must be had to this act in determining whether the death act applies to such corporations. The language of the death act is clear and express that the "person who, or the corporation which," whose neglect or default was the cause of the death, should be liable as they would have been liable for injuries so caused if death had not ensued. Thus, within the terms of the act, regarding the statute imposing the burden of building, rebuilding, and repairing bridges on the boards of chosen freeholders, and liability for neglect or default in this respect, they are brought within the provisions of the death act. This death act is a remedial statute, to be construed liberally, for the suppression of the mischief existing in the common law and the advancement of the remedy (1 Bl. Comm. pp. 86, 87); and being thus remedial in its character, and subject to liberal extension in construction, it would be naturally applicable to that class of persons, and those classes of corporations, upon whom a liability for injuries, when death does not ensue, caused by neglect, is imposed; and as the statute imposes such liability upon the boards of chosen freeholders of the respective counties, in respect to their duties in relation to the erection and repair of bridges, it would be anomalous to exclude them from the provisions of the law. Besides, the word "corporations," in its general and ordinary sense, embraces both public and private corporations; and there is nothing in the language or spirit of the statute which narrows or restricts this general meaning, and confines it to any one class of corporations. The act is intended to give a right of action against persons or corporations against whom a liability existed if death had not ensued, and, in the absence of any language in the act which either expressly or impliedly excludes public corporations, it would upon principle be clear that they were intended to be, and are, included within the provisions of the act, which in its nature must be liberally and beneficially interpreted. If otherwise interpreted, its inherent import would be restricted, and the remedy therein provided be materially impaired. A suable wrong, committed by a public corporation, should not become remediless by the death of the person injured. In this case there exists no circumstance upon which such a restriction could be based in order to diminish by construction the natural meaning and force of the terms used in the statute. In the construction of a remedial statute, the rule is to avoid all subtle inventions and evasions for the continuance of the mischief and denial of the remedy, et pro privato

Digitized by Google

commodo. The duty of the court is to add force and life to the cure and remedy, according to the true intent of the maker of the act, pro bono publico. Heydon's Case, 3 Coke, 7; Plowd. 205; Vanhorne v. Dorrance, 2 Dall. 316. This act is in the highest sense remedial, and is entitled to receive the liberal construction which appertains to such statutes. Its object was to abolish the harsh and technical rule of the common law, "Actio personalis moritui cum persona." Haggerty v. Railroad Co., 31 N. J. Law, 349. In statutes relating to the creation of corporations, and to the grant of the ordinary franchises to them, undoubtedly the term "corporation," by proper construction, must be confined to private corporations; but all writers divide the general term "corporation" into those which are private only, formed by voluntary agreement for private purposes, and those which are created by the state for the purposes of government and management of public affairs, which are public or quasi public corporations; and in any remedial statute the term "corporations" includes all classes of corporations, and it is difficult to perceive, upon applying the legal rules of construction, why the term should not be extended to every character of corporations which can be created by legislative power, and which may have imposed upon them duties for the breach of which a liability for damages for personal injuries in law arises. It cannot be doubted that the legislature by this remedial statute intended to include all classes of corporations, private and public, as well as those of a quasi public character, whenever by law a duty was imposed upon them the neglect of which created a liability to answer in damages for injuries occasioned to the person by reason of such neglect of duty. The conclusion is that this action is sustainable against the board of chosen freeholders, the defendant, as a public or quasi public corporation, and that the declaration shows a legal cause of action. The demurrer is therefore overruled, with costs to the plaintiff.

FREEDMAN v. SANDKNOP et al.

(Court of Chancery of New Jersey. Feb. 27, 1895.)

MECHANICS' LIENS—FILING CONTRACT.

Where a house is built by contract, and it is necessary to refer to the specifications to ascertain what part of the labor is to be performed or what materials are to be furnished by the contractor, the specifications should be filed with the contract; but, if the contract provides that the contractor shall do all the work and furnish all the materials, it is not necessary to file the specifications.

(Syllabus by the Court.)

Bill by Abraham Freedman against Anton Sandknop and others. On motion to dissolve injunction, heard on bill, answers, and copy of contract. Denied.

George P. Rust and Thomas M. Moore, for the motion. William W. Watson, opposed.

McGILL, Ch. It appears by the bill that the complainant entered into a contract in writing with the defendant Sandknop in April, 1894, by which the latter became bound to "well and sufficiently erect and finish the new building to be erected" on Dayton avenue, in the city of Passaic, "agreeably to the drawings and specifications made by C. Kevitt," and to "find and provide such good, proper, and sufficient materials of all kinds whatsoever as" should "be proper and sufficient for the completing and finishing all the plumbing, carpentering, mason, painting, tinning, and other works of said building mentioned in the specifications." The contract contained further provisions; among others, that in case the health authorities of the city of Passaic should compel changes or alterations in the plans or specifications of any work which should be done in and about the erection of the building, Sandknop would make all such alterations and changes at his own expense; and that if at any time during the progress of the work the complainant should request any alterations of, additions to, or omissions from the contract, they were not to affect or make the contract void, but were to be added to or deducted from its amount, as the case might be, by a fair and reasonable valuation. Several persons furnished labor and materials to Sandknop during the erection of the building, for which they subsequently demanded payment from the complainant, and for which they now threaten to claim liens upon the building. These claims aggregate in amount to about $1,800, while the entire sum remaining due to Sandknop is about $1,250. Assuming that the contract protects him from lien claims, the complainant has paid the $1,250 into this court in this suit, commenced by him against the contractor and claimants, by which he seeks to compel them to interplead, and have their respective rights in the fund settled. He has procured an injunction, which restrains them from proceeding at law against him,—the injunction which the defendants now move to dissolve. The statute provides that when any building shall be erected, in whole or in part, by contract in writing, it shall be liable to the contractor alone for work done or materials furnished in pursuance of the contract, provided, among other things, the contract be filed. P. L. 1892, p. 358. Thereby it is prescribed that when the owner of a building contracts in writing for the performance of work in the erection of that building, the contractor alone shall have a lien for the work done and materials furnished in performance of the contract, if, among other things, the contract be filed. One reason why the contract is re-

Digitized by Google

quired to be filed is that any one performing labor or furnishing materials in the erection of the building may, upon examining the files, know precisely what work the contractor is to do, and therefore the extent to which the building is exempt from a lien by him for the work he may do and the materials he may furnish, and consequently how he should limit any credit he may conclude to give. If the contract refers to plans and specifications of the work, and it is necessary to examine them in order to ascertain how much of the building the contract covers, to complete the notice contemplated by the statute, they, also, must be filed. Ayres v. Revere, 25 N. J. Law, 474; Babbitt v. Condon, 27 N. J. Law, 162; Budd v. Lucky, 28 N. J. Law, 484; Pimlott v. Hall, 55 N. J. Law, 192, 26 Atl. 94.

In the present case it appears that the contract with Sandknop, referring, as has been seen, to specifications, was filed, but that the specifications were not filed. The defendants rely upon this omission to justify their insistment that the building is not exempt from liens for their claims. It is perceived that the question is resolved to this: Is it necessary to examine the specifications referred to in the contract with Sandknop to ascertain how much of the work and materials in the erection of the complainant's building it covers? If it is necessary, the contract was not properly filed, and the claimants have their liens, and cannot be obliged to look to the fund in court. As has been seen, the contract required that Sandknop was to sufficiently "erect and finish" the building agreeably to the specifications, and provide all kinds of materials for the "completing and finishing" all works of the building "mentioned in the specifications." If the health authorities should require changes in any work "in and about the erection of the building," he was to make the additions, alterations, and changes at his own expense. If the complainant should desire additions to or omissions from the contract work, they were to come within the contract and be added to it or subtracted from the specified work, and not affect or make void the contract. It is plain, to my mind, that the contract contemplated that Sandknop was to do all the work and furnish all the materials necessary to complete the building. He was to "erect and finish" it. It is true that the work primarily contemplated was described and particularized in plans and specifications. That was because, between the contracting parties, those plans and specifications were necessary to determine the character of the erection. But they did not limit the contract. That was made elastic, so as to go beyond them, and cover all work in the erection, by providing that if, at the owner's pleasure, there should be additions to, omissions from, or changes in the specified work, the changes and additions were to be within the contract. In short, whatever the contractor was to do he was to do under the contract. How, under these circumstances, would examination of the specifications more clearly show the extent of the work which the contractor was to do upon that building? All that he would do would be done under the contract. In Ayres v. Revere the builder was to find and provide all materials according to the plans and specifications, except where it was otherwise stipulated, expressed, or agreed in the specifications; and there, of course, the extent of his obligation could not be ascertained unless reference was had to the specifications. In Hill v. Carlisle, 14 N. J. Law J. 114, the contractor was to provide materials for completing and finishing all the "mason and other work" of the building "mentioned in the mason's specifications." This, too, was manifestly a contract limited to part of the work on the building, which part could be ascertained only by inspection of the specifications. So, in Pimlott v. Hall, the contract was expressly limited to the mason work mentioned in the specifications, not to all mason work that should be done in the building. In each of those cases it was properly held to be necessary to file the specifications with the contract. But this case is not similar to those. It is like Babbitt v. Condon, where the builder was to do all the work and supply all the materials, and it was held that the contract referred to the specifications merely for the description of the work. In distinguishing that case from Ayres v. Revere, Mr. Justice Haines said: "But where all the labor and all the materials are to be done and furnished by the builder, then the contract alone will give the notice required by the statute, and that alone is sufficient to be filed. And, though the contract may refer to the specifications, and declare them to be part of it, yet, for the purpose of such notice, it is not an essential part, nor necessary to be filed with it. If placed on file, it could give no further notice than is given by the contract itself." So, in Budd v. Lucky, the same reasoning was applied. My conclusion is that, as the case stands, the fund alone appears to be subject to the claims of the defendants, and that the complainant is entitled to the protection which the injunction affords him, and hence that the motion to dissolve must be denied.

JACKSON v. MAYOR, ETC., OF CITY OF NEWARK.

(Court of Chancery of New Jersey. Feb. 28, 1895.)

INJUNCTION — ERECTION OF PUBLIC BUILDING — CERTIORARI—MUNICIPAL BOARD—ACTS IN EXCESS OF AUTHORITY.

1. Injunction will not lie at the suit of a taxpayer to restrain city authorities from erecting a public building, on the ground that the city had no authority to purchase the site, the remedy being by certiorari.

Digitized by Google

2. Certiorari will lie to review the action of a city board in purchasing land, under a resolution of the common council, where such purchase was in excess of the authority conferred by the common council.

Action by Philip N. Jackson against the mayor and common council of the city of Newark to restrain the construction of a public building. Defendant demurs to the bill. Demurrer sustained.

J. Frank Fort, for complainant. Sherrerd Depue, for demurrant.

EMERY, V. C. The complainant in this case files a bill to restrain the city of Newark from constructing a disinfecting station and sterilizing plant on lands owned by the city in the township of Clinton, which adjoins the city, and from awarding any contract for such construction until the further order of this court. No further relief of any kind is prayed for in the bill. The defendant demurs for want of equity, and because the complainant has a remedy at law. The complainant's bill bases his right to this equitable relief solely on his status as a taxpayer of the city, and the proceedings of the city authorities which, as he claims, invade his rights, are stated in the bill to be the purchase of lands outside the city limits for the purpose of making such erections, without express statutory authority, and also the proceedings of the public buildings committee of the common council in adopting plans for these erections upon the lands and advertising for bids for the same. The bill alleges that the common council, by resolution dated August 17, 1894, created a fund known as the "special building account," to be used for the purchase of land and the erection of buildings for the care and abatement of infectious diseases, but that the resolution gave no further directions in reference to the selection or purchase of the land. The land was selected under the authority of the public buildings committee, August 31, 1894, on the recommendation of the board of health; and the buildings committee selected a tract containing 24 acres in the township of Clinton, Essex county. By resolution of this committee of the same date, the chairman of the committee, the chairman of the board of health committee, the mayor of the city, and the city council were empowered to take all necessary steps for the purchase of the property selected and its conveyance to the city. In pursuance of this action of the public buildings committee, the city received a deed for these lands on September 10, 1894, for the consideration of $15,000, which deed was recorded on September 11, 1894. The public buildings committee, on November 23, 1894, commenced consideration of the plans for the disinfecting station and sterilizing plant to be erected on the lands; and the complainant's bill was filed on December 11, 1894. The bill challenges the legality of the purchase of the land outside of the city for the purposes mentioned, and also challenges the acts of the building committee in proceeding to erect buildings thereon, as beyond the authority of the resolution of the common council, which did not expressly authorize the purchase of lands outside of the city limits.

Upon the filing of the bill, an application for a preliminary injunction was made to the late Vice Chancellor Van Fleet upon bill and affidavits, and the application was heard by him upon these and the answering affidavits filed by the defendant. The preliminary injunction was denied, one ground being that, for the wrong complained of, the complainant's remedy for relief against the city was by certiorari, and, inasmuch as the pecuniary interest of the complainant as a taxpayer—the sole basis of his equitable standing—was insignificant in comparison with the protection of the health of the city, a court of equity would leave him to his legal remedy. The opinion on this ground reaches to the whole equity of the complainant's bill, and, as the question was directly involved in the application, I consider myself bound by this decision as to the complainant's rights under this bill. Moreover, in this decision of the learned vice chancellor I fully concur. The jurisdiction of the supreme court, on the application of a taxpayer, to review the proceedings of municipal officers, is so well established and so constantly exercised that it has passed beyond the necessity of citation of authority to support it. In exercising its jurisdiction, it has long since established and acted on a series of rules and principles, equitable as well as legal, specially applicable to the review of municipal proceedings, and adopted and enforced with special reference to a preservation of the rights of municipalities as well as of taxpayers. Its action on such review by certiorari is in the name of the state, and reaches directly to the proceedings themselves, which it adjudicates upon by a judgment validating them or making them void. No such result could be reached in equity by a decree on the personal bill of an individual complainant. This general rule as to the review of municipal proceedings was not denied at the argument, but it was contended that, under the supreme court practice, only the resolutions of the common council could be taken up, and not the proceedings of the building committee after the resolution, which were claimed to be merely ministerial. It was said that no fault could be found with the resolutions of the common council, which did not appear to contemplate the purchase of land beyond the city limits, but that the real complaint was the action of the building committee in assuming that the resolution of the common council authorized such purchase and in proceeding to act upon this construction. It was also suggested that this view of the complainant's case was

Digitized by Google

not urged upon the motion for preliminary injunction, and should now be considered and weighed on the hearing of the demurrer.

The bill does expressly attack the validity of the purchase made by the city, and the authority of the common council to make it, but I have considered the suggestion as to the review of the proceedings of the building committee by the supreme court, and, in my judgment, there is no support for the contention that the action of this committee when it proceeds as far as an actual contract, binding the city, or perhaps before (see State v. Mayor, etc., of Paterson [Ct. Err. & App. 1877] 39 N. J. Law, 489, 493), may not be subject to review upon certiorari if the supreme court, under its rules which govern such application, chooses to allow the writ to issue. The contracts of municipal bodies are constantly made the subject of review under certiorari proceedings, and in the latest case (Brady v. City of Bayonne [N. J. Sup. Jan. 20, 1895] 30 Atl. 968) not only was the resolution of a municipality taken up by certiorari, but also a contract professedly made under authority of the resolution, and the contract was attacked upon grounds which, if sustained, would have set aside the contract, while allowing the resolution to stand. In my judgment, there is no reason for questioning the correctness or the application of the principle, declared as the law in this case by the vice chancellor, that the complainant's remedy, if it exists at all, must be sought at law; and I shall therefore advise that the demurrer be sustained, with costs.

STATE (DECKER, Prosecutor) v. BOARD OF EXCISE OF CITY OF ELIZABETH.

(Supreme Court of New Jersey. March 4, 1895.)

REVOCATION OF LIQUOR LICENSE.

The board of excise of the city of Elizabeth has no power to revoke a license after the session at which it was granted has ended, except for a cause mentioned in Act 1889, p. 77, § 10, or because the license was obtained through fraud practiced upon the board.

(Syllabus by the Court.)

Certiorari by the state on the prosecution of Horam Decker against the board of excise of the city of Elizabeth to review the resolution of the defendant board. Resolution vacated.

This writ of certiorari brings up a resolution of the board of excise revoking a certain license theretofore granted to the prosecutor. The resolution was passed on July 5, 1894. The license revoked was granted on February 1, 1894. It seems to have a third renewal, such renewal being made under color of the act (Pamph. Laws 1891, p. 12).

Argued November term, 1894, before GARRISON and REED, JJ.

P. H. Gillhooley, for prosecutor. J. C. Connolly, for defendant.

REED, J. The license was revoked at a meeting of the board of excise held subsequent to and distinct from the meeting at which the license was granted. No notice of such intended action was given to the prosecutor. No fraud was practiced, so far as appears, in obtaining the license. That it was irregularly granted seems obvious. The act of 1891 (page 12) seems to provide for only one yearly renewal of the license, to be made upon the original petition. But, assuming that the board made a mistake, it does not appear that the mistake was induced by any fraudulent conduct of the petitioner. It was an error attributable to infirmity of judgment in the board. Certiorari would have brought the license into this court for the purpose of vacating it. But the power of the board itself to revoke is limited to instances where the license has been fraudulently procured, or where the statute has expressly conferred the power of revocation. Lantz v. Mayor, etc., of Hightstown, 46 N. J. Law, 102. The causes for revocation, and the proceedings to be taken in bringing about such revocation, are set out in Laws 1889, p. 77, § 10 et seq. The resolution brought up is vacated for two reasons: First, the action of the board was judicial, and therefore notice to the licensee was essential to its validity; second, there was no apparent cause for revocation, had the notice been given.

STATE v. CRUSINS et al.

(Supreme Court of New Jersey. Feb. 15, 1895.)

CRIMINAL PROSECUTION — RECORD ON APPEAL — STATEMENT OF FACTS—PUBLIC NUISANCE—DISORDERLY HOUSE—CHANGE OF LAW—EFFECT.

1. Upon a motion in arrest of judgment, where the record contains an indictment in due form, the arraignment of the defendants, and their plea of guilty, a statement of facts, agreed upon as showing the conduct of the defendants for which they were indicted, cannot be embodied in the record so as to be considered in determining whether the defendants should be convicted or not.

2. Acts which would have constituted a public nuisance under the common law are in New Jersey a statutory misdemeanor, by force of section 192 of the crimes act.

3. Section 4 of the act relative to statutes (Revision, p. 1120) prescribed a rule for the interpretation of statutes which repeal prior penal statutes, and therefore is within the object expressed by the title of the act.

4. A statute passed February 27, 1893, declared that certain acts which, under the common law, would have amounted to a public nuisance, should not be criminal or indictable, and that all inconsistent laws, statutory or common, should be repealed. Nevertheless, by the rule of construction prescribed in section 4 of the act relative to statutes, acts of that nature committed before February 27, 1893, continued to be offenses, and punishable under section 192 of the crimes act.

(Syllabus by the Court.)

Digitized by Google

Prosecution of John N. Crusins and others for keeping a disorderly house. On motion for arrest of judgment. Motion denied.

Argued November term, 1894, before MAGIE, LIPPINCOTT, and DIXON, JJ.

C. H. Winfield, for the State. Allan L. McDermott, for defendants.

DIXON, J. At the December term, 1893, of the Hudson county oyer and terminer, the defendants were indicted in the usual form for keeping a disorderly house, and in May, 1894, they pleaded guilty. The judges of the oyer and terminer being unable to agree upon a sentence, the state caused the proceedings to be removed into this court, and now prays judgment on the plea. The defendants move in arrest of judgment, basing their motion upon a written stipulation, signed by their counsel and the public prosecutor, and sent up by the court below as part of its record, which states the conduct for which the defendants were indicted. Such conduct, the defendants insist, was, at the time of their indictment, not punishable. We think this stipulation cannot be considered upon a motion in arrest of judgment. That motion must be determined solely by the record, using the term in its proper sense. So employed, it imports the history of only those proceedings which take place in the orderly progress of a cause, and which the common law or statutes require to be perpetuated. In the present case, these comprise merely the indictment, with its incidents, the arraignment of the defendants, and their plea. The plea of guilty conclusively established the truth of the indictment, so far as the legal propriety of conviction was concerned, and, so long as that plea stands, there is nothing to justify a statement or an investigation of facts for the purpose of ascertaining whether the defendants should be convicted or not. In the face of such a plea, the stipulation can have no place in the record, and therefore is utterly void of significance on a motion to arrest the judgment.

The defendants further urge that, in case we consider their acts, as set forth in the stipulation, legally dispunishable, then they should be permitted to withdraw their plea, and plead not guilty, and to this prayer the prosecutor makes no objection. The application is, of course, addressed to our discretion; but it ought to prevail if, in our judgment, the plea of guilty is not warranted by the truth. The stipulation is to the effect that from January 16, 1892, up to the presentation of the indictment, in December, 1893, the defendants kept a place in Hudson county where persons resorted for the purpose of betting on horse races, and where the practice of betting on horse races, commonly known as "book making," was habitually carried on, within the inclosure of the North Hudson Driving Park Association, and upon the races authorized by it within its inclosure, and during the race days. The stipulation also sets out that the association was incorporated under our statutes, for the improvement of horses in running, racing, and trotting. On February 27, 1893, the legislature passed a law which, the defendants insist, declared that such conduct as is described in the stipulation should not constitute a nuisance, or the keeping of a disorderly house, or any other misdemeanor or criminal offense, and that the persons engaged therein should not be indictable. This law also enacted that all laws and parts of laws, both statutory and common, inconsistent therewith, should be thereby repealed. The defendants contend that by this statute their conduct subsequent to its passage was not criminal, and their conduct previous to its passage was rendered dispunishable. The argument presented to support this contention with respect to the previous conduct is that such conduct was criminal by force of the common law only, that pro tanto the common law was repealed by the statute, and that the effect of such repeal was to extinguish the criminality of prior offenses for which judgment had not been pronounced against the offenders, upon the principle that, after the repeal or expiration of a law, no penalty can be imposed or punishment inflicted for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute. The principle thus invoked seems to be thoroughly established. 1 Hale, P. C. 291; Yeaton v. U. S., 5 Cranch, 281; Com. v. Marshall, 11 Pick. 350; Den v. Du Bois, 16 N. J. Law, 285, 300; Hartung v. People, 22 N. Y. 95; Com. v. Kimball, 21 Pick. 373; Norris v. Crocker, 13 How. 429; U. S. v. Tynen, 11 Wall. 88; 23 Am. & Eng. Enc. Law, 512. But we think it is not applicable to the present case, because the criminality of the defendants' conduct depends on statute, and by section 4 of "An act relative to statutes" (Revision, p. 1120) it was enacted "that no offence committed, and no liability, penalty or forfeiture, either civil or criminal incurred previous to the time when any statutory provision shall be repealed or altered, shall be discharged or affected by the repeal or alteration of any statute under which such offence, liability, penalty or forfeiture was incurred, unless it be expressly declared in the act of the legislature whereby such repeal or alteration shall be made that offences, liabilities, penalties or forfeitures already committed or incurred shall be thereby released or discharged; and indictments and prosecutions for such offences, liabilities, penalties and forfeitures shall be instituted and proceeded with in all respects as if such prior statute had not been repealed or altered," except as to mere matters of practice. The statute on which, in our opinion, the criminality of the defendants' conduct may be rested, is section 192 of the crimes act (Revision, p. 261). This enacts that "assaults, batteries, false imprisonment, affrays, riots, routs, unlawful assemblies, nuisances, cheats,

Digitized by Google

deceits, and all other offences of an indictable nature at common law, and not provided for by this or some other act of the legislature, shall be deemed misdemeanors, and the offender on conviction shall be punished by imprisonment at hard labor or otherwise, not exceeding two years, or by a fine not exceeding five hundred dollars, or both." The substance of this statute has been in force since March 18, 1796 (Pat. Laws, p. 208). The conduct of the defendants amounted to a nuisance, and, although such conduct was indictable at common law, yet, since the passage of this statute, it has been an offense against its terms. Counsel for the defendants would construe the act as though it merely provided for the classification and punishment of common-law offenses, so long as the common law remained to condemn them; but the statute is much broader than this. It contains every ingredient necessary to fasten upon the acts to which it relates the character of statutory crimes. It denotes the acts which it is intended to prohibit; it declares those acts to be misdemeanors, and provides that the person committing any of them may be convicted as an offender, and thereupon shall be punished by fine or imprisonment or both. It may, indeed, be necessary to look to the common law for precise definitions of some of the terms employed in this statute; but, the definitions being thus ascertained, the guilt of persons who commit the acts covered by those definitions depends not, or not solely, on the prohibitions of the common law, but on the expressed will of the legislature. Whether the common-law criminality of these acts remains or it has been supplanted by this statute, so as to have become extinct, we need not now decide, for in either case the statute must have sway, both in its prohibitions and in its penalties, except so far as the legislative will which it expresses is legally revoked. As already indicated, that will has not been revoked, with regard to the conduct of the defendants prior to February 27, 1893, because of section 4 of the act relative to statutes, the act of February 27, 1893, not expressly declaring that previous offenses or penalties should thereby be released or discharged.

It is further urged on behalf of the defendants that section 4 of the act relative to statutes is unconstitutional, because the object of that section is not expressed in the title of the act; that the section does not relate to statutes, but to crimes, providing, not a rule of interpretation, but a rule of substantive criminal law, by which offenders may be punished after the law which rendered their conduct penal has ceased. This objection, we think, is invalid. The section does relate to statutes by prescribing a rule for their construction. It declares, in effect, that every statute which repeals a prior penal statute shall be construed as though it contained a clause saving previous offenses from its operation, unless on its face it expressly declares a contrary purpose. This is, I think, nothing more than providing that such repealing statutes shall have a reasonable interpretation. In view of the general rule that statutes deal with the future only, it was a strained construction which implied, in terms naturally expressive of prospective operation only, a purpose to remit the punishment of past offenses. This section forbids such a construction, and in so doing is plainly within the scope of the title. Our conclusion is that for the maintenance of their disorderly establishment from January 16, 1892, until February 27, 1893, the defendants are punishable under this indictment, and therefore the court should proceed to judgment upon the plea of guilty.

MAGIE, J. (concurring). While I concur in the opinion of Mr. Justice DIXON, I desire not to be understood as admitting that the act of 1893 is applicable to defendants. It was thereby enacted that "book making" on horse races should not be a criminal offense, and persons engaged therein should not be indictable, when it is carried on within the exterior inclosure of the grounds of any agricultural society or other incorporated body of this state, wherein, for the racing of horses for money, such society or body is not indictable. Defendants can obtain immunity under that act only in case the North Hudson Park Driving Association was not indictable for horse racing for money within its inclosure. By section 55 of the crimes act the racing of horses for money is made a criminal offense, but a proviso declares that the section shall not apply to "fairs or exhibitions of any agricultural or other incorporated society." Revision, p. 237. The affairs and exhibitions intended by this proviso are plainly those which such incorporated societies have power to hold. No one would contend that a corporation empowered to carry on a banking, insurance, or manufacturing business could open a race course, and race horses for money, and be protected by this proviso. The North Hudson Park Driving Association was organized under the corporation act of April 7, 1875 (Revision, p. 179). Its certificate, executed on March 16, 1885, set out the objects of its organization to be (1) the improvement of agriculture and agricultural stock, and (2) the improvement of horses, mares, and geldings in running, racing, and trotting. Corporations organized under general laws of this sort acquire the powers which are necessary to an attainment of the expressed objects of the organization. 1 Mor. Priv. Corp. § 318. Competition may be necessary to the attainment of improvement of horses, etc., in running, etc., but the public exhibition of such competition is not necessary thereto. Nor do I think that it is incident to such object. But this corporation cannot be deemed to have incidentally acquired power to hold such exhibitions, for

Digitized by Google

by a supplement to the corporation act, approved March 3, 1880 (Supp. Revision, p. 159), the tenth section of the act was amended so as to include as one of the objects of incorporation the carrying on of "agricultural fairs and exhibitions for the encouragement of competition in the development of speed in horses." When the North Hudson Park Driving Association was organized, in 1885, those who associated themselves might have expressed their object, or one of their objects, to be the holding of a fair or exhibition as permitted by the supplement of 1880, above cited. Had they done so, they would probably have fallen within the terms of the proviso to section 55 of the crimes act. But the certificate executed and filed by them did not include that object. In my judgment, it cannot be construed to incidentally clothe the corporation with a power which it might have acquired by an express declaration of its purpose to acquire such power. Had this corporation included this object in its certificate, it would have acquired the further powers confined by the supplement to the corporation act approved May 9, 1889 (Laws 1889, p. 409), under which it would seem that the proviso to section 55 of the crimes act would have applied to it. My conclusion is that this association could not claim immunity under that proviso, but would have been indictable for racing horses for money. It follows that the act of 1803 is inapplicable to the acts admitted to have been done by defendants.

STATE ex rel. MAYOR, ETC., OF BOROUGH OF WILBUR v. TRENTON PASSENGER RY. CO., Consolidated.

(Supreme Court of New Jersey. Nov. 14, 1894.)

MANDAMUS TO CITY RAILWAY COMPANY—CONSOLIDATION OF FRANCHISES.

1. The ordinance of a borough required a city railway company to lay its road within the municipality in a certain manner, and the company duly accepted such ordinance under its corporate seal, and afterwards refused to comply with its provisions. *Held*, that a peremptory mandamus would be issued to compel it to perform the duty thus assumed.

2. Upon the amalgamation of several city railways by virtue of the statute, the consolidated company thus formed acquires the rights and franchises of the respective companies, but such prerogatives are not enlarged or magnified by such transmissions, but are still subject to their original limitations and applications.

(Syllabus by the Court.)

Application for mandamus by the state, on the relation of the mayor and council of the borough of Wilbur, against the Trenton Passenger Railway Company, Consolidated. Peremptory writ granted.

Argued November term, 1894, before DEPUE, VAN SYCKEL, and LIPPINCOTT, JJ.

Barton & Dawes, for relator. James Buchanan, for respondent.

BEASLEY, C. J. This case stands before the court on the facts narrated in an alternative writ of mandamus, the object of the procedure being to compel the respondent, which is a street-railway company, (1) to take up from its railway tracks on East State street, in the borough of Wilbur, in the county of Mercer, certain rails of a particular design, known as the "T rail," and to lay down in their places others of a different design, and (2) to pave so much of the street as lies between the rails of the railway tracks, and between the tracks, and 18 inches beyond, in a particular manner and with specified materials. With respect to the T rail which is thus sought to be got rid of, it is alleged that "it is not a fit and suitable rail for street railways, and it impairs the use of the said street by the people with their horses, carts," etc. As the writ has been generally demurred to, it, of course, follows that the unfitness of the rail thus described is admitted. After the foregoing statement, the narration then proceeds to show that the mayor and council of the borough of Wilbur, in the year 1892, passed a certain ordinance, entitled "An ordinance to authorize the Trenton Passenger Railway Company, Consolidated, to build, maintain, and use a street railway in the borough of Wilbur," whereby it was, among other things, duly enacted and ordained "that the Trenton Passenger Railway be, and the same are bereby, authorized and empowered to construct, maintain, and use a single and double track railroad," etc., "on East State street, from the westerly boundary of the borough of Wilbur to the easterly boundary of the borough of Wilbur," etc. This grant of power was conditioned by the requirement that the company should lay its rails on a level with the face of the street, and that they should be of the standard, best, and most approved form for city railroads, and that the respondent should pave with certain specified materials that part of the street so occupied by it, and likewise 18 inches on each side of the track. In this connection, it is also, finally, averred that this ordinance was accepted under its corporate seal, by the respondent.

The object of the writ before the court is to compel the respondent to comply with the ordinance thus accepted by it, and the nonperformance complained of is of this complexion. Part of the railway track in question was formerly, and before the incorporation of the borough of Wilbur, in the township of Hamilton; and, while this was so, a certain street railway had been organized by virtue of the general law of this state, and had applied to the township committee of Hamilton township for authority to lay its track in that district; and, such application proving successful, an ordinance was accordingly passed giving the authority necessary to construct, maintain, and operate a street railway upon East State street, in

Digitized by Google

the township just mentioned. By force of this authorization, the Hamilton Township Street-Railway Company proceeded to the construction of the track so sanctioned, and laid it with the T rails of which complaint is now made. Affairs remained in this condition, as appears from the pleading before us, until after the creation of the borough of Wilbur, and until the Hamilton Township Street-Railway Company had merged and consolidated its corporate franchise and property with those of the Trenton Horse-Railroad Company, the City Railway Company, and with the Clinton Avenue & Broad Street Railway Company, under the style and name of the Trenton Passenger Railway Company, Consolidated, such amalgamated company being the respondent in this case. It will be observed from this brief sketch of the circumstances that the complaint of the relator is that the respondent still continues the use of the T rail in the construction of that part of its track in the borough of Wilbur that was originally laid out by the Hamilton Township Street-Railway Company. Can any reasonable ground be assigned for such retention?

In the first place, it is contended by the counsel of the respondent that this part of the track in question, thus objectionably constructed, is not embraced in the ordinance of the borough of Wilbur, the substance of which has already been stated. It is argued that this ordinance is prospective, and cannot be construed to apply to that part of the track already in existence. But such a construction is entirely inadmissible, for it would be plainly repugnant to the language and evident purpose of the ordinance itself. The borough law gives its assent to a right in the respondent to construct, maintain, and use a street-railway track from the eastern to the western boundary of the borough; and it is that entire track that it regulates, and prescribes what kind of rails shall enter into its construction. No reason has been or can be assigned why this regulation should not be executed according to the exact linguistic sense of the terms thus employed. Any attempt to contract its force so as to give it only a partial application to the structure in question must prove fruitless, for it would seem that no plausible ground can be laid that could have induced the borough authorities, after providing so carefully and specifically for the proper construction of a part of the track, to leave the residue of it in such a condition as to occasion very considerable public inconvenience. It is deemed that the ordinance indisputably calls for the removal of the T rail, and the substitution of the improved rail in its stead. This being the situation, it is difficult to understand how it can be reasonably contended that the respondent can refuse to comply with its provisions. The ordinance, it will be remembered, requires the laying of the improved rail on the entire track within the limits of the borough; and that ordinance was formally accepted by the respondent. How is it that the obligations thus assumed are to be disregarded?

The argument on this subject contained in the brief of the counsel of the respondent is plainly founded on a misapplication of a legal rule that no one denies. The principle referred to is that which is embodied in the decision of Hudson Tel. Co. v. Jersey City, 49 N. J. Law, 305, 8 Atl. 123, and which is to the effect that when a corporate body has been authorized, with the assent of the municipal authorities, to use the streets of a city for a public purpose, and such assent has been given, prescribing the mode of such use, and the corporate company has constructed its works in accordance with such conditioned acceptance, the city council cannot arbitrarily revoke the authority thus given. But it is obvious at a glance that the reported case differs from the case now before the court in two important particulars. In the first place, the right to lay the T rail in question has neither the sanction of the legislature nor the assent of the local authorities. The general law under which the respondent was organized has no provision on the subject, and when the ordinance of the committee of the township of Hamilton conferred the authority, in general terms, to lay a track in that locality, such grant of power, by necessary implication, excluded all pretension of a license to construct the roadbed with the T rail, which, when present, is, according to the record before us, little short of a public nuisance. Such an assent as the one just stated was a permission to construct a road in a proper manner, and consequently the respondent shows in such a sanction not the slightest color of right for the erection or retention of the structure now the subject of complaint.

Nor is the second contention in behalf of the respondent in this respect more stable. I refer to the position that the charter of the Trenton Horse-Railroad Company makes it "lawful for said company to lay such rails or form of street rails on their road as they may consider the most approved," and that, by force of the statutory amalgamation which has taken place, the respondent is empowered to construct the whole or any part of its consolidated route with such rails as itself deems to be of the most approved pattern. This application of a special provision in the charter of one of these conjoined companies to all of them is sought to be justified by force of the third section of the act that authorizes these city railroads to consolidate, and which declares that "all and singular the rights, privileges, and franchises of each of said corporations," etc., "shall be taken and deemed to be transferred to and vested in such new corporation," etc. Supp. Revision, p. 838. But it is deemed to be manifest that this statutory provision will not bear the construction thus sought to be put upon it,

Digitized by Google

for its effect is very plainly to give to the newly-formed company all the rights of the several parts of which it has been composed in the state in which such rights existed at the time of consolidation. Such rights are not extended or enlarged by the process of transmission to the consolidated company, the consequence being, conspicuously, that the privilege given to the Trenton Horse-Railroad Company to lay such rails as it might deem the most approved, within the area of its operations, cannot be expanded into the prerogative of this proceeding within the several districts occupied by the companies, respectively, with which it has become merged.

And, in quitting this subject, two additional comments are not deemed inappropriate; the first being "that even on the assumption of the existence of the right of the consolidated body to maintain a railroad in the borough of Wilbur, fashioned with such rails as it may consider the most approved," such a power will most assuredly not justify the laying of the T rail in question, which, by its demurrer, the respondent admits to be totally unfit for use; and, secondly, this court can in strictness know nothing of the privilege claimed to exist in the charter of this Trenton Horse-Railway Company, as that corporation was organized by force of private legislation, of which judicial cognizance cannot be taken.

In short, the conclusion is that no ground has been laid that should induce the court to refuse to grant the mandatory writ here prayed for. The respondent, in solemn form, agreed to do that which the process, if issued, will compel it to do, and it is certainly most difficult to comprehend how it can reasonably complain of such compulsion. Let the mandamus issue, unless leave be given to plead anew.

RICE v. McCAULLEY.

(Court of Errors and Appeals of Delaware. June 3, 1885.)

ACTION—WHEN PENDING.

An action is "pending," within Act April 6, 1881, exempting pending actions from its provisions, where a writ of summons in assumpsit is issued, though the sheriff's return is non est inventus. Saulsbury, C., dissenting.

Error to superior court, New Castle county; Saulsbury, Chancellor, and Houston and Whiteley, Judges.

Action of assumpsit by Samuel W. McCaulley against John V. Rice. From a ruling in favor of plaintiff, defendant excepted, and took a writ of error. Affirmed.

A writ of summons in assumpsit against the plaintiff in error was issued, at the instance of the plaintiff below, on February 23, 1881, returnable to the following May term of the superior court in and for New Castle county. This writ was returned May 15th, the first day of the term, "non est inventus." On May 25th an alias summons was issued, returnable to the November term of the superior court, and was returned November 25th, "summoned personally." On April 6, 1881, in the interval between the issuing of the first writ and the issuing of the second, the legislature passed the following act:

"Sec. 1. No person shall be incompetent to testify in any civil action or proceeding whether at law or in equity, because he is a party to the record or interested in the event of the suit or matter to be determined. * * *.

"Sec. 2. The provisions of this act shall not apply to any civil action or proceeding pending at the time of its passage."

16 Del. Laws, 708.

At the trial of the cause, in December, 1882, the defendant offered himself as a witness in his own behalf. Counsel for the plaintiff objected to his competency, on the ground that the issuing of the writ of February 23d constituted an action pending at the time of the passage of the above act; and on this ground the court rejected the defendant as a witness. To this ruling the defendant noted an exception, and took a writ of error. The question before the court, therefore, is whether or not the writ of February 23d, which was returned "non est inventus," constituted an action pending, within the meaning of the exception contained in the second section of the above act.

John B. Moore, for plaintiff in error. Anthony Higgins, for defendant in error.

HOUSTON, J. This is purely a question of law, involving the construction of the words of a statute passed by the legislature on the 6th day of April, 1881, providing, in the first section, that no person shall be incompetent to testify in any civil action or proceeding, whether at law or in equity, because he is a party to the record, or interested in the event of the suit or matter to be determined; and, in the second section, that the provisions of the act shall not apply to any civil action or proceeding pending at the time of the passage of the act; and the only question to be determined in the court below was whether a writ of summons issued in an action of assumpsit out of the court below, at the suit of McCaulley against Rice, on the 23d day of February, 1881, returnable on the first day of the next May term of that court, and returned on that day, the 15th of May, 1881, by the sheriff, non est inventus, constituted, without a service of the writ on the defendant in it, any civil action or proceeding in the suit pending at the time of the passage of the statute, within the meaning of that word as thus employed in it. An alias summons was issued on the 25th day of May, in the usual form, which was served and returned at the next term, when the defendant appeared, and, the case having been

Digitized by Google

afterwards pleaded to issue on the trial of it, he was called as a witness to testify, and was objected to on the other side as incompetent because he was the defendant in the case; and, the above question then having been raised, the court below held that he was not a competent witness in the case, within the meaning and intention of the second section of the statute; and that is, of course, the same question of law now to be determined by this court, and which involves no question of equity whatever before this tribunal, any more than it did in the court below.

It is admitted by the counsel for the plaintiff in error that, under our general statute and the established practice of the superior court of this state, the writ or summons first issued in this case constituted in law the commencement of the action; but his contention is that, as it was not served on the defendant, and was returned non est inventus to the next term of the court, it failed to have any legal effect whatever, and therefore there was not any civil action or proceeding in the suit so commenced on the 6th day of April, 1881, when the statute was passed. Or, in other words, that, without service of the summons first issued upon the defendant in it, there was, according to the technical signification of the terms, no lis pendens in the case at that time. The first authorities cited by him for the rule on this subject, and in support of the point made by him, were Murray v. Ballou, 1 Johns. Ch. 566, and Lockwood v. Bates, 1 Del. Ch. 435; both cases in chancery, where the rule upon a principle of equity, purely, has long been recognized, and established with greater uniformity in the decisions upon it than has been in the courts of law, where no principle of equity was involved, but the time of the commencement of the action, and whether it was barred by the plea of the statute of limitations, as in other similar cases, were the only material questions involved in them in respect to the rule. In the case first cited, of Murray v. Ballou, a bill was filed in the court of chancery of New York against a trustee of real and personal estate for the benefit of a married woman, by the latter, for a breach of the trust, to enjoin him from acting as trustee, or selling any of the trust estate, or the securities or funds thereof, and for the appointment of a receiver. After the subpoena had been issued and served upon him in the case, he sold a portion of the real estate of the trust to Ballou, and took his bond and mortgage for the consideration, which were afterwards assigned to another person by the name of Hunt, by whom the amount of them was subsequently paid to the trustee. A bill was afterwards filed in the court by the receiver against Ballou and Hunt to set aside the sale of the premises, on the ground that they both had knowledge of the suit pending against the trustee when they purchased the premises, but which they denied in their answers. There was no proof to contradict the answers, but Chancellor Kent held that, though he had no knowledge of the suit when Ballou bought the premises, which had then been pending a year in the court, it was not pretended that he was ignorant of the existence of the trust, and it was to be presumed from his silence that, when he purchased the land from Winter, he knew that Winter held and sold it, not in his own right, but as trustee. The bill charged that it was generally known at the time of the sale that Winter's authority was questioned. The answer went no further than to deny any knowledge of the chancery suit, or of the injunction, or of any suspension or defect of authority in Winter to sell. The answer of Hunt was to the same limited extent; and the probability was that it was a matter of public notoriety at the time that Winter held the large real estate in his possession as a trustee. And after some further comments on the circumstances of the case, the chancellor proceeds to his conclusion, as follows: "Admitting that Ballou had no knowledge in fact of the suit when he made the purchase, he is nevertheless chargeable with legal or constructive notice, so as to render his purchase subject to the event of the suit. The established rule is that a lis pendens, duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the lis pendens begins from the service of the subpoena after the bill is filed." And which, he further says, was no more than an adoption of the rule in a real action at common law, where, if the defendant aliens after the pendency of the writ, the judgment in the real action will overreach such alienation. And the reason for which, we may add, both at common law and in chancery, is that, when the suit involves the right of the plaintiff to real estate in the possession of the defendant in it, the jurisdiction of the court over it forbids that the adjudication of his right to recover it according to law or equity shall not be prevented or defeated by the defendant's sale and conveyance of it to another during the pendency of the suit.

And to the like effect was the decision of the court of chancery in this state on the same rule in the second case cited,—Lockwood v. Bates. For our present purpose, it is enough to say, of the facts established in that case, that a bill had been filed in the court of chancery at the suit of James Clayton, Samuel Lockwood, and Armwell Long, three members of the firm of Mitchell, Lockwood & Co., against John Mitchell, the remaining member of it, to obtain a settlement of the affairs of the partnership by Mitchell, who had been the active partner. The cause was proceeded in to a hearing at the August term, 1823, and the final decree of the chancellor was entered in it on the 8th day of August, 1825. By it the rights of the several

Digitized by Google

partners were adjudged, and the defendant, Mitchell, was ordered to pay to them their several shares of the net partnership assets. As part of the decree, he was ordered to pay to Samuel Lockwood, one of the partners, the sum of $1,818.95. Pending the suit for the settlement of the partnership, Samuel Lockwood was indebted to John Mitchell in a judgment bond for the real debt of $3,000, dated December 3, 1817, on which judgment was entered in the court of common pleas on the 9th of January, 1819, subject to a credit of $1,000 on the judgment as of February 11, 1818, but leaving, with the interest in arrear, a balance due to Mitchell larger than the sum due from him to Lockwood under the decree in the partnership suit. On the 8th of December, 1824, while the partnership suit was pending, Mitchell executed a written assignment of the judgment he held against Lockwood to Martin W. Bates, in trust for certain creditors of Mitchell. Notice of this assignment was given to Lockwood on the 5th of November, 1825, and on the 22d of June, 1830, the judgment was marked on the record "For the use of Martin W. Bates, as per assignment to him dated the 8th of December, 1824." Several years afterwards, Samuel Lockwood filed his bill in the court against Martin W. Bates and others, setting forth the above-stated facts, and prayed that he might have the benefit of the decree made in 1825, in the partnership suit, by way of set-off against the judgment due from him to Mitchell, and now standing for the use of Martin W. Bates in trust. The answer, admitting the facts set forth in the bill, relied upon three grounds of defense, but only one of which it is necessary for us now to notice, and that was that, the assignment of the judgment against Lockwood in trust for creditors having been made on the 8th day of December, 1824, prior to the decree in the partnership suit in 1825, the rights of Lockwood's creditors under the assignment could not be affected by the subsequent decree against Mitchell, the original judgment creditor. The chancellor held that Lockwood, the complainant, was entitled in a court of equity to set off, against the judgment assigned to Bates for the creditors named of Mitchell, the sum decreed to be paid to him by Mitchell in the partnership suit, and, as what he said on this part of the case, in announcing his opinion, is well and more concisely expressed in the syllabus of the report of it, we will quote from it his ruling in it on the particular question we are now considering. It is as follows: "A lis pendens is constructive notice, not only to affect purchasers of the subject-matter of the litigation, but also to protect all rights and equities arising out of it. In the present case, the pendency of a suit in equity resulting in a decree for the payment of a partnership balance by the defendant to his copartner, which the latter sought to set off against a judgment due from him to the defendant, held to be constructive notice of the copartner's equity to an assignee of the judgment who took pending the litigation."

We have thus referred particularly to two cases in chancery, cited in support of the construction of the words of the statute contended for in this case by the counsel for the plaintiff in error, to show the meaning and purpose of the rule of lis pendens when resorted to by courts of equity, and why it has been held in courts of equity that the subpoena must not only have been issued on the filing of the bill, but must also have been served upon the defendant in the case, to warrant the application of the rule of lis pendens to it. And the reason for that was that where an innocent purchaser for a fair and valuable consideration, and without any knowledge that it was a subject-matter of litigation in a suit, bought a tract of land of the defendant, and there was no proof that such a purchaser, or that even the defendant, then had actual notice or knowledge that the suit had been commenced against him, no court of equity could have ruled that either had constructive notice of it, until the subpoena had been served upon the defendant; but, the service of it being actual notice to him that the suit had been instituted against him, they were prepared to hold, and have for a long time firmly held, that it constituted constructive notice of it, even to such a purchaser; and, as the hardship of the rule in such a case was strongly pressed upon the consideration of Chancellor Kent by the counsel for the purchasers in the case before him, much of his opinion was devoted to the support and vindication of it in that case. And in the second case cited, as the partnership suit had proceeded to a hearing before the chancellor on the bill and answer filed, and was awaiting his final decree in it when Mitchell's judgment against Lockwood was assigned to Bates, in trust for the creditors of the former, and without the relief sought in the subsequent suit in that court by Lockwood against the assignee, Bates, and others, with such notice of the subject-matter of the litigation between Lockwood and Miller in the partnership suit as would have defeated Lockwood's equitable right of setting off the sum due to him from Mitchell under the decree against the judgment, the reason was the same for the chancellor's holding that, as the assignment was made pending the partnership suit, it was constructive notice to the assignee of the judgment of Lockwood's equity to set off the sum due him from Miller, the assignee of it, against the judgment. But in the case now before us, commenced and prosecuted, as it was, with all due diligence, in the established mode of procedure in such cases, to verdict and judgment in the court below, there is no question involved as to either actual or constructive notice of the institution of it to the defendant, or, particularly, to another person to whom he had conveyed or assigned his interest in the sub-

Digitized by Google

ject-matter of it, with the view of defeating the recovery of the plaintiff by thus divesting himself of his interest in it after the commencement of the action, and therefore the rule of lis pendens, as stated and applied by Chancellor Kent in the case referred to, can have no application to the case before us; and it is equally manifest that it could not have any application to even a real action at common law, whence courts of equity originally derived it, without such a conveyance of his interest in the premises to a third person, pending the action, according to his exposition of the rule in that case. On the contrary, in this case, in the court below, the question simply was—and it is the same here—whether, in the meaning and intention of the legislature, as expressed in the words of the statute, the first or original summons in it, having been issued prior to the passage of it, returnable to the next May term of the court, which was after the passage of it, and remaining or hanging in the meanwhile in the sheriff's hands for service on the defendant, who had no place of abode in the state, or where it could be served by his leaving a copy of it, and was not served, but returned non est inventus by him to the next term, was or was not a civil action or proceeding pending during that time, and particularly at the time when the statute was passed, which was the 6th day of April in that year. If the words of the act merely were "any civil action pending" at the time of its passage should be within the provision of the preceding section of it, although it would not even then be free from any doubt that the legislature intended to use the words in the technical sense contended for; and to constitute it a lis pendens it was, at least, necessary that the summons should have been served by that time upon the defendant. But the addition to them of the other words, "or proceeding," renders the meaning of the legislature in the use of them, in this connection, the more uncertain in that respect. For a civil action of any kind in the courts of our state, all of which are well known and ascertained in our practice, has a legal signification as fixed and definite as can be claimed, perhaps, for any other legal names or terms, and in its general sense embraces all the proceedings of record in it, from the original writ with which it is commenced to the verdict and judgment with which it concludes, when it has been regularly prosecuted and conducted through all the progressive stages of it from such a commencement to such a conclusion. It may, however, be terminated in various ways in the meantime, but until it is terminated it is usual to say, even in court, and in language generally well understood out of it, that the action is pending, and which, by a figure of speech in the terms of the civil law, "lis pendens," is likened to fruit forming and growing in the stages of its development, but yet hanging by its roots or stem. There are, however, other civil proceedings of several kinds in our courts of law in which the testimony of witnesses is required and heard, but which are not considered or denominated actions of law, because they are commenced without the issue and service of any original writ upon the other party, and prosecuted and conducted without any declaration or pleadings filed, as in all civil actions at law is prescribed and required in them. And in such a proceeding, so commenced and conducted, it may well be doubted whether the rule of lis pendens, as defined and contended for by the counsel for the plaintiff in error, could be properly applied, because it was not commenced by an original writ served on the defendant, as in an action at law. And yet it is quite as common in court, and out of it, to apply the term "pending" to such a proceeding, so commenced, as long as it continues before the court undetermined, or undecided, as to an action of law continuing before the court in like manner; and the statute itself applies the same term, "pending," to any civil proceeding as to any civil action, and we therefore think the legislature intended to use the word "pending" in the connection in which it is employed in this statute, in the general sense in which it is now used and understood, and not in any more limited or technical sense in which the term "lis pendens" has been defined and interpreted in any of the cases cited in the argument by the counsel for the plaintiff in error.

We do not think that there was any ground for the contention of the counsel that on the return of the first summons without service upon the defendant in it, and non est inventus to the next term of the court, it was then functus officio, and became a nullity, and of no effect for all the purposes of the action which he admits was commenced by it. For, by the long-established practice in the superior court of the state, a summons so returned by the sheriff does not become null and void, if, as in this case, an alias summons, or another like it, is thereupon issued returnable to the next term of the court; but it constitutes a repetition and continuation of the former in its legal effect, so that the commencement of the action in such case dates from the issuing of the first. And this practice was early adopted here, in analogy to the practice in the courts of England, so far as it was applicable to the more simple mode of instituting actions in our courts. It was issued as an alias summons, reference being made in it to the original summons in the regular form usual in such cases, returnable to the next term; and it was no less the function and office of it to preserve the action as commenced by the original writ than to effect what it had failed to have accomplished,—the service of such process in the action upon the defendant. But both in the courts of law in England and in the courts of law in this country, in which it has

Digitized by Google

been held, in regard to the rule of lis pendens, and as a general principle, that the issuing of the original writ in it does not constitute the commencement of an action, they have all held to the contrary when the time of the commencement of the action for any reason became material, as in the case of a plea of the statute of limitations against it, or of a tender, which must have been made before the suit was brought, to be a legal defense, and in various other cases when it became material to determine when, in point of fact, the action was commenced; and in which it has uniformly been held that the issue of the original process in it was the commencement of the action. And such cases clearly show that, notwithstanding the rule contended for, the courts in both countries have exercised a good deal of discretion in departing from it in their decision of them. And in this case, which turns upon the interpretation of a recent statute of our state, and the meaning of the word "pending" merely, as employed in it, we think we are warranted, for a like reason, in holding that it was employed, not in the technical sense of the Latin word "pendens" in the rule, but rather in the sense of the word "commenced" in our language, in which it is more generally understood. For although it is not a statute of limitations, the section of it in question was solely to limit and restrict, according to the meaning of the word "pending" used in it, as we think, the initial operation and application of the act to civil actions or proceedings commenced after the passage of it; or, in other words, that it should not apply to any commenced before the time of the passage of it. We therefore think that the judgment of the court below should be affirmed.

SAULSBURY, C., dissents.

DAMPMAN v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. March 5, 1895.)

CARRIERS OF PASSENGERS — ACTION FOR INJURY — EVIDENCE — PRESUMPTION.

1. In an action by a passenger for injuries caused by a broken rail, where defendant's section foreman, on cross-examination, testified that he did not state on the day of the accident, to certain persons named, that he had notified the company that such rail was defective, it was not error to permit such persons to testify that defendant's witness made the statements claimed, when the evidence was restricted to the purpose of affecting such witness' credibility, and the jury was directed not to consider it as affecting defendant's liability.

2. Where a passenger is injured in the course of transportation, the law presumes negligence by the carrier, and the burden is on it to remove such presumption.

Appeal from court of common pleas, Chester county.

Action by Peter Dampman against the Pennsylvania Railroad Company for personal injuries caused by defendant's negligence while plaintiff was a passenger on its train. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff was a passenger on defendant's train, composed of a combined baggage car, milk car, and passenger coach; and when nearing Shelmire station the coach in which plaintiff was riding was derailed, detached from the rest of the train, and turned over on its side. Plaintiff was thrown from his seat in the car and injured. The accident was caused by a broken rail. On cross-examination, Harrison Hendricks, defendant's section foreman, called as a witness for defendant, testified, in substance, that he knew Frank Ludwick, Robert Plank, Dr. Larkin, Logan Rogers, and Joseph Dowlin; that he did not say to such men, on the day of the accident, he had reported this rail to defendant; that he had no occasion to consider the rail; that he did not state to such men, or to anybody else, on the day of the accident or shortly afterwards, that it was not his fault, that he had reported this rail to the railroad company, and that they must not blame him, nor that he could not keep the road in repair because they gave him old rails off the Pennsylvania Railroad; that he did not remember seeing those men the day after the accident, nor of taking anybody up the road right after the accident, and showing them the broken rails, or a weak rail. Plaintiff afterwards called the persons named, and they testified, in substance, that Harrison Hendricks, in conversation with them concerning the accident, on the same day, in the station at Shelmire, made the remark that he was not to blame for this accident; that he had notified the company some time before that of this being a bad rail; that he could not make the road any better with the supplies he had; he had old materials to do it with. The first six specifications of error relate to the admission of the latter testimony on the part of the plaintiff.

John J. Pinkerton, for appellant. Butler & Windle, for appellee.

PER CURIAM. Restricted, as it clearly was, to the single purpose of contradicting Mr. Hendricks, we think the testimony referred to in the first six specifications of error was rightly admitted. In ruling on one of the offers, the learned trial judge said: "We will admit this testimony simply for the purpose of affecting the credibility of Mr. Hendricks, with the distinct understanding that it cannot be used to affect any liability on the part of the company by any declarations made by Mr. Hendricks at the time of the conversation." Afterwards he pointedly cautioned the jury by saying they "must not understand that this testimony is offered to show that Mr. Hendricks did give the company notice of this condition of affairs. It is simply to contradict Mr. Hen-

Digitized by Google

dricks when he says he did not tell these gentlemen so, and afford you an opportunity to judge how far you can rely on Mr. Hendricks when he has testified to certain facts in the case; and the jury will not understand the testimony as given to implicate the company in maintaining improper rails on their road." The testimony in question was clearly relevant and competent for the single, specific purpose for which it was admitted, and special care was taken by the court to prevent its being used for any other purpose. We find no error in either of the first six specifications, and they are therefore dismissed.

The only other specification of error is to the refusal of the court to charge, as requested in defendant's fifth point: "There is no evidence in this case of negligence upon the part of the defendant in either the construction of its track or the transportation of its passengers, and the verdict of the jury must be for the defendant." In view of the testimony, it would have been plain error to have affirmed this point as presented. It tended to prove that the plaintiff, while a passenger on one of defendant's cars, in course of transportation over defendant's road, was severely injured, without any fault on his own part, and thus raise a presumption that the injury was the result of defendant company's negligence. In declining to affirm the point the learned judge very properly said to the jury: "If you are satisfied that Mr. Dampman was injured, and he was a passenger on this road for transportation, then the law presumes negligence; and the burden is on the other side to remove the presumption. If the defendant has removed that presumption by its evidence, and the plaintiff has not met that, then your verdict will be for the defendant." This was quite as favorable to the company as it could reasonably ask. The case depended on questions of fact which were for the exclusive consideration of the jury. They were all fairly submitted to them in a very clear and comprehensive charge, to which no just exception can be taken. We are all of opinion that the judgment should not be disturbed. Judgment affirmed.

DAVENPORT CO. v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. March 4, 1895.)

DISCOVERY—ANSWERS TO INTERROGATORIES—SUFFICIENCY—PRIVILEGED COMMUNICATIONS.

Pending an action against a railroad company for delay in transporting fruit from P. to A., plaintiff filed a bill for discovery in aid thereof, in which he asked for the "official reports and communications made by" defendant's agent at A., in course of his ordinary duties, to the main department at P., on and after the day of shipment, for defendant's information, "and without reference to any litigation." A judgment pro confesso was obtained for want of answer, and plaintiff filed interrogatories inquiring if any officer or agent of defendant at A., on such day or afterwards, furnished defendant's proper department at P. official reports relating to plaintiff's claim, and directing copies to be attached to the answers. Defendant's answer stated the general character of the report received, and alleged that it was not made in the ordinary course of business, but was made for the special purpose of resisting plaintiff's claim, so that if suit was brought it might be placed in counsel's hands to guide them. *Held*, that the facts stated in the answer were good as a reply to such interrogatories, though they would have been good as an answer to the bill.

Appeal from court of common pleas, Philadelphia county.

Bill by the Davenport Company against the Pennsylvania Railroad Company for discovery, in which there was a judgment pro confesso, for want of an answer. From a judgment dismissing exceptions to defendant's answers to interrogatories filed by plaintiff, the latter appeals. Affirmed.

Horace M. Rumsey, for appellant. John Hampton Barnes and Geo. Tucker Bispham, for appellee.

WILLIAMS, J. The plaintiff shipped fruit over the defendant's line of road from Philadelphia to Altoona, in June, 1892. When it reached its destination, it was decayed to such an extent as to occasion loss to the shipper. An action was brought against the defendant in September of the same year to recover in damages for the loss suffered. Pending this action, the plaintiff filed his bill on the equity side of the court for discovery in aid of the action at law. The specific discovery sought was of certain writings described in the bill as "official reports and communications made by the agent of the defendant at Altoona," in the course of the ordinary duties of such agent, to the main department in Philadelphia, on and after the 13th day of June, 1892, for the information of the railroad company, "and without any reference to any litigation." A judgment pro confesso was obtained for want of an answer. Interrogatories were filed and answered. Two of these answers were excepted to, the exceptions dismissed by the learned judge, and this appeal was then taken. No question is raised except that of the sufficiency of the answers made to the second and third interrogatories. By these interrogatories the defendant was inquired of whether or not any officer, agent, or employé of the railroad company at Altoona, on or about the 13th day of June, 1892, or afterwards, had furnished to the proper department of the company at Philadelphia, in the ordinary course of duty, certain official reports relating to the plaintiff's claim, and directing that copies of such reports be attached to the answers. The answers are not a simple denial of the existence of such a report as is inquired after, but contain a statement of the general character of the report actually received. This report, they allege,

Digitized by Google

was not made in the ordinary course of business, but for a special purpose, viz. to resist and defend against the claim which the plaintiff had made on the company by letter dated the 7th of July, 1892; that it was prepared after the receipt of the plaintiff's letter, and as a statement of the defense of the railroad company to the claim set up against it by him, so that if suit was brought it might be placed in the hands of counsel to guide them in making defense. The objection made to these answers is that they set up new matter that should come into the case by answer to the bill. There can be no doubt that the facts stated would have made a good answer to the bill, but we think they are equally good as a reply to the interrogatories. If they are true,—as for the purposes of this appeal they must be assumed to be,—they amount to a denial of the possession of any communication or report such as the plaintiff alleges, and an assertion that the documents they have were prepared after the plaintiff's claim for damages was made, and for the special purpose of resisting it. This brings the documents within the privilege accorded to communications made to counsel. It is true, as appellant points out, that they were not made directly to counsel, but the answers allege they were made to the immediate superior of him who made them, for the express purpose of being by him submitted to counsel. They were in effect made to counsel, for they were made for the use of counsel in resisting this particular claim, and were transmitted to the proper officer, that he might deliver them to the attorney to whom the defense of the company might be committed. It is very clear that such reports do not belong to the class of instruments of which discovery will be compelled by a chancellor, and the learned judge of the court below was right in dismissing the exceptions. The decree appealed from is affirmed, and the appellant directed to pay the costs of the appeal.

BAILIE v. BAILIE.

(Supreme Court of Pennsylvania. March 4, 1895.)

BILL FOR ACCOUNTING — RESPONSIVENESS OF ANSWER—JUDGMENT—SUFFICIENCY OF EVIDENCE.

1. In a suit for an accounting plaintiff claimed for services in a store at $15 per week and one-fourth of the profits. The bill admitted payment at such rate to May, 1889, and at the rate of $15 per week from that date until January, 1890, when he voluntarily quit defendant's service; and asked an account of profits between such dates. The answer admitted that in 1887 a contract was made as alleged, which was to continue until the next annual account of stock should be taken; that such stock was taken May, 1889, after which the share in the profit was no longer to be paid, but only the $15 per week; that plaintiff remained on such terms until January, 1890; and that he made no claim to share in the profits during such time, nor until more than six months after he quit work. *Held*, that the answer was responsive to the bill.

2. On an issue as to whether complainant was to share in the profits of defendant's business after a certain date it appeared that, though complainant knew that defendant understood that he was not so entitled after that date, he continued to work for defendant for six months without claiming other compensation than his weekly wages, upon which basis he settled when he left, and that he never spoke to defendant as to his interest in the profits till six months after he left defendant's employ. Both the bill and the answer were verified. *Held*, that defendant's contention should prevail.

Appeal from court of common pleas, Philadelphia county.

Bill by Hugh Bailie against Samuel Bailie for an accounting. From a judgment dismissing exceptions to and confirming the master's report in favor of plaintiff, defendant appeals. Reversed.

John Sparhawk, Jr., and E. Hunn Hanson, for appellant. William W. Ker, for appellee.

WILLIAMS, J. The prayer for an account in this case rested on a claim for services as a clerk in a grocery store at the rate of $15 per week and a one-fourth part of the profits made by the store. The bill admitted payment at the rate demanded from October, 1887, to May, 1889, and at the rate of $15 per week from the 3d day of May, 1889, to the 18th day of January, 1890, at which time the plaintiff voluntarily left his brother's employment, and asked that an account be taken of the profits made from May, 1889, to January, 1890, and that the defendant be required to pay over to him the one-fourth thereof. The answer admitted that a contract was made in October, 1887, as alleged, which was by its terms to continue until the next annual account of stock should be taken; that this took place in May, 1889, after which, on account of the smallness of the profits and of the return for the use of the capital employed, the share in the profits was no longer to be paid, but the plaintiff, so long as he chose to remain, was to receive only the weekly sum of $15; that he remained on these terms until the 18th day of January, 1890, making no claim to share in the profits during nor at the close of this part of his service, or until more than six months afterwards. This was responsive to the bill. It admitted the making of the contract in October, 1887, and payment in accordance with its terms as alleged by the plaintiff. It denied that the contract was to continue indefinitely; alleged that it was ended by mutual consent in May, 1889, and that the subsequent services of the plaintiff were rendered and were settled for at the rate of $15 per week. The question of fact thus raised was whether the admitted contract remained in force after May, 1889. The bill asserted it. The answer distinctly denied it. Here was oath against oath, with the burden on the plaintiff of overcoming the

Digitized by Google

answer. He was not corroborated, however, by any witness, nor by any important circumstance. His declarations shown by Robinson and Palmer make it clear that he knew how his brother understood their relations after the stock taking. The further facts that with this knowledge he continued at work till 1890, making no claim to any other compensation than his weekly wages; that when he left he settled upon that basis; and that, according to his own testimony, he never spoke to his brother on the subject of his interest in the profits from the stock taking in May, 1889, till his letter written in July, 1890, six months after he left the store, —are not consistent with his present allegation that he supposed himself entitled to share in the profits during his whole period of service. On the other hand, his declarations and his conduct are fairly corroborative of the defendant. Upon the question of fact on which the case depended the plaintiff stood absolutely alone, while his declarations and his conduct tended to corroborate the testimony of the defendant. The fair preponderance of the evidence was against him, to say nothing of the effect of the answer, to overcome which the plaintiff required more than his own oath. The learned master seems to have lost sight of the effect of the answer, and to have reached the conclusion that it was not responsive, and therefore not within the rule which put the burden on the plaintiff of overcoming it by more than his oath; and the defendant contradicted it by his own testimony, so as to destroy its value as answer. We are wholly unable to understand the process by which these conclusions were reached. We can adopt neither of them. The answer is responsive so far as the only question in controversy is concerned. It denies distinctly that the contract covered any services after the stock taking in May, 1889. The defendant's testimony is in entire harmony with his answer, and what should be conclusive on the subject is that the plaintiff's declarations and conduct are not consistent with an honest belief on his part that his original contract continued in full force after May, 1889. If the conclusions of the matter had rested only on his estimate of the credibility of the parties, we should be inclined to let them stand; but they do not. We cannot adopt his construction of the answer or of the testimony, and for this reason we are constrained to reject the conclusions he has reached in regard to their effect. The decree is reversed, and the bill is dismissed; the plaintiff to pay the costs.

WESSELS et al. v. WEISS et al.

(Supreme Court of Pennsylvania. March 4, 1895.)

PARTNERSHIP—WHAT CONSTITUTES.

1. Where a person loans a merchant money, for which he is to receive, at a specified rate, interest, and, in addition thereto, a certain per cent. of the net profits of the business, he becomes a partner at common law.

2. Act April 6, 1870, provides that a loan of money upon an agreement to receive a share of the profits of the business in lieu of interest shall not make the lender liable as a partner except as to the money loaned, provided the agreement be in writing, and the party shall not hold himself out as a general partner. *Held* that, where the lender agrees to receive a share of the profits of the business of the borrower, and interest in addition thereto, and the agreement as to the interest is not in writing, such statute does not apply.

Appeal from court of common pleas, Philadelphia county.

Action by Gerhart Wessels and Charles T. Wessels, trading as G. Wessels & Co., against Ernest Weiss and Charles W. Schmidt, trading as E. Weiss & Co., on promissory notes. From a judgment for defendants, plaintiffs appeal. Reversed.

The agreement referred to in the opinion is in substance as follows: "Agreement, made the twenty-second day of November, A. D. 1887, between Ernest Weiss, dyestuffs dealer, of the city of Philadelphia, and Chas. W. Schmidt, liquor dealer, of the same place. Whereas, the said Chas. W. Schmidt has advanced and loaned to Ernest Weiss the sum of $6,000, for which he, the said Chas. W. Schmidt, is to accept a mortgage which is drawn in favor of Weiss Bros., Germany, given by James C. Biddle upon the Dark Run Mill, in the Twenty-Third ward of the city of Philadelphia, which is to be put upon record as soon as certain papers arrive from the said Weiss Bros.; and to secure the said Chas. W. Schmidt until such times that the said mortgage is recorded and assigned to him, the said Ernest Weiss agrees to give a judgment note for the aforesaid loan, which note is not to be recorded except in case the said Ernest Weiss should fail in business. Further, the said Ernest Weiss agrees to give to the said Chas. W. Schmidt fifteen per cent. of the net profits of the business for the term of one year, after first deducting the sum of $3,000, being the yearly salary of the said Ernest Weiss. Also the said Chas. W. Schmidt agrees to accept at the end of one year from the date hereof the said $6,000 for said mortgage, which is to be assigned to Ernest Weiss upon payment of the said net profits."

Sharp & Alleman, for appellants. Samuel Peltz, for appellees.

FELL, J. The agreement between the defendants made them partners at common law in this state. The case of Waugh v. Carver, 2 H. Bl. 235, decided in 1793, which followed Grace v. Smith, 2 Wm. Bl. 998, decided in 1775, was followed and adopted to its full extent in Purviance v. McClintee, 6 Serg. & R. 259, in 1820. The well-settled rule of Waugh v. Carver was overruled in England in 1860 by the case of Cox v. Hickman, 8 H. L. Cas. 268, but there has been no departure from it in this state, except by legislation in 1870. In the opinion in Edwards v. Tracy,

Digitized by Google

62 Pa. St. 374, decided in 1869, Sharswood, J., pointed out the new English rule of Cox v. Hickman, but followed the old one of Waugh v. Carver, saying: "It is entirely too late now to question either the rule or the exception. We are bound to stand super antiquas vias by our own decided cases." In the opinion in Lord v. Proctor, 7 Phila. 630, decided at nisi prius the same year, he said that the rule in Waugh v. Carver was too ancient a landmark in our law to be now disturbed, and that it has accordingly been followed in Edwards v. Tracy. Since the act of 1870 there has been no change in judicial decision. The question whether the agreement between the defendants made them partners as to third parties did not arise in Hart v. Kelley, 83 Pa. St. 286. The agreement had been rescinded, and the claim in suit was for goods sold before it went into effect, or after it had been abandoned. Caldwell v. Miller, 127 Pa. St. 442, 17 Atl. 983, reaffirms the rule, and both Walker v. Tupper, 152 Pa. St. 1, 25 Atl. 172, and In re Gibb's Estate, 157 Pa. St. 59, 27 Atl. 383, came within the well-recognized exceptions, almost as ancient as the rule itself, which were made to avoid the injustice of its universal enforcement. This rule has been so long established as a part of our jurisprudence that it is needless now to consider whether it is philosophical, and in harmony with the principles governing the partnership relation. The departure from it in this state—and it was doubtless the wiser course—has been by legislation. The act of April 6, 1870, provides that a loan of money to an individual or a firm upon an agreement to receive a share of the profits of the business as compensation for the use of the money and in lieu of interest shall not make the party loaning the money liable as a partner, except as to the money loaned, provided that the agreement for the loan shall be in writing, and that the party shall not hold himself out as a general partner. This legislation distinctly recognized the rule as it had existed in this state for 50 years, and in England from 1775 to 1860, and modified it to conform more nearly to the modern English rule of Cox v. Hickman, supra. The affidavit of defense contains a denial of the partnership, but it admits or leaves unnoticed all the allegations of fact in the statement. It is a denial, therefore, of a conclusion of law only, and raises the single question whether, under the facts as stated, the defendant Schmidt is liable as a partner. As he would have been liable before the act of 1870, it remains only to determine whether he comes within its protection. This cannot be, unless he has complied with its provisions. The exemption from liability is on condition that the agreement shall be in writing, and that the share of the profits shall be in lieu of interest. Only a part of the agreement in this case was in writing, the stipulation for interest on the loan being oral. The interest to be paid was 6 per cent., and the defendant was to receive in addition thereto 15 per cent. of the profits. The 15 per cent. was not to be paid in lieu of interest, but in addition to it. The 6 per cent. was not to be received as a part of the profits in lieu of interest, but was payable as interest in any event, whether there were profits or not. This agreement is not in compliance with the requirements of the statute, either in letter or spirit, and its effect is to impose a liability as a partner. The judgment is reversed, and the record is remitted, with direction that judgment shall be entered for the plaintiff, unless other just or equitable cause shall be shown.

MULHOLLAND v. WOOD et al.

(Supreme Court of Pennsylvania. March 4, 1895.)

MASTER AND SERVANT — TRAVELING SALESMAN — WHAT CONSTITUTES—PREFERENCES.

1. One who agrees with wholesale merchants to give his whole time to the sale of their goods, and is to receive as compensation house and road commission on all approved sales, and pay his own expenses, is a traveling salesman.

2. Act May 12, 1891, which provides that all moneys that may hereafter become due for labor and services of any clerk employed in stores or elsewhere, and all other tradesmen hired for wages or salary from any person or persons, shall be preferred, etc., does not apply to a traveling salesman whose compensation is a commission on sales made.

Appeal from court of common pleas, Philadelphia county.

Action by John W. Mulholland against Wood, Brown & Co., defendants, and Harry S. Grove, garnishee. There was a judgment against the garnishee, and he appeals. Reversed.

Crawford & Loughlin and John G. Johnson, for appellant. Kinley J. Tener, for appellee.

FELL, J. The proceedings in this case were designed to raise the single question whether certain creditors of Wood, Brown & Co. are entitled, under the provisions of the act of May 12, 1891, to a preference for the amounts due them for wages. The garnishee is the assignee of the defendants for the benefit of their creditors, but, as a decision of the question raised is desired by all parties in interest, no objection has been made to the manner in which the plaintiff attempted to enforce the right claimed. The contract on which the claim is based is in writing, as follows: "I, J. W. Mulholland, hereby engage with Mess. Wood, Brown & Co., of Phila., to sell goods, giving my entire time and attention to their interests, and being at all times subject to the rules and regulations of the house, on the following terms for the year 1893: House and road commission on all approved sales, I paying my own expenses. J. W. Mulholland." The part of the act to be considered provides: "All moneys that may be due or hereafter become

Digitized by Google

due for labor and services rendered by any miner or mechanic, servant girls at hotels, boarding houses, restaurants or in private families, or any other servant and helper in and about said houses of entertainment and private families; porter, hostler or any other person employed in and about livery stables and hotels; laundrymen or washerwomen, seamster or seamstress employed by merchant tailors or by any other person; milliner, dressmaker, clothier, shirtmaker, or clerk employed in stores or elsewhere; hand laborer, including farm laborer or any other kind of laborer; printer, apprentice, and all other tradesmen hired for wages or salary from any person or persons * * * shall be preferred," etc. Wood, Brown & Co. were wholesale dealers in dry goods. The plaintiff was to sell goods, paying his own expenses, and receiving house and road commissions. His compensation was entirely by commissions on approved sales, whether made upon the road or at the house, by him or by any one to customers whom he had secured. He was clearly a traveling salesman. It is claimed, however, that he is within the meaning of the act as a "clerk employed in a store or elsewhere." The act of May 12, 1891, is an amendment of the act of June 13, 1883, which was an amendment of the act of April 9, 1872. Each successive act enlarges the number of persons intended to be benefited. The first act included but 4 classes, the second 23, and the third 25. Each act includes clerks, and in the third all limitations as to the business of the employer and places of employment are removed as to them. In Sproul v. Murray, 156 Pa. St. 293, 27 Atl. 302, it was held that the act of 1883 should receive an enlarged or remedial construction in ascertaining whether certain persons specifically named were within its provisions. The act of 1872 limited the right of preference by naming the classes of employers whose property was subject to the right. The subsequent act enlarged the class of employés, but not that of employers. It was held that the latter class was enlarged by necessary implication to correspond with the former. This construction gave effect to the obvious intent of the legislature, and was necessary to make the act sensible. The question now before us is whether the right has been conferred, and that is to be determined by the language of the statute. The original meaning of the word "clerk" has become so enlarged that in modern usage it may include a salesman in a retail store. It cannot, however, be extended to include one whose business is to travel and secure customers, and whose compensation is by commissions on sales effected by or through him. Such a person is not an assistant in the store or business of his employer. He is not employed to keep accounts, or to assist in the store or elsewhere in the management of the business. At the time of the passage of the act traveling salesmen were a well-known and distinct class of employés. If it was the intention to extend to them the preference given by the act, it is to be presumed that they would have been included with the classes of persons named. The judgment is reversed.

GILTON v. HESTONVILLE, M. & F. P. RY. CO.

(Supreme Court of Pennsylvania. March 4, 1895.)

STREET RAILROADS—DEFECTIVE TRACK—CONSTRUCTIVE NOTICE—QUESTION FOR JURY.

While plaintiff was driving on defendant's track, the rim of his wagon wheel was caught by the end of a rail which had become worn and split, and he was thrown out. There was evidence that for two squares from the place of the accident the rails were worn, and many were insecurely fastened or entirely loose; that the rail causing the injury was so worn that it would not hold spikes, and that there was a split at the end an inch wide; that it appeared to have been in such condition for some time; that the defects were apparent to any one supervising the track; and that, after the accident, the rail was bent so that its end was two feet above the ground. *Held*, that it was a question for the jury whether defendant had notice of the defect.

Appeal from court of common pleas, Philadelphia county.

Action by Elwood S. Gilton against the Hestonville, Mantua & Fairmount Passenger Railway Company for personal injuries caused by defendant's negligence. From a judgment of nonsuit, plaintiff appeals. Reversed.

John G. Johnson, for appellant. Russell Duane and J. Bayard Henry, for appellee.

FELL, J. The plaintiff was injured by being thrown from his wagon while driving on the tracks of the Hestonville, Mantua & Fairmount Passenger Railway Company, the corporation defendant. The accident was caused by the rim of the wheel of his wagon being caught by the end of a rail which had become worn and split. A nonsuit was entered, upon the ground that it did not appear that the defendant had notice, actual or constructive, of the defective condition of the rail. It was shown by the testimony that the car tracks for two squares from the place of the accident were in a condition dangerous to persons driving on the street, because the rails were worn, and many of them insecurely fastened or entirely loose; that the rail which caused the injury was so worn that it would not hold the spikes by which it had been fastened down; and that at one end it was split, and the parts separated about an inch. The rail appeared to have been in this condition for some time, and the defects were apparent, and would have been observed by any one supervising the track. After the accident, this rail was

Digitized by Google

found bent so that its end was two feet above the surface of the street. It did not clearly appear whether the rail had been bent by the wheel of the plaintiff's wagon catching in the split end, or by a like preceding cause. Either conclusion might have been drawn by the jury, and it was unimportant which was reached. If the rail had become so worn that it was loose from the timbers to which it had been spiked, and its end so split that a wagon wheel would probably become wedged in it, the danger was as real, though not as manifest and imminent, as if its end was bent up. The proof was distinct that the rim of the wheel was caught in the end of the rail, and whether it was caught before or after the rail was bent went only to the degree of nonrepair of which the defendant should be held to have had notice. If the rail was worn and loose and split, it was an object of danger, whether bent or not, and its becoming bent would naturally follow as the result of its condition. The defect in the rail did not occur suddenly, or from an unusual or an accidental cause. It was the result of ordinary and long-continued use. It was apparent, and the danger from it probable. Without holding the defendant to a higher duty than to make repairs after notice, either actual or constructive, of defects, there seems to be enough in the evidence to have carried the case to the jury. The duty of the defendant to keep the tracks in repair was clear and imperative. It was bound to know that use and that climatic influences would produce defects in the rails, and it was bound to make such a continued inspection as would detect those which were apparent. The defects in the rail in question did not arise in a day, nor probably in a week or a month. The certainty that they would arise in time imposed the duty of continued vigilance. The judgment is reversed, and a procedendo awarded.

BALDWIN v. TAYLOR et al.

(Supreme Court of Pennsylvania. March 5, 1895.)

LICENSE—WHEN IRREVOCABLE—ESTOPPEL—SUFFICIENCY OF EVIDENCE.

1. B. and H., owners of adjoining lots, agreed to erect a three-story building on the lots, and make the upper story into one room, for lodge purposes. H. agreed orally that, if B. would deed him two feet extra of ground, he would put the stairway wholly in his building, for the use of tenants of the upper stories, and thus enable B. to accommodate the post office in his building. *Held*, that the license to B. to use such stairway was restricted, and not irrevocable.

2. After the upper stories had been occupied several years by such tenants, the opening in the wall on the second floor was built up, and a partition was put on the division line on the third floor. There was a door left in each partition, connecting with the stairway. *Held*, that H. was not estopped to refuse the use of such stairway to B.'s grantee.

3. On an issue as to an equitable estoppel arising in an action of trespass, the verdict of the jury is advisory only; and where the estoppel rests on plaintiff's testimony alone, and this is contradicted by defendant and three others, the judge may properly give a binding instruction for defendant.

Appeal from court of common pleas, Chester county; Hemphill, Judge.

Action by Semiramis D. Baldwin against B. Franklin Taylor and Joseph Bonsall to recover damages for trespass. From a judgment entered on a verdict directed by the court in favor of defendants, plaintiff appeals. Affirmed.

The opinion of the court of common pleas is as follows (Hemphill, J.):

"This is an action of trespass brought by the plaintiff against the defendants for closing up two doorways on the property of George D. Hayes, adjoining her own, by reason of which she was deprived of ingress and egress to and from the second and third stories of her building, over a stairway located within the building of the said Hayes, the right to the use and enjoyment of which, for herself and her tenants, she claims under an irrevocable license from the said Hayes to Robert L. Baldwin, her predecessor in title. The evidence of the plaintiff's right to the use of this stairway rests upon the testimony of the said Robert L. Baldwin, which, briefly stated, was as follows: In the spring of 1871 he (Baldwin) contracted with H. S. Worth for the purchase of a lot in the borough of Oxford, 48 feet in front, on Market street, and in depth 105 feet. Shortly thereafter, and before title had passed, he agreed to sell to George D. Hayes a portion (18 feet front) of this lot. The bargain was not then concluded, because Hayes said there were parties who would want to occupy rooms, if they would erect a building properly (the post office and secret societies), and that he would look it up. 'When he returned he proposed that we build one building together, alike in every particular,—building material, windows, style of architecture, and everything,—and that the societies would take the third story, if it was all in one room.' Baldwin replied that he could not accommodate them on his side without limiting his own space for business, unless they put in but one stairway, and on his (Hayes') side. Hayes then said that if Baldwin would deed him 20 feet he would put in the stairway for the use of the whole building; that it would be for the benefit of themselves and the tenants they would have in common, and in that way the post office could be accommodated on his (Baldwin's) side. This proposition was agreed to. They prepared their own plans, and the building was commenced the last of April or first of May, 1872, and finished in the fall of that year. Between the properties there was, in the basement, a communicating door; on the first floor, a solid parti

Digitized by Google

tion wall; in the second, a large opening, six or eight feet wide, in the partition wall; and the third was all in one room. The stairway was erected in the Hayes building, and was reached by entering a doorway in the center of that building, which opened into a storeroom, and by passing along the front of that storeroom to the foot of the stairway. Each paid for his own building, and they were in no sense joint owners. They were separated in the deeds from Worth, and by a party wall erected on the division line. The whole of the third floor was occupied by the secret societies until the spring of 1875, when they removed from the building, and the Oxford Press Company, which up to that time had occupied the whole of the second, moved up, and took possession of the third floor, just vacated by the societies. The opening between the buildings, on the second floor, was then built up with a solid wall, and a doorway cut in the partition wall at the head of the stairway. Theodore K. Stubbs, Esq., then leased the room on the Baldwin side from Mr. Baldwin, and the right to the use of the stairway from Mr. Hayes, and so continued to occupy the one and use the other until June, 1893. In 1881 or 1882 the Oxford Press Company vacated the third story on the Baldwin side, and a partition wall was erected on the division line, leaving, however, a doorway connecting with the stairway. Mr. Baldwin then leased his side to the Odd Fellows, and Mr. Hayes leased them the right to the use of the stairway. This leasing continued for about fifteen months, when the room was next leased to Douglass Brinton, who was connected with, and was a son of one of the owners of, the Oxford Press, and since his vacation it has been used for storage purposes by Mr. Baldwin. The leasing of the stairway from Hayes, by both Stubbs and the Odd Fellows, Baldwin knew of,—not when the leases were made, but some time thereafter. The opening in the basement was built up at the termination of Dr. Barton's tenancy, in 1873 or 1874; and the doorways in the second and third stories, by the defendants, in June, 1893. On behalf of the defendants, George D. Hayes deposed that he had never entered into any contract with the plaintiff, or any former owner of the land now held by her, to pass and repass over his premises, except that, in the latter part of the year 1881, R. L. Baldwin asked for the temporary use of the stairway for his mechanics to put up the partition in the third story, which was granted; that he built the stairway on his side of the party wall, entirely at his own expense; that Mr. Baldwin said to him that as he was to occupy the second, and the secret societies the third, stories of both buildings, there was no need for a stairway at that time in his building, and that he could use his first story to better advantage by not taking up the front with a stairway; and that he would put one up at any time, whenever needed for the use of the occupants of his building. Mr. Hayes further deposed that with the exception of himself, his employés, and the tenants they had in common, no other persons ever used the stairway for the purpose of occupying the rooms of plaintiff without first getting permission from him, by lease or otherwise. Theodore K. Stubbs, Esq., testified that he had a conversation with Mr. Baldwin when he first leased from him, which he could not now repeat, but that that conversation led him to make a lease with Mr. Hayes for the stairs; that, the last year he was there, Baldwin asked him to try and get the stairs, saying, 'I do not think I can get them, and I think you can.' John M. Moore testified that he was one of the trustees of the Odd Fellows who leased from Baldwin; that, at the time of the leasing, he told the trustees that he could not give them the right of the stairs to get to the room; that 'he had no control over them, and consequently could not rent them to us. He told us to go to George D. Hayes. We went and leased the stairs from him.' John Wiley, another trustee, testified in substance the same,—that 'Baldwin said either he would not rent the stairway from Hayes, or Hayes would not rent the stairway to him, and that we would have to go to Hayes for the steps.' Mr. Baldwin denied so much of the conversations between himself and the trustees and Mr. Stubbs as had reference to admissions by him that Hayes had control over the stairway, and that he had no right to use or lease the same. This is, in substance, the evidence upon which the court directed a verdict for the defendants, and in so doing, it is alleged, erred; and it is upon the ground of this alleged error that a new trial is now asked for.

"Was it, then, under the evidence, error to give binding instructions to find for the defendants? The plaintiff's right to damages is dependent upon whether the use of the stairway in the Hayes building is a right appurtenant to the messuage purchased by her, created by an irrevocable parol license given by Hayes to her predecessor in title. If no such license exists, no trespass was committed. 'License,' as a term of real-estate law, is defined to be 'an authority to do a particular act or series of acts upon another's land, without possessing any estate therein,' and is usually created by parol, though it may be inferred from circumstances in the relationship of the parties. It is distinguished from an easement, which must be created by grant or prescription, in the fact that the latter always implies an interest in the land upon which it is imposed. 'A dispensation or license,' says Chief Justice Vaughan in Thomas v. Sorrell, Vaughan, 351, 'properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it

Digitized by Google

had been unlawful.' Being, therefore, created by parol, it is ordinarily confined to the original parties; its terms must be strictly followed, and cannot be extended or varied; is generally revocable at the will of the licensor, and not assignable unless coupled with an interest; for to give it an effect which is denied to a contract in parol would virtually be to abrogate the statute of frauds. Yet an equitable estoppel may convert a license into what is, in effect, an easement, 'not upon the principle, however,' says Judge Duncan in Le Fevre v. Le Fevre, 4 Serg. & R. 241, 'that the right passes by the parol agreement, but that whenever one party has in part executed it, by payment of money, taking possession, and making valuable improvements, the conscience of the other is bound to carry it into execution, and equity will compel him to do it.' And 'here, where we have no court of chancery to resort to in order to compel such a thing to be done, it will be considered in our courts of law as actually done, and the grantee or promisee protected in the enjoyment of the thing promised, accordingly.' McKellip v. McIlhenny, 4 Watts, 322. And the principle of equitable estoppel is also recognized and enunciated by Judge Gibson in Rerick v. Kern, 14 Serg. & R. 271. 'Equity,' he says, 'will execute every agreement for the breach of which damages may be recovered, where an action for damages would be an inadequate remedy.' Referring to the cases cited, and others, Judge Strong, in Huff v. McCauley, 53 Pa. St. 206, adds: 'All these decisions rest upon the principle of estoppel. The parties cannot be placed in statu quo after the license has been executed, and work done or money expended on the faith of it, and hence such a case is regarded as presenting a sufficient reason for a chancellor's interference to restrain any action of the licensor which would deprive the licensee of the benefit of the expenditure he was encouraged to make by the very party who seeks to make it fruitless.' But where there has not been expenditure on the faith of a license, as in the present case, there is no foundation for an estoppel, and the same reason does not exist for holding it irrevocable. Even if there has been a consideration paid, there is nothing in the way of restoring the parties to their original condition. No case in this state has gone to the length of ruling that it is converted into a contract giving irrevocable interests in or out of lands by the mere fact that a consideration was to be paid or allowed for it. Such was not either of the cases that have been cited. In all of them, something has been done in reliance upon the license, and it was impossible to restore the licensees to the position they occupied before the license was given. Revocation, therefore, would have been a fraud. In the case under consideration, Mr. Baldwin, the only witness who testified as to the terms of the license, said: 'He [Hayes] wanted me to deed him twenty feet,—two feet in excess,—and he would put in the staircase for the use of the whole building, and by that means we would accommodate the post office on my side. He would put in the staircase on his side, and arrange the building for the benefit of ourselves and the tenants we would have in common together.' The agreement, therefore, seems to have been that in consideration of the two additional feet, and to accommodate the post office in Mr. Baldwin's building, Mr. Hayes agreed to put a stairway in on his side for the use of the building, and for the benefit of themselves and the tenants they expected to have in common.

"What, then, was the character and extent of this license? Was it limited or unlimited? 'For a right under a license, when not specially restricted, is commensurate with the thing of which the license is an accessory. But it is otherwise where the object to be accomplished is temporary.' Rerick v. Kern, supra. It was a license to Mr. Baldwin to use the stairway, and so far was nonassignable. It was also a license to the tenants they would have in common, to use them. At the time the tenants they expected to have in common were the secret societies and the Oxford Press Company, and they actually became their tenants, and used and enjoyed the stairway so long as they remained such; but, immediately upon their leaving, the second and third stories were, by mutual consent, divided by walls built on the line between the properties, doorways only being left as exits from the Baldwin side to the stairway. Viewed in the light of the circumstances existing when created, it was a restricted license,—restricted to the use of Mr. Baldwin and the tenants he would have in common with Mr. Hayes, and who had already engaged to occupy the second and third stories, and which, when vacated by them, were so altered as to indicate that tenants in common were not thereafter expected to use them, if it did not preclude such use, each owner seeming thereby to contemplate a sole use of his own property. Nor is there any ground upon which the plaintiff can invoke the principle of equitable estoppel, for the licensee has not expended money, done work, or made improvements on the faith of the license, but, on the contrary, has saved money by having the use of Mr. Hayes' stairway for many years, this relieving him from building one on his own premises, and further by having the full and free use of his whole first floor front, unincumbered with a stairway. In the case of Pierce v. Cleland, 133 Pa. St. 189, 19 Atl. 352, upon which the plaintiff seems to rely as controlling this case, the facts and circumstances were quite different. There the owners were tenants in common at the time they adopted the plan and let

Digitized by Google

the contract, and the building was built upon a common and single plan, and as a single structure. In our case the parties were not tenants in common. Each owned his own lot. They prepared their own plans for their mutual accommodation and that of the tenants they had already engaged and expected to have in common, but not, excepting so far as uniformity of exterior, as a single plan, and for the erection of a single structure.

"But even if the plaintiff was right in her contention that the license, as testified to by Mr. Baldwin, was an irrevocable one, and conferred a right appurtenant to her property in the use of the stairway, has it been established by sufficient evidence? The scintilla doctrine, though now obsolete in England, in our federal courts, and in most of the states, still exists, though in a mildly-modified form, in this state; and were this in substance, as it is in form, an action at law, it would have been our duty to have submitted the case to the jury, for the testimony of Mr. Baldwin amounted to more than a mere scintilla of evidence, and the supreme court, in Holland v. Kindregan, 155 Pa. St. 160, 25 Atl. 1077, say, 'If there is a conflict of evidence, it must go to the jury, unless the evidence on one side amounts to but a scintilla,' though, in the next sentence but one, it declares that, 'where the evidence is so weak that it would be the duty of the court to set aside the verdict of the jury, there is no propriety in submitting it.' This action, though in form trespass, is in substance a bill in equity to restrain the defendants from interfering with a license the plaintiff claims in and upon the property of George D. Hayes. Her claim is an equitable one, resting solely upon the ground of an equitable estoppel; and while, in this state, we administer equity through the legal forms, yet in its administration the courts are governed and guided by the rules and practice in equity. Said Judge Strong in Todd v. Campbell, 32 Pa. St. 252: 'The administration of both legal and equitable principles through the medium of legal forms, which has so long prevailed in this state, has given rise to some mistaken impressions. There are not a few cases in which, in a common-law proceeding, a plaintiff sets up a simple equity, and with equal frequency an equity is the sole defense. The principle, however, does not change because it is applied in a strange forum, and in a new form of proceeding. It has sometimes been thought that, when an equitable case is to be adjudicated in a tribunal composed of both a judge and a jury, the latter are to determine what the equities between the parties are. This is a mistake. The judge alone is the chancellor. It is in his discretion whether he will send an issue to a jury. And if he does their verdict is only advisory. It is not conclusive upon him. Whenever, therefore, upon the trial of an ejectment founded upon an equitable title, the court is of opinion that the facts proved do not make out a case in which the chancellor would decree a conveyance, it is their duty to give binding instructions to that effect to the jury. The responsibility belongs to the judge, and he may not throw it off upon those whose only duty is to aid him in ascertaining disputed facts.' And in Faust v. Haas, 73 Pa. St. 300, Judge Sharswood said: 'It is perfectly well settled that, in the administration of equity in the courts of this state through common-law forms, the judge sits as a chancellor, assisted by the jury, who are to determine the credibility of the witnesses, and the effect of conflicting testimony. But the conscience of the judge, as chancellor, must be satisfied of the sufficiency of evidence, if believed. If it be too vague, uncertain, or doubtful to establish the equity set up, it is his duty to withdraw it from the jury by a nonsuit, or a binding instruction in his charge, as the case may require.' And again, in Ballentine v. White, 77 Pa. St. 27, the same judge said, 'It is true that the character of the whole case, as presented, must be such as to satisfy the conscience of the chancellor that the equity is clearly, not doubtfully, established by the evidence of the witnesses, if believed.' Now, as the equity here sought to be enforced is in derogation of the statute of frauds, the parol proof must be full, complete, satisfactory, and indubitable, in order to satisfy the chancellor. For a chancellor to doubt is to deny. 'If a chancellor were to act on doubtful parol proof, or strained and fanciful inferences, or vague surmises, he would annul the wholesome provisions of the statute, in search of a visionary equity, and introduce into the community the very evils which the legislature intended to remedy.' Lord's Appeal, 105 Pa. St. 460. In the present case the evidence to sustain the plaintiff's equitable estoppel rests upon the testimony of R. L. Baldwin alone, and is denied by George D. Hayes; and the chancery rule that where the equity is supported by the testimony of but one witness, and is denied by that of another, the denial must prevail, would, of itself, have justified the binding instructions, because of the insufficiency of the plaintiff's evidence. But the defendants, though the burden was not upon them, did not rest wholly upon the testimony of Hayes, but called, as we have seen, three other witnesses, who testified to declarations and admissions by Baldwin, inconsistent with the plaintiff's claim of an irrevocable license. Under the rules of equity, the testimony was insufficient to make out the plaintiff's case, or to justify a finding in favor of the alleged irrevocable license. Being, therefore, of opinion that the license was not irrevocable, but restricted and temporary, and that the plaintiff's evidence was insufficient to es-

Digitized by Google

tablish an equitable estoppel, we think we did right in giving the jury binding instructions to find for the defendants, and must therefore refuse a new trial, and discharge the rule."

J. Frank E. Hause and Thomas W. Baldwin, for appellant. Wm. T. Fulton and E. D. Bingham, for appellees.

PER CURIAM. Neither of the assignments of error is sustained. In his opinion discharging the rule for new trial, the learned judge of the common pleas has fully and satisfactorily vindicated the correctness of his rulings. On that opinion we affirm the judgment. Judgment affirmed.

In re INCORPORATION OF BOROUGH OF PROSPECT PARK.

Appeal of OESTERLE et al.

(Supreme Court of Pennsylvania. March 5, 1895.)

MUNICIPAL CORPORATIONS—WHEN INCORPORATION REFUSED.

The fact that creating certain territory into a borough may not be immediately advantageous to a few property owners is insufficient ground for denying incorporation where the advantages as to the entire community will greatly exceed the disadvantages.

Appeal from court of quarter sessions, Delaware county.

Petition for the incorporation of the borough of Prospect Park. From a judgment dismissing their exceptions to the report of master, and including their lots within the boundaries of such borough, Charles F. Oesterle and others appeal. Affirmed.

George E. Darlington and Anthony A. Hirst, for appellants. V. Gilpin Robinson, for appellee.

PER CURIAM. Neither of the specifications of error involves any jurisdictional or other strictly legal question, nor does the record disclose any error or irregularity in the proceedings that would justify a reversal of the decree. The allegations of fact upon which appellants rely are not sustained. The expediency of granting the prayer of the petitioners, and erecting the territory in question into a borough, was first duly determined and certified by the grand jury; and the correctness of their conclusion is fully vindicated by the facts afterwards found by the learned master. In view of the facts thus established, the decree complained of was fully warranted.

There is nothing in either of the specifications of error that appears to require special notice. As was well said in Millville Borough, 10 Pa. Co. Ct. R. 321, the question of necessity or expediency of incorporating a village and adjacent territory into a borough does not depend so much upon the will of a majority of the freeholders residing outside the limits of the proposed borough, or upon the unanimous consent of those residing within the proposed lines, as it does upon the fact that the advantages to the whole people, as a community, will overbalance the disadvantages. While it may be true in this case that inclusion within the borough limits may not be immediately advantageous to a few, we think the established facts warrant the conclusion that, as to the entire community, the advantages of incorporation will greatly exceed the disadvantages.

Decree affirmed, and appeal dismissed, with costs to be paid by appellants.

In re REES' ESTATE.

Appeal of TENNENT.

(Supreme Court of Pennsylvania. March 5, 1895.)

DESCENT AND DISTRIBUTION—ILLEGITIMATE CHILD.

Under Act April 8, 1833, § 17, providing that the provisions of the act relative to decedents and distribution of estates among descendants and collateral relations of intestates shall be construed to mean such persons only as have been born in lawful wedlock, the illegitimate child of a decedent's sister cannot inherit from such uncle.

Appeal from orphans' court, Chester county.

Final audit and distribution of the estate of Lewis Rees, deceased. From a judgment dismissing exceptions to and confirming the auditor's report, and ordering distribution in accordance therewith, William Tennent appeals. Affirmed.

The opinion of the trial court is as follows (Hemphill, J.): "The fourteen exceptions filed to the auditor's report raise two questions: (1) Has the auditor erred in finding that William Tennent, Jr., was the illegitimate son of William Tennent, Sr.? (2) If illegitimate, has he erred in holding that the acts of assembly do not confer upon him the right to inherit from his uncle by representation through his mother? William Tennent, Jr., a claimant to a share in this estate, is the son of William Tennent, Sr., and Alice, a sister of the decedent, whose death occurred previous to that of her brother. The auditor finds that he was an illegitimate son, and a careful examination of his report, and of the testimony taken by him, satisfies us that he was correct in so finding. Being, therefore, an illegitimate, he could not inherit at common law, and is expressly denied the benefits of our intestate act of April 8, 1833, the seventeenth section of which provides that 'the provisions of this act relative to decedents and distribution of real and personal estate, among the descendants and collateral relations of intestates, shall be construed to mean such persons only as have been born in law-

Digitized by Google

ful wedlock.' The exceptions are therefore dismissed, the report confirmed, and an order made to pay out in accordance with the auditor's schedule of distribution."

James C. Sellers, for appellant. J. Frank E. Hause, for appellees.

PER CURIAM. We find no error in this record. Appellant's claim depended on a question of fact, which appears to have been rightly determined in favor of the appellees. All that is necessary to be said on the subject will be found in the opinion of the court below. For reasons therein stated, the decree should not be disturbed. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO. v. BYRNES et al.

(Supreme Court of Pennsylvania. March 5, 1895.)

MORTGAGE—FORECLOSURE SALE — INADEQUACY OF PRICE.

A foreclosure sale will not be set aside for inadequacy of price where the purchasers at several prior sales had failed to comply with their bids, and one prior sale was set aside on exceptions by the owner of the property, in the absence of any available assurance that a higher price would be realized at a resale.

Appeal from court of common pleas, Delaware county.

Actions by the Fidelity Insurance, Trust & Safe-Deposit Company against John P. Byrnes and the Folsom Land Company to foreclose certain mortgages, in which there were judgments and decrees for plaintiff, and a sale of the mortgaged premises. From a judgment refusing to set aside the sale, the Folsom Land Company appeals. Affirmed.

It appeared that there had been four prior sales; that at the first sale the hand money paid was $500, and the property brought $100,500, but the purchaser failed to comply with the sale; that at the second sale the hand money was $1,500, and the property was sold for $90,500, but the purchaser also failed to complete the sale; that at the third sale the hand money was $2,000, and the property sold for $73,200, but the purchasers again failed to consummate the sale; and that at the fourth sale the hand money was $5,000, and the property was sold for $75,000. Afterwards, on exceptions filed by the Folsom Land Company, the sale was set aside, on the ground of inadequacy of price. At the last and final sale the property was sold to plaintiff for $20,000, and the court refused to set aside the sale because of inadequacy of price, on condition that plaintiff released defendant and the Folsom Land Company from personal liability for the balance of the debt. The amount of the judgment on one of the mortgages was $47,362.63; on the other, $22,714.90; and the total debt, insurance, cost, and taxes, at the time of the sale, exceeded $78,000.

Isaac Johnson and W. Henry Sutton, for appellant. Lewis Lawrence Smith, for appellee.

PER CURIAM. We are not convinced that either of the exceptions to the sheriff's sale should have been sustained. On the contrary, we think their dismissal, in the circumstances, was a proper exercise of judicial discretion. In the absence of any available assurance that a higher and better price would be realized by the proposed resale of the property, there was nothing to justify the court in setting aside the sale, and thus subjecting the plaintiff to further delay and expense in the collection of its claim. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

MARLOR v. PHILADELPHIA, W. & B. R. CO.

(Supreme Court of Pennsylvania. March 5, 1895.)

RAILROADS—WIDENING ROADS—LANDS OCCUPIED BY DWELLING.

Act 1869 (P. L. 12) giving to any railroad the right, when public necessity requires it, to widen its road, and to take as much adjoining land as is necessary, damages to be ascertained and paid as provided by Gen. Railroad Law 1849 (P. L. 83) § 10, supplements all railroad charters granted by special acts before the act of 1849, and authorizes them to take land occupied by a dwelling house.

Appeal from court of common pleas, Delaware county.

Suit by William Marlor to enjoin the Philadelphia, Wilmington & Baltimore Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

The opinion of the lower court was as follows (Clayton, J.):

"The bill alleges that the defendant, in proceedings to widen its road, is about to condemn the land upon which his dwelling house stands. The plaintiff claims that his dwelling is exempt from condemnation for railroad purposes, under the tenth section of the act of 1849 (P. L. 83). This act is known as the 'General Railroad Act,' and applies to all railroads chartered under it since its passage. The answer admits the proposed condemnation, but claims the right under the defendant's charter, by special act of assembly of April 2, 1831 (P. L. 353), and its supplement of March 14, 1836 (P. L. 86), to take a dwelling house, if necessary, after securing to the plaintiff full compensation. The company defendant further sets up the act of 1869 (P. L. 12), as extending its chartered privilege to the same right it had under its original charter, whenever it became necessary, for public convenience, to widen its road. The issue is therefore narrowed down

Digitized by Google

to the following question: Is the act of 1869 to be read as a supplement to all the railroad charters of the state, and to be construed as applying to each charter? or is it to be read as only a supplement to the act of 1849 (the general railroad law)? It will be observed that the act itself contains no repealing clause, nor does it call itself a supplement to a former law. It gives, in general terms, the absolute right to any railroad, whenever public necessity shall require it, to widen any such road, and to take, in addition to its original location, as much adjoining land as may be necessary. It does not restrict the companies from taking lands occupied by dwelling houses. All it provides for is that adequate security shall be first given. The only reference to the act of 1849 is that the damages shall be ascertained and paid in the manner provided by the eleventh section of the act of 1849. We are of opinion that the act of 1869 is to be read as a supplement to all charters granted by special laws before the general act of 1849. We decline to pass upon the question whether, as to charters under the act of 1849, it gives any additional powers. We can see some good reasons why the act of 1869 should be construed as an independent law, giving to all railroads the power, in widening their roads, to take, if necessary, the land of a dwelling house. When originally opened, the company could easily avoid dwelling houses, but when a road of a single track was opened some 60 years ago, making two trips in 24 hours through a sparsely-populated country, and by the outer suburbs of villages which have since become large cities, it is not difficult to understand why the legislature saw proper, in its wisdom, to grant the right to take the land of a dwelling house, which has been erected, perhaps, since the location of the road. As the strength of a chain is its weakest link, so the capacity of a highway is its narrowest part. What advantage will the public receive by widening this road from Philadelphia to Chester, and from Chester to Baltimore, if it must be confined to a single track in Chester? It is quite possible that for this and other reasons the legislature intended the act of 1869 as an independent law, granting the commonwealth's right of eminent domain to all railroads, however chartered, where public necessity requires a widening of the roadbed. We, however, do not deem it necessary to pass upon this part of the case. In the case of Stahl v. Pennsylvania Co., 155 Pa. St. 309, 26 Atl. 437, the supreme court barely touch the issue presented in this case. Using the language quoted by the lower court in that case, we do not think this is a proper case for an injunction, but a clear case for damages. The plaintiff cannot be condemned for defending his dwelling house, however humble, and, when we consider the great advantage to the defendant of having this important question settled, we think it a proper case for a division of the costs. Let the exceptions be dismissed, and report of the master be confirmed, costs to be divided."

W. B. Broomall, for appellant. W. Ward, for appellee.

PER CURIAM. The question involved in this case has been carefully considered and rightly decided by the learned president of the common pleas. All that is necessary to be said on the subject will be found in his clear and concise opinion sent up with the record. On that opinion we affirm the judgment. Judgment affirmed.

In re PAIST, Clerk of Council, et al.
Appeal of SIMON.

(Supreme Court of Pennsylvania. March 5, 1895.)

CITY COUNCIL — INVESTIGATION BY COMMITTEE—WITNESS—REFUSAL TO ANSWER—ORDER BY COURT—TIME TO ANSWER.

Where, on an investigation by a committee of the city council, a witness refuses to answer a question, and, pursuant to the provision of Act June 1, 1885, art. 15, for referring to the court questions involving the rights and duties of witnesses, the court is petitioned for an order commanding him to testify, it is error for it to refuse to give him time to answer the petition and prepare his defense, he being notified of the rule to show cause only an hour before it is returnable.

Appeal from court of common pleas, Philadelphia county.

Petition of Joseph H. Paist, clerk of select council, and George W. Kochersperger, clerk of common council, of Philadelphia, for an order on Frederick C. Simon to compel him to testify. From an order in accordance with the petition, Simon appeals. Reversed.

John G. Johnson, for appellant. James Alcorn, Asst. City Sol., and Charles F. Warwick, City Sol., for appellees.

STERRETT, C. J. It appears that in January last, by joint resolution of councils, a special committee of those bodies was raised "to investigate accusations against members of councils of the city of Philadelphia in reference to the passage of the ordinance approved July 2, 1894, granting privileges to the Mutual Automatic Telephone Company." After reciting certain newspaper charges, to the effect "that a large amount of stock of said company was used in securing the passage of" said ordinance, etc., and that "it is due to the members of councils, as well as to the public, that there should be a full, searching, and impartial investigation of these charges," the resolution provides for the appointment of "a joint, special committee of five members from each chamber * * * to investigate the aforesaid accusations, with full power and authority to send for persons papers, books, and documents, in the hands and possession whomsoever the

Digitized by Google

same may be, and the production and examination thereof before the committee." It also provides that "the committee, in the discharge of their duties, shall exercise all the powers conferred by the" acts of May 17, 1883, and June 1, 1885. In these enactments the legislature appears to have recognized the necessity for full, thorough, and complete investigation in certain cases that might thereafter arise, and to that end ample provision was made for necessary process, and its proper enforcement. The authority to create such committee and invest it with the powers conferred by said acts cannot be doubted. In a similar case, which came into this court on appeal from common pleas No. 1 of Philadelphia, we said the investigation then in progress under the provisions of same acts was lawful, and that the witness who had been regularly subpoenaed by the committee was bound to obey the process, etc. Eckstein's Petition, 148 Pa. St. 509, 24 Atl. 63; Yard's Appeal, Id. In the case before us it is alleged by the appellees that on February 11th last appellant appeared before the joint committee, and testified to certain matters in relation to which he was interrogated, but refused to say for whom he acted in purchasing certain stock from the personal representative of Hugh Piggott, deceased; whereupon it was resolved by the committee that the refusal of the witness to testify as to that fact should be certified to the court for its action in the premises. That was accordingly done in the form of a petition by the clerks of select and common councils purporting to set forth said proceedings before the joint committee, and praying that an order be issued commanding appellant "to testify before said committee as to whom he represented in the purchase of the stock of Hugh Piggott, deceased, and all other matters necessary and pertinent in reference to said stock and the purchase thereof, in accordance with the fifteenth article of the act of June 1, 1885." Upon presentation of the petition, February 13, 1895, the court granted a rule on appellant to appear and answer why he should not answer the questions propounded by said committee, returnable at 1 o'clock p. m., same day. At 12 o'clock noon of same day, notice of the rule was given to appellant, who was barely able, within the hour that intervened, to retain counsel in time to appear in court at 1 o'clock. The court was then fully informed of the facts by appellant's counsel, who, among other things, stated that the petition upon which the rule to show cause was issued had just been handed to him; that it would be impossible for him to be ready with an answer to this long petition at the hour named; and that he would therefore ask the court to give him until to-morrow to prepare an answer, etc. In reply to the following questions, put by the court: "What is the nature of the answer? Is it a denial?"—appellant's counsel replied: "I cannot tell. I do not know, as I have not had time to consider. Until I read it over, I cannot tell whether I will put in additional matters, or demur to it, or deny it. I am not ready to file an answer at one o'clock in a matter handed to me at twelve o'clock." Other appeals on behalf of defendant, for barely sufficient time and opportunity to examine the petition and prepare an answer, etc., together with the negative replies of the court thereto, are shown by the stenographer's notes of what occurred at the time, but, inasmuch as they disclose nothing that tends to justify the action of the court in the premises, further reference to them is unnecessary. The entirely reasonable, and, in the circumstances, legal, demand of appellant and his counsel was denied, and thereupon the court handed down its opinion, together with the order complained of.

The reason for referring to the court, for its consideration and determination, questions involving the rights and duties of witnesses and others, as provided for in the fifteenth article of the act of June 1, 1885, doubtless was that they are strictly judicial questions of such importance, and sometimes fraught with such serious consequences, that they could not be safely submitted to the determination of any investigating committee. While it is in every way desirable and necessary that such questions should be heard and decided as speedily as is consistent with the rights of the parties concerned, it was never intended that they should be so speeded as to deprive the respondent of both time and opportunity of answering the petition or otherwise presenting his defense, as was done in this case. Appellant's rights in that regard were wholly ignored. It was manifestly impossible for him or his counsel to prepare an answer to the petition, and present his defense, if any he had, within the one hour that intervened between service of the rule to show cause and the time fixed for hearing. In Yard's Appeal, supra, opportunity was given for filing an answer, and the case was heard and disposed of in a regular and orderly way. The merits of the present case are not before us, for the obvious reason that the proceeding was practically ex parte, and therefore illegal. The decree is reversed, with costs to be paid by the appellees, and it is ordered that the record be remitted to the court below, with instructions to proceed and determine the case according to law.

WILLIAMS, J. (dissenting). This appeal should be quashed for two unanswerable reasons: First, no appeal is given by the statute under which the proceeding was conducted. If it be conceded that a common-law certiorari might properly issue, yet it would bring up nothing but the record, and the record proper discloses no irregularity. But, second, if an appeal was given, no final order has yet been made from which an appeal will lie. The order complained of is in these words: "It is therefore ordered that he an-

Digitized by Google

swer the questions, unless there be other sufficient reasons for not answering." This was not a final order. It left an open door before the defendant. It afforded him opportunity to be further heard before an attachment could be awarded or a commitment directed. No appeal lies from such an interlocutory order. A simple statement of the situation shows our duty so plainly that no amount of argument could make it clearer. The appeal should be quashed, and the defendant remitted to the forum he has so hastily fled, for his own final answer, and a final order of the court.

McCOLLUM, J. I concur in the foregoing dissent.

In re HAMBLETON'S ESTATE.

Appeal of LAMBORN.

(Supreme Court of Pennsylvania. March 5, 1895.)

ADMINISTRATOR—AUDIT OF ACCOUNT—ALLOWANCE OF CLAIM—WHEN DISTURBED.

A judgment confirming an auditor's report in allowing a claim against an estate by decedent's daughter-in-law, for board and funeral expenses, will be affirmed, where there was a contract that decedent was to pay therefor, and claimant's husband testified to the several items constituting the account.

Appeal from orphans' court, Chester county.

Final audit and distribution of the estate of John Hambleton, deceased. From a judgment dismissing exceptions to the auditor's report, and ordering distribution in accordance with such report, Annie C. Lamborn, residuary legatee, appeals. Affirmed.

Report of the auditor is as follows:

"The undersigned auditor, appointed by the order hereto annexed to make distribution of the balance remaining in the hands of John Coates, executor, etc., of the estate of John Hambleton, late of the township of Upper Oxford, deceased, to and among the parties entitled thereto, respectfully reports that, having given due public notice of the time and place of meeting by the insertion of an advertisement in the Chester County Democrat and the Daily Local News and the Legal Intelligencer Supplement (a copy of which advertisement is hereto annexed), three newspapers printed and published at West Chester, Pa., for three successive weeks, he sat for the purpose of his appointment at his office in the borough of West Chester, Pa., on Wednesday, the 12th day of July, 1893, and by adjournment on Thursday, July 20, 1893, when and where he was attended by the accountant, John Coates, and his counsel, William S. Harris, Esq., and Robert E. Monaghan, Esq., of counsel for William F. Dale and Samuel D. Ramsey, the administrators of Jacob Fox, deceased, and by said administrators, and by Samuel D. Ramsey, Esq., the administrator of Ann Fox, deceased, and by Samuel D. Ramsey, Esq., of counsel for D. Frances Hambleton, and by Theodore Hambleton. John Hambleton, the testator, died September 5, 1892, and on the 22d day of same month letters testamentary were granted to John Coates, the executor of testator's last will. By the provisions of the fourth item in said will Annie C. Lamborn was named as the residuary legatee, subject to life estate of Emmor Hambleton and Chalkley Coates. Two claims were presented before the auditor: (1) The claim of D. Frances Hambleton, a daughter-in-law of the decedent, for boarding and washing for the decedent, a period of twenty-four weeks immediately preceding his death, and for expenses about the funeral, making in all a claim of $44.36, and a claim of $84 for boarding and washing, and the total of both items is $128.36. There was clear and satisfactory evidence of a contract between the decedent and his daughter-in-law that he was to pay her $3 per week for his boarding, and 50 cents per week for his washing, and from such evidence the auditor finds that there was such a contract, and her claim, which amounts to $84, is therefore allowed. Theodore Hambleton testified to the several items of charge for services rendered, material furnished, and meals served, and horses fed at the time of the funeral; and, as the charges seem to be fair and reasonable, the auditor allows that portion of the said claim. (2) The claim of the estate of Jacob Fox and Ann Fox, deceased, to one year's interest upon a certain bond for $3,000, given by the decedent to secure the payment of that sum in one year from April, 1888. Upon this bond interest has been paid at the rate of five and one-half per cent. per annum, and the basis of this claim rests upon the receipt which is upon the bond in the handwriting of Jacob Fox, and was made in the spring of 1890, and mentions the payment as being in full to April, 1891. It would seem as if at that time one year's interest in arrears and one year's interest in advance had been paid, making in all the sum of $330. If such a payment was then made, the estate of the said decedents has no standing here upon this fund. It is claimed, however, that this receipt is a mistake; that the payment actually then made to Jacob Fox was $165; and in support of this view of the case the testimony of John Coates (the accountant) is important. He says that after the death of Jacob Fox he went to see Ann Fox, who was the holder of said $3,000 bond, for the purpose of paying the interest on behalf of John Hambleton; that the bond was produced, and the mistake in the receipt thereon noticed and commented upon; and that, pursuant to his suggestion, the receipt then indorsed upon the bond for the payment then made by the witness was made to conform with the fact of the case, as they then understood it, viz.: That the payment of April, 1890, was of one year's interest. The bank

Digitized by Google

book of the decedent was produced before the auditor, and an examination of its entries showed that in the spring of 1890 a check to Fox as payee for $150 was charged, and the evidence both of John Coates and of Theodore Hambleton showed that it was customary for the decedent to use a check in making such payments. The accountant does not remember that he communicated to John Hambleton his talk with Mrs. Fox. From all these facts and circumstances the auditor finds that the receipt written upon said bond was an error as to the date to which interest was then paid, and that there is still due, upon said $3,000 bond, $165 interest, and that, of this interest money so due as aforesaid, $96.25 belongs to the estate of Ann Fox, deceased, and $68.75 belongs to the estate of Jacob Fox, deceased, and he makes distribution accordingly.

"Schedule of Distribution.

Amount as per order.....		$1,108 06
Auditor's fee.....	$ 35 00	
Clerk's fee.....	8 60	
Advertising	5 00	48 60
Net balance for distribution		$1,059 46
There is awarded to D. Frances Hambleton for boarding, washing, and funeral expenses.....	128 36	
To William F. Dale and S. D. Ramsey, administrators of Jacob Fox, deceased	68 75	
To S. D. Ramsey, administrator of Ann Fox, deceased	96 25	
To John Coates, executor, in trust as per third item in will.....	766 10	
	$1,059 46	

"July 26, 1893. All of which is respectfully submitted."

"August 14, 1893. The auditor has considered the exceptions filed by W. S. Harris, Esq. Whatever may be the theories which it may please us to indulge, it is the condition of the facts which confronts the auditor, and upon such condition as shown by the testimony he finds the fact of a contract, and the fact that the receipt upon the Fox bond is an error, and as a further fact that the year's interest here claimed remains due and unpaid and belongs to said claimants. No evidence to shake such findings has been produced, and the auditor sees no reason to change his report."

The exceptions to the report of the auditor are as follows:

"(1) The auditor erred in awarding to D. Frances Hambleton for boarding, washing, and funeral expenses the sum of $128.36. (2) The auditor erred in awarding to William F. Dale and S. D. Ramsey, administrators of Jacob Fox, deceased, the sum of $68.75. (3) The auditor erred in awarding to S. D. Ramsey, administrator of Ann Fox, deceased, the sum of $96.25. (4) The auditor erred in deciding that there was $165 yet due on a bond of $3,000 held by the estate of Jacob Fox, deceased, against the decedent. (5) The auditor erred in not deciding that the claim of D. Frances Hambleton had been paid."

Opinion of the trial court is as follows (Hemphill, J.):

"The exceptions are to the auditor's findings of facts. In these we think him right, or, at least, cannot say that he is clearly wrong. Objection was made to a part of the testimony of Theodore P. Hambleton on the ground of interest, the other party being dead. He was called by Mr. Ramsey to testify to matters occurring since the death of his father, but Mr. Harris upon cross-examination examined relative to matters prior to decedent's death, thus making him a competent witness for all purposes, and the evidence subsequently adduced was, in our opinion, properly admitted. The exceptions are dismissed, the report confirmed, and an order made to pay out in accordance with the schedule of distribution made by the auditor."

Assignments of error are as follows:

"(1) The court erred in confirming that portion of the auditor's report in which it is decided that the estate of said decedent is not entitled to a credit of $100, as against the claim of D. Frances Hambleton, amounting to $128.36, and in ordering the whole of said claim to be paid to her. (2) The court erred in dismissing the first exception to the auditor's report, which is as follows: 'The auditor erred in awarding to D. Frances Hambleton for boarding, washing, and funeral expenses the sum of $128.36.' (3) The court erred in confirming that portion of the auditor's report in which it is decided that the receipt on the back of the $3,000 bond, dated May 9, 1890, and being in full for interest to April 1, 1891, was a mistake, and in ordering the payment of one year's interest from April 1, 1890, to April 1, 1891, to the holders of said bond in accordance with said report. (4) The court erred in dismissing the second exception to the auditor's report, which is as follows: 'The auditor erred in awarding to William F. Dale and S. D. Ramsey, administrators of Jacob Fox, deceased, the sum of $68.75.' (5) The court erred in dismissing the third exception to the auditor's report, which is as follows: 'The auditor erred in awarding to S. D. Ramsey, administrator of Ann Fox, deceased, the sum of $96.25.' (6) The court erred in dismissing the fourth exception to the auditor's report, which is as follows: 'The auditor erred in deciding that there was $165 yet due on a bond of $3,000 held by the estate of Jacob Fox, deceased, against the decedent.'"

W. S. Harris, for appellant. Monaghan & Holding and S. D. Ramsey, for appellees.

PER CURIAM. There was no error in dismissing appellant's exceptions, or in confirming the auditor's report, and distributing the

Digitized by Google

fund in accordance therewith; nor is there anything in either of the specifications of error relating to these subjects that requires special notice. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

HAUGHT et al. v. IRWIN et al.

(Supreme Court of Pennsylvania. March 11, 1895.)

PRELIMINARY INJUNCTION—TEMPORARY RECEIVER—ACCESS TO BOOKS—CONTEMPT—SUPERSEDEAS BY APPEAL.

1. Under Act Feb. 14, 1866 (P. L. 28), providing that an appeal from an interlocutory order granting a preliminary injunction shall not be a supersedeas, an appeal from an order appointing a temporary receiver, which is an adjunct to and part of the preliminary injunction, does not authorize defendant to refuse to deliver his books to the receiver, on the demand of the latter, pursuant to the order appointing him.

2. Where a court has jurisdiction of the subject-matter, a party must obey its order, though the jurisdiction, as may be shown by appeal, is wrongfully exercised.

3. Where an appeal does not operate as a supersedeas, the proper remedy against any threatened injury pending appeal is an application to the appellate court for a special order of supersedeas.

4. On appeal from an order attaching defendant for contempt in disobeying an order granting a preliminary injunction and appointing a temporary receiver, the only inquiry as to the jurisdiction of the lower court is whether prima facie it had jurisdiction of the subject-matter.

5. Where books ordered to be given to a receiver in a suit contain matters not relevant to the issues of the case, disclosure of which might injure interests not involved in the suit, they should be protected in the orders of the court.

Appeal from court of common pleas, Allegheny county.

Suit by J. M. Haught and others against George M. Irwin and others for an accounting. From orders granting an injunction against Irwin, and appointing a receiver, and attaching him for contempt, he appeals. Affirmed.

J. S. & E. G. Ferguson, Knox & Reed, John S. Robb, Sr., D. F. Patterson, and Thos. M. Marshall, Sr., for appellant. D. B. Maxwell and M. A. Woodward, for appellees.

MITCHELL, J. The order appointing a temporary receiver was an adjunct to the preliminary injunction, and legally a part of it. Schlecht's Appeal, 60 Pa. St. 172. Both were interlocutory, and the right of appeal therefrom depended on the act of February 14, 1866 (P. L. 28), which expressly provides that it shall not be a supersedeas. The receiver having made a demand for the appellant's books, pursuant to the order of court, appellant refused to deliver them, and, having taken an appeal, resisted obedience to the order on the ground that the court was without jurisdiction to make or enforce it. Such claim cannot be maintained. It is true that where a court is absolutely without jurisdiction of the subject-matter, as if this bill had been filed in the orphans' court or the oyer and terminer, its orders and decrees are nullities, and are not binding on anybody. But where the court has jurisdiction of the subject-matter it is not for any litigant party to say that it is wrongly exercised, and that he will not obey. It is his duty to obey, even though his contention may ultimately be successful. His proper remedy for any threatened injury pending the appeal is to apply to this court for a special order of supersedeas.

It is argued with great earnestness that the bill sets out no case for jurisdiction in equity because, first, it is founded on wagering contracts, and, secondly, because the parties complainant have no joint interest, and have their several remedies at law. The discussion of these points is premature. All that is before us now is the prima facie jurisdiction of the court over the subject-matter, and of that there can be no doubt. Appellant received the money of the complainants for investment in specified ways, and with a duty to account. The bill charged that the money had not been so applied, and that the defendant had stopped payment and absconded. On this the complainants were clearly entitled to discovery and account, and the jurisdiction of the court attached for such purposes. It may be that, the money having been applied in accordance with the contract of deposit, the defendant is not further liable, or it may be that the use contemplated was in wagering contracts, which are illegal, and will not support an action even by ignorant and misguided participants. These questions, if in the case at all, will arise on the final hearing. We express no opinion upon them now. So, in regard to the joinder of numerous complainants having several interests, it is sufficient at present to say that the money of all these parties was to be used together by their common agent and trustee. Whose money was in fact so used, what profits or losses, if any, were made, and in what proportions due to the different parties, were questions requiring a joint investigation, and for which separate actions at law afforded no adequate remedy. But, as already said, these matters are presented prematurely. They will be discussed and decided when they come properly before us. They are touched upon now only to show that the court, in entertaining the bill and making its orders thereon, was not so outside of its jurisdiction as to justify the appellant in treating its commands as nullities, and refusing to obey them. The terms of the injunction and appointment of the receiver on preliminary hearing were somewhat severe and drastic, but the defendant appeared to the learned court as an absconder, and the need of such action urgent. We cannot say that its discretion was not properly exercised. The duty of the receiver is primarily to collect and hold the assets to await the final determination of the case. In so doing, it is proper, and perhaps necessary, that he should have access to the

Digitized by Google

books. But the books presumably contain other matters that are not relevant to the issues of the case. Disclosure of these might indirectly do serious injury to many interests not involved in the present contest, and not in fault in any way concerning it. Such interests are entitled to protection from unnecessary scrutiny, and especially from that impertinent intermeddling with people's private affairs which the public press so often seeks to excuse under the name of enterprise. The books are at present in the hands of a depositary, under the order of this court attached to the allocatur of the appeal, and they are now turned over to the custody of the court below for the purposes of this case. Both parties will be entitled to access to them under such regulations as the court shall prescribe. The opinion of the learned judge below indicates his care for the rights of the persons interested, and his view that no list of depositors should be published, and that the examination of the books should be strictly confined to the legitimate needs of the case. It would be well, for the sake of caution, that such restrictions should be formally incorporated in the orders made permitting access. Order affirmed.

BRADLEY et al. v. IRWIN et al.

(Supreme Court of Pennsylvania. March 11, 1895.)

Appeal from court of common pleas, Allegheny county.

Suit by John Bradley and others against George M. Irwin and others for an accounting. From orders granting an injunction against Irwin, and appointing a receiver, and attaching him for contempt, he appeals. Affirmed.

J. S. & E. G. Ferguson, Knox & Reed, John S. Robb, Sr., D. J. Patterson, and Thos. M. Marshall, Sr., for appellant. H. L. Goehring, for appellees. Geo. P. Hamilton, for receiver.

MITCHELL, J. This case is ruled by Haught v. Irwin (opinion filed herewith), 31 Atl. 260, and, for the reasons there given, the order is affirmed.

LEWEY v. H. C. FRICK COKE CO.

(Supreme Court of Pennsylvania. March 11, 1895.)

LIMITATION—WHEN STATUTE BEGINS TO RUN—TRESPASS BY MINING COAL.

Where a landowner, by means of openings on his land and subterranean passageways, mines and removes the coal from the adjoining land, without the knowledge or means of knowledge by the owner of the latter, limitation of his right of action for compensation does not begin to run until he discovers the trespass, or until discovery is reasonably possible.

Appeal from court of common pleas, Westmoreland county.

Action of trespass by Julius Lewey against the H. C. Frick Coke Company, a corporation. From a judgment for defendant, plaintiff appeals. Reversed.

Williams, Sloan & Griffith and Atkinson & Peoples, for appellant. Jas. S. Moorhead and Jno. B. Head, for appellee.

WILLIAMS, J. The legal question on which this appeal depends is beset with difficulty. The interests to be affected by it must increase in magnitude as the value of the minerals in which this state abounds increases. It is not directly ruled by any of our own cases, and we are at liberty to treat it as a question of first impression. The facts are not in dispute. The plaintiff is the owner in fee simple of a lot of land lying in the outskirts of the borough of Connellsville, containing about one acre and a quarter. This lot is underlaid with coal, which has not been severed from the surface by lease or sale, and which the plaintiff has made no effort to mine or remove. The defendant company owns a considerable body of coal lands in the same neighborhood, which adjoins and practically surrounds the plaintiff's land, and is engaged in mining and removing its coal through openings upon its own lands. In 1884, in the progress of its mining operations, the defendant company made an opening or passageway through the plaintiff's coal under one corner of his lot, which was from 75 to 100 feet in length, about 6 feet in height, and 8 to 9 feet wide. The coal removed, amounting to more than 4,000 bushels, was brought to the surface through the defendant's pits or openings on its own lands, and used or disposed of as its own. The plaintiff had no knowledge of the trespass upon him or the removal of his coal, and no means of knowledge within his reach. In 1891, some seven years after his coal was taken, as he alleges, he first became aware of his loss. In the following year he brought this action, and is met with the statute of limitations as a defense. The contention is that it began to run in 1884, when the coal was taken, and had barred his remedy one year before he knew that a cause of action had accrued. The court below so ruled. The correctness of this ruling is the only question now to be considered. When did the statute begin to run? The general rule is, as stated by the learned trial judge, that it begins to run from the act done, but this is not of universal application. The statute makes certain exceptions. As to all persons who may be, when the cause of action accrues, "within the age of twenty-one years, femme covert, non compos mentis, imprisoned, or beyond sea," it is provided that the statute shall not begin to run until such disability ceases. In 1842 a supplementary statute restrained the running of the limitation still further so as to include a resident plaintiff, laboring under no disability whatever, if the defendant debtor or wrongdoer should be beyond sea when the cause of action arose. As to such a plaintiff the running of the statute does not begin until the return of the debtor or tres-

Digitized by Google

passer to this country, so that proceedings against him become possible. It is easy to see that the mischief which the statute was intended to remedy was delay in the assertion of a legal right which it was practicable to assert. The remedy provided was a denial of process to one who had slumbered for six years during which process was within his reach. The cases in which this denial would work a positive and an apparent hardship, so far as they were foreseen by the lawmakers, were provided for by the exceptions to which we have referred and by the act of 1842. These have been extended by the courts so as to include other cases which, while not within the letter of the statute, were held to be within the spirit of the proviso. Thus, it was held in Hall v. Vandegrift, 3 Bin. 374, that "it is the spirit of the statute of limitations to allow 21 years from the time that a person might make entry on land and support an action" before taking away his remedy. For this reason it was decided that it did not run against one who had a possibility of title, but no present right of entry. Again, it was held that, when the plaintiff had been kept in ignorance of his rights by fraudulent practices on the part of the defendant, the statute did not begin to run against him until discovery of the fraud.

The earliest case I have found in which the courts of this state applied this doctrine in a common-law action is Jones v. Rees' Ex'rs, found in 1 Smith's Laws, p. 80. The case was tried at circuit before Yeates and Smith, justices. It appeared that Rees had sold a negro to Jones in 1786, alleging him to be a slave. The negro was in fact a freeman, but had been kept in ignorance of it by the fraudulent practices of Rees. He discovered the fraud and his own freedom in 1801, and brought an action against Jones for the purpose of having his freedom established in a court of law, and of recovering damages for his deprivation of it. He recovered. Jones then brought an action against Rees to recover the price paid for the negro some 16 years before, and for damages. Rees set up the statute of limitations. The court refused to sustain the plea, giving as a reason therefor that, "whenever there is a fraud, the act of limitations is no plea, unless the fraud be discovered within the time"; that is, within the time fixed by the statute, or six years before suit brought. To make this entirely clear, it was added that, "while the slavery of the negro was uncontested, the plaintiff had no ground to suppose he had been injured or deceived; but, when he obtained his liberty in a due course of law, the plaintiff's cause of action accrued against the defendant." This rule was applied in an action of ejectment in Thompson v. Smith, 7 Serg. & R. 209, and was stated by Tilghman, C. J., at page 214, as follows: "After the discovery of the fraud, a man has a right to avail himself of the statute; but so long as the fraud is unknown, pending the concealment of the fraud, the statute ought not to run. The discovery of the fraud gives a new cause of action." This rule has long been applied in equity, where two good reasons are given for it. The first is that it would be inequitable to permit a defendant to profit by his own fraud. The other is that one who cannot assert his right, because the necessary knowledge is improperly kept from him, is not within the mischief the statute was intended to remedy, but is within the spirit of the proviso that restrains its operation. Courts of equity go a step further still, and decline to apply the statute where the plaintiff neither knew, nor had reasonable means for knowing, of the existence of a cause of action. But if the cause of action be known, or might have been known by the exercise of vigilance in the use of means within reach, equity follows the law and applies the statute. Hamilton v. Hamilton, 18 Pa. St. 20; Neely's Appeal, 85 Pa. St. 387. Mere ignorance will not prevent the running of the statute in equity any more than at law; but there is no reason, resting on general principles, why ignorance that is the result of the defendant's conduct, and not of the stupidity or negligence of the plaintiff, should not prevent the running of the statute in favor of the wrongdoer. It seems to be a general doctrine in courts of law that the plaintiff is bound to know of an invasion of the surface of his close. The fact that his land is a forest, and that the defendant goes into its interior to trespass by the cutting of timber, does not relieve against its operation. What is plainly visible he must see at his peril, unless, by actual fraud, his attention is diverted and his vigilance put to sleep. But ought this rule to extend to a subterranean trespass? The surface is visible and accessible. The owner may know of its condition without trespassing on others, and for that reason he is bound to know. The interior of the earth is invisible and inaccessible to the owner of the surface, unless he is engaged in mining operations upon his own land; and then he can reach no part of his own coal stratum except that which he is actually removing. If an adjoining landowner reaches the plaintiff's coal through subterranean ways that reach the surface on his own land and are under his actual control, the vigilance the law requires of the plaintiff upon the surface is powerless to detect the invasion by his neighbor of the coal 100 feet under the surface.

The case at bar affords an excellent illustration of ignorance due to the defendant's conduct, and without fault on the part of the plaintiff. The defendant was mining its own coal through its own shafts or drifts opened on its own lands. In the course of its operations, and for its own convenience, it pushed an entry or passage under the plaintiff's lands, and appropriated the coal

Digitized by Google

removed therefrom. It was bound to know its own lines, and keep within them. If, by mistake or for any other reason, it did invade the mineral estate of another, and remove and appropriate the coal therefrom, good conscience required that it should disclose the fact, and pay for the coal taken. Its failure to do this is, in its effects, a fraud upon the injured owner; and if he has no knowledge of the trespass, and no means of knowledge, such a fraud, whether it be called constructive or actual, should protect him from the running of the statute. We have felt constrained to recognize the susceptibility of land to division into as many estates in fee simple as there are strata that make up the earth's crust, and to protect the owners of these separate estates from each other. Thus, the possession of one who has a title to the surface only does not extend to or affect any subjacent estate. The occupancy of a coal stratum for more than 21 years will not give title to the surface above it, or the oil or gas stratum below it. The law does not require impossibilities. It recognizes natural conditions, and the immutability of natural laws. The owner of the surface cannot see, and because he cannot see the law does not require him to take notice of, what goes on in the subterranean estates below him, with which he has no communication through openings within his inclosures or under his control. On the other hand, one who is in possession of a lower stratum is not bound to know, nor can he be affected by, what is going on upon the surface above him, or in a still lower estate under his feet. The owner of each stratum must, however, take notice of what affects his own estate so far as he is in possession of or has access to it. In the case before us no severance of the coal from the surface has taken place. The title of the plaintiff extends from the surface to the center, but actual possession is confined to the surface. Upon the surface he must be held to know all that the most careful observation by himself and his employés could reveal, unless his ignorance is induced by the fraudulent conduct of the wrongdoer. But in the coal veins, deep down in the earth, he cannot see. Neither in person nor by his servants nor employés can he explore their recesses in search for an intruder. If an adjoining owner goes beyond his own boundaries in the course of his mining operations, the owner on whom he enters has no means of knowledge within his reach. Nothing short of an accurate survey of the interior of his neighbor's mines would enable him to ascertain the fact. This would require the services of a competent mining engineer and his assistants, inside the mines of another, which he would have no right to insist upon. To require an owner, under such circumstances, to take notice of a trespass upon his underlying coal at the time it takes place, is to require an impossibility; and to hold that the statute begins to run at the date of the trespass is in most cases to take away the remedy of the injured party before he can know that an injury has been done him. A result so absurd and so unjust ought not to be possible.

In the English courts this question has arisen quite frequently. The old rule applied in the courts of law was that the statute might be successfully pleaded as running from the date of the trespass. In the courts of equity, where an account for the coal that had been taken was asked for, it was applied only from the discovery of the trespass. McSwinny, Mines, 543. See, also, Hovenden v. Lord Annesley, 2 Schoales & L. 634. If, after discovery, or the happening of any circumstance calculated to put the owner on notice, he slept on his rights till the statutory period had expired, he was held bound by the statute in equity precisely as he would have been at law. If he knew, or if by the exercise of reasonable care he might have known, of the trespass, the statute ran from the discovery, or the time when discovery could have been made. Bainb. Mines, 515, 516. It was against good conscience to permit one who had taken the property of another without the owner's knowledge, and who had failed to disclose or to account for what he had taken, to avail himself of the statute while the owner remained in ignorance of his loss. When compensation was sought by means of a bill for an account, it was held that the statute began to run at the time of discovery, regardless of the time of taking. The same question was also encountered in actions to recover for injuries done on the surface by subsidence due to the withdrawal of support. When the action was trespass, it was generally held that the statute ran from the date of the removal of the support, which was the trespass to which the injury was due; but, when the action was case, the subsidence was treated as the consequence of the wrongful removal of the coal or other underlying stratum, and the damages suffered as consequential. The happening of the injury was upon this ground held to give a cause of action, against which the statute would run only from its date. The removal of the supports might not be known to, or be discoverable by, the owner of the surface until the subsidence revealed it; and, unless the injury consequential to the trespass could be treated as creating a cause of action, in most cases redress for a substantial injury would be denied altogether. Backhouse v. Bonomi, 34 Law J. Q. B. 181, 9 H. L. Cas. 503; Smith v. Thackerah, 14 Am. Law. Reg. (volume 5, N. S.) 761, and note. The reason for the distinction exists in the nature of things. The owner of land may be present by himself or his servants on the surface of his possessions, no matter how extensive they may be. He is for this reason held to be constructively present wherever his title extends. He cannot

Digitized by Google

be present in the interior of the earth. No amount of vigilance will enable him to detect the approach of a trespasser who may be working his way through the coal seams underlying adjoining lands. His senses cannot inform him of the encroachment by such trespasser upon the coal that is hidden in the rocks under his feet. He cannot reasonably be held to be constructively present where his presence is, in the nature of things, impossible. He must learn of such a trespass by other means than such as are within his own control, and, until these come within his reach, he is necessarily ignorant of his loss. He cannot reasonably be required to act until knowledge that action is needed is possible to him. We are disposed to hold, therefore, that the statute runs against an injury committed in or to a lower stratum from the time of actual discovery, or the time when discovery was reasonably possible. But it is enough for the purposes of this case to hold that, inasmuch as equity is administered in this state through the common-law forms of action, the plaintiff need not be turned out of a court of law in order to be admitted at the equity side of the same court. He may not be entitled to statutory damages, but he is entitled to compensation in the same manner that he would have been on a bill for an account. For this purpose, the equitable rule that the statute shall run only from discovery, or a time when discovery might have been made, should be applied by courts of law. It follows that the judgment in this case must be reversed, and a new trial had, in which the jury should be instructed that, while the statute may be available as against the penal consequences of the trespass, it is not available as a defense against payment for the coal actually taken and converted to the use of the defendant. The statute will run against a claim for compensation from the time the existence of the claim was or might have been known to the plaintiff, the owner and occupier of the surface. The judgment is reversed, and a venire facias de novo awarded.

MITCHELL, J., dissents.

BARBER v. JAMES et al.

(Supreme Court of Rhode Island. Feb. 6, 1895.)

SUMMONING JURY—HARMLESS ERROR.

1. Where 12 "good and lawful" men were secured as jurors, as required by Pub. St. c. 104, § 4, defendant cannot complain that more than that number were summoned.

2. Defendant cannot complain of the exclusion of testimony, where it had already been brought out by previous answers of the witness.

Exceptions from court of common pleas, Washington county.

Action by John C. James and another against Gardner S. Barber. Judgment for plaintiffs, and defendant excepts. Exceptions overruled.

Samuel W. K. Allen, for plaintiffs. John M. Brennan, for defendant.

PER CURIAM. We find no error in the action of the court in summoning more than 12 jurors. Pub. St. R. I. c. 104, § 4, directs that 12 good and lawful men shall be returned. The summoning of more than 12 may frequently be necessary in order to secure the 12 good and lawful men required. If these are obtained, the defendant can have no grounds of complaint because more than 12 good men were summoned, to attain this result. Fitchburg R. Co. v. Boston & M. R. Co., 3 Cush. 85; Hosmer v. Warner, 15 Gray, 46.

The defendant has no ground of complaint because of the alleged exclusion of the testimony of Shippee, assuming that the testimony was proper. The defendant had already had the benefit of it, in the previous answers of the witness.

We see no occasion to disturb the verdict on the ground that the damages were excessive.

GOOD v. ROGERS.

(Supreme Court of Rhode Island. March 2, 1895.)

BILL OF SALE AS MORTGAGE—LIABILITY FOR VENDOR'S DEBTS—RIGHT TO POSSESSION.

1. Property covered by a bill of sale meant to operate as a mortgage is, in the hands of the vendor, while the same is redeemable, subject to attachment for his debts.

2. Unless there is some stipulation in a chattel mortgage to the contrary, the mortgagee is entitled to immediate possession of the mortgaged property.

Action by John E. Good against Charles L. Rogers. Judgment was rendered for plaintiff, and defendant petitions for a new trial. Granted.

Hugh J. Carroll, for plaintiff. Claude J. Farnsworth, for defendant.

PER CURIAM. The court is of opinion that the first request should have been granted. The bill of sale referred to was clearly a mortgage, both by its terms, and by the testimony of the plaintiff himself. It did not purport to be, and was not intended to be, for the absolute transfer of the property, but only for security. The property covered by it, therefore, like any mortgaged property "in the possession of the mortgagor, and while the same is redeemable at law or in equity," was subject to attachment for the debts of the mortgagor.

The second request was properly refused. The mortgagee has an immediate right of possession, unless there is some stipulation in the mortgage to the contrary. Jones, Chat. Mortg. § 426.

The exception to the first refusal to rule as requested is sustained. The second is over

Digitized by Google

ruled. The petition for a new trial is granted. Case remitted to the common pleas division.

MARONEY v. CITY COUNCIL OF PAWTUCKET.

(Supreme Court of Rhode Island. March 5, 1895.)

REMOVAL OF CITY ASSESSOR—TRIAL.

The action of the city council of Pawtucket, in removing the city assessor from office without notice to him of the proceeding, was not such a trial as is contemplated by the charter of such city, and was void.

Petition by William P. Maroney for a writ of certiorari to review the proceedings of the city council of Pawtucket, R. I., whereby he was removed from his office of assessor. Proceedings quashed.

Thomas J. McParlin and Charles E. Gorman, for petitioner. T. P. Barnefield, for defendant.

PER CURIAM. Though notice was given to the petitioner of the taking of the testimony before the committee of the city council appointed for that purpose, the record does not disclose any notice to him of the proceeding before the council for his removal from office, so that he could be heard on the question of his removal. Without such opportunity to be heard, the proceeding was not such a trial as is contemplated by clause 7 of the charter of Pawtucket. For this reason we are of the opinion that the proceeding must be quashed. We have no statute modifying the common-law procedure on certiorari. At common law, the writ of certiorari brings up for review nothing except the record proper of the proceeding, of which the evidence before the tribunal below, strictly speaking, forms no part, and which it is, therefore, under no obligation to send up as a part of the record. Hannibal & St. J. R. Co. v. State Board of Equalization, 64 Mo. 294, 308; People v. Board of Delegates of San Francisco Fire Department, 14 Cal. 479; Steamship Co. v. Haas (Pa. Sup.) 25 Atl. 85. In the present instance, the report of the testimony before the city council has been sent up as a part of the record. While it is not our province to review on certiorari findings of fact, it may not be improper for us to suggest that an examination of the testimony shows that the alleged misconduct of the petitioner related to transactions which occurred prior to his present term of office, and, moreover, that it does not appear by any competent evidence that there was any connection between such alleged misconduct and the action of the petitioner in his office of assessor.

HOLDEN et al. v. WELLS.

(Supreme Court of Rhode Island. Feb. 18, 1895.)

WILLS—ESTATE DEVISED—CURTESY.

1. A testator devised land to his daughter H., her heirs and assigns, forever, "providing that she dies leaving lineal heirs of her body"; but, in case she dies "leaving no child or children or descendants," he gave the land to others. *Held*, that the daughter H. took an estate tail.

2. Curtesy is an incident of an estate tail, and is not defeated by the fact that the estate held by the wife terminated at her death because of the death of the issue during her life.

Case certified from court of common pleas.

Action by Zelotes W. Holden and others against Seth H. Wells. The case was certified upon an agreed statement of facts. Judgment ordered for defendant.

Cooke & Angell and Charles E. Salisbury, for plaintiffs. James Tillinghast, for defendant.

TILLINGHAST, J. This is an action of trespass and ejectment to recover possession of a certain tract of land, with a dwelling-house and other improvements thereon, situate in the town of Foster. It was brought in the common pleas division in December, 1893, and subsequently certified to this division on an agreed statement of facts, which, in so far as material to the questions raised, shows: (1) That Thomas O. H. Carpenter, late of the town of Foster, died on the —— day of ——, 1893, seised and possessed in fee simple of the real estate described in the plaintiffs' declaration, and leaving a last will and testament, which was duly admitted to probate, the fourth clause of which is as follows, viz.: "Fourthly. I give, devise, and bequeath to my daughter Henrietta Matilda Carpenter, after the payment of my just debts, all the residue and remainder of my personal estate of any kind and nature whatsoever, together with all my real estate situated in the town of Foster and Coventry, excepting therefrom my 'Baker Farm,' so called, and my lot lying southerly from my Baker farm, called the 'Morse Lot,' and for a particular description of the real estate hereby devised, and the boundaries and quantities of the same, reference being had to my deeds and conveyances thereof on record in the said town of Foster and Coventry, the same will fully appear; which said real and personal estate is to be and remain to her, the said Henrietta Matilda Carpenter, and to her heirs and assigns, forever, providing that she dies leaving lineal heirs of her body. But, in case that the said Henrietta Matilda shall die leaving no child or children or descendants to take and hold said real and personal estate, then, and in such case, I give, devise, and bequeath said real and personal estate, herein given to the said Henrietta Matilda, to my son Thomas O. H. Carpenter, Jr., and to my daughter Fanny H. Holden, equally be-

Digitized by Google

tween them, and to their heirs and assigns, forever." (2) That Henrietta Matilda Carpenter named in the said will was lawfully married to said defendant on the 23d day of June, 1853; that said Henrietta had one female child born of her body while so married to said defendant, on the 20th day of March, 1856; that said child died on the 28th day of March, 1861; that said Henrietta never had any other child or children or descendants; that said Henrietta peaceably entered into possession of said real estate subject to the provisions of said will; that said Henrietta died on the 8th day of August, 1892; that she was living on said premises with her said husband at the time of her decease; and that since her decease he has been and is now in possession of said estate. (3) That Thomas O. H. Carpenter, Jr., named in the will of said Thomas O. H. Carpenter, died intestate after his father's death, and in the lifetime of said Henrietta, and that four of the plaintiffs, to wit, Helen C. Phillips, Amy W. Tanner, Loretta Phillips, and Ella M. Blake, are lineal descendants of said Thomas O. H. Carpenter, Jr., and his only heirs at law; that Fanny H. Holden, named in the will of said Thomas O. H. Carpenter, died intestate after the death of her father, and in the lifetime of said Henrietta, leaving one son, to wit, Zelotes W. Holden, one of the plaintiffs, who is her only heir at law.

In view of these facts, the plaintiffs' contention is that, the said Henrietta having deceased leaving no child or descendant to take and hold the real estate devised to her, the title thereto has vested absolutely in them by descent from Thomas O. H. Carpenter, Jr., and Fanny H. Holden, both deceased, as a gift over by way of executory devise; that it is evident, from the language used in said will, that the testator intended that the limitation over to his son Thomas and to his daughter Fanny should take effect in case of said Henrietta's death without leaving any child or children or descendants to take and hold said real estate, at a definite time, to wit, on the death of his daughter Henrietta, thus making the devise executory. The defendant's contention, on the other hand, is that, under the said fourth clause of the will of Thomas O. H. Carpenter, his daughter Henrietta (afterwards Mrs. Wells) took a vested estate tail, and that, this being so, her husband is entitled to curtesy in this estate; and, further, that, even if the gift over be construed to be an executory devise, the result will be the same. An estate tail is an estate of inheritance, deriving its existence from the statute de donis, which, instead of descending to heirs generally, goes to the heirs of the donee's body, which means his lawful issue in a direct line, and upon the extinction of such issue the estate determines; while an "executory devise," as defined by Mr. Fearne, is "such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law." In other words, it is such a disposition of lands by will that no estate vests at the death of the devisor, but only on the happening of some contingency. See 4 Kent, Comm. (12th Ed.) *264; Tied. Real Prop. § 530, and cases in note 1. We think it is clear, in view of this distinction between the two estates, that an estate tail, and not an executory devise, was created by said fourth clause of the will. It is very evident that the testator did not intend that the gift over should take effect until failure of the whole line of Matilda's descendants. The phrase, "lineal heirs of her body," as well as the subsequent phrase, "but in case that the said Henrietta Matilda shall die leaving no child or children or descendants," shows that not only her children, but all of her lineal descendants, were intended to be included. 2 Redf. Wills, 396; Torrance v. Torrance, 4 Md. 11, 25; Barstow v. Goodwin, 2 Bradf. 413. And, in the absence of language making a different intent apparent, the rule is that words of limitation, on failure of issue, should be construed to mean indefinite failure, and not a failure at the first taker's death. See cases collected in 3 Jarm. Wills, p. 297, note 1; Id. p. 325, note 10; Pearce v. Ricard, Index LL, 130, 26 Atl. 38. And, this being so, the case falls within the rule that where a testator devises land to a person and his heirs, and, if he shall die without heirs of his body, then over to another, such devise vests an estate tail in the first devisee. Jarm. Wills (1881) 94–98, and cases cited. In the recent case of Bailey v. Hawkins, Index MM, 108, 27 Atl. 512, this court recognized the "well-settled principle that a devise in fee will be restricted, and a devise for life enlarged, to an estate tail, by a gift over, in case the devisee dies without issue, unless there is something in the context to justify a different construction." See, also, Arnold v. Brown, 7 R. I. 195; Brownell v. Brownell, 10 R. I. 512; Jillson v. Wilcox, 7 R. I. 518; Whitford v. Armstrong, 9 R. I. 395; Sutton v. Miles, 10 R. I. 348; 1 Washb. Real Prop. (5th Ed.) pp. 104, 105, and cases cited; Richardson v. Richardson, 80 Me. 585, 16 Atl. 250; Malcom v. Malcom, 3 Cush. 472; Simpson v. Simpson, 4 Bing. N. C. 345; Jones v. Davies, 4 Barn. & Adol. 53; Morgan v. Morgan, L. R. 10 Eq. 99, and cases. "The principle has now become a settled rule of property, in relation to lands," said Sargeant, J., in Eichelberger v. Barnitz, 9 Watts, 450, "that if a devise be made to one in fee, and if he die without issue, or on failure of issue, or for want of issue, or without leaving issue, then over to another in fee, the estate of the first taker is a fee tail, which, if he have issue, passes to them ad infinitum by descent as tenants in tail. The estate vests in the first taker fully, and to all intents and purposes,

Digitized by Google

as a fee tail, and any devise over after the failure of such must, of course, be after an indefinite failure of issue, and bad as an executory devise. It is good as a vested remainder, subject to be barred by a fine or recovery, or deed executed by the tenant in tail, under the act of assembly." In short, it is well settled that a devise in fee, like the one now before us, with a limitation over upon the death of the first taker, leaving no lineal heirs of her body, no child or children or descendants, reduces the estate in fee to an estate tail. If the limitation over is to take effect, not on an indefinite failure of issue of the prior taker, but on a specified definite failure thereof, then the limitation over will not create an estate tail in the first taker. As, for example, had the testator in the will now before us provided that, at the death of Matilda "leaving no issue," then said estate should go to his said other children, it would have vested a fee in her, with an executory devise over. Thus in Swinburne, Petitioner, 16 R. I. 208, 14 Atl. 850, cited by plaintiff's counsel, where the language was, "Should either of my above named children die leaving no legal heirs born of their own body, then I give their shares, after their death, to my then living heirs," etc., it was held that the words, "after their death to my then living heirs," obviously meant immediately after their death, said words being intended to fix definitely the time at which the bequest over was to take effect. It was held, therefore, that the bequest over was an executory bequest. "The principal distinction," said Shaw, C. J., in Parker v. Parker, 5 Metc. (Mass.) 139, "and it is a very important one, between an estate tail with remainder and an estate in fee with a limitation over upon the happening of some event, as an executory devise, is that a party holding the latter—an estate in fee determinable upon a contingency—has no power to defeat the executory devise. He has himself an estate defeasible upon the happening of the contingency. He may alienate it, but his alienee will take it subject to the same condition. But the owner of an estate tail may, at his pleasure, bar the entail, and defeat and cut off all the remainders, by a common recovery, or, under our statute, by a simple deed." See, also, Allen v. Trustees, 102 Mass. 264. If it be suggested that a devise over after an indefinite failure of issue of the first taker is void under the rule against perpetuities, it is sufficient to reply that as the right exists to bar the entail at common law by suffering a common recovery, or by a deed executed and acknowledged in the manner prescribed by Pub. St. R. I. c. 172, § 3, or by will as provided in the same section, if an estate remained in the devisee on which a will could operate (Bailey v. Hawkins, Index MM, 109, 27 Atl. 512), the restriction on alienation is determinable at the option of the tenant in tail, and hence the devise is not obnoxious to said rule (De Wolf v. Middleton, Index LL, 153, 26 Atl. 44). But the plaintiff's counsel contend that, when this will was before the court on a former occasion (Wells v. Fairbanks, 6 R. I. 474), it was held, under another clause thereof, in which the same language is used as in the clause now before us, that Christopher S. Carpenter, one of the devisees therein named, who had had one child, but died leaving no child, died without descendants. As we understand this contention, it is that as the court held in that case that upon the death of the testator's son Christopher, leaving no children or descendants, his share passed immediately to his sister Henrietta, under the fifth and sixth clauses of said will, we ought now to hold that, said Henrietta having since deceased leaving no descendants, her share thereupon vested absolutely in the plaintiffs. A comparison of the language used in the fifth and sixth clauses of the will with that used in the clause now before us, however, shows a very material difference. In the former the testator, after making a devise to his two sons, William and Christopher, for their lives, to hold, not jointly, but equally between them, so that they were to hold several estates, added a proviso "that, in case either of my sons shall die leaving no child or children or their descendants to take and hold as lawful heirs, the portion of said estate herein given to such deceased son then to go to the children of the other," etc., "if any there be." It is also provided "that, in case of the failure of said estate vesting in the legal descendants of the said William and Christopher in manner as aforesaid, then, and in that case, I give and devise said real estate to my said daughter Henrietta, as follows: To take and to hold one-half of said estate upon the death of the first of my said sons, and the other half upon the death of the other of my said sons." It was therefore held, and very properly, that the estate of each, if it passed at all to the daughter, was to pass upon the death of such son, the share of each upon the death of each; that "the state of things upon which the estate of either son passed was, in the contemplation of the testator, to exist at the death of such son." In the clause now before us, however, no such contingency is specified, nor are there any expressions added to the words importing a failure of issue which show that the testator intended to restrict the meaning thereof. As the defendant's wife took an estate tail, then, in the real estate described in the plaintiffs' declaration, such an estate being one of inheritance, curtesy is clearly one of the incidents thereof; and it is well settled in respect to estates tail that though the issue in tail fail by the death of the child or children in the lifetime of the wife, whereby her estate at her death is at an end, yet the husband takes curtesy, the same being a right incident to such an estate. See 1 Washb. Real Prop. (5th Ed.) 175; Tied. Real Prop. §§ 101–108, and cases cited; Buck-

Digitized by Google

worth v. Thirkell, 1 Coll. Jurid. 332; Barker v. Barker, 2 Sim. 251, 252; Greenl. Cruise, 147–150; 4 Kent, Comm. **33, 34. The case is remitted to the common pleas division, with direction to enter judgment for the defendant.

ALLEN v. ARNOLD et al.

(Supreme Court of Rhode Island. Feb. 28, 1895.)

STOCKHOLDERS—ENFORCEMENT OF LIABILITY.

A bill to enforce the statutory liability of stockholders of a manufacturing corporation cannot be maintained until remedy against the company has been first exhausted, by obtaining a judgment against it, and having execution on that judgment returned unsatisfied.

Bill by John B. Allen, executor, against John J. Arnold and others, to enforce their statutory liability as stockholders of a corporation. Demurrer to the bill sustained.

Arnold Green and Benj. N. Lapham, for complainant. John J. Arnold and James Tillinghast, for respondents

PER CURIAM. Assuming that the provisions of Pub. St. R. I. c. 155 ("Of Manufacturing Corporations"), to which, by its charter, the Warwick & Coventry Water Company is made subject, are applicable to that company, which has no manufactory established either within or without this state, we do not think that the complainant is entitled to maintain his bill against the stockholders of that company, either to enforce their statutory liability, or for contribution, on the ground that they have not paid in full their subscriptions to the capital stock, until he has first exhausted his remedy against the company, by obtaining a judgment at law against it, and having the execution on that judgment returned unsatisfied; the reason being that the primary liability is that of the corporation, that of the stockholders being merely secondary. 1 Cook, Stock, Stockh. & Corp. Law (3d Ed.) §§ 199, 200, 219, and notes. Demurrer sustained.

DODGE et al. v. HOGAN et al.

(Supreme Court of Rhode Island. March 7, 1895.)

RENT—WHAT CONSTITUTES—CHARGE FOR SUPPORT ON LAND—ACTION TO ENFORCE—MERGER OF ESTATES.

1. Testatrix devised two-thirds of her lands to her husband, and one-third to her children, all subject to her husband's tenancy by the curtesy, and the two-thirds to the husband subject to the charge of providing a suitable support for two daughters and one son until the happening of specified events. *Held*, that the charge created was not a rent charge, and that the joinder of such daughters and son in a deed of one parcel of the land charged did not extinguish the charge as to the other parcels.

2. The land charged consisted of three separate parcels. The devisees, including such daughters and son, gave a mortgage of one parcel, with full covenants of quiet enjoyment and warranty, which was afterwards foreclosed by sale and conveyance. *Held*, that such daughters and son could maintain a bill to enforce the charge on the two remaining parcels.

3. The charge did not become merged in the absolute interest in the land inherited by such daughters and son on their father's death.

Bill by Charlotte R. Dodge and others against John W. Hogan and others to enforce a charge for their support on certain land under the will of plaintiffs' mother. Decree for plaintiffs.

Warren R. Pierce, Albert R. Greene, and Irving Champlin, for complainants. John W. Hogan, Wm. H. Greene, and P. J. McCarthy, for respondents.

MATTESON, C. J. This is a bill to ascertain the amounts to be allowed the complainants for their support under an alleged charge on certain real estate, and to enforce the payment of the amounts so ascertained. The case is as follows: Charlotte D. Dodge, the mother of the complainants Charlotte R. Dodge and Walter C. Dodge, died in Providence, on November 11, 1875, leaving a last will and testament, the third clause of which is as follows: "I give and bequeath all the real estate of which I die seised and possessed, and to me belonging at my decease, to and unto my said husband, Christopher G. Dodge, and my children Mary R. Slocum, wife of Nathaniel W. Slocum, of Medford, Mass., Charlotte R. Dodge, Sarah A. Dodge, Walter C. Dodge, Ida R. Burr, wife of George Burr, of said city of Providence (the whole being subject to the tenancy by the curtesy of my said husband), in the following proportions: Two-thirds undivided of said real estate to my said husband, and one undivided third thereof to my said children,—to have and to hold said real estate subject to said tenancy by the curtesy to my said husband and my said children in the proportions and in the manner specified as aforesaid, their heirs and assigns, forever; the two-thirds devised to my said husband being, however, subject to the charge of providing a suitable and comfortable support for my two daughters, Charlotte R. Dodge and Sarah A. Dodge, until such time as each of them shall be married, when and whereupon said charge as to them shall cease and determine; and also until such time as my son Walter C. Dodge shall engage in business, or shall learn a trade, from which business or trade he shall derive sufficient income to maintain and support himself comfortably, according to his station in life. Said two-thirds of my real estate so given and devised to my said husband shall be charged for his support, and when my said son shall have the income aforesaid, derived in manner aforesaid, then said charge on said real estate shall as to him also cease and determine." At her decease the testatrix was

Digitized by Google

seised and possessed of two parcels of real estate situated in Providence, and particularly described in the bill, on which the complainants seek to enforce the charge. These two parcels are: (1) A lot of land, with the buildings and improvements thereon, between Fountain and Worcester streets, on the westerly side of Union street, estimated to contain 3,545 square feet; and (2) two lots of land, with the buildings and improvements thereon, situated on the southeasterly corner of Holden and Jewett streets, numbered, respectively, 33 and 34 on the plat of the Holden estate, etc., by Cushing & Farnum, 1850. Lot 33 of this second parcel was subject to a mortgage for $600. Besides these two parcels, the testatrix at her decease was seised and possessed of another lot of land, with the buildings and improvements thereon, situated on Dodge street, in Providence, which was mortgaged by the devisees named in the third clause of the will, on March 14, 1879, to Charles C. Weaver. The mortgage was foreclosed by Weaver by a sale and conveyance of the mortgaged estate, July 24, 1886, to Charles A. Cook. Christopher G. Dodge, the husband of the testatrix and father of the complainants, died March 28, 1888. Since his decease the respondents John W. Hogan, John H. Coyle, George E. Tillinghast, and Frank B. Hazard have acquired, by mesne conveyances, from or under the several other devisees named in the third clause of the will, as such devisees and as heirs at law of said Christopher, the two parcels of land first above mentioned, and are seised and possessed of the same as tenants in common in the following proportions, viz.: Of the Union street estate, Hogan, 23 undivided sixtieths; Coyle, 28 undivided sixtieths; Tillinghast, 9 undivided sixtieths. Of the estate on the corner of Holden and Jewett streets, Coyle, 28 undivided sixtieths; Tillinghast, 9 undivided sixtieths; Hazard, 23 undivided sixtieths. Sarah A. Dodge, named in the said third clause of the will with the complainants as a beneficiary, married within a year or two after her mother's death, and thereupon ceased to be entitled to the benefit of the charge. The complainant Charlotte has never been married, and for a number of years has been of unsound mind. Since October 1, 1892, no portion of the rents or income of the estates sought to be charged has been applied to her support by the respondents, though demand on them in her behalf has been made therefor, nor have the respondents made any provision for her support out of the estates. The complainant Walter has never engaged in business or learned a trade from which trade or business he has derived a comfortable support. He is mentally and physically weak, and is incapable, by reason thereof, of obtaining and retaining steady employment. In May following his father's death he executed and delivered to one George W. Hubbard a warranty deed of his share in the real estate devised in the third clause of his mother's will for about $300, though the share conveyed was worth in the neighborhood of $3,000. After the money received from Hubbard was gone, his sister, Mrs. Slocum, procured employment for him at different times, but he was unable to retain his positions, partly on account of his health, and partly because his services were not satisfactory to his employers. He then took up the peddling of small articles, such as writing paper, envelopes, court-plaster, etc., from house to house, by which means he has for several years earned small sums of money, but not enough for his support, for which, to a considerable extent, he has been dependent on others. He has received no portion of the rents or income of the estates sought to be charged since the respondents acquired the title thereto, and it does not appear that any demand therefor has been made on the respondents prior to his obtaining leave to intervene and become a complainant in this suit.

Both Charlotte and Walter are in a situation entitling them to the benefit of the charge, if it is enforceable. The respondents contend that it is not. They base their defense in part on the assumption that the will created a strict rent charge, and that as Charlotte and Walter both joined in the mortgage to Weaver of the Dodge street estate, which was one of the parcels of land subject to the charge, and this parcel was afterwards sold under the power contained in the mortgage, and thereby released from the charge, the charge, not being apportionable, was extinguished as to all the other parcels. 2 Wash. Real Prop. (5th Ed.) 301. A "rent" is defined as the right to the periodical receipt of money, or money's worth, in respect of land held in possession, reversion, or remainder by him from whom the payment is due. 2 Wash. Real Prop. (5th Ed.) 284. This definition implies a fixed sum, or property amounting to a fixed sum, to be paid at stated times. A rent is regarded as an interest or estate in land which may be the subject of a grant, and which may be created in fee, for life, or for years. If it be in fee or fee tail, it is subject to the incidents of curtesy and dower. Id. 287, 288. A moment's consideration will suffice to show that the charge for the support of the complainants has nothing in common with a rent, except that it is charged on real estate. In the first place, it is not a fixed amount, nor is it required to be paid periodically. In the second place, it is not an estate which can be granted to another. It is rather an equitable charge or lien, which appertains to the beneficiary personally, and to him alone. Tied. Real Prop. § 647; Clapp v. Clapp, 6 R. I. 129; Jordan v. Donahue, 12 R. I. 199; Willett v. Carroll, 13 Md. 459; Luckett v. White, 10 Gill & J. 480; Association v. Walker, 52 Md. 452; Ripple v. Ripple, 1 Rawle, 387; Rhoades v. Rhoades, 88 Ill. 139.

The respondents further contend that the

Digitized by Google

bill ought not to be maintained because it seeks to charge only the Union street estate and the Holden and Jewett street estate, and does not include the Dodge street estate, which was originally included in the charge, but which was mortgaged as already stated, Charlotte and Walter joining in the mortgage, and sold under the power contained in the mortgage. This objection to the maintenance of the bill cannot avail. The mortgage referred to conveyed, not merely the right, title, and interest of the mortgagors, but the estate itself. It contained the usual covenants for quiet enjoyment and of warranty, which extended to the entire estate. By the covenant for quiet enjoyment, the mortgagors agreed that the mortgagee, his heirs and assigns, should and might, from time to time, and at all times forever thereafter, lawfully, peaceably, and quietly have, use, occupy, possess, and enjoy the demised and bargained premises,—that is, the mortgaged estate,—with the appurtenances, free and clear, and freely and clearly acquitted, exonerated, and discharged of and from all and all manner of former and other gifts, grants, bargains, sales, leases, mortgages, wills, entails, jointures, dowries, judgments, executions, and incumbrances, of what name or nature soever, that might in any measure or degree obstruct or make void the mortgage deed. By the covenant of warranty, they engaged the demised premises—the mortgaged estate—to the mortgagee, his heirs and assigns, against the lawful claims and demands of any person or persons whatsoever, forever to warrant, secure, and defend. These covenants were covenants running with the land, and would therefore be available, in case of a breach, not only to the mortgagee, but to the purchaser under the mortgage or his grantees. If the complainants were permitted to enforce the charge against the Dodge street estate, they would thereby render themselves liable to suit on their covenants above recited by the owner of the estate to make good the damage sustained from the enforcement of the charge. The prevention of this circuity of action is the foundation of the principle of estoppel, which precludes a person from asserting any claim or title in derogation of his covenants. Jackson v. Bradford, 4 Wend. 619, 622; Jones v. King, 25 Ill. 383; Korngood v. Davis, 21 S. C. 183, 209; Bigelow, Estop. (2d Ed.) 289, 301; Tied. Real Prop. § 728. If, therefore, the complainants were to attempt to establish their lien under the charge on the Dodge street estate, they would be held to be estopped from so doing, and, consequently, the effect of the mortgage containing the covenants recited was to release that estate from the lien of the charge, and to leave the charge to rest on the two remaining parcels.

The respondents make the further point that inasmuch as the complainants took by descent from their father an undivided five-sixtieths each of the two-thirds of the real estate which remained at his death, subject to the charge, the charge is not enforceable, because it was merged in their absolute ownership of the fee. The point is untenable. The charge in favor of the complainants cannot extend beyond their lives at the longest, while the estates taken by them by descent were in fee. The charge and the estate acquired by descent are therefore not coextensive and commensurate. When such is the case, though a merger takes place at law, it is not the necessary result in equity. Equity will not permit a merger, except in accordance with the intention of the acquirer of the two interests or estates, and, if he has expressed no intention, will look to the circumstances of the transaction to ascertain what is for his advantage, and will presume his intention to be in accordance therewith. 2 Pom. Eq. Jur. §§ 787–791; Knowles v. Carpenter, 8 R. I. 553; Duffy v. McGuiness, 13 R. I. 595; McGale v. McGale, Index OO, 157, 29 Atl. 967. It was clearly for the advantage of the complainants that the charge should be kept alive, and hence the merger suggested did not take place. It is conceded that the respondents purchased the estates with notice of the charge. We are of the opinion that the charge is enforceable, and, after due consideration of the circumstances, we have fixed the sum to be allowed to Charlotte at $500 a year, to begin from the time when demand in her behalf was made on the respondents, and the sum to be allowed in favor of Walter at $400 a year. As, however, Walter, by his deed dated May 18, 1888, conveyed to Hubbard, as before stated, his nine-sixtieths of the two parcels of land, and as his deed contained covenants for quiet enjoyment and of warranty in the same form as those which were contained in the mortgage of the Dodge street property, he is estopped thereby from claiming from the respondents holding these nine-sixtieths that proportion of the $400, to wit, $60, so that the amount to be paid under the allowance is reduced to $340 a year, to be paid by the respondents other than the holders of said nine-sixtieths. No demand on the respondents having been made by Walter or in his behalf, the payment on his account will begin from the date of the filing of his petition to intervene in the suit. The ownership of the two parcels of land charged not being in the same respondents, the sums allowed must be apportioned between the two parcels. The data before the court is insufficient to enable us to make the apportionment. If the respondents are unable to agree, we will hear them on the question.

Digitized by Google

DE WOLF et al. v. MIDDLETON et al.

(Supreme Court of Rhode Island. Feb. 25, 1895.)

WILLS—DETERMINATION OF DEVISEES.

1. Where a testator devises land to his daughters, and, "on both their decease" without issue, to his heirs, since the daughters take a defeasible fee, and the heirs take by way of executory devise, the heirs are to be determined as of the date of the death of the surviving daughter, and not as of the date of the testator's death.

2. A further clause, qualifying the heirs at law by the words, "according to the statute of descents," has reference to the statute existing at the time the devise to such heirs took effect.

Bill by William F. De Wolf and another against Annie E. Middleton and others for partition of real estate. Decree for complainants.

For former opinion, see 26 Atl. 44.

James, Theodore & Wm. F. Tillinghast, for complainants. B. M. Bosworth, Darius Baker, Pegram & Cooke, Francis Colwell, and Walter H. Barney, for respondents.

STINESS, J. Upon a previous hearing in this case (18 R. I. 151, 26 Atl. 44), it was held that the second and fifth clauses of the will of William De Wolf gave to his two daughters, Charlotte and Maria, defeasible estates in fee, which, upon their deaths without issue, passed to the heirs of said William by way of executory devise. The question now arises whether the heirs are to be ascertained as of the date of the death of the testator, in 1829, or of the death of the surviving daughter, in 1890. Three claims are made: First, by the complainants, that the estate is to be treated as vested in the heirs of the testator at his death, as in the case of a contingent remainder; second, by the respondent Annie E. Middleton, that the estate vested upon the happening of the contingency in 1890, but that the heirs are to be ascertained under the statute of descent in force at his death; and, third, by the other respondents, that the heirs are to be ascertained by the statute in force in 1890, when the devise took effect. In most, if not all, of the cases cited by the complainants there was a precedent estate supporting a remainder, created from the death of the testator, but contingent upon an event. It would follow from this that the heirs must be ascertained as of the testator's death, because the interest in the remainder began then. Bullock v. Downes, 9 H. L. Cas. 1; Mortimore v. Mortimore, 4 App. Cas. 448; Stewart's Estate, 147 Pa. St. 383, 23 Atl. 599; In re Kenyon, 17 R. I. 149, 20 Atl. 294. But a marked distinction between a contingent remainder and an executory devise is that estates of the latter kind arise when their time comes, and do not depend for support upon a prior estate. Williams, Real Prop. 289. They may be limited upon a fee, as in this case. An executory devise is the devise of a future estate, and, if the executory devisee dies before the event happens, the estate goes to the heir at the time of the event, and not to the heir at the time of the death of such devisee. Goodright v. Searle, 2 Wils. 29; Cain v. Teare, 7 Jur. 567; Fearne, Rem. 560, and cases cited. The happening of the contingency determines who is to take the estate, and until that time no one has an interest to transmit. Brown v. Williams, 5 R. I. 309. In Doe v. Frost, 3 Barn. & Ald. 546, where a testator gave an estate to his son in fee, and if he should die without issue to the heir at law of the testator, subject to legacies for the younger branches of the family, it was held that the son took an estate in fee with an executory devise over to the person who, on the happening of the event contemplated by the will, should become the heir of the testator. This case was referred to as a correct decision by Denman, C. J., in Doe v. Spratt, 5 Barn. & Adol. 731, upon the intention of the will. Doe v. Frost is also cited as an authority in Coltsmann v. Coltsmann (1868) L. R. 3 H. L. 121. While the general rule is that the heirs of a testator are to be taken from the time of his death, yet the rule gives way to a contrary intent to be found in the will. Assuming, then, that the cases referred to go no further than this, we think that the will in this case shows such an intent. The property given to Charlotte or Maria is to go, "on their decease," in the second clause, and "on both their decease," in the fifth clause, to the heirs at law of the testator. In making such a gift his mind would naturally look forward to the time when the estate might vest in possession, and so the words used comport with an intent to point out the time and mode of ascertaining who the heirs will be, by designating a class to take as executory devisees. The agreed facts also point to such an intent. When the will was made the son William was a domiciled resident of Cuba, who, as an alien, was incapable, as our law then stood, of taking by descent. But that there can be no inference of an intent to exclude him on this account appears by the fact of a devise of real estate to him, and the fact that he, with the other children, was one of the residuary legatees in the will. Of course, the testator could not foresee changes in our law in regard to alienage, but it is not improbable that he looked forward to a return of his son or his family to citizenship in this country, when he or they could stand as legatees in the class which he designated. Moreover, the words are that the estate, "on their decease, be divided among my heirs at law." The division was to be prospective, and we see no reason why the class should not also be taken to be so. For these reasons, as well as those given in the previous opinion, we think that these words were intended to fix the time for the vesting of the estate and for the ascertainment of the persons to

Digitized by Google

take in possession. They are not substantially different from cases where the devise is to those who shall then answer the description. 2 Jarm. Wills (6th Ed.) § 992, and cases cited; In re Swinburne, 16 R. I. 208, 14 Atl. 850; Pinkham v. Blair, 57 N. H. 226. In Sears v. Russell, 8 Gray, 86, the words, "in case of the death of any child of a daughter without issue, after its mother and before its father, the share of such child shall not go to its father, but to the testator's heirs at law," were construed to mean the testator's heirs then living, and under such construction the devise was held to be void for remoteness. But it is argued that the words, "according to the statute of descents," import a class to be ascertained and traced from testator's death. We do not think this is so. In Sturge v. Railway Co., 19 Ch. Div. 444, it was held that a devise to persons "who shall, by virtue of the statutes for the distribution of the estates of persons dying intestate, be my next of kin," describes a class to be ascertained on the hypothesis that the testator lives up to and dies at the period of distribution. See, also, Wharton v. Barker, 4 Kay & J. 483. It must be admitted that in some of the cases cited the language has been clearer than in the will before us, but understanding, as we do, that the testator pointed out a time when his devise was to take effect, and the class to whom it was then to be given, this case does not fall within the numerous cases of a remainder, which is to be traced from the testator's death. It is a gift to persons who shall be his heirs when the contingency arises, and not to those who were his heirs at the time of his decease. We therefore decide that the heirs of William De Wolf, Sr., are to be ascertained as of the date of the death of Mrs. Rogers, December 14, 1890, "according to the statute of descents" as it then was. By Pub. St. c. 172, § 6, aliens are admitted to take and transmit title to real estate. It is admitted that by the law of Cuba the marriage of William De Wolf, Jr., to Susanna Du Coudray, in 1822, had the effect to render legitimate the son called Jerome De Wolf, born in Cuba in 1819. He was therefore an heir of his father, according to the law of the father's domicile, and this determines his status here. Melvin v. Martin, Index OO, 135, 30 Atl. 467.

MERCHANTS' & MINERS' TRANSP. CO. v. BORLAND et al.

(Court of Chancery of New Jersey. March 8, 1895.)

FRAUDULENT PAYMENT OF INSURANCE PREMIUMS —RIGHTS OF CREDITORS—EQUITABLE ASSETS.

1. Payments made by a debtor as premiums upon a policy of life insurance upon his own life, for the benefit of a wife and child, are essentially gifts to the beneficiary, and conclusively fraudulent and void as against creditors existing at the time of such payments.

2. The contrary doctrine advanced by the supreme court of the United States in Central Bank v. Hume, 9 Sup. Ct. 41, 128 U. S. 195, is not binding on the courts of this state.

3. The act of February 19, 1851, as amended by the act of March 8, 1871 (Revision, p. 640), does not authorize a husband who is indebted to pay premiums upon a policy upon his life for the benefit of his wife, and enable her to hold the proceeds of the policy as against a creditor of the husband existing at the time of such payments.

4. A creditor of a decedent by judgment recovered against him in another state, the existence of which is admitted by the personal representative, is entitled to maintain a suit in this court to reach equitable assets, viz. moneys given by the debtor to his wife and children in fraud of the judgment creditor.

(Syllabus by the Court.)

Bill by the Merchants' & Miners' Transportation Company against Louisa Borland and others. Demurrer to bill. Overruled.

The defendants are the widow and four children of Robert B. Borland, late a resident of this state, who died insolvent, July 15, 1893. The complainant is a creditor of the deceased by judgment recovered in the state of New York, and the object of the bill is to compel the defendants to pay complainant's judgment out of certain moneys received by them from certain life insurance companies, in payment of certain policies of insurance taken out by the deceased upon his life for the benefit of his wife and children, the annual premiums upon which were paid by him out of his own moneys, mostly after the recovery of complainant's judgment. The principal question raised by the demurrer is the general one as to the merits of complainant's claim. More specifically stated, the facts set out in the bill and admitted by the demurrer are as follows: On November 11, 1886, complainant recovered in the supreme court of New York a judgment against Borland, then a resident of New Jersey, for $6,309.54, for which amount Borland was then indebted to complainant. No part of this indebtedness has ever been paid, and the whole, with interest, still remains due. Borland died July, 1893, insolvent to the extent of 97 per cent. of his indebtedness. (1) In December, 1886, after the recovery of complainant's judgment, Borland procured from the Mutual Benefit Life Association of New York a policy upon his life for $5,000 in favor of his four children, defendants. (2) On the same day he procured from the same company a like policy for $5,000 in favor of his wife, Louisa, defendant. (3) In 1886, and after incurring the indebtedness to complainant merged in the judgment, exact date not given, Borland took out a like policy from the Mutual Life Insurance Company of New York for $30,000 in favor of his wife, Louisa, defendant. These several policies were subject to the payment of certain annual premiums, the amount of which is not stated in the bill, but it is there alleged that they amount to over $1,400 a year, and were paid by Borland out of his own means and

Digitized by Google

money up to his death. (4) In the year 1890, exact date not given, Borland took out another policy of insurance upon his life from the Mutual Life Insurance Company of New York for $5,000 in favor of his wife, Louisa, the annual premium upon which was $293, which was paid by him each year, until he died, out of his own money and means. (5) In the year 1891, exact date not stated, Borland took out another policy upon his life from the Mutual Life Insurance Company of New York for $5,000 in favor of his wife, the annual premium upon which was $308, which was paid by him to the company out of his own money and means each year until he died. In addition to the foregoing five policies, Borland had taken out, in 1876, from the Mutual Life Insurance Company of New York, a policy upon his life for $5,000 in favor of his four children above named, the annual premium upon which was $161, which was paid by him each year up to his death, as well before as after the recovery of complainant's judgment, out of his own means and money. At his death two of his children were minors, and letters of guardianship of them were granted by the surrogate of Hudson county to his widow, the defendant Louisa. The bill charges that these annual payments of premiums were so paid by Borland for the purpose of placing so much of his means beyond the reach of his creditors, and for the purpose of defrauding the complainant, and that he during the whole period was insolvent. The bill further alleges that all these policies have been paid in full, those in favor of Mrs. Borland to her in her own right, and those in favor of the children in part to her as guardian, and in part to those who were of age. It further alleges that Borland died testate of a will, by which he gave his wife his whole estate, and appointed her executrix; that she proved such will before the surrogate of Hudson county, and undertook the burden of its execution; that he left no real estate whatever, and personal estate to the value of $1,350 only; that preferred claims against the estate amounting to $878 were presented to the executrix, and other claims (whether including complainant's or not is not distinctly stated) amounting to $13,457.72 have been duly presented under oath to the executrix; so that the estate will not pay above 3 per cent. of the general indebtedness, including complainant's claim. Mrs. Borland is made a party defendant as executrix as well as individually, but no decree is prayed against her as executrix.

W. B. Gillmore, for complainant. Isaac S. Taylor, for defendants.

PITNEY, V. C. There is no mystery or charm about life insurance. It is not a means of creating wealth, nor yet a contract of mere indemnity, as is that of fire and marine insurance. It is, in its most usual form, simply a mode of putting by money for savings. A sum of money is paid half yearly, or yearly, as the case may be, to a corporation, which receives and invests it carefully, and adds to it its yearly earnings, and in consideration of such payments agrees to pay the party insured, or such other person as may be named, a sum certain upon his death. The amount so agreed to be paid is arrived at by taking the age and state of health of the party at whose death the money is to be paid, and estimating how many years he will probably live. This is arrived at by consulting what are called the "Tables of Mortality," viz. an account kept for a great number of consecutive years of the ages at which men and women die, and taking the average of all such ages. By this means the probable number of years any man or woman of a given age and of ordinary health will live may be arrived at with reasonable certainty. Having ascertained this chance of life, the company fixes such an annual rate as will, with accretions, at the time of the death of the party insured, amount to the sum agreed to be paid, together with the cost of investment, care, etc. Some of those so insured will live longer, and some not so long, as the tables indicate they ought to live. The real business of the insurance company, as distinguished from that of any other investment company or ordinary savings bank, is to collect overpayments from those who live beyond the average period,—the long livers,—and to pay their proceeds to those who do not live the average period,—the short livers. This distinction, however, does not alter, in legal contemplation, the intrinsic character of the transaction between the insurer and assured, which is that of paying money to-day in expectation of its repayment at a future day, either to the party paying it or such other person as he or she may name. There is, and can be in law, no difference between the payment by a husband of a stated sum of money at stated periods to an insurance company upon promise to pay a certain sum at the death of the payer to his wife, and the deposit by the husband of a like stated sum, at like stated periods, in a savings bank to the credit of the wife. Both are gifts to the wife, and the money afterwards paid by the savings bank or insurance company, as the case may be, to the wife, or her personal representatives, is nothing more than a payment to her of the money previously paid to it by the husband, with its earnings and increase.

The illustration I have used is that of the form of life insurance, so called, in most common use, and it is the one here in question. But the same reasoning applies to the other forms of life insurance. For instance, if the premium—by which is meant the cash consideration paid to the insurer—is paid, as it may be, all at once, in a single down payment, and the insurer agrees to

Digitized by Google

pay a greater sum at the death of the assured, it is a mere mode of placing a certain sum of money at interest to be repaid at death, the amount of interest being fixed by the probability of life of the assured. The case presented, then, is this: A debtor owing a large sum upon a judgment, and plainly insolvent, is in receipt, from some source, each year, of money and means, belonging to himself, over and above what he finds necessary or proper to expend for current expenses, to the amount of about $1,500; and, instead of devoting it to the payment pro tanto of his debt, he makes a present of it to his wife and children by the machinery of divers policies of life insurance, with the result that at his death he has given his wife in premiums enough to pay his debt, and she has become practically rich at the creditor's expense. This statement of the case seems to me to decide it. The old maxim that a man must be just before he is generous applies. I am unable to discover any principle or well-considered authority upon which such a transaction can be sustained against creditors. To do so would, as it seems to me, be to run counter to principles so well settled and familiar as hardly to require recital. A husband cannot settle money or property in any shape upon his wife while he is indebted. If he attempts it, the creditors are entitled to the aid of this court to reach the property so settled, in whatever form it may be found. The great weight of authority holds that payments on account of life policies for the benefit of another must be considered as made in fraud of creditors. Schondler v. Wace, 1 Camp. 487; Skarf v. Soulby, 1 Macn. & G. 364; Jenkyn v. Vaughan, 3 Drew, 419; 2 Jur. (N. S.) 109; 25 L. J. Ch. 338; Stokoe v. Cowan, 29 Beav. 637; 7 Jur. (N. S.) 901, 30 L. J. Ch. 882; Freeman v. Pope, L. R. 9 Eq. 206; 5 Ch. App. 536; Taylor v. Coenen, 1 Ch. Div. 636.

The foregoing were all cases of policies taken out in the name and for the benefit of the party whose life was assured, and by him assigned to a beneficiary. But I am unable to perceive any difference between such a case and that of a policy taken out in the first instance in the name and for the benefit of a third party. Take the case of a policy issued in consideration of a single down payment. If a debtor invests a sum of money in a policy for a certain sum payable to his personal representatives at his death, and then assigns that policy to his wife, that is an indirect mode of making a settlement upon her. If, instead of taking the policy payable to his personal representative, he should have it made payable directly to his wife, that seems to me to be making a direct settlement upon his wife. It is, in effect, loaning a sum of money to the insurance company, and taking the contract of the company to repay it, with a fixed interest, to his wife at his death. Holt v. Everall (1878) 2 Ch. Div. 266, was the case of a policy taken out by a husband in favor of his wife under the new English married women's acts, which validate such policy unless the creditor shall prove that the policy was taken and premiums paid by the husband with intent to defraud his creditors. Vice Chancellor Hall found as a fact that the husband had paid the premiums for the purpose of defrauding his creditors. The court of appeals differed with him on the question of fact, and found the premiums had been, in fact, paid by the wife, and upheld the transaction; but Lord Justice James (page 274) says: "But it would be a very different thing, as regards this transaction, if the premiums were paid out of the husband's money. That might affect the main question itself, and certainly the payment of the premiums out of the husband's money becomes important, because, under the married women's property act, if any premiums are paid by the husband with intent to defraud the creditors, those premiums ought to be repaid to the husband's creditors, and one part of the bill is addressed to that particular relief." And to the same effect is what was said by Lord Justice Mellish. The view above set forth is so well supported by the opinion of the supreme court of Alabama, in the case of Fearn v. Ward, 80 Ala. 555, at page 560, 2 South. 114, that I transcribe it here: "The procurement of the policy of insurance by Robert Fearn in favor of his child, and the payment of the premiums with his funds, constitute a gift to her,—a voluntary conveyance, based on parental affection,—which is void as to his existing creditors, though no fraud may have been intended. It is a voluntary provision, effected by converting to her benefit money which, in equity and good conscience, should have been paid to his creditors. Though the law regards the parental duty of maintenance, and the consequent duty of making provision for the future when the father may no longer exercise protecting care, it subordinates the discharge of those duties to obligations to his creditors, and declares void as to them any voluntary appropriation of property not authorized by legally expressed exemptions or privileges. If money belonging to a debtor, which should be paid to his creditors, is used in the purchase of property for the benefit of another, merely on good consideration, the property purchased becomes the property of the debtor as to his creditors. A father who procures a policy of insurance to be issued on his life payable to his child and pays the premiums with his own money, makes a voluntary gift or assignment of a portion of his estate, which constitutes an investment for the benefit of the person for whose benefit the policy was issued. There can be no difference between a policy thus procured and the assignment of a policy originally issued in his own name. The insurance constitutes the property purchased, and is the subject-matter of the in-

Digitized by Google

vestment. If the father be in debt, such voluntary investment is fraudulent in law, as to his existing creditors, without regard to his intent or to his circumstances and condition as to his ability to pay. * * * Without the statutory intervention, the whole of the insurance would be subject to the debts of the insured."

It is hardly necessary to state that it is settled law in New Jersey that all voluntary gifts are conclusively fraudulent and absolutely void as against all existing creditors, without regard to the actual intention of the donor. Haston v. Castner, 31 N. J. Eq. 697, at page 701 et seq.; Arnold v. Hagerman, 45 N. J. Eq. 186, 17 Atl. 93; Gardner v. Kleinke, 46 N. J. Eq. 90, 18 Atl. 457. In looking at the American authorities, it must be borne in mind that in many of the states the statutory law provides, as in England the act just referred to, that husbands may insure their lives for the benefit of their wives or children, or both, and that the wife or child in such case shall be entitled to receive the proceeds of the policy against the creditors of the husband and father. In a few states no limit is placed upon the amount which a husband and father may, in this mode, abstract from his business or earnings and settle on his family. In most of the states, however, the amount is limited, as, indeed, common justice requires it should be, to a sum certain in each year. In New York—the only state, except our own, in which, for present purposes, we are interested—it is fixed at $500 a year. The only statute in New Jersey is that of February 19, 1851 (Nixon, Dig. 1868, p. 548), as amended by the act of 1871 (P. L. 25; Revision, p. 640). That act, before being amended, provided: "(1) It shall be lawful for any married woman, by herself and in her name, or in the name of any third person, with his assent, as her trustee, to cause to be insured for her sole use the life of her husband for any definite period, or for the term of his natural life; and in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable by the terms of the insurance, shall be payable to her, to and for her own use, free from the claims of the representatives of her husband or his creditors; but such exemption shall not apply where the amount of premium annually paid shall exceed $100. (2) In case of the death of the wife before the decease of her husband, the amount of the insurance may be made payable, after the death, to her children for their use, and to their guardian, if under age." As amended, the last clause of section 1 was omitted. This act is in marked contrast with most of those of other states. That of Massachusetts (Gen. St. c. 58, § 62, cited in Gould v. Emerson, 99 Mass. 155) provides that "the policy shall be good whether procured by herself, her husband, or any other person." That of Connecticut provides that any policy of life insurance, expressed to be for the benefit of a married woman, shall inure to her separate estate; but, if the annual premiums exceed $300, the amount of such excess shall go to the creditors of the person paying the premium. The New York act more nearly resembles ours. In fact, it is precisely like ours, until we come to the last clause of the first section of our act as originally enacted. That clause, as above quoted, is: "But such exemption shall not apply where the amount of premium annually paid shall exceed $100." The New York act, as it now stands, reads: "But when the premium paid in any year out of the property or funds of the husband shall exceed $500, such exemption from such claims shall not apply to so much of said premium so paid as shall be in excess of $500, but such excess, with the interest thereon, shall inure to the benefit of his creditors." Laws N. Y. 1870, c. 277, cited in Stokes v. Amerman, 121 N. Y., at pages 341, 342, 24 N. E. 819. This statute has been held in New York to warrant the setting aside by a husband of $500 a year for the benefit of his wife. Barry v. Society, 59 N. Y. 587, at page 593. And in Stokes v. Amerman, supra, it was held that all beyond $500 a year must go to the creditors. Acts of this character are, properly enough, called "Exemption Laws," and, unless some limit is placed upon the amount by them permitted to be annually settled on the wife, they furnish a ready means by which a husband, no matter how much he may owe, may settle all his property upon his wife to the complete discomfiture of his creditors, and they may well be called statutes whereby fraud is encouraged and ratified. For this reason they should be carefully examined, and when without limit should be strictly construed.

But to return to the case in hand. The case does not show within what jurisdiction the several contracts were entered into, or in what state the several insurance companies are domiciled, except as it may be inferred from their names that they are New York corporations. If the case is to be adjudged by the law of New York, there is an end of the defense, since it appears that the annual payments were largely in excess of $500, and as to the premiums upon the policy for the benefit of the children there is no statutory protection whatever. Let us now consider the true construction and effect of our own statute. That had its origin in our state in the fourth and fifth sections of the charter of the Mutual Benefit Life Insurance Company (P. L. 1845, p. 27), from which the act of February 19, 1851 (P. L. p. 34; Nixon, Dig. 1868, p. 548), was copied, the only change being that the limit of annual payments was reduced from $300 to $100. The fourth and fifth sections of the charter of the Mutual Benefit Life Insurance Company are an exact rescript of the New York act of 1840, c. 80, §§ 1, 2. That act, which was the first of the kind in New York, was amended in 1858

Digitized by Google

(chapter 187, § 1) by adding the words, "out of the funds or property of the husband," so that it read: "But such exemption shall not apply where the amount of premiums annually paid out of the funds or property of the husband shall exceed three hundred dollars." These words, or any equivalent, have never been introduced into our statute. A question having arisen in New York whether the amendment of the New York statute just referred to had the effect of giving the creditor the whole proceeds of the insurance, where there had been an excessive payment by the husband, the act was further amended in 1870 so as to read as it now stands, and as it is above quoted.

The object and purpose of the New York statute of 1840 seems to me to be readily ascertained. In the first place, it was doubtful, to say the least, whether by the common law as declared by the courts of that state, and under their statutes against wagers, a policy taken out by a wife upon her husband's life was not void as a wager (see Ruse v. Insurance Co., 23 N. Y. 516); and, as life insurance was then in its infancy, it was prudent, to say the least, to provide against any such result. In the second place, all the wife's personal property and the income of her real estate belonged, at that time, absolutely to the husband. This marital right included her earnings. Schouler, Dom. Rel. § 81; 1 Bish. Mar. Wom. §§ 21, 212. Hence a policy of insurance upon the husband's life for the benefit of the wife, the premiums being paid by her with money which, but for her coverture, would belong to her, would belong to the husband. Thus, in Moehring v. Mitchell, 1 Barb. Ch. 264, where a wife had insured her husband's life for her own benefit immediately after the above-recited enactment of 1840, and had, with his consent, indorsed upon the policy a well-executed testamentary disposition, and husband, wife, and only child had sailed upon and were lost with the steamer President, the testamentary disposition was held to be of no avail, and the case not within the provisions of the act of 1840, and the proceeds of the policy given to the husband's representatives. If the policy in such a case would belong to the husband, then, of course, his creditors could take it. This view of the object of the act is strengthened by the fifth section of the Mutual Benefit Company's charter, which was the second section of the New York act, and is the second section of our act as above quoted. The object of that section was, and is, to prevent the policy from going to the husband under his marital rights.

These considerations show that some legislation was proper, if not necessary, in order to insure the validity of a contract of insurance in favor of the wife, and to protect it from the husband's creditors, even where the premiums were paid by her out of what would be called, in common parlance, her own moneys. The general right, at common law, of the husband to his wife's property and income was always subject to the limitation of a reduction thereof to possession by him (Stall v. Fulton, 30 N. J. Law, 430); and a husband was at liberty to permit his wife to collect and retain her own earnings and income. Here we find at once a source from which a wife might, at the common law, have a fund out of which to pay the premiums upon a policy of insurance upon her husband's life for her own benefit, and take advantage of the provisions of the statute in her favor. In this state of the law, and it not having yet been decided in this state that life insurance policies were not void as wagers (Insurance Co. v. Johnson, 24 N. J. Law, 576, decided in 1854), the object and purpose of the legislation in question in this state was precisely the same as in New York. Thus the introduction of the sections in question into the charter of the Mutual Benefit Life Insurance Company is accounted for, and also its subsequent introduction into the general statutory system of the state in 1851, a year before the married woman's act was passed. There is nothing in the language of the enactment which indicates an intention to enable the husband to set aside a portion of his property or income to the use of his wife as against his creditors. The language used indicates that the authority is to the wife to procure the policy and to pay the premiums on it. Further it is to be observed that the legislature in 1871, after the passage of the married woman's act securing her separate estate to her own use (P. L. 1871, p. 25), deliberately struck out of the act the clause limiting the amount which a wife might so invest in a policy. This I cannot believe would have been done if the legislature had understood that, by the true construction of the act, a husband was thereby empowered to invest his own moneys in a policy for his wife, which she might hold as against his creditors. The result of such construction, after the limit was removed, would be to enable a husband to settle all his property in a lump on his wife at the expense of his creditors. It follows that our act does not authorize such investment by the husband. A contrary result under the New York statute is due to the interpolation therein, in 1858, of the words, "out of the funds or property of the husband," as above shown. The introduction of these words raised an implication that the husband was so empowered as against his creditors.

I should have deemed it not worth while to spend so much time and space upon the general question of the right of a husband or father to settle property upon his family by the machinery of life insurance, but for a recent decision of the supreme court of the United States, which is supposed to militate against the views I have taken. I refer to Central Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41. I do not propose to indulge in a general crit-

Digitized by Google

icism of the doctrines there advanced. This has been done in an able and thorough manner by Mr. Williston in the twenty-fifth volume of the American Law Review (page 185), and I refer particularly to and adopt his language found on page 196. It is enough to say that there were in that case circumstances which rendered it exceptional, and warranted the result arrived at, without infringing upon the long-established and wholesome rules of law for the protection of creditors, and much of what was said by the learned chief justice was obiter. The only point, however, actually decided in that cause which can be invoked in defendants' favor is this: "A married man may rightfully devote a moderate portion of his earnings to insure his life, and thus make reasonable provision for his family after his decease, without being thereby held to intend to hinder, delay, or defraud his creditors, provided no such fraudulent intent is shown to exist or must be necessarily inferred from the surrounding circumstances." Now if we should apply that test here, I should feel constrained to hold that the circumstances do, of necessity, show a fraudulent intent. A man who has just suffered a large judgment to be recovered against him, and at once procures a very large policy of insurance to be issued on his life for the benefit of his wife, and keeps it up for years by payment of the annual premiums, and during all that time does not pay anything on his judgment indebtedness, does by such conduct at once induce the belief that he intended thereby to devote money to the enrichment of his wife which he ought, in mercantile honesty, to have applied to the payment of his debt, and such conduct is in law and morals a hindering, delaying, and defrauding of his creditors. But, whether I am right or not in this view, the law in this state is, as above shown, well settled that all such gifts and payments are conclusively fraudulent and void as against any existing creditor, such as the complainant here. Upon such questions I must be guided by the decisions of the highest court of our own state. While the utterances of the supreme court of the United States are binding throughout the Union upon certain constitutional and statutory questions, and are entitled to great weight upon all questions, they cannot be considered as authoritative on such as are here involved, outside of the District of Columbia, where, in fact, the case just cited arose. The result is that whether the contracts here in question are to be construed by the law of the state of New York, or by that of New Jersey, the complainant is entitled to relief. So much for the merits.

The further point was made by the defendants that complainant has no standing in this court, because it did not show that it issued an execution upon its judgment, thereby exhausting its remedy at law, citing Robert v. Hodges, 16 N. J. Eq. 299, and that line of cases; and, further, that it does not appear that complainant has presented a claim upon its judgment against the personal representative of the deceased. I think neither of the points is well taken. The object of requiring a judgment as a foundation of a right to a standing in this court in a case like this is that the debt should be conclusively established, and should be in a shape to reach any property the defendant may have, and the object of issuing an execution and having a return of nulla bona is to show the necessity for coming to this court to reach equitable assets not liable to execution. But, as shown in Haston v. Castner, 31 N. J. Eq. 697, neither of these prerequisites is required after the death of the debtor, provided the debt be admitted by the personal representative, and the deficit of assets in his hands appears. Nor is it necessary that there should be a request to the personal representative to sue, and a refusal on his or her part so to do, before coming here for relief of the kind here asked. This is shown by the learned chief justice in the course of his opinion in Haston v. Castner, supra, where he says (page 701): "But, in the second place, it is obvious that, in many cases, perhaps in most, there would be serious difficulties in the way of a procedure of this nature being instituted in the name of the personal representative, because conveyances of this character depend very often for their effect on the relations of the debtor towards particular creditors, so that, while they may be void as to some of such creditors, they may be valid as to others. Suggesting, therefore, these embarrassments, but without concluding that the personal representative may not take proceedings of this kind, after having obtained in the orphans' court an order for the sale of the lands of the debtor, it is sufficient now to say that it is a convenient practice, and is not open to legal objection, for the individual creditor, for his own benefit, and in behalf of others similarly situated, to institute these suits." Besides this consideration, it is obvious that it would be idle to ask the personal representative here to sue herself and children. If it be said that complainant may ask the orphans' court to charge the executrix in her account with the amount of premiums received by her, the answer is twofold: First, non constat that all the creditors are entitled to share in the fund now being pursued; and, second, such proceeding would not reach the moneys received by the children. The case, then, stands thus: By the demurrer it is admitted by all the defendants, including the personal representative, that complainant is a creditor, by judgment recovered in the sister state of New York, which is as conclusive here as if recovered here in our own courts; that the estate is largely insolvent; that there is no real estate or personal property upon which a levy could be made; and that the defendants hold moneys received indirectly from the judgment debtor by an arrangement

Digitized by Google

fraudulent and void as to the complainant. Upon such a case, it seems to me there can be no question as to the right of complainant to some measure of relief. As remarked by the court in Stokes v. Amerman, supra, it is not for present purposes necessary to define just what that measure of relief, in the absence of an answer, may be. If the complainant has not presented its claim under oath to the executrix, it may be, possibly, as against these defendants, that it will be obliged to credit upon its debt the amount of such dividend as it would have received if the claim had been duly presented. If, on the other hand, such claim has, in fact, been presented, and no dividend as yet declared and paid upon it, the defendants will probably be entitled to be subrogated to the rights of the complainant against the estate in the hands of the executrix. These are matters to be worked out according to equitable principles, in the further progress of the suit. The demurrer must be overruled, with the usual consequences.

STATE (STEWART, Prosecutor) v. MAYOR, ETC., OF CITY OF HOBOKEN.

(Supreme Court of New Jersey. Nov. 23, 1894.)

CHANGE OF STREET GRADE—ASSESSMENT—NOTICE—REVIEW—LACHES.

1. By the provisions of the statutes (P. L. 1888, p. 471, and P. L. 1889, p. 378), an assessment for damages for a change of a street grade may be made in any city having power to change such grade by those officers who, under the city charter, make assessments for benefits arising from municipal improvements; and Hoboken is one of those cities.

2. When the change of grade is itself an improvement for which benefits may be assessed, or is a part of or an incident of such an improvement, the assessment for damages should be made at the same time, and as a part of the assessment for benefits.

3. The provisions in the charters of the respective cities respecting the notices which shall be given of the making or confirmation of an assessment for benefits apply also to that portion of the assessment which is for damages.

4. When the commissioners fail to report any damages in favor of an abutting landowner, but their report shows that the question of damages was passed upon, certiorari is an appropriate writ to renew the proceeding.

5. When such owner knew, while the improvement was in progress, that the street grade was to be raised, and knew of the assessment shortly after it was made, yet waited for nearly two years before applying for his writ, it is such delay as, under the circumstances, should lead to dismissal of the writ.

(Syllabus by the Court.)

Certiorari by the state (Thomas H. Stewart, prosecutor) against the mayor and common council of the city of Hoboken to review an assessment for benefits and damages resulting from the building of a sewer and other improvements. Dismissed.

On certiorari, bringing up an assessment for benefits and damages resulting from the building of a sewer and other improvements in Monroe street, in the city of Hoboken. On March 27, 1890, an ordinance was passed by the common council of Hoboken, providing, in section 1, that a brick sewer be constructed in Monroe street, from the southerly line of Fourth street to the center of First street, and also that Monroe street be graded in accordance with the established grade, the curbs reset and flags relaid, and new curb set and new flags laid where necessary, and the roadway be repaved with Belgian block pavement. Section 2 provided for an assessment for benefits. On September 30, 1891, the commissioners of assessment of the said city made their report of the expense of the work done, amounting to $19,753.82. Of this amount $16,559.28 was assessed upon land peculiarly benefited, and the remainder—$3,048.54—was assessed upon the city. They also report that they have considered the question of damages, and find that two persons have been damaged to the amounts set down. No award of damages was made to the prosecutor of this writ. Upon the presentation of this report, the clerk was directed by the common council to advertise for objections according to law. This notice was published in one of the papers published in said city for 20 days previous to October 28, 1891. It notified the public that on that date objections would be heard.

Argued June term, 1894, before DIXON, ABBETT, and REED, JJ.

J. C. & S. A. Besson, for prosecutor. N. L. Minturn, for defendants.

REED, J. (after stating the facts). The prosecutor is the owner of four houses, in front of which houses this street improvement was made. It appears in the testimony that the agents of the city, in executing this work, raised the surface of the street in front of these houses, so that the improved street was from 3½ to 5 feet higher than its previous surface. The prosecutor claims that the value of his houses was greatly depreciated by this result. He also insists that it was the duty of the commissioners to award him compensation for his injury.

Let us first inquire upon what statutes the power of the commissioners to make such an assessment rests. In Vorrath v. Hoboken, 49 N. J. Law, 285, 8 Atl. 125, it was held that the commissioners in that city had no power to assess damages for the alteration of street grades. The remedy then was by action at law, under section 70 of the road act (Revision, p. 1009). By an act passed in 1888 (page 471), it is enacted that it shall and may be lawful hereafter for the commissioners of assessment in cities having to assess for benefits by reason of street improvements, but without power to assess damages therefor, to include in their report such damages as they may consider the property on the line of said improvement to have suffered. The second section of this act pro-

Digitized by Google

vided that, if the commissioners failed to make such assessment for damages, the owners should have the same rights as if the commissioners had no power to make assessments. In 1889 (page 378) an act was passed which provided that, where any city has power to change the grade of any street or part of a street upon which any house or other building stands or is erected, it shall be lawful for the municipal authorities in such city, through its proper officers, to make, or cause to be made, the proper award of damages, if any, ensuing or arising to the owner or owners of any such house or other building standing and erected upon any such street or part of a street the grade whereof is changed as aforesaid. Under the first of these acts the commissioners are empowered, and in the second practically enjoined, to assess for damages resulting from a change of grade in Hoboken. This city has, by section 56 of its charter, a power to grade, and this carries with it the incidental power to establish grades (State v. Township of West Orange, 40 N. J. Law, 122), and therefore to change grades. This brings it within the class of cities mentioned in the act of 1889; and street grading is also included in the term "street improvement," used in the act of 1888. The ability of these commissioners to make a legal assessment for damages resulting from an alteration in grade is therefore quite apparent. It is quite clear that under these statutes, where the change of grade is an incident or part of a street improvement, the assessment of damages should be made at the same time as the assessment for benefits, and as an adjunct thereof. It is also evident that the commissioners on this occasion made such an assessment. Their report shows that they passed upon the question of damages to the owners of property, and they embodied the result of their judgment in an award to two of such owners, and in finding that none other than these were injured. Indeed, it is upon the assumption that such an assessment was made that the propriety of the present method of review rests; for, if no assessment at all for damages was made, then mandamus, and not certiorari, would be the appropriate writ to compel the performance of this neglected official duty.

The ground of complaint is that the assessment was, in respect to the prosecutor, illegally made. It is, in the first place, contended that the prosecutor received no notice of the making or confirmation of the assessment, and was deprived of his right to be heard in respect to it. If this be true, it follows, as a matter of course, that the assessment cannot stand. The testimony respecting personal notice to the prosecutor, or to his agents authorized to act in the matter for him, is not clear. While it is of such a character as to lead to a strong probability that such notice must have been sent and received, yet, in view of the loose method, or want of method, of the city officers in preserving the evidence of such notification, and in view of the emphatic denial of prosecutor and his agents that such notice was received, we cannot say that such personal notice was proved. But notice was given by publication. As already observed, a notice was published in a Hoboken newspaper for 20 days previous to October 28, 1891, that the report had been filed, and that, on the evening of that day, objections to this assessment would be heard and considered.

The charter of Hoboken (P. L. 1855, p. 475, § 52) provides that, after the assessment for benefits for opening, grading, or paving, etc., of a street shall have been filed in the office of the city clerk, the clerk shall cause to be inserted in one of the newspapers published in said city, for at least 10 days, a notice of the filing of said report, and that the council will meet at a time and place, to be specified in said notice, to consider said assessment, and receive and consider all objections thereto. Now, as has been already remarked, the act (P. L. 1888, p. 471) which provides, in the first section, that the assessment for damages shall be included in the report of the assessment for benefits by reason of street improvements, taken together with the act (P. L. 1889, p. 378) which provides that the proper municipal officers shall make the assessment for damages in case of a change of grade, shows that the assessments are to be made as a single proceeding. In instances like the one now in hand, the assessment for damages is a concomitant of the assessment for benefits. It follows that the course of procedure enjoined by the charters of the several municipalities in making the latter assessment must attend the making of the assessment, which is extended, by the statutes mentioned, to damages as well as benefits.

Now, the published notice was the notification required by the charter of the city of Hoboken. Unless the notification prescribed by the legislature contravenes some fundamental right of the prosecutor, he has no ground of complaint. But there does not seem to be the least support for such a notion. That a notice by publication of the kind enjoined in the charter of Hoboken is sufficient has been so repeatedly held that no citation of authorities would be now of use. Nor need the notice be for a hearing before the commissioners who made the assessment, as well as before the common council who affirmed it. Wilson v. State, 42 N. J. Law, 612. The notice was sufficient.

The main attack, however, is that the injury resulting to the property of the prosecutor is so palpable that the report should be set aside. In respect to the testimony taken to show the amount of injury, I am quite clear that a large part of the money spent in repairing the houses, in repapering them, and in filling, is not the necessary result of the alteration of the grade. Never-

Digitized by Google

theless, it would seem difficult to escape from the conclusion that the expense of actually lifting the houses into their new positions, as well as some expense for plumbing and for filling, were the necessary consequences of the change. But, while the testimony leads us to think that some award should have been made to the prosecutor, yet we think that to vacate and send this assessment back at this late day would work more injustice to the municipality than the assessment, as it stands, inflicts upon the prosecutor. Under the act of 1889, the amount awarded as damages is to be assessed upon the property benefited by the improvement. For this, as other reasons, it is important to cities and to property owners that the amounts of such assessments should be finally fixed at as early a day as is practicable. The legislature recognized that there should be no marked delay in asserting a right to damages caused by changes of grades, for in section 70 of the road act the right to bring an action for such damages is limited to a period of 12 months. The duty of assessing for such damages was substituted for the action at law by the act of 1889. In the present case the report of the commissioners was confirmed December 3, 1891. The testimony shows that the prosecutor was informed, while the improvement was in course of execution, that the grade of the street was to be raised. He says that he saw the work progressing, and that the foreman told him that they were running a sewer through the street, and that they were also going to raise the grade. He seems to have paid no further attention to the matter. He made no arrangements to be informed, either directly or through his local agents, of the progress and completion of the work or of the assessment. After he received the bills for the amount of his assessment for benefits, he says that late in 1891 or early in 1892 he saw the houses and perceived the injury which had resulted from the raised grade. Yet it was not until November 3, 1893, that he sued out his writ of certiorari. For this reason, I think the writ should be dismissed.

PEMBERTON BLDG. & LOAN ASS'N v. ADAMS.

(Court of Chancery of New Jersey. March 6, 1895.)

INFANCY—ACTION FOR MONEY LOANED—ESTOPPEL.

1. Infancy is no defense to a suit upon a contract, the consideration of which was money actually advanced to the infant upon his falsely representing himself to be of age, such representation being relied upon by the lender.

2. A court of equity will not permit a defendant to protect himself against the enforcement of a contract, under which he has secured a loan of money, under the plea of infancy, without returning the money loaned.

(Syllabus by the Court.)

Bill by the Pemberton Building & Loan Association against George L. Adams. Decree for complainant.

Joseph H. Gaskill, for complainant. John W. Wharton, for defendant.

BIRD, V. C. The principal question in this case is whether the defendant, George L. Adams, represented himself to be of age, and on such representations secured the loan of the moneys named in the mortgage. The evidence shows that when the parties were negotiating the person making the loan asked Adams if he was of age, to which Adams replied that he was. That such inquiry was made is not only established by the testimony of the person who made it, but by a bystander, who distinctly heard the inquiry, but did not hear the answer thereto, although he swears that something was said by way of reply. Adams says he made no representations concerning his age. I have no doubt but the inquiry was made, and that the answer was purposely false. It is equally clear that the statement that he was of age was relied upon; and that the loan would not have been made if the answer had been according to the fact. The law will not, under such circumstances, allow a frauddoer to protect himself under the plea of infancy. Jones, Mortg. § 631; Herm. Estop. p. 1252, §§ 1100, 1118; Id. p. 1253, § 119; Parker v. Hayes, 39 N. J. Eq. 478, 479; Id., 41 N. J. Eq. 631, 633, 7 Atl. 511; 2 Pom. Eq. Jur. §§ 780, 945. In the next place, Adams, after coming of age, retained the possession of this property, and claimed and enjoyed all the benefits of a conveyance thereof, and now raises this defense of infancy without offering to return the consideration money. Under these circumstances, his liability continues, even though there had been no fraud. Jones, Mortg. §§ 104, 105; Herm. Estop. p. 1257, § 1121; 3 Wait, Act. & Def. 443, and many cases there cited; 1 Story, Eq. Jur. § 385. The complainant is entitled to a decree, with costs. I will so advise.

STATE v. SCHMIDT.

(Supreme Court of New Jersey. March 4, 1895.)

ILLEGAL SALE OF LIQUORS—INDICTMENT.

1. An indictment charges a sale by retail of intoxicating liquor contrary to law. *Held*, on motion to quash, that the indictment contains no description of any legal offense.

2. The supplement to the crimes act (P. L. 1893, p. 193) provides that, where the offense of keeping a disorderly house consists wholly in the unlawful sale of intoxicating liquors, the indictment shall be "in form for the sale of intoxicating liquors contrary to law," and not in that for keeping a disorderly house. *Held*, that the recital of the words of the statute did not constitute in any reasonable completeness a description of a legal offense.

(Syllabus by the Court.)

Digitized by Google

Jacob Schmidt was indicted for an illegal sale of liquor, and moves to quash. Granted.

Argued November term, 1894, before REED and GARRISON, JJ.

Alfred Hugg, for the motion. W. H. Jenkins, opposed.

GARRISON, J. This indictment charges that the defendant, "on the 31st day of January, 1894, did sell by retail, and cause and knowingly permit to be sold, to George Lewis, certain intoxicating liquors contrary to law, contrary to the statute in such case made and provided."

That this pleading lacks reasonable certainty in the description of any legal offense must be perfectly obvious.

In no wise is the defendant informed wherein the unlawfulness of his misconduct is supposed to lie. He is left to surmise whether it is because of his own lack of lawful qualification, or because of some undisclosed circumstance connected with the time or manner of such sale, or because of something in the age or condition of the person to whom it is said he unlawfully sold. As was pointed out in a recent case in the court of errors of this state, a conviction under such an indictment would not insure the subsequent protection of the defendant should his conduct be again questioned for the same act; that is, he would not be able to plead either a conviction or an acquittal had under this indictment in bar of any subsequent proceeding. Association v. Platt, 55 N. J. Law, 557, 27 Atl. 1091.

This method of pleading likewise ignores those provisions of the constitution of this state by force of which every person held for a criminal offense is guarantied not only that he shall be accused of such offense by a grand jury, but also that he shall "be informed of the nature and cause of the accusation." Const. art. 1, §§ 7, 8.

Unless the charge contain a description of the crime of which the grand jury accuses the defendant, and a statement of some circumstance by which it may be identified, and its particular nature disclosed, it is readily conceivable that a true bill may be found for one offense, and the defendant be compelled at the trial to meet any offense that happens to fall within the general terms of the indictment.

Furthermore, such a pleading does not inform the defendant of the nature of the accusation against him. Unlawful sales of liquors differ entirely in their nature; as, for instance, sales without a license differ radically from Sunday selling or sales to an habitual drunkard. I fail to see how a defendant indicted in this vague fashion can either plead or prepare for trial. He cannot intelligently traverse the facts. Still less can he admit their truth in order to question their legal sufficiency. He cannot even, with any show of consistency, plead that he is guilty as charged.

The sole ground upon which an averment of this character is sought to be sustained is that it is in the precise words of the statute under which the indictment was drawn. P. L. 1893, p. 193.

That act is as follows: "It shall not be lawful hereafter to indict any person or persons for the offense of maintaining a common-law nuisance or keeping a disorderly house under section one hundred and ninety-two of said act entitled 'An act for the punishment of crimes,' where the offense sought to be punished consists wholly in its unlawful sale of spirituous, vinous, malt or brewed liquors; but in all such cases the indictment shall be in form for the sale of intoxicating liquors contrary to law, and on conviction of such unlawful sale of any of said liquors the person or persons so convicted shall be punished as in and by said section one hundred and ninety-two of the said act entitled 'An act for the punishment of crimes' is provided."

It is undoubtedly a well-settled general rule that, in an indictment for an offense created by statute, it is sufficient to describe the offense in the words in which the statute describes it. This rule, however, is based upon and applies only to those cases in which the statute describes the offense with which it has to do. Unless this is so, the mere recital of nondescriptive words from the statute will not constitute, in reasonable completeness, a statement of the offense, so as to relieve the pleader from averring the acts that go to make it up.

The statute of 1893 does not, however, create an offense, nor does it purport to describe any. The expressed intention of the enactment was to substitute a form of indictment for selling contrary to law for the more sweeping charge of keeping a disorderly house in all cases where the elements of unlawfulness were confined to the sale of intoxicating liquors. In effect, it simply prohibits the use of the indictment for keeping a disorderly house in those cases in which that offense consists wholly in the unlawful sale of intoxicants, as, for instance, in cases coming under section 2 of the act of 1889 (P. L. p. 78), by which a single sale without a license is declared to be a nuisance. The act under consideration does not attempt to prescribe the language in which the pleader shall aver the facts that constitute the offense, which consequently is left to the established canons of criminal pleading.

The indictment in this case is quashed.

HARDY v. DELAWARE, L. & W. R. CO.

(Supreme Court of New Jersey. Feb. 21, 1895.)

MASTER AND SERVANT — THE RELATION—FELLOW SERVANTS.

1. The Passaic Rolling Mill was employed by defendant to do the work of erecting a

Digitized by Google

bridge. No price was agreed upon, other than that skilled workmen were to be furnished by the rolling mill to do the work, the defendant to pay the rolling mill for their work at a price stated in the contract. The plaintiff, while working on the bridge in the performance of the contract of the rolling mill, was injured by the carelessness of the engineer of the railroad company in running a train of cars over the bridge. *Held*, that it should have been left to the jury to say who the plaintiff's employer was.

2. To constitute the relation of fellow servants, the service must be not only under the same master, but the employment must be one having a common object.

(Syllabus by the Court.)

Error to court of common pleas, Essex county; Kirkpatrick, Judge.

Action by Walker B. Hardy against the Delaware, Lackawanna & Western Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Argued November term, 1894, before BEASLEY, C. J., and DEPUE and VAN SYCKEL, JJ.

Flavel McGee, for plaintiff. McCarter, Williamson & McCarter, for defendant.

VAN SYCKEL, J. The defendant, desiring to erect a bridge over Passaic avenue in the township of Harrison, made a contract with the Passaic Rolling Mill to furnish the iron that was necessary for the structure, at a specified price, according to the plans and specifications furnished by the defendant. The rolling mill was also employed by the defendant to do the work of erecting the bridge. No price was agreed upon, other than that skilled workmen were to be furnished by the rolling mill to do the work, the defendant to pay the rolling mill for their work at a price stated in the contract. This suit is brought by the plaintiff to recover damages from the railroad company for injury done to him, while working on the bridge under this contract, by the alleged carelessness of the engineer of the defendant in running a train of cars over the bridge. The plaintiff was nonsuited in the trial court on the ground that he was a fellow workman with the engineer of the train. The case of Ewan v. Lippincott, 47 N. J. Law, 192, was relied upon to support that ruling. In that case the plaintiff and the engineer of the mill owner were working to a common end. If the mill owner had directly employed both, there could have been no doubt that they were fellow servants. It made no difference that one was employed through a third person. That case carries the doctrine which bars recovery by a coservant to its extreme limit. The case before us can, I think, be distinguished.

The plaintiff was a regular employé of the rolling-mill company. He was paid by that company, and during the progress of the entire work, and on the day of the accident, he and those working with him were, as they testify, under the control and supervision of an employé of the same company. It is true that the engineer of the railroad company had general supervision of the work which was to be done by the rolling mill, but, so far as appears, he never assumed or attempted to exercise the authority of a master over the plaintiff. His inspection related to the results accomplished; the case does not show that he interfered to control the agencies by which those results were attained, or that he undertook to supersede the rolling mill in the position which that company occupied as master. No intimation was given to the plaintiff that the relation of master and servant which had previously existed between himself and the rolling mill had ceased to exist. Mr. Justice Reed, in delivering the opinion in Ewan v. Lippincott, says: "The service must be not only under the same master, but the employment must be one having a common object." He classed the plaintiff in that case with trainmen, trackmen, guards upon the bridges, and the various servants employed in different departments in keeping a railroad in repair, all rendering their services with the common object of enabling the railroad company to conduct its general business with safety and success. He also referred to the fact that Ewan had talked to Lippincott about the danger of running the mill, while he was working, and that the agreement was that the mill was not to be started while he was at work on the wheel. The law was correctly stated in the citation given, but whether the test was properly applied, and whether the fact of coservice as found by the court in that case was correctly deduced from the circumstances there present, it is not material to consider. Wiggett v. Fox, 11 Exch. 832, illustrates the rule, holding that all the workmen engaged in the various branches of work in the erection of a building are fellow servants, although some of them are employed by subcontractors. While the rolling mill was executing the work contracted for, the defendant owed to that company and those employed by it the duty of running its trains with reasonable care. The question as to who was the employer of the plaintiff should have been left to the jury. There was error in ordering a nonsuit, and therefore the judgment should be reversed.

KEAN et al. v. UNION WATER CO.

(Court of Errors and Appeals of New Jersey. March 4, 1895.)

EQUITY JURISDICTION—ELECTION OF DIRECTORS OF CORPORATION.

A court of equity has no jurisdiction, in a direct proceeding for that purpose, to determine whether the election of the directors of a private corporation has been legally held, and whether certain persons, claiming to be and acting as such, are such. The case of Owen v. Whitaker, 20 N. J. Eq. 122, approved and followed.

(Syllabus by the Court.)

Appeal from court of chancery; Pitney, Chancellor.

Digitized by Google

Bill by the Union Water Company against John Kean, Jr., and others. From a decree for complainant (27 Atl. 1015), defendants appeal. Reversed.

R. V. Lindabury, F. Bergen, and F. W. Stevens, for appellants. A. V. Schenck, for respondent.

BEASLEY, C. J. On the part of the appellants, who were the defendants in the court of chancery, it is insisted on this appeal that the subject of the suit is not within the cognizance of a court of equity. In the process of deciding the case a jurisdictional objection of this nature must, of necessity, have precedence. Looking at the bill before us in its general aspects, it presents to our view neither more nor less than a controversy between two rival sets of directors of the corporate defendant, each claiming to be its legal representative, having as such the right to exercise the functions appertaining to their office. This is the sole ground on which jurisdiction over the case in hand can be claimed, for there are no other facts stated in the bill which even tend to strengthen, in this particular, the complainant's position. Indeed, such additional facts as are there exhibited must be deemed rather to impair than to add force to the contention that this contest is susceptible of equitable cognizance. The averments are to this effect: The complainant alleges that many years ago the commissioners named in its charter organized it in due form, and that subsequently certain persons were chosen directors, who still continue to be such; that a number of years after such organization, as the appellants contend, these same commissioners convened and received subscriptions for stock, and that the persons so subscribing elected the appellants to be directors. They also deny the legality of the election of the directors who are represented in this suit by corporate body. The status of these parties is this: Each contends that the election of directors relied upon by his opponent is invalid for the want of a legal organization of the corporate body at the time of choosing, respectively, such officers. No one who examines the case with the least care can have any doubt upon this subject. There is no ground nor hint of any adventitious circumstance laying a further jurisdictional foundation. If, therefore, the court of chancery had rightful cognizance of the controversy before us, it was because that court has the power to arbitrate between rival claimants to corporate office. A jurisdiction resting on this single basis was asserted and exercised in the present case in the inferior court, and the inquiry now arises, can that course of law be vindicated? It does not seem possible to doubt that this conclusion just stated stands opposed to everything that had preceded it in the shape of judicial decision and judicial declaration. The rule as decided and expressed was that a court of equity could not inquire into the legality of an existing corporation, except when such inquiry arose collaterally in a case within its cognizance, and that a dispute touching the election of directors did not per se constitute such a case. This doctrine is not only explicitly stated, but is just as explicitly enforced, by decree in the case of Owen v. Whitaker, 20 N. J. Eq. 122. The nature of the controversy in that instance was not merely similar to, but was in all respects identical, with that now present in this appeal, so that, if the present decision should be affirmed by this court, as an inevitable concomitant the reported decision would be repudiated as a precedent.

The facts to which the adjudication now referred to applied have been carefully collected and stated in the elaborate and very lucid brief of the counsel of the appellants, and may be thus summarized, viz.: By the act incorporating the Sussex County Railroad Company 16 persons were nominated as incorporators and commissioners. The capital stock of the company was fixed at $175,000. The commissioners gave notice, opened books, and received subscriptions to an amount exceeding $175,000, and thereupon apportioned the stock among all the subscribers. A controversy arose as to the right to make such apportionment. The persons who subscribed for the first $175,000 of stock claimed that they were entitled to the full amount of their respective subscriptions, and that all the subscriptions made in excess of such amount were void. The two classes of stockholders thereupon elected two boards of directors, and a bill was filed by one class of stockholders and directors against the other class of stockholders and directors to ascertain which party were the true stockholders and directors. It will be observed from this statement that the issue was whether a court of equity was the appropriate tribunal to adjudge of the legality of these two several elections, and that is precisely what has been done in the present case. Nor is there a particle of doubt with respect to what Chancellor Zabriskie, who decided the case, considered the issue before him, nor with respect to the rule that was applied in disposing of such issue. He thus certainly, in very plain terms, states the problem he is called upon to solve. He says: "The first question in the cause is whether the court has jurisdiction to determine whether an election of the directors of a private corporation has been legally held, and whether certain persons claiming to be and acting as directors are such;" and in deciding this question he declares emphatically: "This court has no jurisdiction to determine the validity of this election, or the right of the directors elected to hold and exercise the office of directors; and therefore can grant no relief that is

Digitized by Google

merely incident to that power, such as to restrain the directors from acting as such." It has not been observed how it can be reasonably deemed that this decision is as applicable to the facts now before this court as it was to the facts which led to it. As we think, the two cases are not to be differentiated by the existence of immaterial distinctions with respect to mere forms of procedure. The circumstances that in the reported case, unlike the present proceeding, the corporation was not the complainant, and some of the prayers of the bill are variant from these in the bill before us, are obviously insignificant disagreements, for they neither did nor could affect the judgment. In the reported case the chancellor declared that he had no jurisdiction to determine whether an election of a private corporation has been legally held, and that he had no power to restrain the defendants from acting as such; and in the present case his honor, the vice chancellor, has adjudged that he has the capacity to entertain such a controversy, and, accordingly, has restrained the defendants from exercising their alleged office. It does not seem possible to avoid the conclusion that in the present inquiry the decision in Owen v. Whitaker is, with the utmost exactness, directly in point, and as it is the expression of the opinion of a very great and experienced jurist, and has existed, and has been approved of, for over 20 years, it cannot be hastily pushed aside; for all that can be done, in the presence of such a precedent, is to follow it, or, after full consideration and on the most stable grounds, to reverse it. In deciding the case of Owen v. Whitaker it is held that the statute laws of this state provide an ample remedy for the injury complained of, and the forty-fourth section of the corporation act (Revision, p. 184) was particularly referred to. That provision is in these words, viz.: "It shall be the duty of the supreme court, upon the application of any person or persons, or a body corporate, who may be aggrieved by, or may complain of any election, or any proceeding, act or matter, in or touching the same reasonable notice having been given to the adverse party or to those who are to be affected thereby, of such intended application to proceed fully with and in a summary way, to hear the affidavits, proofs and allegations of the parties or otherwise inquire into the matter or causes of complaint, and thereupon establish the election so complained of or to order a new election, or make such order and give such relief in the premises as right and justice may appear to said supreme court to require; provided, that said supreme court may if the case shall appear to require it, either order an issue or issues to be made up in such manner and form as the supreme court may direct in order to try the respective rights of the parties who may claim the same to the office or offices, or franchise in question, or may give leave to exhibit, or direct the attorney general to exhibit, one or more information or informations in the nature of a quo warranto in the premises." The chancellor, in denying the jurisdiction of his court to determine the validity of an election of directors of a private corporation, describes this act as a "summary and efficient proceeding," created for the very purpose of determining the dispute before him; and he cites the case of Mickles v. Bank, 11 Paige, 124, in which Chancellor Walworth, passing on the same jurisdictional question, as well as on the efficacy of an identical New York statute, says: "The question as to the validity of the election of G., W., and S. as trustees does not appear to be a proper subject of equitable cognizance. The legislature has provided a summary remedy, by an application to the supreme court to set aside the election of these directors if it is illegal; that court, therefore, is the proper tribunal to set aside the election, if it has not been in conformity to law." In the subsequent case of Johnston v. Jones, 23 N. J. Eq. 216, Chancellor Zabriskie reiterates, with emphasis, the doctrine declared by him in Owen v. Whitaker, and discriminates between the cases in which the jurisdictional foundation is laid simply in the averment, as in the instance we are now considering, and that other class in which such question comes in collaterally, in the determination of matters over which equity has direct cognizance. This distinction is indisputable, and is recognized in every authority that has been noticed, and is nowhere more plainly declared than in the case just cited. After repudiating in express terms the theory that a court of equity, in a direct procedure for that purpose, can inquire into the question of the right to an office, or as to the regularity of a corporate election, the very able chancellor then proceeds to set out the ground on which he vindicates his right to take charge of the controversy. He says: "That the defendant obtained an office claimed by him in a corporation by an election procured to be held by him by fraud, by breach of trust and a positive agreement, by concealment and treachery, confers on a court of equity jurisdiction to inquire into the validity of such an election, for the purpose of restraining the acts of the defendant and other persons claiming office by such election; that equity had jurisdiction of the question of the legality of one of these elections, when such question arises incidentally to the decision of fraud or breach of trust,—will be denied by no one versed in the law; and this is what this particular case enunciates. But how such a doctrine has any tendency to support the hypothesis on which the present decree has been rendered is not apparent." This view of the law of this subject, thus expressed by Chancellor Zabriskie, has received the weighty approval of the late Vice Chancellor Van Fleet. In

Digitized by Google

the case of Mechanics' Nat. Bank of Newark v. Burnet Manuf'g Co., 32 N. J. Eq. 238, this very distinguished jurist says: "A court of equity has no jurisdiction to pass upon the validity of the election of the officers of a private corporation, and pronounce judgment of amotion against them. Owen v. Whitaker, 20 N. J. Eq. 122. But where the question of the right or power of an officer to represent or bind a corporation arises incidentally in the course of a suit of which this court may properly take cognizance, and it becomes necessary to look into the legality of his election and the validity of his title, in order properly to determine the rights of the parties, this court will pass upon his title and capacity, as it would upon any other question of law or fact necessarily arising in the due determination of an action. Johnston v. Jones, 23 N. J. Eq. 216."

In the opinion of this court, the jurisdictional rule is properly and accurately delineated in the decisions thus referred to. The question of the right to corporate office or franchise is purely a legal one. It seems to have always been so regarded. It is many years since the subject was examined by Chancellor Kent, who, in the leading case of Attorney General v. Utica Ins. Co., 2 Johns. Ch. 371, said that "the charge of the usurpation of a franchise has so frequently occurred, and the remedy by injunction is so convenient and summary, that the jurisdiction of this court would have been placed beyond all possibility of doubt, and have been distinctly announced by a series of precedents, if any such general jurisdiction existed. But I have searched in vain for this authentic evidence of such a power. The precedents are all in the king's bench, and Kyd cites nearly a hundred instances, within the last century, of informations filed in the king's bench to call in question the exercise of a franchise." It does not appear that the principle thus authoritatively declared in this series of decisions, and in influential dicta, has ever been rejected or challenged, except in the case now under review, and it may be in that of Van Dyke v. Stout, 8 N. J. Eq. 344. This latter decision was properly treated by Chancellor Zabriskie in Owen v. Whitaker as of no account. It was decided, with respect to the facts, on an incidental motion; and the chancellor in determining the matter does not appear to have had the faintest suspicion that he was treading on jurisdictional ground that, to say the least of it, was unstable. It is probable that it was considered to be a case of fraud. As an authority on the point now being considered the case is worthless. In conclusion, it is sufficient to say that the entire weight of authority is, in our opinion, opposed to the theory on which the decree appealed from was based; and, indeed, if there were no precedents relating to the subject, our conclusion, on general principles, would have been adverse to the jurisdiction exercised in the present instance. The controversy is exclusively a legal one; it has no trace of anything to put it within the cognizance of an equitable tribunal; and the remedy at law is more complete than any other. The futility of a proceeding in equity is perfectly manifest. The present decree does not vacate the offices in question. It ties the hands of the defendants, but leaves them in their offices; and, if the decision had been in their favor, a decree to that effect would have been as useless as so much blank paper. It would have left the dispute between these two sets of directors absolutely untouched, for in that litigation the determination of the court in this proceeding would not have been legitimate action, for the class of directors who have pushed to the front the corporation as the dominus litus are not parties to the present bill. In contrast to a legal course so uncertain and ineffectual, if we turn to the provision of the statute above referred to it will be observed that, in our entire system of law, no remedy exists that is more simple and complete. In short, we regard the rule of law applicable to the juncture before us as settled by an unbroken series of decisions, and it is obviously so regarded by the text-writers. It is thus enunciated by Spelling in his late work on Private Corporations (section 396): "A court of equity will not entertain jurisdiction of a suit the purpose of which is merely to test the legality of the election of directors, or to secure an officer of a corporation who is in actual possession; yet, where the question arises incidentally and collaterally, in a suit rightly filed for another purpose, the court will decide it." Taylor also states the rule in the same way. Tayl. Priv. Corp. § 381. These texts are warranted by a number of authorities cited in the notes. Let the decree appealed from be reversed, and the bill dismissed.

STATE v. SAWYER.

(Supreme Court of Vermont. Addison. Jan. 7, 1895.)

INTOXICATING LIQUORS — ILLEGAL SALES — PRIOR CONVICTION.

1. The admission of a question objected to will not be considered on appeal, where no exception is taken to its admission.

2. St. 1888, No. 42, provides that if a person sells, furnishes, or gives away, or owns, keeps, or possesses, with intent to sell, furnish, or give away, intoxicating liquors, in violation of law, he shall forfeit, for each offense, upon the first conviction, etc., and increases the penalty for a second conviction. *Held* that, on a conviction for possessing liquor with intent to sell it, a prior conviction of selling will warrant the infliction of the increased penalty.

Exceptions from Addison county court; Start, Judge.

Daniel Sawyer was convicted of keeping intoxicating liquor with intent to sell it in violation of law, and excepts. Affirmed.

Digitized by Google

In reference to the admission of testimony, the exceptions stated: "The state, in order to show whether the liquor and contents of the bottles so found were intoxicating, improved as a witness said town liquor agent, who was asked the following question: 'Question. Did Mr. Cobb, the deputy sheriff, deliver to you, last December, some bottles and barrels of bottles?' Which question was seasonably objected to and admitted." The other question decided appears in the opinion.

F. L. Fish, State's Atty. J. M. Slade, for respondent.

THOMPSON, J. 1. No exception was taken to the admission of the question objected to by the respondent, and therefore the ruling of the county court cannot be passed upon by this court.

2. The information charged the respondent with keeping and possessing intoxicating liquor with intent to sell and furnish the same in violation of law, and also alleged his prior conviction for selling and furnishing intoxicating liquor contrary to law. On trial, the record of such prior conviction was admitted in evidence to enhance the sentence, against the respondent's exception. The respondent was found guilty by the jury as of a second conviction, judgment rendered upon the verdict, and respondent sentenced to imprisonment in the house of correction for 90 days, and to pay a fine of $200 and costs of prosecution, with the alternative sentence, to which he excepted. The respondent contends that the conviction should be set aside because of the admission in evidence of the record of his prior conviction for selling and furnishing, and insists that only a record of his conviction for keeping with intent to sell and furnish could be admitted in this prosecution to increase the penalty. R. L. § 3802, as amended by St. 1888, No. 42, § 1, is as follows: "If a person by himself, clerk, servant or agent, sells, furnishes or gives away, or owns, keeps or possesses with intent to sell, furnish or give away intoxicating liquor or cider, in violation of law, he shall forfeit for each offence to the state, upon the first conviction, not less than five nor more than one hundred dollars and may also be imprisoned in the discretion of the court, not more than thirty days; upon the second and each subsequent conviction, not less than ten nor more than two hundred dollars and shall be imprisoned not less than one month nor more than one year." This statute does not impose the increased penalties for a second or subsequent conviction for the same offense, but for a second or subsequent conviction for selling, furnishing, or giving away, or owning, keeping, or possessing, with intent to sell, furnish, or give away, in violation of law, intoxicating liquor or cider in violation of the act. These are different forms of committing the same legal offense,—violating the act. In thus holding, we follow State v. Haynes, 36 Vt. 667, which in principle is decisive of this case. A conviction for violating the statute in one of these forms is available to enhance the penalty on a subsequent conviction for a violation in another. As was said by Poland, C. J., in State v. Haynes, supra, "it is equally within the intent and purpose of the law to punish offenders so incorrigible and hardened as not to desist after one chastisement for their breach of law." Judgment that there is no error in the proceedings of the county court, and that respondent take nothing by his exceptions. Let execution of sentence be done.

WESTERN UNION TEL. CO. v. BULLARD.

(Supreme Court of Vermont. Caledonia. Feb. 16, 1895.)

INJUNCTION—TELEGRAPH LINES—CONSENT TO CONSTRUCTION—ESTOPPEL—LICENSE.

1. In an action to enjoin a landowner from interfering with the placing of telegraph poles in front of his land, it appeared that plaintiff had maintained its line on a highway in front of the land, and that, the posts thereof becoming unsafe, the village trustees directed the company to replace them, and that the company undertook to erect new poles on the line on which the old poles had stood. The trustees informed defendant of the proposed plan, and he consented, and the company proceeded with the work. Defendant objected to some poles which it was proposed to place in front of his land, and selected others, which he said were satisfactory, and these plaintiff set. Defendant then had one of the poles cut down, and warned plaintiff's agents not to proceed further, threatening to remove any poles erected; but later he withdrew his objection, and the line of poles opposite his premises was completed, and cross arms nailed thereon. *Held*, that defendant was estopped to object to the completion of the line.

2. The granting of permission to a telegraph company to construct its line in front of one's land on a highway, the fee of which is in the public, gives a mere license, and not an easement.

Appeal in chancery, Caledonia county; Tyler, Chancellor.

Bill by the Western Union Telegraph Company against G. B. Bullard to enjoin defendant from interfering with the construction of a telegraph line opposite defendant's premises. A decree was rendered for orator, and defendant appeals. Affirmed.

The orator prayed that the defendant be perpetually enjoined from interfering with its telegraph line opposite his premises, and for general relief. The bill alleged that the defendant had partially destroyed, and proposed to entirely destroy, the orator's line, unless restrained, and the master found that the damages occasioned by what the defendant had done before the granting of the temporary injunction were $40. The facts fully appear in the opinion.

Harry Blodgett, W. P. Stafford, and Bates & May, for orator. Dunnett & Nelson, for defendant.

Digitized by Google

TYLER, J. The report of the special master has practically settled the matters in controversy in this suit. Acts 1888, No. 32, which is an amendment of section 3633, R. L., gives telegraph and telephone companies the right to construct and maintain their lines upon any highways in this state, though not to interfere with the public use of such highways. It being found desirable to erect this line along the street of a village, and in front of and near the defendant's residence, substantially where the old line stood, it was his right, under section 3635, R. L., to apply to the village trustees, who were empowered to determine through what streets, and in what manner, the line should pass. Though the defendant did not apply to these officers, "the location and the manner of replacing and repairing the line was adopted upon conference between the orator and the trustees, * * * and the trustees approved of the work as it progressed." The defendant's premises constituted a fine residential property fronting on this street, and he desired to cultivate his grounds, which commanded an extended and picturesque view, and make the place a model of beauty. His counsel contend that, as it was found that the line caused some damage to the property, the orator should have proceeded under section 3637, R. L., which provides that the selectmen shall in such cases appraise the damage before the line is erected. This should have been done, if the defendant objected to the erection of the line. Upon this subject the master finds "that the poles and wires do interfere somewhat with the defendant's shade trees, but that results from the fact that the trees overlap a public street"; that the poles "do somewhat mar the beauty"; that "the outlook is interrupted"; and that there was some trimming of the branches of the trees that overhung the street. He also finds that the manner of construction of the line was reasonable and proper, and that the trimming was of the smaller twigs, and was carefully and properly done. It was held in Rugg v. Telegraph Co., 66 Vt. 208, 28 Atl. 1036, that this section was to be construed, in the light of the preceding sections, to mean that the selectmen were not to assess damages in the cases named in the section, except when objections were made.

The findings are that the old posts had become dilapidated, unsightly, and unsafe; that the trustees had made complaint thereof to the company, which undertook to replace the old line with a new one on the southern side of Eastern avenue; and that the location was agreed upon. Before anything was done the trustees informed the defendant of the proposed plan, with its material details, to which he gave his consent. The agent of the company, relying thereon, proceeded to prosecute the work; erected poles on the avenue as far as the defendant's estate, and one pole opposite thereto. Other poles were left upon the ground, and holes were dug for them, when the defendant objected to those selected to stand on each side of his driveway, and was allowed to select others, which he did, and said they were satisfactory to him. The orator's agents then set these two poles in the line, and the next morning the defendant directed his man to cut down one of them, warned the agents not to proceed further, threatened violence if they should do so, and gave notice that he should remove the poles as fast as they were erected. Later in the same day, upon a conference with the trustees, he withdrew his objection, and said that he would not object further, whereupon the line of poles opposite his premises was completed, and the cross arms were nailed on and prepared for the wires. This was on Saturday. Sunday night he proposed to one of the trustees to run the line in the rear of his buildings, and notified the trustee, in behalf of himself and daughters, "that he would not have any lines or telegraph poles and wires in front of his premises." This was communicated to the company's agents who had the work in charge. Early Monday morning the company's agents strung two wires upon the arms, and later in the day, by the defendant's directions, one arm was sawed off and one pole was cut down, which acts were the cause of procuring the injunction. So it appears that nothing was done about erecting the line in front of the defendant's premises without his consent, except stringing the wires Monday morning. It is found that the orator was a corporation which, for many years prior to 1880, and ever since, has operated a telegraph line along the Passumpsic Division of the Boston & Maine Railroad, from Newport to St. Johnsbury, and thence connecting with the principal cities of the country. The company's office, since 1880, had been in Union Block, on Main street, about one hundred rods west of the railway station, and from it poles and wires ran through Eastern avenue to the station. From this office the train-dispatching messages were sent, and it was also for the accommodation of the general public. The defendant had given the orator's agents permission to do all that had been done, down to the stringing of the wires. They had acted on his consent, and incurred expense. In view of the facts stated, his consent was irrevocable at that stage of the work,—certainly, without an offer to place the orator in statu quo. To have prevented the completion of the line would have operated as a fraud upon the orator. The doctrine of equitable estoppel should be applied. Clark v. Glidden, 60 Vt. 702, 15 Atl. 358, and cases cited; Ricker v. Kelly, 1 Greenl. 117; Rerick v. Kern, 14 Serg. & R. 267. In Hudson Tel. Co. v. Jersey City, 49 N. J. Law, 303, 8 Atl. 123, under a statute which required that the authorities of incorporated cities and towns should designate the streets in which telegraph poles and wires should be placed, it was held that after

Digitized by Google

such designation by the defendant's common council, and the erection in the designated streets of from 35 to 40 posts, at an expense of about $10 each, and an expenditure of some other moneys, the plaintiff's right was irrevocable; that, after the expenditure of money in reliance upon such designation, the plaintiff obtained a vested right, of which it could not be deprived by a subsequent revocation. There is an elaborate discussion of the doctrine of parol license and revocation thereof in the notes to Rerick v. Kern, in 2 Am. Lead. Cas. 546, 577, where the editors say that the apparent discrepancy in the numerous cases considered is, after all, chiefly in "the form of the remedy, and the forum where it should be sought, and hardly extends to the existence of the right, or the interpretation of the principles on which it rests. Foster v. Browning, 4 R. I. 47. Every one must assent to the position taken by Chief Justice Gibson in Rerick v. Kern, that equity will decree a specific performance when compensation in damages would be inadequate to the purposes of justice, and that the partial execution of a parol agreement may supply the want of a writing, and withdraw the case from the operation of the statute of frauds. Nor would it be easy to take any valid exception to the dictum of the same judge in Swartz v. Swartz, 4 Pa. St. 353, 358, that when the revocation of a license would operate as a fraud a chancellor will turn the licensor into a trustee ex maleficio for the licensee, on principles analogous to those which apply when the owner of land stands by and allows another person to make improvements on it under the belief that he will be allowed to reap the fruits of his labor and expenditure." In Williams v. Morris, 95 U. S. 457, it is said: "Where one of two contracting parties has been induced or allowed to alter his position on the faith of such contract, to such an extent that it would be a fraud on the part of the other party to set up its invalidity, courts of equity hold that the clear proof of the contract and of the acts of part performance will take the case out of the operation of the statute, if the acts of part performance were clearly such as to show that they are properly referable to the parol agreement." Chit. Cont. 66, 278; 2 Story, Eq. Jur. § 761.

The defendant further contends that the legislature cannot, by law, subject a public street to this use without compensation to the owner of the abutting land for damages, and that it was in this view that section 3637 was enacted. It has been a controverted question whether the use of a street or highway for a telegraph or telephone line imposes a new burden upon the land, for which the owner would be entitled to compensation. It has been contended on one side that the easement of the highway is the right of use of the public generally for the purpose of intercommunication, not only for travel, but also for the transmission of intelligence; that the use of the telegraph, being for a public purpose, is not inconsistent with the use for which the highway was dedicated. On the other hand, it has been argued that streets and highways were designed for public travel and transportation; that they were dedicated or condemned for those purposes, and that their use for the transmission of intelligence is an entirely different use, and could not have been contemplated when the land was taken. Keasbey, Elec. Wires, 71. The defendant's counsel have referred us to several authorities in support of the latter claim, but in nearly every case the title of the aggrieved owner extended to the center of the street, so that the structure was on his land. In this case it is found that the Bullard property was carved out from land of Joseph Fairbanks, who owned where the avenue now is, and that the Bullard title extends north only to the south line of the avenue, which was laid before the defendant acquired his title, and that the telegraph line is wholly off the defendant's land, within the limits of the avenue. Some authorities hold, and the defendant contends, that the rights of the abutter, as between him and the public, are substantially the same whether the fee is in him, subject to the public use, or in the municipality, in trust for street uses proper. Dill. Mun. Corp. § 698. Other authorities make the determinative question whether the fee is in the landowner or in the public, and allow compensation in the former case, and deny it in the latter. It is unnecessary to decide these questions now, for the reason that whatever rights the defendant had he gave up by his consent. In the circumstances, there was no occasion for the selectmen to assess the damages.

It appears that the defendant occupies this land as tenant by the curtesy, and claims that his consent could not bind his children, who hold the reversionary interest, and who are not made parties to the suit. The right conferred was not an easement in the land. It was a mere license to do a certain act along the street, and not upon the land of the reversioners.

The general prayer for relief in a bill in chancery is sufficient to obtain all relief consistent with the general frame of the bill. Danforth v. Smith, 23 Vt. 247. Under this prayer, and to prevent a multiplicity of suits, upon a bill to restrain a trespass, damages may be awarded for injury from the trespass prior to the injunction. 1 Daniell, Ch. Prac. 377, notes. It is said in Whipple v. Village of Fair Haven, 63 Vt. 221, 21 Atl. 533: "* * * It is a familiar rule that, when the court of chancery has jurisdiction of a case for one purpose, it will retain it for all other purposes, and dispose of the whole matter. And this is a salutary rule, for it prevents litigation, and to end that is for the public good." Decree affirmed, and cause remanded.

Digitized by Google

LANE v. SCAGEL.

(Supreme Court of Vermont. Franklin. Sept. 30, 1894.)

ACTION FOR NEGLIGENCE—LEAKAGE IN PIPE—EVIDENCE.

In defendant's room, directly above plaintiff's store, there was a wash basin connected with the waterworks, which had an outlet large enough to carry off all water that might run into it. Plaintiff, upon discovering water leaking down on his goods, found that defendant had left the faucet open, but that the basin was not running over, and that there was no water on the floor. *Held*, that plaintiff could not recover, there being nothing to show that defendant knew of any leak beneath his floor, or that it was his duty to repair such a leak.

Exceptions from Franklin county court; Ross, Chief Judge.

Action on the case by Albert F. Lane against George A. Scagel. Plea, the general issue. Verdict and judgment for the plaintiff. At the close of the testimony the defendant moved the court to direct a verdict, for that there was no evidence tending to show negligence. This the court declined to do, and the defendant excepted. Reversed.

H. C. Adams and Wilson & Hall, for plaintiff. Farrington & Post, for defendant.

START, J. This is an action on the case, and the plaintiff alleges that the defendant so negligently used a certain faucet connected with the St. Albans Waterworks as to damage his goods. At the time of the injury complained of the plaintiff occupied the first floor, and the defendant the second floor, of a building owned by O. A. Burton. The defendant had in his room a hand wash basin, connected with the St. Albans Waterworks. It had an outlet at the bottom, and holes through the sides near the top, to carry away the waste water. The outlet, which was open at the time the plaintiff claims his goods were damaged, was sufficiently large to carry off all the water that would run into the basin. The plaintiff, on going to his store on the morning of November 1, 1892, found water running through the ceiling from the floor above. At this time it was found that water was running from the faucet into the basin in the defendant's room. The basin was not running over, and there was no water on the floor. This evidence did not tend to show that the defendant was guilty of negligence, and the court should have ordered a verdict for the defendant. The outlet of the basin was sufficient to carry off all the water that would run from the faucet, and it does not appear that it did not so carry it off at the time of the injury complained of. It does not appear that there was any defect in the basin or pipes in the defendant's room. Negligence cannot be inferred from the fact that the faucet was open. In leaving the faucet open, and allowing the water to run, the defendant was using it for the purpose for which it was intended. Such arrangements are for use in supplying water, and it was error to leave the jury at liberty to infer negligence from the fact that the defendant allowed water to run into a basin that had an outlet of sufficient capacity to carry it off. There is nothing in the evidence that tends to show that the construction and arrangement of the plumbing on the defendant's floor was not all that was required to guard against damage from water to the occupant below. If any inference can be drawn from the evidence, it is that the water escaped from the pipe after it passed through the floor occupied by the defendant. If such inference can be legitimately drawn from the facts, the plaintiff was not entitled to go to the jury; for it does not appear that the defendant knew, or had reason to believe, that there was any defect in the pipe below the floor occupied by him, nor does it appear that the defendant was under any duty to inspect or keep in repair the pipe below the floor occupied by him. We find no error in the rulings of the court in respect to the admission of evidence, nor in the charge of the court as given, nor in the refusal to charge as requested upon the subject of damages. Judgment reversed, and cause remanded.

THOMPSON, J., being engaged in county court, did not sit.

TOWN OF SANDGATE v. TOWN OF RUPERT.

(Supreme Court of Vermont. Bennington. Sept. 30, 1894.)

SUPPORT OF PAUPER — CONTEST BETWEEN TOWNS.

A pauper who came to want in plaintiff town was ordered to remove to the defendant town. Defendant town, after accepting the pauper and supporting him for 27 years in the plaintiff town, except for a few weeks while he was supported in the defendant town, refused to further support him. *Held*, that the pauper's legal residence was in defendant town when it refused to support him, and that it was liable for his support. Start, J., dissenting.

Exceptions from Bennington county; Thompson, Judge.

Assumpsit by the town of Sandgate against the town of Rupert for reimbursement for the support of a pauper. The case was heard on an agreed statement, and, there being a judgment pro forma for plaintiff, defendant excepts. Judgment affirmed.

The name of the pauper was Fred Conkey, and the agreed statement of facts, so far as is material, was as follows: "The said Conkey was 30 years old in July, 1892. Was born in Hebron, in the state of New York. Was the son of William Conkey, and grandson of Nathaniel Conkey. William Conkey died in Sandgate before June, 1874. His wife, the pauper's mother, had deceased about eight years before in the town of Arlington, at which place they were then living and keeping house, and Fred was then living with them. At the time William died

Digitized by Google

he had no legal settlement in Sandgate under the then law. After the death of the pauper's mother, the pauper lived some of the time with his grandfather in Sandgate, and some of the time in other places. Nathaniel Conkey came to Sandgate to live about 1877, and lived there to the time of his death, which was in 1892. Prior to living in Sandgate he had resided in Rupert, and his legal settlement was in Rupert at the time he moved to Sandgate. At the time of William's death his legal settlement was in Rupert. On the 1st day of July, A. D. 1874, at Sandgate, before William R. Hoyt and Walter B. Randall, justices of the peace, on complaint of Morehouse Hamilton, overseer of the poor of the town of Sandgate, a court of examination was held under the law at that time and pursuant thereto. It was, among other things, then and there adjudged by said court that Frederick Conkey, the pauper in question, had come to reside in Sandgate, and had not gained a legal settlement therein; that he belonged to and had his legal settlement in the town of Rupert; that he ought to be removed to Rupert, as required by law; and pursuant to law said court ordered and directed that he be removed to the said town of Rupert. Before the pauper was removed to Rupert under the order, the latter town, in said month of July, accepted him, and has supported him as a pauper from then until April 1, 1891. Rupert has so supported him by contract in the town of Sandgate, substantially all the time, in the family of Nathaniel Conkey. The pauper was, however, supported and kept a few weeks by Rupert, in the town of Rupert. The pauper has always held himself subject to the direction of Rupert as to where he should be kept, and he has, while supported by Rupert, lived in Sandgate, as stated, because it was more economical for Rupert to so support him there. The requisite notice preliminary to bringing this suit was given. The town of Rupert refused to support the pauper after April 1, 1891, and the town of Sandgate has supported him from that date to the date of the writ in this cause. Except as herein stated, the pauper never lived in the town of Rupert."

O. M. Barber, for plaintiff. Fayette Potter, for defendant.

START, J. It appears from the agreed statement of facts that the pauper in question was, on the 1st day of July, 1874, ordered to remove to the defendant town. Before he was removed the defendant accepted him and supported him in the plaintiff town, except for a few weeks, while he was supported in the defendant town by the defendant, until April 1, 1891, when the defendant refused to longer support him. The pauper has always held himself subject to the direction of the defendant as to where he should be kept, and he lived in the plaintiff town while he was being supported by the defendant because it was more economical for the defendant to support him there. Upon these facts, it is held by a majority of the court that it is fairly inferable that, while the pauper was being supported in the defendant town by the defendant, he went to the plaintiff town by the procurement of the defendant; that the case falls within the rule laid down in Leicester v. Brandon, 65 Vt. 544, 27 Atl. 318; and that, in legal contemplation, the pauper's residence was in the defendant town when the defendant refused to longer support him; and that he was a transient person in the plaintiff town, and therefore the plaintiff is entitled to recover. I do not concur in this holding. It does not appear that the pauper ever resided in the defendant town for three years, maintaining himself and family. In an action under our statute relating to the support of paupers, I think that no recovery can be had, unless it appears that the defendant town is the town where the pauper last resided for three years, maintaining himself and family. Acts 1886, No. 42, § 13. I do not think it can fairly be presumed, from the fact that the pauper was supported for a few weeks by the defendant in the defendant town at some time between 1874 and 1891, that he went there and returned to the plaintiff town by the procurement of the defendant. I do not think that, in legal contemplation, the pauper's residence was in the defendant town when the defendant refused to longer provide for him, or that he was a transient person in the plaintiff town. The pauper had come to the plaintiff town to reside when the order of removal was made. The order of removal conclusively establishes this fact. He has not since changed his residence, nor has he since come to want. Since he came to want in 1874, in the plaintiff town, his wants have been provided for by the plaintiff or defendant in the plaintiff town, with the exception of a few weeks while he was provided for by the defendant in the defendant town. His stay in the defendant town appears to have been temporary, and, in my judgment, there is nothing in the case that tends to show that he went there to reside. No question is or can be made but that he resided in the plaintiff town when he first came to want, and this residence is presumed to continue until the contrary is shown. I think the case comes fairly within the rule laid down in Worcester v. Town of East Montpelier, 61 Vt. 139, 17 Atl. 842, and Chittenden v. Barnard, 61 Vt. 145, 17 Atl. 844. In Worcester v. Town of East Montpelier, supra, the pauper was supported by East Montpelier, in the town of Worcester, from some time in 1881 until No. 42 of the Acts of 1886 was passed. After the passage of this act, East Montpelier notified Worcester that it would not support him any longer, and it was held that Worcester could not recover for sup-

Digitized by Google

port thereafter furnished. In Chittenden v. Barnard, supra, the pauper had a legal settlement in Barnard, and had resided there and been supported by Barnard. He went to Stockbridge to reside, and was there ordered to remove to Barnard. He then went to Chittenden, and there came to want. Barnard was notified, and it assumed the burden of his support, and provided for him in the town of Chittenden from April 1, 1884, to March 1, 1887, and then refused to further provide for him; and it was held that Chittenden could not recover for support thereafter furnished. See, also, Vershire v. Town of Hyde Park, 64 Vt. 638, 25 Atl. 431, and Londonderry v. Town of Landgrove, 66 Vt. 264, 29 Atl. 256, and the cases there cited. The pro forma judgment affirmed.

MUNSON, J., prior to his election, having advised in matters involved in the litigation, did not sit.

TAFT, J., concurs in the result, upon the ground that the case shows the defendant took the pauper into Sandgate, and in contemplation of law the atmosphere of Rupert enveloped the pauper, and he was residing in that town ever after, and of course, for that reason, was transient in Sandgate.

BENEDICT v. LAWRENCE.

(Supreme Court of Vermont. Bennington. Feb. 4, 1895.)

PROMISSORY NOTE—AGREEMENT TO PAY—EVIDENCE.

Plaintiff's father conveyed his farm to plaintiff and his sister, with the personal property thereon, on part of which there was a mortgage to defendant securing the father's note. At plaintiff's auction sale of the personal property, defendant purchased a portion thereof, which was not covered by his mortgage, and claimed the right to credit the price on the father's note because plaintiff had agreed with his father to pay the note. *Held*, in an action for the price, that plaintiff could show in rebuttal that he did not agree to pay his father's note.

Exceptions from Bennington county court; Taft, Judge.

Assumpsit by Robert Benedict against Frank E. Lawrence. Judgment was rendered for plaintiff, and defendant excepts. Affirmed.

O. M. Barber, for plaintiff. Batchelder & Bates, for defendant.

ROWELL, J. Plaintiff's father conveyed his farm and the personal property thereon to the plaintiff and his sister. The question was whether the plaintiff agreed with the defendant that the price of all the property that the defendant bid off at plaintiff's auction should be applied on a note that defendant held against plaintiff's father, as the defendant claimed, or whether the agreement was that the price of only the property bid off that was covered by the chattel mortgage that secured the note should be thus applied, as plaintiff claimed. To support his claim, the defendant introduced evidence tending to show that the plaintiff, either alone or jointly with his sister, agreed to pay the note; and the defendant testified that, at about the time of said conveyance, the plaintiff and his father came to see him, and that his father said in plaintiff's presence that he had deeded his farm to the plaintiff and his sister, and that they had agreed to pay the note. On rebuttal, the plaintiff called his sister, who testified that there was no agreement between her and her brother on the one part and her father on the other that her brother should pay the note. We construe the exceptions to mean that the defendant claimed that the plaintiff, alone or with his sister, had agreed with his father, not with the defendant, to pay the note. That being so, it was clearly competent for the plaintiff in rebuttal to show that no such agreement was made as far as he was concerned, for that exactly met the defendant's claim in regard to the matter. Judgment affirmed.

MASON v. HORTON.

(Supreme Court of Vermont. Rutland. Jan. 29, 1895.)

CREATION OF EASEMENT—IMPLIED GRANT OF WATER PRIVILEGES—ADVERSE USE.

1. Where two water privileges on opposite sides of a stream were owned by one person, and the spent water from the mills on one side was discharged below the dam which fed the mills on the other side, the right to thus discharge the spent water continued, upon the owner's death, and the division of the estate, in the respective heirs in severalty.

2. A water privilege owned by defendant and his grantors was not used by them from 1851 to 1877, and the water consequently flowed on the opposite side of the stream, where it was used by plaintiff and her grantors, but to no greater extent than while defendant's privilege was being used, and in 1876 plaintiff ceased to use it. *Held*, that plaintiff's use was not adverse.

3. Nonuse, to extinguish an easement, must result from some adverse conduct by the owner of the servient estate, or originate in or be accompanied by some unequivocal act of the owner of the easement inconsistent with its continuance, and showing an intention to abandon it, upon which act the owner of the servient estate relied, so that a subsequent assertion of the right would work him injury.

Exceptions from Rutland county court; Tyler, Judge.

Action on the case by Mary R. Mason against Bent E. Horton for the diversion of a water course. Plea, the general issue. The court directed a verdict for the plaintiff, submitting to the jury only the question of damages, and the defendant excepts. Reversed.

J. C. Baker, for plaintiff. C. H. Joyce and H. A. Harman, for defendant.

START, J. The plaintiff and defendant own water privileges on opposite sides of a

Digitized by Google

small stream in the town of Clarendon. These privileges were formerly owned and used by William Brown, from whom both parties derive their title. When both privileges were owned and used by William Brown, the water was diverted by a dam, and used to supply mills on the defendant's side of the stream; and the water that was not thus diverted flowed in the channel until it reached land now owned by the plaintiff, and was there diverted by another dam, and used to supply mills on the plaintiff's side of the stream. William Brown died in 1830, and his estate was divided among his heirs. The plaintiff's privilege has not been used since some time between 1870 and 1876. The defendant's privilege was not used from 1851 to 1877, when the defendant built mills, and diverted the water to supply them the same as William Brown had been accustomed to do, and discharged the spent water at a point below the point where a dam was formerly maintained at the plaintiff's privilege. It appeared that during the time the defendant's privilege was not used all of the water flowed in the channel past the plaintiff's privilege; and she claims that it is her right to have it flow as it did during this time. The plaintiff's evidence tended to show that when the defendant's privilege was formerly used the spent water was discharged above her dam, and that she and her grantors had the benefit of all the water. The defendant's evidence tended to show that the spent water was discharged below the dam during all the time his privilege was used by William Brown, his heirs and their grantees, down to 1851; and that neither the plaintiff nor her grantors had any use of the water that was diverted to supply mills on his side of the stream. The plaintiff requested the court to direct the jury to return a verdict for her. The court complied with this request, and refused to submit any questions to the jury, except the question of damages. In this there was error.

The defendant's evidence tended to show that during the time William Brown owned and occupied both privileges the spent water from the mills on the defendant's side of the stream was discharged below the dam which fed the mills on the plaintiff's side of the stream. If the water was thus discharged during William Brown's ownership of both privileges, when the estate was severed, and the different privileges passed to the respective heirs in severalty, the right to thus discharge the water continued, as a matter of legal right, in the respective heirs and their grantees, as an implied grant, the same as though such right had been set forth in the instrument by which the estate was severed, and the privileges set to the respective heirs. Harwood v. Benton, 32 Vt. 724; Goodall v. Godfrey, 53 Vt. 219. The defendant having succeeded to the title of the heirs to whom his privilege was set out, he has a right to discharge water at the same points where it was discharged during the time William Brown owned and used both privileges, unless that right is lost by reason of an adverse use by the plaintiff or his grantors, or by nonuse by the defendant and his grantors, for 15 years. We think the court could not hold, as a matter of law, that the use of the water by the plaintiff and her grantors was adverse, or that they had exercised any adverse rights. When the mills on the defendant's side of the stream went to decay, the defendant and his grantors had no use for the water, until new mills were erected in 1877; and for this reason, from 1851 to 1877, they did not draw water from the stream. Consequently, all the water flowed through the channel into the pond on the plaintiff's side of the stream, and she and her grantors used for a time so much of it as was necessary to propel their machinery; but, in so doing, they were not in the exercise of an adverse right. They used the water because it flowed naturally along the channel and came into their pond. The plaintiff and her grantors have not deprived the defendant or his grantors of the use of the water. They have done nothing to indicate that their use of the water was in any way adverse to the rights of the defendant and his grantors. They have used no more water than they did while the defendant's privilege was being used, and this quantity gradually diminished until 1876, when the plaintiff ceased to use it; and since that time her privilege has not been used. The plaintiff and her grantors have not erected buildings, or in any way improved their privilege, because of the nonuse of the water by the defendant and his grantors. They have done nothing that they could not have lawfully done if the defendant's privilege had been used from 1851 to 1877, the same as it was theretofore used by William Brown. They have done nothing that can be said to be the exercise of an adverse right. The mere use of the water by the plaintiff and her grantors, under the circumstances disclosed by the evidence, was not conclusive evidence of an adverse enjoyment of such use. Arnold v. Stevens, 24 Pick. 106. The court could not hold, as a matter of law, that the right to draw and discharge water at the defendant's privilege was lost by nonuse. The right, as we have seen, was created by grant, and could not be lost by mere nonuse. Mere nonuse, for any length of time, of an easement created by grant, will not destroy or extinguish it. In order to extinguish it by nonuse, there must be some conduct on the part of the owner of the servient estate adverse to, and in defiance of, the easement, and the nonuse must be the result of it, and must continue for 15 years; or, to produce this effect, the nonuse must originate in, or be accompanied by, some unequivocal acts of the owner inconsistent with the continued existence of the easement, and showing an intention on his part to abandon it; and the

Digitized by Google

owner of the servient estate must have relied or acted upon such manifest intention to abandon the right, so that it would work harm to him if the easement was thereafter asserted. There was no evidence of such unequivocal acts on the part of the defendant or his grantors, and the court could not rightfully hold that the easement had been lost by abandonment. The view we have taken of the evidence and the law governing this case leads us to the conclusion that the question of where William Brown discharged the spent water from the defendant's privilege was material, and should have been submitted to the jury. No question seems to have been made but that the defendant took water from the stream in the same manner that William Brown was accustomed to take it; and, if the jury found that he discharged the spent water in the same place where William Brown discharged it, then the defendant was not guilty of diverting the water, unless the defendant or his grantors have released or conveyed the right, or the right has been lost in some of the ways indicated in this opinion. Judgment reversed, and cause remanded.

HUSE v. ESTABROOKS.

(Supreme Court of Vermont. Caledonia. Dec. 3, 1894.)

CHATTEL MORTGAGES—DESCRIPTION OF PROPERTY—SUFFICIENCY.

A description of mortgaged property as "two two year old heifers and three one year old heifers" is, as to purchasers for value, too indefinite, where neither ownership, possession, nor location of the property is stated in the mortgage, nor is it stated that the heifers mentioned were the only ones, of the ages given, belonging to the mortgagor.

Exceptions from Caledonia county court; Tyler, Judge.

Action of trover by Simeon Huse against Fred Estabrooks. Judgment was rendered for plaintiff, and defendant excepts. Reversed.

Bates & May, for plaintiff. M. Montgomery, for defendant.

ROWELL, J. The plaintiff relies for recovery on a chattel mortgage, of which he is assignee, wherein cattle of the kind in question are described as "two two year old heifers and three one year old heifers," without more. The defendant was never a party to the mortgage, but purchased of the mortgagor after the mortgage was given. There was no evidence before the referee tending to show that at the time the mortgage was executed the mortgagor "owned or was possessed of any stock of the kind described in the mortgage, except what is therein described, and no claim was made that he did not then own and have in his possession all the stock which is described in the mortgage." It is found that the cattle in question were owned and possessed by the mortgagor at the time he gave the mortgage, and are the heifers that he attempted and intended to mortgage. While it may often be difficult, and sometimes impossible, to describe property of this kind with such certainty that it can be identified without the aid of extrinsic evidence, yet the mortgage must contain some statement concerning the property that will serve to distinguish it from other property of the same kind, when the existence of the thing stated is made to appear, which may be done by evidence aliunde. The object of the mortgage is to convey specific property, not to give a right to any property of the kind mentioned. The extent of the mortgagee's right is to have claim on the identical property mortgaged, and, if the description is so uncertain as to apply equally to any property of the kind described, there can be no identification without proving something not referred to in the mortgage, which is not allowable. The description need not, as this court has said, be such as to enable one to find the property without inquiry; but it must be such as to suggest the inquiry, and afford a basis of identification. The statement of number and ownership has been held to be sufficient, in certain circumstances, when it appeared that the mortgagor owned no more at the time than the number stated; and especially has such a statement, when coupled with a statement of location, been held sufficient if it appeared that the mortgagor had no more at the place named than the number stated. But in this case it is not found that the mortgagor owned no more heifers of the ages mentioned than the number stated. What is reported on this subject amounts to no more than saying that it did not appear whether he did or not. Neither ownership, possession, nor location is stated in the mortgage, nor is it stated that the heifers mentioned were all the heifers of those ages that the mortgagor owned; so the description applies equally to any heifers of the ages stated, and you cannot apply it to the heifers in question without pursuing a line of inquiry not suggested by the mortgage, and proving something not referred to in it. The description is therefore too indefinite to make the mortgage good against third persons. As this view is decisive against the plaintiff's right, it is unnecessary to consider any other question. Judgment reversed, and judgment for the defendant to recover his costs.

BATCHELDER v. BARBER.

(Supreme Court of Vermont. Bennington. Dec. 27, 1894.)

LIMITATION—SUSPENSION BY NONRESIDENCE.

One who claims that limitations were suspended because of a debtor's nonresidence must show that the debtor, during his nonresidence, did not have property within the state which could have been attached.

Digitized by Google

Exceptions from Bennington county court; Taft, Judge.

Action of assumpsit by J. K. Batchelder against John F. Barber. Judgment pro forma was rendered for plaintiff, and defendant excepts. Reversed.

O. M. Barber, for plaintiff. Stewart & Wilds, for defendant.

TAFT, J. Two questions were argued in this cause by the counsel for the defendant, but it is unnecessary to consider them, for the plaintiff concedes that he cannot recover the amount of the draft in question, for that it does not appear that the defendant, while residing without the state, did not have known property within the state that could have been attached by the common process of law. To entitle him to recover, it was necessary he should establish that fact. Stevens v. Fisher, 30 Vt. 200. Judgment reversed, and judgment for the plaintiff for the smaller sum named in the report.

STILES v. STANNARD et al.

(Supreme Court of Vermont. Rutland. Jan. 7, 1895.)

CONTRACT OF INDEMNITY—CONSTRUCTION.

A creditor of a corporation executed his note, secured by a mortgage on his land, to be used to raise the money, the corporation agreeing to pay the note when due, and, as additional security to the mortgagee, the stockholders contracted to indemnify him against loss in case the mortgage was insufficient to pay the note. *Held*, that the stockholders were not primarily liable for payment of the note, so as to entitle the creditor to enjoin the mortgagee from foreclosing the mortgage before he attempted to collect the amount of the note from the stockholders.

Appeal in chancery, Rutland county; Munson, Chancellor.

Bill by Charles A. Stiles against Heman Stannard and others. The cause was heard on report of a master, and from a decree dismissing the bill orator appeals. Affirmed.

The orator alleged, in substance, that the Paragon Marble Company had contract rights in certain real estate belonging to him, and owed him in respect of said contract the sum of $3,000; that said company was unable to pay the amount so due, and that for the purpose of paying the same, and thereby of saving its rights in said property, it applied to the defendant Stannard, and procured from him a loan of $2,500, which was paid to the orator upon such account; that for the purpose of securing said loan it was agreed that the defendant Stannard should take the orator's note for $2,500, secured by mortgage upon the real estate in question, and that the marble company, upon the maturity of said note, should pay the same; that the other defendants were the stockholders of the Paragon Marble Company; that it was for their interest, for this reason, that the arrangement should be consummated, and that for the purpose of effecting the same they also agreed with the orator to pay said note when due; that the defendant Stannard knew the purpose of the loan; that the marble company and the other defendants were the parties in interest upon the notes, and assented thereto. The prayer of the bill was that the defendant Stannard should be restrained from prosecuting any suit of foreclosure against the premises until he had exhausted his remedy against the other defendants, and that the other defendants be ordered to pay said note. The master found the facts as alleged by the orator in reference to the giving of the note and the agreement of the Paragon Marble Company to pay the same. He did not find that the other defendants agreed with the orator to pay said note, but that they agreed with the defendant Stannard to indemnify him against loss by reason of the taking of said note and mortgage.

H. A. Harman, for orator. J. C. Baker, for defendants.

THOMPSON, J. The orator, Charles A. Stiles, seeks to be relieved from the payment of his note and mortgage executed and delivered to the defendant Heman Stannard. Among other things, the master finds that on the 1st day of October, A. D. 1885, the Paragon Marble Company, a corporation, was in possession of a marble quarry on the orator's land, which it was then operating under the terms of a bond executed and delivered by the orator to one L. W. Collins, and an extension thereof executed and delivered by him to the Paragon Marble Company as the assignees of the bond. By the terms of the bond, and the extension thereof, the corporation was to pay the orator $3,000, October 1, 1885. When that day arrived it had no money with which to make this payment. The defendants Erastus H. Phelps, George M. Fuller, L. W. Collins, and L. B. Smith were the principal stockholders of the corporation, and Fuller was the president, and Phelps was the treasurer. Defendant Stannard was never a stockholder of the corporation. Being unable to make the payment on the last-named day, the corporation, by its officers, asked the orator for further delay, and not to enforce the conditions of the bond; and they also informed him that defendant Stannard would not invest any money in the business of the corporation, but that he would loan $2,500, and they proposed to the orator that he should give his note to Stannard for $2,500, and secure the same by mortgage upon the property described in the bond, agreeing that the corporation should pay the note when it became due, and that it should pay the balance of the $3,000, viz. $500, in one year, with interest. Relying upon this agreement of the corporation, the orator executed and delivered the note and

Digitized by Google

mortgage to Stannard, and received from him $2,500, and permitted the corporation to remain in the possession and control of the quarry. This agreement of the corporation to pay this note was not in writing, but the master expressly finds that such was the understanding between the officers of the corporation and the orator, Charles A. Stiles, and that without it he would not have given the note and mortgage, nor have extended the time for the payment of the $3,000. When the note fell due the corporation did not pay it, and has never paid it. Stannard was not satisfied to take the mortgage as security for the loan, and thereupon the other defendants executed and delivered to him an agreement to indemnify him against loss in case the mortgage security was insufficient to pay the note. The orator predicates his right to be relieved from the payment of the note and mortgage upon the allegation in his bill that, at the time the note and mortgage were given to Stannard, the other defendants gave him a contract in writing agreeing to pay him the $2,500, with interest thereon, when the same became due; but the master finds that they did not make such a contract, and that they only made the contract of indemnity in respect to the adequacy of the mortgage security before mentioned. The master finds no fact which disentitles Stannard to enforce the note and mortgage. It is found that the corporation, and not the other defendants, agreed to pay the note at its maturity. The corporation is not a party to this suit. So far as disclosed by any papers furnished this court, there is no allegation of facts in the bill which, if found, would charge any of the defendants, as stockholders of the corporation, with the payment of this note, and that question is not before us, either by the allegations of the bill or the findings of the master. The bill was properly dismissed, with costs to the defendants. Decree affirmed, and cause remanded.

WOODBURY v. WARREN et al.

(Supreme Court of Vermont. Caledonia. Jan. 7, 1895.)

HOMESTEAD—HOUSE IN PROCESS OF ERECTION.

Under R. L. § 1894, exempting from forced sale the homestead "consisting of a dwelling-house, out-buildings, and the land used in connection therewith, * * * by the head of a family as a homestead," land may be claimed as a homestead on which a house is being constructed.

Exceptions from Caledonia county court; Tyler, Judge.

Assumpsit by trustee process by Sarah L. Woodbury against W. E. Warren and others. There was a judgment for plaintiff, and claimant and trustee except. Exceptions sustained.

B. E. Bullard, for plaintiff. W. H. Taylor, for trustee and claimant.

THOMPSON, J. The defendant bargained for a building lot in the village of Hardwick in the fall of 1888, and the deed thereof was executed and delivered to him April 20, 1889, and on the same day was filed in the town clerk's office in Hardwick. About the date of the deed, the defendant began the erection of a dwelling house on the lot, and the same was in process of erection during the spring and summer of 1889. The defendant moved his family into this house in December, 1889. He has had no other real estate before nor since he took the deed of this. The plaintiff's cause of action is for rent of her tenement for the months of June and July, 1889, and which fell due August 1, 1889. This indebtedness was created and fell due while the defendant's house was in process of erection. This action was commenced August 9, 1893. The fund in the trustee's hands is a balance of a note dated July 29, 1893, given by him to the defendant in part payment of the purchase price of this house and lot. The plaintiff concedes that under R. L. § 1076, this fund is exempt from attachment by trustee process if, at the time this indebtedness was created, the house and lot were defendant's homestead. We therefore construe the agreed statement of facts as raising this question, no other having been argued by counsel on either side.

The plaintiff contends that, while the house was in process of erection, the defendant had no homestead in the lot, and that none could accrue until the house was ready for occupation. In Bank v. Gale, 42 Vt. 27, and Lamb v. Mason, 45 Vt. 500, it was held that the homestead of a debtor was exempt from attachment upon debts contracted after the filing of the deed of the homestead for record in the town clerk's office, and before the occupation of the premises by the debtor as a homestead, he being in the occupancy of the same as a homestead at the time of the attachment. The plaintiff attempts to distinguish these cases from the one at bar, in that there was no house upon the premises involved in the latter case at the time the deed was filed in the town clerk's office, nor at the time when the defendant's debt to her was contracted, and relies upon R. L. § 1894, in support of this contention. Section 1894 is as follows: "The homestead of a housekeeper or head of a family, consisting of a dwelling-house, out-buildings, and the land used in connection therewith, not exceeding five hundred dollars in value, and used or kept by such housekeeper or head of a family as a homestead, shall, together with the rents, issues, profits and products thereof, be exempt from attachment and execution, except as hereinafter provided." Considering the humane purpose of the homestead law, it is too narrow a construction of it to hold that under no circumstances can the debtor's real estate become a homestead, exempt from attachment, unless there

Digitized by Google

is a dwelling house actually erected upon it. In Rice v. Rudd, 57 Vt. 6, it was said that, "to constitute a homestead within the protection of the exemption law, there must be a dwelling house upon the land owned by the housekeeper, or one in process of erection, and actually used or set apart and kept for a home and abiding place for the family." This is the correct construction of the statute. Therefore, as against the plaintiff, the lot and house in process of erection thereon, when defendant's debt to the plaintiff was contracted, were then the defendant's homestead, and exempt from attachment for that debt.

Judgment affirmed, without costs as to the defendant. Judgment as to trustee and claimant reversed, and judgment that trustee is discharged, with costs, and that claimant is entitled to the funds in the trustee's hands.

MARTIN v. CURTIS.

(Supreme Court of Vermont. Orange. Jan. 7, 1895.)

PRESUMPTIONS—USE OF LAND.

Proof that land has "long been used" as a pasture raises no presumption that for a period long prior to the present time the land was so used.

Exceptions from Orange county court; Ross, Chief Judge.

Action of trespass by A. S. Martin against Francis Curtis. Judgment was rendered for defendant, and plaintiff excepts. Affirmed.

John W. Gordon, for plaintiff. R. M. Harvey, for defendant.

THOMPSON, J. The plaintiff claimed that the alleged trespass was committed on the 10-acre lot owned by him. In his chain of title he put in evidence a deed from Samuel Fifield to David Adams, dated March 8, 1806,—the original grant of the 10-acre piece,—in which the description is as follows: "Also, ten acres of land off the west end of the first division lot drawn to the original right of Ebenezer Brewster, beginning at the southwest corner of said lot, and running forty rods east, on the south line of said lot; thence turning, and running about a north point, until it strikes the west line of said lot, far enough to contain ten acres." The parties were at variance, by their respective evidence, in regard to the true location of the west line of the Brewster lot, and especially of its southwest corner. If the southwest corner was located as claimed by the plaintiff, then his evidence tended to show that the 40 rods would extend across the brook. If located as the defendant's evidence tended to show, that distance would not extend across the brook. The location of this corner was a material question, for, if located as claimed by the defendant, no trespass had been committed. As evidence tending to show the location of this corner, the plaintiff offered to show "that the 10-acre piece has long been used as a pasture, which would have no water in it if its southeast corner was where defendant claimed." This offer was excluded, to which the plaintiff excepted. It is now contended by the plaintiff that to show that this piece of land has long been used for a pasture would tend to show that it has always been used for that purpose, and, if always used for that purpose, water is so essential to a pasture that it is probable that the 10 acres described in that deed of 1806 included a part of the brook. The words "has long been used" are indefinite in respect to the time in the past from which it is claimed that this land has been used as a pasture, but it is not claimed that the offer is to be construed as showing such use at the time the deed was executed, in 1806. The existence of a thing permanent in its character, once established, is presumed to continue hereafter until the contrary is shown, but the use of land as a pasture is not of such a character. Again, "a presumption is not retrospective." Lawson, Pres. Ev. 190, rule 37. Hence, no such inferences as those for which the plaintiff contends can legally be drawn from the evidence excluded. There was no error in excluding it. Judgment affirmed.

NEAL v. THORNTON.

(Supreme Court of Vermont. Windsor. Jan. 29, 1895.)

IMPEACHMENT OF WITNESS—OFFER OF COMPROMISE.

In trespass for assault on an infant, the father testified that defendant assaulted plaintiff, and broke his arm. *Held*, that the fact that before the suit the father offered to compromise for what he had paid out for doctor's bills incurred in treating the infant is not admissible to impeach him.

Exceptions from Windsor county court; Thompson, Judge.

Trespass by Alfred Neal, by his father and next friend, Dan B. Neal, against Benjamin Thornton, for assault and battery. Plea, not guilty. Verdict and judgment for the defendant, and the plaintiff excepts. Reversed.

French & Southgate, for plaintiff. William Batchelder, for defendant.

START, J. The plaintiff, in opening his case, improved his father as a witness, and his testimony tended to show that the defendant assaulted the plaintiff and broke his arm. On cross-examination, as bearing upon the credibility of the witness, the defendant was allowed to show, subject to the plaintiff's exception, that the witness offered to settle for the doctor's bill for setting and caring for the plaintiff's arm, if the defendant would settle then without any further ceremony.

Digitized by Google

It appeared that the father employed the doctor and paid him. This offer was not an admission of any fact relating to the extent of the plaintiff's injuries, about which the witness had testified differently, but an offer to compromise a claimed cause of action, provided the defendant would then pay the sum named without further ceremony. The offer being thus conditioned, it was error to allow the jury to consider it for the purpose of impeaching and discrediting the witness. Such offers are usually made with a view of obtaining friendly and amicable adjustment of differences, and for the purpose of avoiding prolonged and expensive litigation. Peace and friendship are of such worth that a man, for the sake of preserving such relations, will forego his strict legal right, and submit to an abatement from his just claim. The offer which a man makes, under such circumstances, does not represent his judgment of what he ought to receive at the end of litigation, but what he is willing to take and avoid it. The fact that a man has offered to compromise and settle a just claim for a sum less than that to which he is legally entitled, for the purpose of preserving friendly relations and avoiding litigation distasteful to him, does not tend to impeach him when he is called to testify respecting the same subject-matter, while asserting his claim according to his strict legal right, and is not admissible for that purpose. Harrington v. Lincoln, 4 Gray, 563; People v. Genung, 11 Wend. 20. The fact that the witness had offered to compromise his claimed cause of action for what he had paid out for doctor's bills could not be legitimately considered for the purpose of impeaching him. Judgment reversed, and cause remanded.

LEAVENS v. EWINS et al.

(Supreme Court of Vermont. Franklin. Jan. 29, 1895.)

RES JUDICATA.

When a probate court, having jurisdiction, construes a will, and makes a distribution of the estate, and no appeal is taken, property rights vested under the decree cannot afterwards be disturbed for error in the construction.

Exceptions from Franklin county court; Taft, Judge.

Petition by L. C. Leavens, guardian, against Lovina Ewins and others, to correct a former decree distributing an estate. There was a reversal by the county court of a judgment of the probate court for petitioner, and petitioner excepts. Affirmed.

H. C. Adams and M. J. Hill, for petitioner. H. E. Wheeler, for petitionees.

START, J. In 1874 the probate court for the district of Franklin made a decree, distributing the estate of Lewis Ewins under his will, by which the executor of the estate was ordered to pay to Rosabella, Lovina, and Zenobia Ewins, in equal parts, the residue of the personal estate. From this decree no appeal was taken. In 1893, and after the decease of Rosabella Ewins, this petition was brought, praying the probate court to correct the decree of 1874 by striking out the words "in equal proportions" therein, thus making the three legatees joint owners of the personal estate instead of owners in common. In making the decree of 1874 the probate court undertook to decree the estate according to the legal effect of the will. It had jurisdiction to make a decree distributing the estate, and its decree, unappealed from, was binding upon all parties. The construction given to the will was a legal construction, and became the law governing the distribution of the estate. If there was an error in the distribution of the estate, it was an error of law, and the remedy was by appeal to the higher court. No appeal having been taken, the law as then interpreted by the court became the law of the case. The construction thus given to the will was a judicial construction. Property rights vested under it, and for error in that construction they cannot now be disturbed. Stone v. Peasley, 28 Vt. 716, and cases there referred to. Judgment affirmed. Cause certified to the probate court.

TITUS v. WARREN et al.

(Supreme Court of Vermont. Caledonia. Jan. 29, 1895.)

PROCEEDS OF HOMESTEAD—LIABILITY FOR DEBTS.

1. In an action to subject the proceeds of defendant's homestead to the payment of his debt, where plaintiff's specifications set out items of account, some of which accrued before, and some after, the homestead was acquired, it was proper to allow plaintiff to waive his right of recovery on the items which accrued subsequently to the acquisition of the homestead, and to prosecute his claim on the others.

2. The proceeds of a debtor's homestead are liable for debts which accrued prior to the time the homestead was acquired.

Exceptions from Caledonia county court; Tyler, Judge.

Action of assumpsit by I. P. Titus against W. E. Warren and another (a trustee) on an open account, and to subject the proceeds of the homestead of defendant Warren to the payment of his debt. Judgment was rendered for plaintiff, and defendants except. Affirmed.

The debt due from the principal defendant to the trustee was for the purchase price of the defendant's homestead, and the question was whether this fund was attachable upon the plaintiff's debt. The defendant acquired his homestead April 20, 1889. The plaintiff's account was a store bill which accrued from 1886 to 1891. Upon the trial the plaintiff was allowed, against exception, to waive all those items which accrued after April 20, 1889. The plaintiff's account continued to be an open book account until after the date of acquiring the homestead, and items of both debt and credit entered into it after that date.

Digitized by Google

B. E. Bullard, for plaintiff. W. H. Taylor, for defendants.

START, J. In the court below the trustee was adjudged liable on account of money due and owing from him to the principal defendant for a homestead conveyed to him by the defendant; and the case comes to this court on exceptions taken by the trustee and claimant, who claim that the sum thus due is exempt from attachment by trustee process.

The plaintiff, in his specification, set out several items of account, some of which accrued before, and some after, the homestead was acquired. The court properly allowed the plaintiff to waive his right of recovery upon items of his account which accrued subsequently to the time the defendant acquired his homestead, and rendered judgment against the principal defendant for only such causes of action as existed at the time of acquiring the homestead. It is clear that the judgment is founded upon a cause of action which existed at the time the homestead was acquired. The judgment being founded upon such cause of action, the funds in the hands of the trustee were subject to attachment by trustee process.

R. L. § 1076, relied upon by the trustee and claimant, exempts from attachment by trustee process such sums only as are due and owing to the principal defendant for property sold and conveyed by him, which was, at the time of the sale, exempt from attachment and levy upon execution. R. L. § 1901, expressly provides that the homestead of the debtor shall be subject to attachment and levy upon execution upon causes of action existing at the time the homestead was acquired. The authorities cited in support of the claim that a cause of action accrues at the date of the last item of an account, have no application to this case. The causes of action for which the plaintiff recovered judgment against the principal defendant all existed before the date of the last item on the specification, and before the homestead was acquired. The existence of the cause of action at the time the homestead was acquired determines the right of the plaintiff to attach the funds in the hands of the trustee. The statutes above cited make the right to depend upon the existence of the cause of action, and not upon whether the demand is due, so that an action could be maintained at the time the homestead was acquired. Judgment affirmed.

ROLAND PARK CO. OF BALTIMORE CITY v. STATE.

(Court of Appeals of Maryland. Feb. 28, 1895.)

CORPORATE TAXES—APPLICATION OF ACT—CORPORATIONS SUBSEQUENTLY FORMED.

Act 1890, c. 536, provides that every corporation incorporated "since Jan. 1st, 1890," cemetery companies excepted, shall pay to the state a bonus of one-eighth of 1 per cent. on its authorized capital stock, and the act was approved April 8, 1890. It is incorporated with the laws providing for the permanent raising of revenue, and Act 1894, c. 114, by increasing the number of corporations exempt from its operation, and by providing that such corporations should not be relieved of liability for payment of the bonus accruing "prior to the date of the passage of this act [1894]" under the provisions of chapter 536, Act 1890," shows that the legislature intended the act to be of permanent force. *Held*, that the act of 1890 applies to all corporations incorporated after January 1, 1890, and not excepted, and not merely to those incorporated between January 1 and April 8, 1890.

Appeal from court of common pleas.

Action by the state of Maryland against the Roland Park Company of Baltimore City to recover the bonus tax levied on the amount of capital stock in company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

J. N. Steele, J. E. Semmes, and F. K. Carey, for appellant. J. Alex. Preston and R. L. Preston, for the State.

McSHERRY, J. Whether the appellant is liable for the franchise tax or bonus imposed by Act 1890, c. 536, is the sole question involved in this proceeding. The appellant is a body corporate, incorporated on July 30, 1891, under the general incorporation law, and its capital stock was limited by its charter to one million of dollars. The act of 1890, which adds a new section to the Code, prescribes that "every corporation incorporated since January first, eighteen hundred and ninety, under any general or special law of this state, except cemetery companies," etc., "shall pay to the state treasurer, for the use of the state, a bonus of one-eighth of one per centum upon the amount of capital stock which said company is authorized to have," etc. This act was approved and became effective on April 8, 1890. The contention of the appellant is that this statute is only applicable to corporations formed after January 1, and before April 8, 1890, and that the word "since," properly construed, makes the provisions of the act relate only to such corporations as were formed between January 1 and April 8, 1890. This contention is founded on the assumption that the word "since" means, and necessarily means, and was intended to mean, a period of time beginning with the 1st of January, 1890, and ending with the date when the statute became effective. To support this contention, we have been referred to various lexicons which define the word "since." We are not, however, dealing with a question of mere philology. What we have to do is to discover the legislative intention, and to give to it, when ascertained in accordance with established canons or rules, full and com-

Digitized by Google

plete effect. The mere words which the legislature may use are not always controlling. If the obvious purpose of an enactment is beyond the literal meaning of the language employed, it will not be restricted in its scope and application by the narrow significance of its words; and equally, too, broad and comprehensive terms will not include that which is not within the design and the object of the statute. The real intent, when ascertained, will always prevail over the literal sense of the language (State v. Milburn, 9 Gill, 109; Milburn v. State, 1 Md. 17), because both the canons of verbal criticism and the rules of grammatical construction must alike yield to the manifest spirit and intent of an enactment. Or, as differently expressed, "sometimes cases not within the words are held to be within the act, and other cases are, by construction, taken without the operation of the law, though covered by the language, according to the intent and design of the legislature." Wilson v. State, 21 Md. 1. This intent or design may be gathered, not merely from the language of the enactment, but also from the causes or necessity which prompted its passage, and from foreign circumstances. Johnson v. Heald, 33 Md. 352; Durousseau v. U. S., 6 Cranch, 307. Now, the obvious purpose of the act of 1890 was to raise a revenue for the treasury of the state. No reason has been assigned, or can well be suggested, for limiting its application to such corporations as were formed within the space of three months and eight days, in the beginning of the year 1890. By its first section it added a new section, to be known as section 88a, to article 81 of the Code of Public General Laws, relating to revenue and taxes, and thereby indicated that its provisions imposing the bonus should be a permanent and continuing part of the written law of the state, until repealed. The mere fact that it was included in, and by its express terms became a part of, the fixed and established revenue and tax system, at least implies that its application was not designed to be of the short and restricted duration claimed. It was made an integral part of a revenue system, of which, had it been purposely confined in its application to so brief a space of time, it would properly have formed no portion. As the statute was distinctly a revenue measure, it is not apparent why, if it was deemed necessary to resort to it for the first three months of 1890, it was not equally necessary for the remainder of that year, or until, in fact, its modification or repeal. But, in addition to this, the act contains inherent indications that it was designed to be continuous in its application. Its title declares that it is an act "providing for the payment by every newly created company of a bonus on its capital stock," etc., and suggests no restriction to those created before its passage, and subsequent to the preceding 1st of January. And, further on in the body of the act, provision is made for the imposition of a bonus of one-sixth of 1 per cent. upon the increase of the capital stock "of any of said companies or any company of like character heretofore incorporated." Now, if the literal and restricted meaning assigned in the appellant's contention to the word "since" is to prevail, then the only companies which would be liable to pay the bonus of one-sixth of 1 per cent. upon an increase of their capital stock would be those formed after January 1, and before April 8, 1890, and those incorporated at any time prior to the passage of the act of 1890. There is no conceivable reason why every corporation formed prior to April 8, 1890, should be liable, upon increasing its stock, to pay this bonus, and every one formed after that date should be exempt. This consequence, flowing from the construction insisted on, would result in inequality, if not in injustice, and would, to a great extent, defeat the raising of revenue from this particular source. A result which may follow from one construction or another of a statute is always a potent factor, and is sometimes, in and of itself, conclusive as to the correct solution of the question as to its meaning. People v. Rice (N. Y. App.) 31 N. E. 921.

Looking to the object which the legislature had in view in passing this act, and considering the important circumstance that they carefully incorporated its provisions in the Code, as a part of the revenue system, under the subtitle, "Payment of Taxes by Corporations," we think the true reading of the statute includes all corporations formed after January 1, 1890, except those specially excluded, and that the enactment is not confined to those formed between that date and April 8th of the same year. That this is what the legislature meant is made more apparent by Act 1894, c. 114. By this act other classes of corporations besides those excluded by the act of 1890 were exempted from paying the bonus, and it was specifically provided that no corporation incorporated prior to the date of the act of 1894 "shall in any manner by this act [the act of 1894] be relieved or released from the payment of any bonus now due and owing by it or which shall become due and payable by it prior to the date of the passage of this act under the provisions of chapter 536 of 1890." If the act of 1890 was intended to apply only to corporations formed between January 1 and April 8, 1890, there was no necessity for enlarging, by the act of 1894, the classes of corporations exempted from paying the bonus. The court below gave to the act of 1890 the same construction that we have placed upon it, and its judgment in favor of the state for the bonus due by the appellant will therefore be affirmed. Judgment affirmed, with costs above and below.

Digitized by Google

LANGHAMMER et al. v. MUNTER et al.

(Court of Appeals of Maryland. Feb. 28, 1895.)

ELECTION—REGISTRATION—EVIDENCE—RESIDENCE.

1. In an action to have names stricken from the registry of voters, the entries in the registry are admissible to show that the register acted properly in placing the names thereon, and will be deemed to be true till their falsity is established.

2. The fact that a person's name does not appear on the police census of registered voters of Baltimore does not prove that he is not entitled to vote in that city.

3. In an action to have the name of E. stricken from the registry of voters, it appeared that E. lived in Baltimore 25 years, and in the ward in which he registered 4 years. A witness who resided at the house from which E. registered testified that, at E.'s request, he allowed him to sleep two nights in his kitchen; that E. asked to be allowed to register from the house; that E. "followed the water," and witness did not think he had a regular home; that he had known E. for some years, and had on two previous occasions allowed him to sleep at his house for a night or two at a time. A subpoena issued to E. had been returned non est. *Held*, that E.'s name was properly placed on the registry of voters.

Appeal from court of common pleas.

Action by John F. Langhammer and Richard A. Dunn against John Munter and others, registration officers. From an order of the court of common pleas of Baltimore city dismissing the petition, plaintiffs appeal. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

C. J. Bonaparte and John C. Rose, for appellants. P. J. Campbell, Jas. H. Preston, Ed. D. Fitzgerald, and Wm. S. Bryan, Jr., for appellees.

PAGE, J. This is an appeal from an order of the court of common pleas of Baltimore city dismissing the petition of the appellants, praying that the names of James Bosley and Charles Williams be stricken from the registry of voters of the Fifth precinct of the First ward of Baltimore city. At the hearing the petitioners produced the registry of voters of the precinct and ward, and read in evidence so much of the contents thereof as related to the registration of the persons alleged by the petition to be improperly registered. The appellants' counsel, however, contend that these entries can only be used for the purpose of showing what the appeal is from, and are not evidence to be regarded by the judge in determining whether the register has acted properly. We cannot adopt this view. The duty of a register of voters, under our statute, is not merely ministerial. It is his duty to interrogate the party applying for registration, under oath, touching his right to register; and if, after this primary examination of the applicant, and of such other evidence as may be immediately accessible, he is in doubt, he may adjourn his determination to a subsequent day, when he must proceed to determine whether the applicant is a qualified voter, or disqualified. He is thus compelled to take evidence, weigh its force and effect, and finally to "determine"; and it is from this determination that any one who thinks himself aggrieved may appeal to one of the judges of the supreme bench of Baltimore city, if the election precinct is in Baltimore city. The appeal is by petition, and with it shall be filed certified copies of all the entries in the registry of voters relating to the subject-matter; and if, in the opinion of the judge, the petition and exhibits show a prima facie cause of complaint, he orders the proceedings provided by the act. After answer is made and evidence adduced, the court is required to consider, in making up its determination, the petition (which includes the entries), the answers, and such testimony, for or against the petition, as may be offered, and from the whole case, thus made up, decide whether the party is or is not a qualified voter. These entries are not only the sworn statements of the applicant, but also the deliberate findings of an officer charged with the public duty of determining their correctness, and, as such, should not be disturbed until their falsity has been established by sufficient evidence. Adopting this principle in the case we are now considering, what does the proof establish? There is no evidence assailing such entries as shown that James Bosley is white, 25 years of age, and has resided in Baltimore city 25 years, and in the ward 4 years. There is no sufficient evidence to controvert the entry with respect to his residence (the nature of which, as proven, will be hereinafter examined) in the precinct. The proof that his name does not appear upon the police census of registered voters is too uncertain to be entitled to much weight. The fact that Bosley was a seafaring man might fully account for his absence at the time the census was taken, even if it be assumed that the police performed their work with perfect accuracy. It was proved by the testimony of Charles A. Eisensick that he resided at 2225 Essex street, the place Bosley had stated as his residence in the ward and precinct; that neither of the alleged voters had ever lived there, but that he knew them, and in the month of August, 1894, had permitted them, at their request, to sleep for two nights in his kitchen; that they had asked him to permit them to register from his house, and he had replied that he did not object, if it was not contrary to law; that the alleged voters were two young men who "followed the water," and he supposed they were then down the bay, dredging. He did not know whether they had any permanent home. Thought they had not, and, if they had, he did not know where it was. He had know them for some years, and on one or two previous occasions they

Digitized by Google

had, in like manner, slept at his house for a night or two at a time, but never longer. It was also shown that subpoenas had been issued for each of the parties, and returned by the sheriff non est.

This is a full statement of all the evidence in the cause. We have stated it particularly with reference to James Bosley, but what has been said is equally applicable to the case of Charles Williams. Under these circumstances, the appellant contends that neither of these men is a qualified voter, and entitled to be registered. This depends on the meaning of the word "residence," as used in the first section of article 1 of the constitution, when applied to the particular proof in this case. What constitutes "residence," within the meaning of this section and article of the constitution, has frequently been the subject of judicial decision in this state and elsewhere. It has often been held to be equivalent to the word "home," in the sense of a home to which one, whenever absent, intends to return. It undoubtedly carries with it an element of permanence, differing, however, widely in special cases. "The word 'home' suggests relations differing in breadth and strength, though not in kind, when applied, on the one hand, to a farmer who has resided since his birth, and expects to reside until his death, on the same spot, and, on the other hand, to the clergyman, whose home may change in two years, or to the railroad laborer, whose home may change in two months." Paine, Elect. 46; Chase v. Miller, 41 Pa. St. 403; Story, Confl. Laws. Temporary absence, with a continuous intention to return, will not deprive one of his residence, though it extend through a series of years (Cooley, Const. Lim. 600; Fry's Election Case, 71 Pa. St. 302); nor will a sojourn, however prolonged, with the purpose of returning, be sufficient to acquire a residence. There must be the act of abiding, without the intention of removing therefrom. Story, Confl. Laws, § 41, says: In other words, there must be, to constitute residence, an "actual home, in the sense of having no other home, whether he intends to reside there permanently, or for a definite or indefinite length of time." Shaeffer v. Gilbert, 73 Md. 71, 20 Atl. 434. Residence, therefore, is a question depending upon fact and intention; and, if so, it may be applicable to a particular spot, or to a whole country. A person who wanders from country to country, with no intention of remaining fixedly anywhere, acquires no new residence. On the other hand, one who confines his wanderings to a particular country or locality, but declines to fix himself upon some particular spot, can very properly be said to be a resident of that country or locality. Home, domicile, or residence, may therefore include a spot or a wide area. Each of these words may be applied either to a house, a precinct, a ward, a county, or a state. Dicey, on the law of Domicile (page 55), says, "It is obvious that * * * state residence and the district residence, are of the same nature, and whatsoever is necessary to constitute the one is essential to define the other." Fry's Election Case, 71 Pa. St. 306. The framers of our constitution have, in the first section of article 1, clearly recognized these applications of the word "residence." That section prescribes, as the qualification of a voter, that he shall be a resident of the state for one year, and a resident of the district six months. There is no requirement that the proposed voter shall have some particular spot which he calls his home, provided he makes his home (in the sense of having no other home) anywhere, or in however many places, for the required times, within the limits of the state and the voting district. Probably, it was borne in mind that numbers of citizens, through misfortune or otherwise, were without dwelling places, but there is no evidence to be found in any part of the constitution that these were to be denied the privilege of the elective franchise. On the contrary, it seems to have been the purpose to confer the right of suffrage upon every male citizen who has attained the age of 21 years, only requiring, for wise reasons, that every such person shall have resided in the state one year, and in the voting district six months. When the general assembly came to provide by law for a uniform registration of voters, as required by the fifth section of article 1 of the constitution, it was careful to prescribe such regulations, as should prevent abuse and fraud in the exercise of this great privilege. The city of Baltimore having been divided into small precincts, officers of registration are provided for each, and large powers are given them, effectively to discharge the duties imposed upon them. For the purpose of clearly identifying the person applying to be registered, the officers of registration are to ascertain his name; color; age; place of birth; place of residence, by street and number, if any; the time of his residence in the city and ward,—and enter the same in the proper column of books prepared by the state, and furnished them for that purpose. Fraudulent conduct on the part of the registers, or of other persons, in or about the registration of voters, is made a misdemeanor punishable on conviction, with heavy penalties. And in addition to all this if any person, whether he be the person applying to be registered, or any other person, shall think himself aggrieved by the action of the officer of registration, there is given the right of appeal to a judge of the supreme bench. If these safeguards should prove ineffectual to prevent the fraudulent practices which the counsel for the appellant seems to apprehend, it will be for the legislature to devise and enact other provisions to accomplish the most desirable object of securing absolutely pure elections. But, whatever may be done, no restrictions can be imposed that will require other or differ-

Digitized by Google

ent qualifications for voting than those prescribed by the first article of the constitution of the state. Order affirmed.

FIRST NAT. BANK OF GRAFTON v. BUCKHANNON BANK OF WEST VIRGINIA.

(Court of Appeals of Maryland. Feb. 28, 1895.)

CHECKS—PRESENTMENT FOR PAYMENT—DILIGENCE OF PAYEE.

1. A check drawn on bankers in Baltimore, dated January 11th, was received by the payee by mail on the 12th, and forwarded by the payee to its correspondent in Philadelphia, who received it on the 13th, and on the same day sent it to its correspondent in Baltimore, who received it on the 14th, and presented it for payment by 1 o'clock of the same day. If the check had been mailed by the payee on the 13th directly to Baltimore, it would have reached there on the 14th. *Held*, that the check was presented within a reasonable time, so as to render the drawer liable thereon in case of nonpayment.

2. The payee of a check took in payment the check of the drawee, the drawee being unable to pay cash, as afterwards appeared. Thirty minutes later, the drawee became bankrupt, and payment of the substituted check, when presented the same day, was refused. The drawee had no funds in the hands of the bank on which the substituted check was drawn, and there was no evidence that the check, if presented for payment within the 30 minutes, would have been paid. *Held*, that the taking of the substituted check, and failure to present it for payment within the 30 minutes, did not relieve the original drawer from liability, as it in no way injured him. Anderson v. Gill (Md.) 29 Atl. 527, distinguished.

Appeal from Baltimore city court.

Action by the First National Bank of Grafton, W. Va., against the Buckhannon Bank of West Virginia. From a judgment for the defendant, plaintiff appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, ROBERTS, PAGE, BOYD, FOWLER, and McSHERRY, JJ.

Frank Woods, for appellant. N. P. Bond, for appellee.

McSHERRY, J. The case of Anderson v. Gill, 79 Md. —, 29 Atl. 527, is clearly distinguishable from the one now before us. In Anderson v. Gill we held that when the payee of a check drawn on a banker having funds of the drawer available to cash it presents it in due time through his collecting agent, and the latter, instead of receiving money for it, surrenders it, and takes in lieu of the money the drawee's own check upon another bank having funds with which to pay the substituted check, and then fails to use proper diligence in presenting the substituted check for payment, which, when it is presented, is not paid because of the supervening insolvency and suspension of the drawer of the substituted check, the loss must fall, as between the drawer and payee of the original check, upon the latter, and not upon the former. It is not necessary to repeat the reasons or again refer to the adjudged cases upon which the conclusion reached in that case was founded. It is obvious that, if the payee's own negligence in not presenting the substituted check in a reasonable time before the suspension of its drawer has been the direct cause of its nonpayment,—or, stating it differently, if the substituted check was drawn upon a bank having funds of its drawer, and if it would have been paid, had due and proper diligence been used in presenting it, and, after the expiration of the time beyond which its presentment would not be within the limits of due diligence, the drawer of it suspends, and the substituted check is, in consequence, not paid,—this negligence of the payee of the original check in not presenting the substituted check at a time when it would have been paid cannot be visited upon the drawer of the original check, and he will be discharged. But this doctrine cannot apply where the facts fail to show that the drawer of the original check has been injured by the delay or the want of due diligence of the payee or his collecting agent. If the drawer of the original check has not been injured by the conduct of the payee, he is in no worse position, in consequence of that conduct, than if due diligence had been used by the payee without securing payment; and if the facts show that the exercise of due diligence in making presentment of the substituted check would have been useless because of the insolvency of the drawer thereof, and because the drawer thereof was without funds to meet it, then the failure to use such diligence could not prejudice the rights of the drawer of the original check, provided the drawer thereof was insolvent when it was drawn, and was unable to cash it when presented. Assuming always that the original check would have been paid in cash had cash been demanded and insisted on when it was presented, and assuming also that the exercise of due diligence would have secured the payment of the substituted check, then the failure to exert that diligence whereby loss occurs, would result in an injury to the drawer of the original check, and would discharge him. But injury cannot be predicated of the want of due diligence, unless, but for the want of such diligence, the money would have been paid. Until it is shown that the use of due diligence by the payee or his agent would have resulted in the payment of the substituted check, the first step has not been taken towards establishing injurious negligence on his part. Now, in the case at bar, the Buckhannon Bank of West Virginia, being indebted to the First National Bank of Grafton, W. Va., and having on deposit with J. J. Nicholson & Sons, of Baltimore, an amount greater than this debt, gave to the Grafton Bank a check on Nicholson & Sons for the amount of the indebtedness due to the Grafton Bank. This check was dated January 11, 1892, and was

Digitized by Google

on the same day mailed to the Grafton Bank, and was received by it on the succeeding day. On that day—the 12th—the Grafton Bank indorsed the check for collection for its account, and forwarded it by mail to its correspondent, the Manufacturers' National Bank of Philadelphia. On the 13th the Manufacturers' Bank received it, and at once sent it by mail to its correspondent, the National Farmers' & Planters' Bank of Baltimore, for collection. On the next day—the 14th—the last-named bank received it, and at 1 o'clock presented it, together with other checks and drafts, at the counter of J. J. Nicholson & Sons for payment. Payment was not made in cash, but, instead thereof, upon the surrender of these checks and drafts, Nicholson & Sons drew their own check on the Western National Bank of Baltimore for the total amount of this and the other checks and drafts, and delivered it to the messenger of the National Farmers' & Planters' Bank. In 30 minutes afterwards, Nicholson & Sons, having suspended, and being hopelessly insolvent, closed their doors. When the check of Nicholson & Sons to the National Farmers' & Planters' Bank was shortly afterwards, but on the same afternoon, and during banking hours, presented to the Western National Bank, payment was refused. Demand was immediately made for the return by the Nicholsons of the surrendered checks, but admittance to their banking house was not obtained until next day, when the check drawn by the Buckhannon Bank was protested, and then recovered by an action of replevin. It is admitted by the agreed statement of facts that, had the check held by the Grafton Bank been presented to Nicholson & Sons at any time on the 13th or up to noon on the 14th, it would have been paid by them; and it is further admitted that Nicholson & Sons had no funds to their credit with the Western National Bank, but, on the contrary, were largely indebted to the bank on account of overdrafts when they drew their check in favor of the National Farmers' & Planters' Bank at 1 o'clock on the 14th of January. It is also distinctly admitted that this check "was in fact of no value."

We are now asked, in the light of these facts, to say that the receipt by the National Farmers' & Planters' Bank of this worthless check, and the failure to present it within 30 minutes thereafter, though it is not shown that it would have been paid had it been presented within that time, has resulted in such an injury to the Buckhannon Bank as to discharge the latter's liability to the Grafton Bank; and this, too, though the Nicholsons were utterly unable, by reason of their hopeless insolvency, to pay in cash the check drawn on them by the Buckhannon Bank when it was presented at 1 o'clock the same day. That is the appellee's contention, and so the court below decided. The position is absolutely untenable. The Grafton Bank, having received, on January 12th, the check drawn on Nicholson & Sons, was bound to present it for payment in a reasonable time. There being no dispute about the facts, what constituted a reasonable time is a question of law for the court. While it is undisputed that, if the check be drawn on a bank located in the place where the check is delivered, the holder has until the close of business hours of the next secular day to present it, it is equally the settled law that, if the check be drawn on a bank situated in another place, it should, at the latest, be mailed for presentment on the day after it is received, and should be presented at the place of payment on the day after it reaches there. 3 Rand. Com. Paper, § 1106; Byles, Bills, 14, 164; Chit. Bills (13th Am. Ed.) 383; Rickford v. Ridge, 2 Camp. 537. In the pending case, as already stated, the check was received by the Grafton Bank on January 12th, and was mailed, not the next day, but the same day, to its Philadelphia correspondent, for collection, and was received in Baltimore on the 14th, and was on that day presented for payment. Though the record contains the admission that, if the check had been mailed in Grafton on the 12th, to Baltimore direct, it would, in the due course of the mail, have reached the latter place on the morning of the 13th, still the Grafton Bank was under no obligation to mail it for collection until the day after it was received by it, —that is, until the 13th; and, had it forwarded it on that day by mail direct to Baltimore, the check would not have been received there until the 14th, the day it was in fact received. The forwarding of it through Philadelphia did not, therefore, cause it to reach Baltimore later than the Grafton Bank was bound to have it there for presentment. As, under the rule above stated, the Grafton Bank had, through its collecting agent, until the close of business hours on the 15th to present the check for payment, it was obviously guilty of no negligence in not presenting it prior to noon of the 14th, up to which time, according to the agreed statement of facts, it would have been paid. But, the check having been presented an hour later, when confessedly the Nicholsons were unable to pay it over their own counter, and the National Farmers' & Planters' Bank having taken, upon the surrender of this worthless check, an equally worthless one, drawn by Nicholson & Sons on a bank in which they had no funds, but to which they were already heavily indebted on overdrafts, no injury was in fact done to the Buckhannon Bank, unless it was made to appear that the Western National Bank would have paid Nicholson & Sons' check within the 30 minutes following its receipt by the National Farmers' & Planters' Bank, even though the drawers of that check had no funds to their credit when they drew it. We cannot assume that the Western National Bank would have paid this check if it had been presented prior to the actual suspension of the Nicholsons; and, as there is nothing in the record to show that it would been paid,

Digitized by Google

there is nothing to indicate that the failure to make the presentment worked any injury to the Buckhannon Bank at all. As the Nicholsons, according to the conceded facts, were utterly unable to pay the check drawn on them by the Buckhannon Bank when it was presented at their counter, the surrender of the check and the acceptance of the substituted check of itself caused no injury to the Buckhannon Bank; and as, according to the admitted facts, the substituted check was, when drawn, utterly valueless, the mere failure to present it within 30 minutes produced no injury to the Buckhannon Bank. Neither, therefore, the acceptance of the substituted check, nor the failure for 30 minutes to present it, placed the Buckhannon Bank in a worse position than it occupied at the moment its check was presented to Nicholson & Sons for payment; and that presentment was in fact made earlier than under the law it was necessary to make it. Consequently no act done by the Grafton Bank or by its agents caused any injury to the Buckhannon Bank. In the Anderson Case just the opposite facts were presented, and, of course, the opposite conclusion was reached. In that case it appeared that the check drawn by Anderson on Nicholson & Sons would have been paid in cash when presented, had cash been demanded; and, further, that the substituted check on the Western National Bank would have been paid, had due diligence been used in presenting it. It was shown that two other checks, drawn by Nicholson & Sons on the Western National Bank after they had drawn and delivered the one given in exchange for the Anderson check, were presented and paid. Had the same diligence been used by the holder of the check given in substitution for the Anderson check that the holders of these two other checks exerted, that check would also have been paid. The failure to use that degree of diligence, under these circumstances, therefore resulted in injuring Anderson, and he was held to be discharged. It follows from what has been said that the judgment of the court below was erroneous, and it will be reversed, that judgment may be entered for the plaintiff. Judgment reversed, and cause remanded, with costs above and below.

FREENY v. FREENY.

(Court of Appeals of Maryland. Feb. 27, 1895.)

EQUITY PRACTICE — EXCEPTIONS TO TESTIMONY—COMPETENCY OF WITNESS—CHILD OF TENDER YEARS.

1. In an action for divorce, it is within the discretion of the court to allow children of the parties, of tender years, to testify.

2. Exceptions to testimony taken before an examiner must state clearly the testimony excepted to, the ground on which the exception is based, and the name or names of the witnesses whose testimony is excepted to.

3. Where, under Code, art. 16, § 220, objection is made to a question because it is leading, the ground of the objection should be stated by the attorney making the objection, and recorded by the examiner.

Appeal from circuit court, Wicomico county.

Bill by Katharine Jackson Freeny against John Oscar Freeny. From a decree for plaintiff, defendant appeals. Affirmed.

Argued before ROBINSON, C. J., and ROBERTS, BRISCOE, McSHERRY, and FOWLER, JJ.

F. Stanley Toadvin, Geo. W. Bell, W. C. Humphreys, and Thos. Humphreys, for appellant. R. P. Graham and H. L. D. Stanford, for appellee.

FOWLER, J. The bill in this case was filed for a divorce a mensa. The ground alleged is cruelty of treatment. The questions presented, with the exception of a few minor ones, in regard to exceptions to testimony, involve issues of fact, and may be briefly disposed of. We entirely agree with the conclusions announced by the learned judges below. The case was heard before a full bench, and the carefully prepared and exhaustive opinion, which was concurred in by all the judges after reviewing all the testimony, grants to the wife the relief she prays for in her bill. This conclusion is, in our opinion, entirely in accordance with the decided weight of the testimony. It would serve no good purpose to discuss in detail the testimony which discloses the unhappy relations which existed between the plaintiff and defendant, nor would it be either instructive or interesting to show that the charges of cruel treatment on which the wife bases her claim to relief have been fully and satisfactorily established. In cases like this the witnesses relied on must necessarily come from the domestic circle. Ill usage of the kind imputed to the husband in this case is not generally indulged in while others are present. In the case of Hawkins v. Hawkins, 65 Md. 107, 3 Atl. 749, and in other cases, it has been remarked that it is from necessity that members of the family or servants must, in most cases like this, be called as witnesses; for, say the court in that case, "ill usage and cruel treatment of the wife do not generally occur in public places, or in the open face of day."

It appears that the parties to this cause were married in 1880, and that, after living together for 13 years, the plaintiff left her husband, taking with her the three children of the marriage, who were, respectively, about 12, 10, and 7 years of age. The testimony of the plaintiff and these three children, leaving out of consideration all other testimony offered by her, if it is to be received and credited, is amply sufficient to have justified the lower court in passing a decree of separation. But the testimony of the children is excepted to by the defendant on the ground that they are incompetent to testify, by reason of their tender years.

Digitized by Google

After carefully examining the children in regard to their capacity to testify as witnesses in the cause, the judges below found them to be fully capable, and therefore competent, and gave the plaintiff leave to examine them. If this question were properly before us, we would say, from an examination of the evidence, that we entirely approve of the course adopted by the court below. But it is clear that it was within the discretion of the trial court. 1 Greenl. Ev. § 367; State v. Juneau, 59 N. W. 580. And the ruling thereon is not, therefore, the subject of appeal.

A large number of other exceptions to testimony were taken below, but, as they were not noticed either in the brief or oral argument of defendant's counsel, we think it unnecessary to discuss them, except to emphasize what was said by the trial judges in regard to the irregular manner in which most of the exceptions were presented in this case. If it is desired to except to testimony taken before an examiner, to be used at the hearing of a cause in a court of equity, it is sufficient to have the examiner note the objection (Code, art. 16, § 220), without setting forth the ground on which such objection or exception is based, unless when a question is objected to because it is leading, in which case the ground of the objection should be stated by the attorney making the objection, and recorded by the examiner, in order that an opportunity may be afforded for changing the form of the question. Under rule 43 of the general equity rules adopted by this court (see section 223, art. 16, of the Code), evidence taken and returned by an examiner shall remain in court 10 days, subject to exception, before the cause shall be taken up for hearing, unless, by agreement of the parties, such time be waived. Ample time, therefore, is afforded for the preparation of exceptions, if counsel wish to avail themselves of it. Every exception to testimony must be reduced to writing, and filed in the cause, at least, before the hearing begins. It will not do, as was done in this case, to except generally to "all the testimony objected to, and noted by the examiner." Every exception should clearly indicate the testimony excepted to, and the ground on which the exception is based, and the name or names of the witnesses whose testimony is excepted to should be set forth. Decree affirmed, with costs to appellee.

JORDAN v. PECKHAM, Town Treasurer.

(Supreme Court of Rhode Island. March 19, 1895.)

DEFECTIVE HIGHWAY—NOTICE TO TOWN COUNCILMAN.

Notice to an individual member of the town council of a defect in a highway is not notice to the town, though the town council as a body, under Pub. St. cc. 64, 65, has much to do with the oversight of highways.

Exceptions from court of common pleas.

Action by George H. Jordan against Pardon S. Peckham, town treasurer. There was a judgment for defendant, and plaintiff excepts. Overruled.

Page & Owen, for plaintiff. E. K. Potter, for defendant.

PER CURIAM. The only question raised by the plaintiff's bill of exceptions in this case is whether notice to a member of the town council of the defendant town, of the defect in the highway where the accident happened, was actual and express notice to the town of the condition of such highway. We do not think it was. A member of a town council, simply as such, is not charged by the statute with any duty, nor has he any authority, regarding the highways of the town. It is true that the town council, acting as a body in their official capacity, has much to do in connection with the construction and oversight of highways (Pub. St. R. I. cc. 64, 65), and we are not prepared to say that notice to it of a defect in a highway would not be express notice to the town. But we fail to see that notice to an individual member thereof is any more binding upon the town than it would be if given to any other taxpayer thereof. Notice brought home to an officer charged with the maintenance and repair of the highways of the town generally, or with the particular one where the defect exists, would doubtless be sufficient. Thus it has been held, and doubtless correctly, that notice to a street commissioner or a road overseer is notice to the corporation (Parish v. Town of Eden, 62 Wis. 272, 22 N. W. 399); and also that notice to one of three supervisors of highways is notice to all and to the town (Bailey v. Town of Spring Lake, [Wis.] 20 N. W. 920). So, where the police are charged with the duty of removing obstructions from the streets, notice to a policeman, while on duty, of the obstruction, has been held sufficient. Elliott, Roads & S. p. 463, and cases cited in note 7. And while there are cases which hold that notice to a town councilman is notice to the town (Carter v. Town of Monticello, 68 Iowa, 178, 26 N. W. 129; Fuller v. Mayor, etc., 82 Mich. 480, 46 N. W. 721; McKlegne v. City of Janesville, 68 Wis. 57, 31 N. W. 299. But see statute of Wisconsin as to powers and duties of councils), and even in one state that notice to individual citizens is notice to the town (Mason v. Ellsworth, 32 Me. 271. But this rule has since been modified by statute. See Rogers v. Shirley, 74 Me. 144), yet the preponderance of authority as well as the better reason, we think, is opposed to this view. See Vanderslice v. City of Philadelphia, 105 Pa. St. 102; McDermott v. City of Kingston, 19 Hun, 198; Bush v. Geneva, 3 Thomp. & C. 409; dissenting opinion by Elliott, J., in City of Logansport v. Justice, 74 Ind. 378; Donaldson v. Boston, 16 Gray, 508. See, also, Pub. St. R. I. c. 65, §§ 15, 16; Winsor

Digitized by Google

v. Tripp, 12 R. I. 454. We are therefore of the opinion that the refusal of the court in this case to charge the jury "that notice to a member of the town council of Coventry was actual and express notice to the defendant town of the condition of said highway" was not error. Exceptions overruled, and judgment of court of common pleas affirmed.

FOURNIER v. WILSON.

(Supreme Court of Rhode Island. March 8, 1895.)

SHERIFFS AND CONSTABLES—SALE OF MORTGAGED GOODS—FAILURE TO PAY OVER PROCEEDS.

A count which sets forth in detail the making and delivery of a chattel mortgage, its nonpayment, the sale of the mortgaged goods under execution, and refusal on the part of the officer who made the sale to pay to plaintiff the proceeds of the sale, as provided in Pub. St. R. I. c. 223, § 6, sufficiently states a cause of action.

Action by James Fournier against James Wilson. Defendant demurred to plaintiff's declaration. Demurrer overruled.

J. Osfield, for plaintiff. Hugh J. Carroll and Jacob W. Mathewson, for defendant.

PER CURIAM. We are of the opinion that the first count in the declaration, to which the defendant has demurred, sufficiently states a cause of action. It sets forth the making and delivery of a certain note, and mortgage securing its payment, by one Isaac Fournier to the plaintiff; the record of the mortgage in the office of the town clerk of Lincoln, in which town, as shown by the mortgage, made a part of the count, the mortgagor resided at the making of the mortgage; the nonpayment in full of the mortgage debt; the sale under execution against the mortgagor of the horse, a part of the mortgaged property; and the refusal of the defendant, who made the sale, on demand by the plaintiff, to pay to him the proceeds of the sale. Pub. St. R. I. c. 223, § 6, provides that the proceeds of the sale of mortgaged personal estate under execution shall be applied to the payment of the amount due on the mortgage in the first instance, and the balance only to the payment of the amount due on the execution. The count is sustained, and the demurrer overruled. Case remitted to the common pleas division for trial.

KNOWLES LOOM WORKS v. VACHER et al.

(Supreme Court of New Jersey. Feb. 21, 1895.)

CONDITIONAL SALES—FAILURE TO RECORD—PRIORITY OF CHATTEL MORTGAGE.

1. The act of 1889, p. 421, requiring conditional sales of personal property to be recorded, applies to a contract of sale, made in New York, of property to be delivered to and held by the purchaser within this state.

2. A chattel mortgage subsequently given by the purchaser on such property in this state, to secure a pre-existing debt, is, within the meaning of the act of 1889, a mortgage in good faith, and is entitled to priority over the unrecorded contract of sale, of which the mortgagee had no notice.

(Syllabus by the Court.)

On case certified from the Passaic county circuit by Justice Dixon.

Action by Knowles Loom Works against J. Vacher and R. J. Hoguet. Case certified. Judgment for defendants.

The questions to be determined in this case are presented by the following certificate: "Paterson, N. J., May 3, 1894. This suit relates to the title of ten silk looms, which, about August 1st last, were in the possession of the defendants, and were then replevied by the plaintiff, and returned under bond to the defendants. The value of the looms was then $1,487.50, which amount, with interest thereon from August 1, 1893 the plaintiff will be entitled to recover if it be entitled to a judgment. The looms were originally the property of the plaintiff, a Massachusetts corporation located in Worcester, Mass., and were delivered by it to the Paris Silk Company, a New Jersey corporation located in Paterson, under a contract for the sale of them made orally in the city of New York between an agent of the plaintiff and an agent of the Paris Silk Company. According to the terms of the contract, the looms were to remain the property of the plaintiff until they were fully paid for, and were to be paid for in installments, at periods ranging from thirty days to six months after delivery. This contract was never formally reduced to writing, but its terms can be gathered from letters written to each other by the parties in Worcester and Paterson, which refer to the oral contract. In pursuance of the contract the looms were delivered by the plaintiff to the silk company, in Paterson, in the latter part of May, 1893, and shortly afterwards notes were given by the silk company to the plaintiff for the amount of the purchase money. These notes have never been paid, and, after the maturity of the note first due, the plaintiff tendered them all back to the silk company before issuing the writ in this cause. On July 5, 1893, the looms being in the possession of the Paris Silk Company, at Paterson, were mortgaged by that company to the defendant Hoguet to secure a pre-existing debt due from the company to Hoguet, Mr. Hoguet having agreed with the company that whatever he realized from the mortgage he would distribute among the creditors of the Paris Silk Company proportionately. At that time the silk company was insolvent, and Hoguet knew it, but he had no notice that the looms were not the property of the Paris Silk Company. The title which the defendants now set up depends upon that mortgage. Whether, under these circumstances, the plaintiff or the defendants are entitled to the judgment of the court is a question reserved and certified to the su-

Digitized by Google

preme court for its advisory opinion. Jonathan Dixon, Judge."

Argued before the CHIEF JUSTICE and DEPUE and VAN SYCKEL, JJ.

W. B. Gourley, for plaintiff. J. W. Griggs, for defendants.

VAN SYCKEL, J. On behalf of the defendants it is insisted that the sale by the plaintiff to the silk company, being a conditional one, was void as against the mortgage of Hoguet, by virtue of the provisions of the act of May 9, 1889, entitled "An act requiring contracts for the conditional sale of personal property to be recorded." Laws 1889, p. 421. The important features of this act are contained in the first and second sections, which are quoted as follows: "(1) That in every contract for the conditional sale of goods and chattels hereafter made, which shall be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things contracted to be sold, all conditions and reservations which provide that the ownership of such goods and chattels is to remain in the person so contracting to sell the same, or other person than the one so contracting to buy them, until said goods or chattels are paid for, or until the occurring of any future event or contingency, shall be absolutely void as against subsequent purchasers and mortgagees in good faith, and as to them the sale shall be deemed absolute, unless such contract for sale with such conditions and reservations therein, be recorded as directed in the succeeding section of this act. (2) That the instruments mentioned in the preceding section shall be recorded in the clerk's office of the county wherein the party contracting to buy, if a resident of this state, shall reside at the time of the execution thereof, and if not a resident of this state, then in the clerk's office of the county where the property so conditionally bought shall be at the time of the execution of such instrument: provided that in any county where the office of register of deeds exists, or hereafter may be created, such instruments shall be recorded in the office of such register." The silk company was the party contracting to buy, and was a resident of this state, located at the city of Paterson, in the county of Passaic. The contract of sale was not recorded as required by the act of 1889.

Two points are involved: First, whether the statute of 1889 is applicable to this case, in view of the fact that the contract of sale was made in the state of New York; and, second, whether the defendant Hoguet, in taking a mortgage to secure a pre-existing debt due from the Paris Silk Company to him, became a mortgagee in good faith.

The act of 1889 directs the contract to be recorded in the county where the buyer resides, if a resident of this state at the time of the execution of the contract, and, if not a resident of this state, then in the county where the property shall be at the time of the execution of such instrument. The manifest purpose of the act is to render inefficacious the conditional sale of all goods held in this state, where the contract of sale is not recorded. There is an implied mandate in the act that the contract of sale shall be in writing; otherwise it could not be recorded, and the act would be futile. The situs of the property, and not the lex loci contractus, determines the validity of such sales. The contract in this case was made in New York, but the property was to be delivered, and was delivered to and held by the purchaser, in this state. Great contention and uncertainty in the title to personal property would be produced if purchasers and mortgagees were bound to ascertain whether the vendor or mortgagor acquired title in another state before they could contract with safety in reference to it. Judicial decision in this state has been hostile to such an interpretation of the law. Safe Co. v. Norton, 48 N. J. Law, 410, 7 Atl. 418. Where the situs of personal property is in this state, it is subject to our statutory provisions in the adjudications regarding it in our own courts, in a suit to which a citizen of this state is a party. The force of our statutes is recognized in Varnum v. Camp, 13 N. J. Law, 326, and in Bentley v. Whittemore, 19 N. J. Eq. 462. "No one can seriously doubt that it is competent for any state to adopt such a rule in its own legislation, since it has perfect jurisdiction over all property, personal as well as real, within its own territorial limits; nor can such a rule made for the benefit of innocent purchasers and grantors be deemed justly open to reproach of being founded in a narrow or selfish policy." Story, Confl. Law, § 390. It seems clear that the New Jersey statute must dominate this controversy.

As to the other question to be discussed, there is more conflict in the cases. The New York chattel mortgage act of 1833, from which our act is copied, was construed by the New York court of appeals in Van Heusen v. Radcliff, 17 N. Y. 580. It is there held that an assignee in trust for creditors cannot impeach a prior mortgage for want of registry. Judge Denio, in deciding that case, relied upon previous decisions in New York that a voluntary trustee under such an assignment was not a bona fide purchaser for value. This case, I think, was well decided. An assignee for the benefit of creditors acquires no title, except strictly that vested in his assignor. He stands in the place of the assignor, with the mere duty of distributing his property among such creditors as may elect to come in for a dividend. The title of the assignor is subject to the prior unregistered mortgage, and in that condition it passes to the assignee. Standing as the mere representative of the assignor, the assignment being voluntary and without consideration, he acquires no title which can be

Digitized by Google

adverse to that of the prior mortgagee. He takes nothing except what his assignor had at the time of the assignment. He acquires, as against his assignor, no lien upon the property for his own benefit, upon which he can establish a claim hostile to one who holds by a previous conveyance. The current of adjudication undoubtedly is that one who takes by voluntary assignment for the benefit of creditors cannot successfully assail a prior equitable title or an unregistered conveyance previously made by the assignor. In the subsequent case of Thompson v. Van Vechten, reported in 27 N. Y. 580, Judge Denio ruled that a precedent debt does not qualify the mortgagee of a chattel as one in good faith, under the New York act of 1833, so as to entitle him to question a prior mortgage for a default in refiling it. In support of this decision he cites the cases of Van Heusen v. Radcliff, in 17 N. Y. 580, and Slade v. Van Vechten, 11 Paige, 21, in both of which cases the party challenging the validity of the prior unregistered conveyance was a voluntary assignee for the benefit of creditors. He also supported his views by reference to the New York doctrine that a person who purchases a negotiable note on account of an antecedent debt is not a bona fide holder for value, and to the case of Dickerson v. Tillinghast, 4 Paige, 215. The New York rule with regard to promissory notes is not the law of this state. In the case last cited the contest was between an unrecorded mortgage on lands and a subsequent purchaser for a pre-existing debt. To give priority to a subsequent purchaser of real estate, the New York statute required the subsequent purchaser not only to be in good faith, but also for a valuable consideration. The distinction between the language used in the recording act concerning real estate and the chattel mortgage act was not adverted to in 27 N. Y. 580. The conclusion that the term "bona fide" had acquired such meaning as was attributed to it in that case is not supported by the authorities there cited and relied upon. An examination of our own cases will show that a different rule prevails in this state.

In Mingus v. Condit, 23 N. J. Eq. 313, in which it is claimed that the New York rule was adopted, Chancellor Zabriskie held that a mortgage of lands from a grantee whose deed is void against creditors of his grantor, under the second and third sections (now sections 12 and 13) of the statute of frauds, will not be protected by the sixth (now section 15) section of that act, if he took his conveyance for a pre-existing debt. The language of the sixth section is for "good consideration and bona fide." The learned chancellor said that the mortgagee in that case was a mortgagee in "good faith," but not for a good consideration, within the meaning of said section. He said he felt bound by the statement made by Chief Justice Green in Allaire v. Hartshorne, 21 N. J. Law, 665, that although a pre-existing debt is sufficient consideration to make the indorsee of negotiable paper a bona fide holder, yet the rule as to personal property is "that a purchaser who has obtained title as a mere security for a pre-existing debt is not entitled to the character of a bona fide purchaser for value." That this is a correct statement of the rule which prevailed in equity will not be questioned. Chancellor Zabriskie manifestly recognized the distinction between a purchaser in "good faith" and a purchaser "in good faith and for a valuable consideration," a distinction in no respect inconsistent with the rule as asserted by Chief Justice Green in Allaire v Hartshorne.

Pancoast v. Duval, 26 N. J. Eq. 445, and De Witt v. Van Sickle, 29 N. J. Eq. 209, followed Mingus v. Condit, but the contesting liens were both upon real estate, in regard to which the language of our recording act is, "bona fide purchaser or mortgagee for valuable consideration."

In Uhler v. Semple, 20 N. J. Eq. 288, Chancellor Zabriskie said that the rule that a prior debt is not sufficient to make one a bona fide purchaser for value has never been adopted in this state. He gave the mortgage on chattels, given to secure an antecedent debt, priority over a prior equity of which the mortgagee had no notice. This case differs from the one in hand, in that the claim counter to the chattel mortgage was merely an equitable one, without legal title, while here the controversy is between two creditors having a legal title. The creditor with an equitable title only seems to be in a more meritorious position to assail the subsequent mortgage given for a pre-existing debt than is the holder of a prior unrecorded mortgage: (1) Because the equitable mortgage arises out of the application of equitable principles to existing circumstances and conditions. It is not in writing, and cannot be recorded as required by the fourth section of the chattel mortgage act. It can, therefore, be superseded only by applying to it the policy of the registry act. (2) The holder of the mere equity is chargeable with no neglect of any act which would fortify his position, while the holder of the prior unrecorded mortgage has failed to do what would have rendered his title impregnable.

In Traphagen v. Hand, 36 N. J. Eq. 384, the assignee of a judgment, which was alleged to have been paid, was given priority over a subsequent judgment. The assignee, although part of the consideration for the assignment was a prior debt of the judgment debtor, was held to be a bona fide purchaser. This case was reviewed by the court of errors and appeals (38 N. J. Eq. 613), and affirmed on another ground; but the court above, while dissenting from the proposition that a judgment debtor could revive a judgment which had been paid, so as to super-

Digitized by Google

sede the lien of a subsequent judgment creditor, expressed no dissent from the declaration that the assignee for an antecedent debt was an assignee in good faith. The learned vice chancellor who decided Sweeney v. Williams, 36 N. J. Eq. 464, evidently did not question the soundness of the doctrine stated by Chancellor Zabriskie in Uhler v. Semple. The vice chancellor followed the same case in Butterfield v. Okie, 36 N. J. Eq. 482, and gave to the mortgage taken for a pre-existing debt priority over the equity of which the mortgagee had no notice. In the absence of registry laws, the subsequent chattel mortgage taken for a prior debt will not prevail over the older incumbrance; but this does not result from the fact that it is not in good faith, because given to secure an antecedent debt, for the rule, "prior in tempore potior in jure," applies equally, whether the later mortgage is for a present or past indebtedness. As against a subsequent mortgage not in good faith, a prior equity is always enforceable, and therefore, in order to permit the subsequent mortgage for previous indebtedness to supersede the prior undisclosed equity, it must be conceded that such mortgage is in good faith. In all the decisions giving such precedence to the subsequent mortgage the quality of good faith has been, and necessarily must have been, attributed to the mortgage. There is no reason why the interpretation given to the term "good faith" in these adjudications between the subsequent legal title and the prior equity shall not be applied in construing the registry laws. That which is good faith between such contestants must be good faith as between mortgagees under the statute.

There is no antagonism between this view and the case of Shaw v. Glen, 37 N. J. Eq. 32, where it is held that a voluntary assignment of property for the benefit of creditors does not vest in the assignee such a title that he can claim precedence over a previous chattel mortgage because it is unrecorded. In making this statement, the cases of Receiver v. Spielman, 50 N. J. Eq. 120, 24 Atl. 571, and Pillsbury v. Kingon, 33 N. J. Eq. 287, have not been overlooked. In the former case it was held that the receiver of an insolvent corporation is the representative of its creditors, and as such may, by suit or defense, avoid any instrument which is void as against them. That is undoubtedly true, but a chattel mortgage unrecorded is not void as against creditors. It is good against the debtor and against general creditors, in the absence of fraud, and can be assailed only by judgment creditors. It was therefore necessary for the decision in the Spielman Case to hold, as the vice chancellor did hold, that a creditor, to be in a position to contest the validity of a chattel mortgage, must have his debt fastened on the mortgagor's property, and that such was the effect of the proceedings in insolvency. In voluntary assignments, where the previous liens are honest, although they may be voided by subsequent judgment creditors, "the assignee takes the estate assigned in the same plight and condition in which his assignor held it." There is nothing in the procedure of a voluntary assignment which elevates the assignee to a higher plane than the assignor himself occupied. The effect of proceedings in involuntary assignments under the insolvent laws is to appropriate the property of the debtor exclusively and irrevocably to the payment of debts, which is held to establish a lien, while in voluntary assignments no appropriation of property is made unless creditors elect to come in. The case of Pillsbury v. Kingon was a voluntary assignment for the benefit of creditors, where a prior conveyance was set aside at the instance of the assignee on the ground that it was fraudulent. The difference between a conveyance made to defraud creditors and one given to secure an honest obligation is too obvious to need comment.

This review of the cases shows that while it has been held that under our statutes requiring the subsequent mortgage to be not only in good faith, but also for a valuable consideration, a mortgage to secure an antecedent debt cannot supplant a prior unrecorded mortgage; and, while it has been also held that an assignee under a voluntary assignment cannot set aside a previous mortgage because it is unrecorded, there is no authority for the contention that a subsequent chattel mortgage given for a pre-existing debt is not superior to a prior unrecorded mortgage under our legislation, which prescribes that the only condition necessary to confer supremacy shall be that the subsequent incumbrance be taken in good faith. The only case expressly to the contrary is Milton v. Boyd, 49 N. J. Eq. 142, 22 Atl. 1078; but this is not, in my judgment, supported by the weight of authority in this state, nor is it in line with the policy of our registry laws. That the chief justice, who delivered the opinion of the court of errors and appeals in Bank v. Cummins, 39 N. J. Eq. 577, did not entertain the views expressed by the vice chancellor in Milton v. Boyd, is apparent from the following citation from his opinion: "In the argument addressed to this court in behalf of the appellant it was a point much relied on that the cestui que trust in whose favor the mortgage was given does not, as it was insisted, occupy the position of a bona fide purchaser, on the ground that such incumbrance rested exclusively on the consideration of a past indebtedness." In this respect the decision of the case of Mingus v. Condit, 23 N. J. Eq. 313, was relied on, and in that case the doctrine is maintained "that a deed or mortgage to a bona fide purchaser or mortgagee, for which the only consideration is the payment of a previous debt," is not within the

Digitized by Google

sixth section of the statute of frauds; but the doctrine "of that case cannot be sustained." I have previously endeavored to show that, conceding Mingus v. Condit to be well decided, it gives no support to Milton v. Boyd. The latter case is decided upon the authority of Mingus v. Condit, Pancoast v. Duval, and De Witt v. Van Sickle, all of which were cases under a recording act containing the words, "in good faith and for a valuable consideration," while in the act now applicable, passed after these decisions were announced, the words, "for valuable consideration," are not present. The various registry acts of our state being in pari materia, it must be considered that the omission from the act of 1889 of important words, of well-understood import, was for the purpose of leading to an interpretation different from that which the previous legislation had received. If it had been intended that the construction which had previously been put upon the sixth section of the statute of frauds and the recording act, relating to real estate, should be applied to the conditional sale act, such controlling words as, "for valuable consideration," would not have been omitted. The language of the act of 1889, "subsequent purchasers and mortgagees in good faith," is clear. It has no relation to the consideration of the mortgage except as to its honesty. A past consideration, in that respect, is as good as a present consideration. Such a mortgage is plainly one in "good faith," and that puts it within the protection of the statute. The object of the statute is to get rid of secret and latent equities. Public policy, as asserted in the extension of the registry laws, requires that the public record should show the ownership of personal property, and a construction which is favorable to that end should be given to the act. The failure to record tends to make transactions in personal property insecure, and therefore the mortgagee who has created that condition against which the statute is aimed has no just claim to outrank the creditor who subsequently secures his debt. The fact that the mortgage was taken for the benefit of the mortgagee and others does not impair its efficacy, nor assimilate it to the title, which is taken under a voluntary assignment for the benefit of creditors. The mortgagee acquired title for his own benefit, and gave, as between him and the mortgagor, a valuable consideration for it. The circuit court should be advised that the subsequent mortgagee is entitled to judgment.

PENNSYLVANIA, P. & B. R. CO. v. TRIMMER.

(Court of Chancery of New Jersey. March 5, 1895.)

EQUITY JURISDICTION — MISTAKE—LICENSE—DAMAGES IN CONDEMNATION PROCEEDINGS.

1. When a railroad company, upon coming into possession of property affixed by its predecessor to land for which no compensation has been made to the owner, seeks an equitable adjustment of the damages to which such owner is entitled, on the ground that the predecessor company was mistaken as to the ownership of the land, equity will not assume jurisdiction, in the absence of evidence that due inquiry as to the title to the land was made when such property was so affixed.

2. In condemnation proceedings by a railroad company against land on which its predecessor in interest had built piers for a bridge, evidence that the landowner had verbally stated to such predecessor that the work of building the piers might "continue until he wanted it stopped" does not show grounds for equitable jurisdiction.

3. Where a railroad company seeks to condemn land on which its predecessor located tracks and built stone piers for a bridge without consent of the landowner, it is proper to regard such piers as the property of the landowner, appraising them at their market value, if any, and not at their cost.

Bill by the Pennsylvania, Poughkeepsie & Boston Railroad Company against Augustus Trimmer. Decree for defendant.

Henry S. Harris, for complainant. C. H. Beasley, for defendant.

BIRD, V. C. The complainant presents two reasons for coming into this court for relief: One is that two of the four piers which were constructed in order to complete the viaduct across the Delaware river were built under the mistaken conviction that the defendant did not own the land; the other is license or permission from Trimmer to proceed with the construction of said piers until he should notify the plaintiff to the contrary. I find nothing in the case to justify me in believing that the original company, under which the complainant claims, considered whether Trimmer or any other person was the owner of the land upon which the two piers on the New Jersey side of the center of the river Delaware were erected, or that it had any conviction or belief with respect thereto. There is nothing to show that it made the slightest inquiry upon this subject. It is true that upon this hearing it produced the deed under which Trimmer claims title to the land adjoining, and demonstrated by an actual survey from that deed that the survey and the boundaries of his land are limited to certain heaps of stone, at points designated in his deed as at low water, or at the water's edge, but there is nothing to show that any investigation respecting these important facts was undertaken before preparations for the present hearing, or, at most, before 1889, seven years subsequent to the construction of said piers. Therefore, upon the ground of mistake, I think the complainant has failed.

Has the complainant succeeded any better with respect to the allegations of license? I think, when a person excuses what would otherwise be a trespass upon the ground of license, such license should clearly be established. The original company under which the present one claims title entered upon the premises of the defendant with a high hand, and an apparent total disregard of his legal

Digitized by Google

rights. I have searched in vain for some slight evidence of knowledge upon the part of Trimmer of the encroachments upon the part of the company upon his land which he did not object to, and so become bound under the doctrine of acquiescence, but nothing of the kind is disclosed. Nor am I satisfied that there was any direct license or permission given by Trimmer for the erection of these piers, or for any other trespass upon his lands. The most direct and unequivocal testimony upon this point is that of Stanton, who was the superintendent of the Pennsylvania, Slatington & New England Company, which is the company who committed the trespass complained of in 1882. Stanton says that in May or June of that year he was at Columbia, and met Trimmer and Ward, and that the subject-matter was then under discussion between them. He says that, although they did not agree as to what should be done, yet Trimmer told him, in Ward's presence, that he might proceed with the work until he notified him (Stanton) to the contrary. He says that he only saw Trimmer on two occasions, and that he thinks work was begun on the piers then. However, he limits it to the work on the piers in the river, but saying not on the piers on the land of Mr. Trimmer. On this occasion Mr. Ward was present. Stanton was asked to state what passed. He says: "Mr. Ward tried to settle with Mr. Trimmer for the right of way, and agree upon the price. They reached no agreement, and Mr. Trimmer said at that time what work must stop, and I said to Mr. Trimmer that, inasmuch as the negotiations were going on, I thought he ought to allow them to go on. He said, after some little hesitation, that he would allow them to go on. Before I left I said, 'Won't you give us in writing when you want us to stop,—won't you write us?' and he said he would do so; he would write me. The work was going on then, working on one of the piers, which Mr. Trimmer knew it was being builded on his land, which he claimed." He says that after this interview he saw Trimmer about the work often. Notwithstanding he had previously said that, at the time of these negotiations, they were only at work on the piers in the river, he subsequently says that, at the time of these negotiations, they were working on Mr. Trimmer's land. He says: "I went with Mr. Ward to see Mr. Trimmer, because Ward thought that I might help with the negotiations." Stanton had heard from Danford that Trimmer was objecting to their proceeding with the work on his land. Having heard this, he says that his object in seeing Trimmer was to procure from him the consent that the work might continue. At this point I think that I ought to observe that these last statements from Stanton show that it was later than May or June when he had this interview with Trimmer. It is perfectly clear from the testimony of Ward, as well as of Trimmer, that Trimmer and Ward did not meet with respect to these negotiations until in harvest time, or after the 4th of July; and that when they did meet, according to all the testimony, considerable work had been done upon the piers on the New Jersey side of the river. Ward went to see Trimmer, and found him in his harvest field. Besides these facts, Stanton, later on in his testimony, says that the company had been doing more or less work all the time previously.

In this very connection I ought also to remark that an effort has been made to prove that Mr. Trimmer was present several times a week from the very commencement of the work on the New Jersey side of the river, which Mr. Trimmer himself emphatically denies, saying that he did not know that they had commenced work there at all until after the 4th of July, in the year 1882, and Stanton says that he (Stanton) had been there very frequently up to that period of time, but that he never had met Trimmer before he met him with Ward, at this interview above named. This must put out of the case the insistment that Mr. Trimmer was apprised of what the company was doing upon his land before harvest time of that year, which it is well known was in the early part of July. The testimony shows that one Danford had contracted with the company to erect these piers. Stanton, as has been said, states that he was there once a week, or at least once in every two weeks, and that after the alleged interview with Mr. Trimmer, in which Trimmer consented that the company might go on with the work, Danford and Danford's men told him that Trimmer was objecting to their proceeding. This is in full corroboration of Trimmer's statement, and of all the circumstances in the case as developed by the testimony. As we examine the testimony of Mr. Ward, who was the agent of the company to purchase the right of way, we will see very clearly that the interview which Stanton speaks of was, as I have intimated, much later than May or June; for he says he went, at the instance of Mr. Ward, to assist in completing the negotiations with Trimmer. The plain purport of Mr. Ward's testimony is that he had no interviews at all with Trimmer until after the 4th of July. At one of these interviews it appears that Ward proposed to Trimmer to give him $500, in order to obtain his consent that they might go on and finish the piers, and that, when the amount of compensation for his land was ascertained, the company should have credit for the $500. The testimony before me is by no means conclusive that Mr. Trimmer accepted the offer. Nor is there any evidence that the money was ever paid or tendered to him. Ward says that he left in the early part of September, and that these negotiations with Trimmer, in which he offered him the $500 as stated, took place about one week before he left. Upon the question of license or permission

Digitized by Google

from Trimmer, the testimony is as follows: "By Ward: Q. What was said by you to him about going on with the work? Try to remember what that was. A. I can't recollect the conversation. I think that I asked Mr. Trimmer to allow us to go on with the work,—to go on until such times as we should come to some understanding about it. Q. What did he say? A. He said, 'You can go on until such time as I notify you to stop.' I came back and notified Mr. Danford. Q. This was the latter part of August or early in the month of September? A. Yes, sir." All this evidently would not have taken place with Ward, had there been any definite understanding between Trimmer and Stanton previously that Stanton speaks of, unless Trimmer had revoked his license given to Stanton, since it is very manifest that Trimmer had been objecting to proceeding with the work. The language employed by Mr. Ward, when he says that he offered $500 to Trimmer to get his consent that they might proceed to finish the work, establishes the fact that Trimmer was all the while objecting. This question was put to Ward: "Q. You started to build these piers without any consent of Mr. Trimmer, did you not? A. Yes; I do not think we ever got any actual consent of Mr. Trimmer, or any objection by Mr. Trimmer either." As above stated, however, Stanton says that Mr. Trimmer had objected. Trimmer denies having given any license or permission to Stanton or to any one else. Trimmer says that the first he heard of their commencing operations on the New Jersey side of the Delaware was about the 4th of July, and that, about the 7th or 8th of July, Ward called upon him; that it was in hay and harvest time; and that he was so busy that he could not then go and look after the matter. He called again, and Trimmer was in the harvest field. They went from there to Mr. Shipman's office in Belvidere, with the view of negotiating for the right of way. I should observe that Ward in no part of his testimony corroborates the statement of Stanton respecting the interview of the latter with Trimmer in Columbia, nor was he interrogated about it.

A consideration of the admitted facts, the preponderance of testimony as to those that are seriously questioned, and all the circumstances of the case, lead me to the conclusion that nothing took place to justify the company in supposing that it had the license or permission from Trimmer to proceed with their work upon his land. The grounds upon which alone this court can entertain jurisdiction not having been established, the case might properly end here. But as the history of the case as developed before me justifies the belief that whatever may be the result of the investigation in this court the opinion of the court of last resort will be sought, it will be proper for me to determine the only remaining question presented by the bill and the evidence in the case, in order to save the necessity of sending it back to this court to determine that point; that is, ascertaining the value of the land or the proper compensation to be paid to Trimmer. The line of the railroad crosses the lands of Trimmer upon the north side of a street called "Columbus Street," in the village of Columbia, located about eight miles north of Belvidere, on the banks of the Delaware. It crosses his land so near to the said street as to cut in twain lots which are described as village lots of the depth of about 200 feet. There are no streets north of the line of the railroad, and none projected. Indeed, all of the land immediately contiguous to the lots spoken of is farm land. Although the testimony is uncertain as to the population of the village, it perhaps does not exceed 300 inhabitants There is no testimony giving the slightest assurance of any immediate growth. It cannot be affirmed, from what appears, that these lands will advance in value within any reasonable period of time. A portion of these lands furthest from the river, and upon the eastern side of the tract, upon which Church street has been projected, but not opened, and which Mr. Trimmer says may be divided into 12 lots, appears to be nothing more than farm land. The rest of the land which he claims should be valued as village lots may properly be so regarded, except the low parcel between the first two piers, over which the water flows at every considerable rise in the Delaware. The whole quantity of land which is sought to be condemned, including the land under water to the center of the Delaware, is one acre and two-thirds. In ascertaining the proper compensation to be paid Trimmer, I have considered that the piers belonged to him, although the erection of them did not cost him anything. I have also considered that he had such an interest in the parcel of land, the title to which is in dispute, as to make it proper to place some value upon that interest, in order finally to determine the controversy between the railroad and Mr. Trimmer; and as to the parcel of land over which, or over a portion of which, the New York, Susquehanna & Western Railroad bed is laid, I have likewise considered what its value is to Mr. Trimmer. Very much has been said in the testimony as to the cost of the construction of the four piers. This cost was several thousand dollars. But no evidence was offered to show that these piles of stone and cement are of any actual value to Mr. Trimmer, which must be the foundation of my judgment. It was admitted on the argument that those piers have no market value. Indeed, if that amount of rock or stone had been forced to the surface, by some effort of nature, upon any other portion of the land of Mr. Trimmer over which the line of the railroad runs, it never would have been suggested that such natural formation increased the value of the premises to Trimmer, unless its mineral qualities made it of some special

Digitized by Google

value. These statements are made for the purpose of showing that I have taken into account every interest to which Mr. Trimmer made claim in estimating the damages which ought to be paid to him by the complainant. These statements are based upon the case of Trimmer v. Railroad Co., 55 N. J. Law, 46, 25 Atl. 982, so far as I am able to understand that case. It is my judgment that in 1889, when the commission made their return, Mr. Trimmer was entitled to $2,550 as damages for the land taken by the company, and interest upon that sum from that time until the present. I will advise, as above intimated, that the bills be dismissed, with costs.

COFFRIN v. COLE.

(Supreme Court of Vermont. Caledonia. Dec. 8, 1894.)

TITLE TO SPRING—WHEN IN ISSUE—RESERVATION IN DEED—PAROL EVIDENCE TO EXPLAIN—ADVERSE USER.

1. Where, in an action involving title to a spring situated on defendant's land, defendant claims title through adverse possession by himself and his grantors, parol evidence is admissible to show that defendant's grantors informed him on the execution of their deed that their use was merely under a license from their grantor, who reserved in the deed to them title to the spring.

2. When a deed to land conveys "all right" the grantor had to water from a spring on the granted premises, parol evidence is admissible to show that the only interest claimed by the grantor was that of a licensee.

3. Where a bill to enjoin the pollution of a spring alleges that orator has had the undisputed possession of the spring for 50 years, and that he has the right to enter on defendant's land to clean "his spring," that the defendant's grantor never claimed title to the spring, and that defendant claims title to the land where the spring is situated, "including the spring in dispute," and the answer denies that defendant's grantor never claimed title to the spring, and alleges that his use and that of his grantor has been open and under claim of right, the rights of the parties to the use of the spring are put in issue.

4. Where, in a suit to enjoin the pollution of a spring, the bill and answer put in issue the right to the use of the water therefrom, orator's title to the spring may be confirmed in him, as well as interference therewith by defendant enjoined under a prayer for general relief.

Appeal in chancery, Caledonia county; Tyler, Chancellor.

Bill by Daniel Coffrin against Melissa Cole to enjoin defendant from interfering with a certain spring. The cause was heard on report of a referee, and from a decree pro forma for orator, confirming his title to the spring, and enjoining defendant from interfering therewith, the latter appeals. Affirmed.

The controversy was in respect to a certain spring, from which both the orator and defendant took their water for domestic purposes. Both parties claimed title to their respective premises through one Hosea Welch, 2d, who obtained title to the same in 1854, and continued in possession until September, 1878. At the time Hosea Welch, 2d, went into possession the only buildings upon the premises were those now occupied by the orator; and these buildings were supplied with water from the spring in dispute, which was situated some 10 rods from the buildings, upon an elevation, and from which the water was conducted to the buildings through a half-inch lead pipe. The master found that the buildings continued to be supplied with water from this spring in this manner from the time said Hosea Welch went into possession, in 1854, down to the commencement of this suit. The premises of the orator and defendant were originally embraced in the same parcel, and continued to be until 1878 or thereabouts. The buildings of the defendant were erected in 1872, under an arrangement between Hosea Welch, 2d, and one Holmes, by which Holmes was to construct the buildings, and was to have the right to purchase the same upon certain terms and conditions which never were complied with. While Holmes occupied the house he took water from the spring in question by pumping it through a pump at the spring, and carrying the water in pails from there to his house. Holmes occupied the premises until about the year 1876, and from that time until March, 1878, Hosea Welch, 2d, rented the premises to different tenants, who were supplied with water by pumping it from the spring in the same way that Holmes had been. March 4, 1878, Hosea Welch, 2d, conveyed to his daughter, Eliza, and her husband, Lewis Keenan, the premises now owned by the defendant. The spring in question was situated upon the premises so conveyed, and the deed of conveyance contained the following exception: "Always excepting a spring of water, which I reserve to myself, together with the right to enter upon said lands, and take up and lay down logs to said spring." After the execution of this deed to Eliza and her husband, she continued to occupy the premises by herself and tenants until the spring of 1881. At that time a pipe was placed in the ground, extending from the spring to the kitchen in the defendant's house, and a pump was attached to the pipe in the kitchen, and the water required for domestic purposes has been since then obtained from the spring through this pipe and pump. The master found that when this pipe was laid from the spring to the house of the defendant, Eliza asked permission of her father, the owner of the orator's premises, to extend the pipe in that manner, so that she could pump the spring directly into her house, and that Hosea Welch, 2d, told her she might put in the pipe and pump, but that it must not in any way interfere with his use of the spring, nor infringe on his right to take the water to his premises. The said Eliza subsequently married Mathew Caldwell, and she and her hus-

Digitized by Google

band, on May 3, 1889, conveyed the defendant's premises to her. Said deed contained, among other things, the following as a part of the description: "All right to have and take water from spring of water on said granted premises." Subject to the exception of the defendant, the orator was allowed to show that at the time of the execution of this conveyance to the defendant the said Eliza objected at first to having anything written in with reference to the spring of water, and that she then told the defendant that she did not own any interest in the spring; that her father gave her the right to pump the water from the spring to the house, but that it was only by word of mouth; and that her father retained full control of the water, and had a right to stop them from using the water at any time. The master did not find that the defendant had in any way befouled the spring, nor interfered with the orator's pipes in the spring, but did find that for three years last past the water had not run through the orator's aqueduct, for some reason which he was unable to determine. He found that the defendant claimed to own the spring, and had so notified the orator; and further found that there was sufficient water in the spring for both the orator and defendant. The prayer of the bill was that the defendant be restrained from meddling with the water in the spring, or the pipes leading therefrom, or from in any way polluting or contaminating the water in said spring, and from interfering with the orator in cleaning and repairing the said spring and pipes.

Bates & May, for orator. R. M. Harvey, for defendant.

ROSS, C. J. 1. The defendant's exception to the master's report, because he received and considered the testimony of J. R. Darling, was properly overruled. His testimony was that when he made the deed of the land on which the spring in controversy is located to the defendant her grantor told defendant that she did not own any interest in the spring; that her father had given her verbal license to pump water from the spring to the house on the land being conveyed, but retained full control over the water, and had the right to stop the use at any time. The deed then being made conveyed to the defendant "all right" the grantors had "to take water from the spring on the granted premises." The deed does not define the right conveyed. It was proper to show what right the grantors claimed. This testimony did not attempt to abridge, but to define, the right conveyed. It also showed that the right conveyed was different from the right which the defendant claims in her answer. She there claims an absolute right, acquired by adverse use, by her grantors and herself, for more than 15 years. This evidence also showed that the defendant was then informed that the use by her grantors was under a license from the common grantor of both parties, and for that reason not adverse to the orator's title to the spring. The defendant's counsel further contends that this evidence was erroneously received by the master, because neither the orator's title and right to use the spring nor that of the defendant were put in issue by the bill and answer. The bill is somewhat loosely drawn, and manifestly mainly for the purpose of charging the defendant with polluting the spring, which is unsustained by the findings of the master. The bill, however, alleges that the orator and his grantors had enjoyed the free, uninterrupted, undisturbed possession of the spring for 50 or more years, and that he has the right to enter upon the land of the defendant to clean his spring, and the pipes leading therefrom. It further alleges that the grantors of the defendant never claimed title to the spring, but that the defendant claims title to the land where the spring is located, "including the spring in dispute." The answer denies that the grantors of the defendant never claimed title to the spring, and never used it except under a license from the common grantor of the parties, and then alleges that she and her grantors, for more than 16 years, have by right used the water from the spring, and that such use has been open, and under a claim of right. Hence the facts alleged in both bill and answer fairly put in issue the rights of the respective parties to this spring of water.

2. The defendant further contends that the decree of the chancellor was erroneous in that it confirms the orator's title to the spring of water, because the orator does not pray to have his title thereto, and the defendant's rights therein, if any, ascertained and determined. The bill prays for an injunction restraining the defendant from meddling with the water in the spring or the pipes therefrom, from in any way fouling the water, and from interfering with the orator in cleaning and repairing the spring and the pipes leading therefrom, and for "such other and further relief as the nature of the case may require." The general prayer for relief, "such as the nature of the case may require," is sufficient to uphold any decree, properly required, fully and effectively to dispose of the issues raised by the bill and answer. As we have shown, the bill and answer put in issue the rights of these parties, if not to the title to the spring, to the use of the water of the spring. The latter is not, in legal effect, different from their respective titles in and to the spring, for the right to use the waters flowing from a spring arises out of the title to the spring. On the facts found, the title to this spring is in the orator, with the right to enter upon the defendant's land, at reasonable times, and in a reasonable manner, and do what is necessary to give him the use of the spring. This is his right under the conveyances from the com-

Digitized by Google

mon grantor, Hosea Welch, 2d. But Hosea Welch, 2d, when owning the orator's premises, and when conveying the defendant's premises to his daughter, who, with her husband, conveyed to the defendant, gave her verbal permission to take water from the spring in the manner it is now being taken, "but it must not in any way interfere with his use of the spring, nor infringe on his right to take water to his premises,"—the premises now owned by the orator. The daughter acted upon this parol license, and put in the pump and pipe now in use. She, under the license from her father, acted upon by her, under the decision of Clark v. Glidden, 60 Vt. 702, 15 Atl. 358, had the right to use the water from the spring in the manner she then entered upon its use, but so as not to infringe upon her father's right, until after she had realized the full benefit of the expenditure incurred, or until the pipe and pump then put in were fairly worn out. Then the license can be revoked. But her exercise of this right must be of such a character as not to interfere with the use then made of the water of the spring by her father. This right of the daughter has come to the defendant, and the right of the father has come to the orator. The defendant had, on one occasion, denied the orator the right to enter upon her premises to clear and repair the spring and pipe, and had made some threat, looking to the pollution of the water. Under the pleadings and facts found it was proper, not only to confirm the orator in his title to the spring of water, but to enjoin the defendant from interfering with his use of the spring, it not being found that the orator had made or claimed to make any improper use of his title to the spring, or the water thereof, nor to interfere with the defendant's right to use the water under the terms of the license. Decree affirmed, and cause remanded.

HAMILTON v. GRAY.

(Supreme Court of Vermont. Orleans. Jan. 26, 1895.)

CHAMPERTOUS AGREEMENT — SUIT FOR WITNESS FEES—EVIDENCE—CROSS-EXAMINATION OF DEFENDANT.

1. An agreement whereby plaintiff was to take certain notes, to collect at his own expense without charge, and divide the amount collected with the owner of the notes, and under which he had implied authority to bring suits, is void as being champertous.

2. On an issue whether the sum charged for serving a writ was more than the legal fee, it was proper to require defendant to answer on cross-examination whether he knew any reason why the fee as charged was not correct.

3. In assumpsit by a witness to recover his fees of the winning party, the clerk's taxation of costs, which included the attendance of plaintiff as a witness, was admissible to show his attendance, though neither defendant nor his counsel were present at the taxation.

Exceptions from Orleans county court; Rowell, Judge.

General assumpsit by B. F. Hamilton against J. A. Gray. Pleas, the general issue, payment, and offset. Verdict for the plaintiff, and judgment thereon, and the defendant excepts. Reversed.

Plaintiff's testimony tended to show that he had made a contract with the defendant to collect certain notes, he to receive one-half of what might be collected by way of compensation therefor. Among these notes was the note of one Morey for $112.67. The plaintiff began suit upon this note in the name of the defendant, which Morey resisted upon the ground that the claim was barred by the statute of limitations. Subsequently the defendant settled the case with Morey for $40, and the plaintiff claimed to recover one-half of this sum. He testified that he made no claim in respect to said note, except by virtue of the aforesaid contract. This contract was in writing, and was as follows:

"This is to certify that I have this day put into the hands of B. F. Hamilton, deputy sheriff, the following notes for collection, which I agree to take one-half of the amount he may get on any or all said notes, and release him from the same; and the said Hamilton is to make no charge to me for collecting them, only the one-half he may collect. Morgan, Vermont, May 29th, 1886. [Then follows a list of 17 claims against different persons, among which is the following]: E. B. Peckham, $9.74; P. Morey, $112.67; Royal Moody, $149.57.

"N. B. The said Hamilton has power from me to settle any of the above notes to the best of his judgment, and I am to take one-half of what he gets, and release him from the same. [Signed] J. A. Gray."

"Received of J. A. Gray the following notes, which I agree to try and collect to the best of my ability, and am to have one-half of all I get on them, and have the power to settle any of them as I think best; and the said Gray hereby agrees to take one-half of what I get, and discharge me from the same. Morgan, Vt., May 29th, 1886. [Signed] B. F. Hamilton."

E. A. Cook, for plaintiff. Dickerman & Young, for defendant.

TAFT, J. Champerty is an agreement between the owner of a claim and a volunteer that the latter may take the claim and collect it, dividing the proceeds with the owner, if they prevail; the champertor to carry on the suit at his own expense. This doctrine is based upon the ground that no encouragement should be given to litigation by the introduction of a party to enforce those rights which the owners are not disposed to prosecute. The agreement in this case comes fully within the definition above given. The plaintiff took the claims under an agreement with the defendant to divide between them all that could be collected. He was to be at the expense of collecting the claims, making no

Digitized by Google

charge to the defendant for so doing. It is argued by the plaintiff that the subject-matter of a champertous agreement must be a suit, or that one must be in contemplation. Conceding this to be true, we think a suit to enforce the claims fairly within the contemplation of the parties to the agreement. The plaintiff took the claims for collection, and under the agreement he had the right to bring suits, if necessary, to collect the claims; and it is fair to infer that the parties had in mind that in the collection of a large number of evidently poor and some outlawed claims suits would become necessary. A champertous agreement was void at common law, and we think the common law as to champerty is in force in this state. It is applicable to our situation and circumstances, and not repugnant to the laws. R. L. § 689. The subject of champerty has been referred to in several cases in our reports (Danforth v. Streeter, 28 Vt. 490; Gregory v. Gleed, 33 Vt. 405; Dorwin v. Smith, 35 Vt. 69); but in none of these cases were the agreements champertous, there being no element of the offense in any of the contracts involved in the litigation. In Dorwin v. Smith the contract was between parties who had a mutual interest in the result of the suit. In Gregory v. Gleed, the contract was a guaranty by an attorney that he would pay the claim, if placed in his hands for collection. In Danforth v. Streeter, Redfield, J., discusses the doctrine to some extent, and says that he is reluctant to believe that the common-law offense of champerty had been adopted as part of the law of this state, but adds there are probably other things than the sale of a chose in action coming more nearly to the idea of the common-law definition of champerty, such as carrying on suits for a share of the avails, and thereby increasing litigation which the law will still regard as champertous, and not countenance. The case then under consideration was the sale of a chose in action, in suit at the time of the sale, and there was no occasion for the discussion of the rule as to champerty. The case at bar is strictly within the statement of the case that Redfield, J., says may still be regarded as champertous and not countenanced, viz. carrying on suits for a share of the avails. The words "purchase" and "sale" have been indiscriminately used in connection with the term "champerty," and such use has bred confusion in the books. As above stated, champerty is an agreement by one to take a suit or claim, and, at his own expense, gather in the spoils, dividing them with the owner. It does not imply a purchase. The word "purchase" means to buy by paying a price, and implies a payment. Curtis v. Burdick, 48 Vt. 166. A purchase is that which is obtained for a price in money or its equivalent. Webst. Dict. The doctrine of champerty was fully recognized and applied in Wright v. Whitbead, 14 Vt. 268, in which case the court, by Williams, C. J., said: "The orator purchased this suit under an agreement to divide whatever sum should be recovered. If he succeeded, he was to pay $150; if he failed, he was to pay nothing. This was a species of champerty or maintenance, which cannot be countenanced in a court of equity." We have here the same misuse of the word "purchase," for the party made no purchase of the claim. He paid nothing for it, but took a conveyance of it, and agreed to pay $150 if he recovered, and was to pay nothing if he failed. The rule is the same at law as in equity. The contract under consideration being champertous and void, no recovery can be had under it. The other questions arising upon this branch of the case become immaterial, and are not passed upon.

There are two other questions in the case. One item in the plaintiff's specification is the sum of $2.80,—his fees as deputy sheriff for serving a writ in favor of the defendant against one Caswell. The question at issue was whether the sum charged was more than the legal fees for the service. The only point reserved was the objection made to a question in cross-examining the defendant. He was required to answer whether he knew any reason why the fees of $2.80, as charged, was not correct. His answer was that he did not. The plaintiff had the right to examine the defendant under the rules applicable to the cross-examination of witnesses. R. L. § 1009. There was no error in requiring the defendant to state that he knew nothing upon the subject. If he did know aught in relation to it, the plaintiff had the right to have him state it. It logically follows, then, that he had the right to inquire of the defendant if he did know anything in regard to the matter. Another item claimed by the plaintiff was $1.60, for his attendance as a witness in a suit in favor of the defendant against one Howard. The question reserved in relation to this item was whether the clerk's taxation of costs in the suit, which included the attendance of the plaintiff as a witness, was admissible in evidence. The fact that the fees for the attendance of the plaintiff as a witness were taxed in behalf of the defendant had a tendency to show that the plaintiff did attend as a witness, and the evidence of the taxation was properly admitted. Although it did not appear in the case that neither the defendant nor his counsel were present at the taxation, nor that the notary before whom the voucher of the plaintiff's attendance was sworn to was in any way connected with the case, we presume the taxation was made with the defendant's knowledge. The defendant had the benefit of it, and he cannot now say that the taxation is no evidence of the fact which was the very basis of including the claim in the taxation. Judgment reversed, and cause remanded.

Digitized by Google

SCHAEFFER v. FARMERS' MUT. FIRE INS. CO. OF DUG HILL.

(Court of Appeals of Maryland. March 1, 1895.)

FIRE INSURANCE—INCREASE OF RISK—ENGINE ON PREMISES—CONSTRUCTION OF POLICY—ALTERATION OF PREMISES.

1. When an unsigned bill of exceptions is connected with the one succeeding, its recitals of fact form part of the latter.

2. A portable steam engine, employed at stated intervals in grinding bark for use in a tannery, is not a "steam engine temporarily employed for the purpose of threshing out crops of any kind," within the prohibition of an insurance policy on farm buildings and a tannery.

3. Under a policy providing that if an engine be stationed on the premises the company shall appoint a committee to ascertain the amount of increased risk, and that the insured shall give an additional premium note therefor, where the risk is found by the committee to be increased by the use of an engine, and no additional note is given, and the engine occasions the loss, the company is not liable.

4. Notice to a general agent of an insurance company that the insured is using an engine on his premises is notice to the company, so as to require it to ascertain the increase of risk, as provided by the policy.

5. Where a policy provides that if an engine be used on the premises the company shall appoint a committee to ascertain the amount of increased risk, for which the insured shall give an additional premium note, whether the use of the engine increased the risk, whether the increased risk caused the loss, and whether the period between the giving of notice of the use of the engine by the insured and the day of the fire was a reasonable time within which the company should have appointed the committee, are questions for the jury.

6. Under a policy providing that if an engine be used on the premises the company shall appoint a committee to ascertain the amount of increased risk, and that the insured shall give an additional premium note therefor, though the use of an engine increases the risk, and no additional note is given, the company is liable, unless the loss occurs from the increased risk.

7. When the risk is increased by the use of the engine, of which the company has notice, and no additional note is given solely because of the company's failure to ascertain the amount of the increased risk, the company is liable for a loss occasioned by the use of the engine.

8. The placing and operating of an engine 50 feet from a tannery, for the purpose of grinding bark, is not an alteration of the premises, within the terms of an insurance policy.

Appeal from circuit court, Carroll county.

Action by Charles Schaeffer against the Farmers' Mutual Fire Insurance Company of Dug Hill, Carroll county, Md., on a fire insurance policy. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before ROBINSON, C. J., and BRISCOE, BRYAN, PAGE, BOYD, FOWLER, and McSHERRY, JJ.

Jos. D. Brooks, H. M. Clabaugh, and John M. Roberts, for appellant. Jas. A. C. Bond, Chas. T. Reifsnider, and J. M. Reifsnider, for appellee.

McSHERRY, J. The appellant's tannery, bark mill, and stock in trade, which, with other property owned by him, were insured under one and the same policy issued by the appellee, were destroyed by fire on February 27, 1892. Due preliminary proof of loss was made, and subsequently suit was brought upon the policy to recover the amount of insurance written on that portion of the property which had been burned. During the progress of the trial in the circuit court for Carroll county, five exceptions were taken. The second one of these, though it appears in the record, was not signed by the judge. It cannot, therefore, be considered by us, beyond its recitals of facts. These, by reason of the unsigned bill of exceptions being connected with the succeeding one, form part of the latter. Cooper v. Holmes, 71 Md. 20, 17 Atl. 711. The first, third, and fourth bills of exception relate to questions of evidence, and the fifth to the several prayers presented by both parties. The verdict and judgment were against the plaintiff, and he has appealed. It will obviate much unnecessary discussion if we proceed at once to an examination of the fundamental and controlling questions involved in the controversy, instead of considering separately the several exceptions in the order in which they appear in the record.

The defendant resists the claim of the plaintiff on the ground that the unauthorized use by the plaintiff of a steam engine located about 50 feet away from the bark mill, but connected with the machinery in the latter by a leather band, worked a forfeiture of the policy, under the terms and conditions set forth therein and indorsed thereon. And it relies in support of this position on the recent case of Insurance Co. v. Hull, 77 Md. 498, 27 Atl. 169. On the other hand, the plaintiff insists—First, that the use of the steam engine for the purpose of grinding bark did not cause a forfeiture; and, secondly, that even if a forfeiture did occur the defendant unequivocally waived it. It can scarcely be necessary to reaffirm what has been so often and so uniformly decided, that forfeitures by mere implication are never favored in the law. A company which resists, on the ground of forfeiture, the payment of a loss against which it has insured, must show both that its policy or written contract contains, either in express terms or by clear implication, some provision forfeiting the policy in specified contingencies, and also that the insured has brought himself within the scope and conditions of that provision. The policy is a contract between the insurer and the insured, and as they have written it, and not otherwise, so courts must construe and enforce it. To the policy, then, and to all that forms a part of it, must resort be had to ascertain, not only whether a forfeiture is in fact provided for, but the conditions and circumstances under which it becomes applicable and effective. In the body of the policy now before us there are two causes

Digitized by Google

of forfeiture, and in the conditions of insurance thereto annexed, and in the by-laws, made a part thereof by reference, there are three more. Those first alluded to relate, the one to the taking out by the insured, without notice to the insurer, additional insurance on the same property, in a different company; and the other, first, to alterations of the premises, and secondly to their use for the purpose of carrying on therein any trade or business "which, according to the by-laws and conditions, class of hazards, or rates hereto annexed, would increase the hazard," unless by the consent of the insurer indorsed upon the policy. Those set forth in the conditions are—First, alterations made in any building which increase the risk; secondly, the omission for 30 days after demand to pay any assessment levied on the assured's premium note; and, thirdly, the sixteenth condition, which, without qualification, prohibits the use of "any steam engine temporarily employed for the purpose of threshing out crops of any kind." Under the policy sued on, which was issued in February, 1887, and covered a period of seven years, the appellant's dwelling house, household furniture, tenant house, wagon shed, barn, hay shed, and other frame buildings and farming implements, together with his tan shop, bark shed, bark-mill house, stock in trade (consisting of bark, hides, leather, finished and unfinished), were all insured. The engine used on the premises the day of the fire was not located at the barn, or employed for the purpose of threshing out crops of any kind, but was stationed between 50 and 60 feet away from the bark-mill house, and was, and for more than a year and a half previously had been, used once a month to furnish the motive power for grinding bark for the plaintiff's tannery. On the day of the fire the engine was in use for grinding bark, and while the employés were at dinner, and the engine was not running, and its fires were banked, a fire broke out in the bark-mill house, and consumed the tannery buildings and stock in trade. When first discovered the fire was within the building whose sides towards the engine were tightly weather-boarded and stripped. Earlier on the same day a slight fire broke out about the same spot, but was promptly extinguished. There was evidence tending to show that the first fire was produced by the friction of the machinery, but there is no evidence whatever in the record to show what caused the second and destructive fire.

It is not pretended that the first of the two causes of forfeiture set forth in the body of the policy, and the second of those contained in the conditions and by-laws, have any relation to the case at bar. There was other insurance in a different company, but it was taken out only after notice had been given to, and a written permit had been procured from, the general agent of the defendant. The third of the causes of forfeiture contained in the conditions, being the one numbered 16, was the one under consideration in Hull's Case. Hull stationed a portable engine within 30 feet of his barn, and connected it, by a strap and pulley, with machinery in the barn, and used these in chopping and threshing his grain. The barn was destroyed by fire while the engine was so used, and we held that the policy—which was identical in terms with the policy in this case, and was issued by the same company, though, of course, covering different property—was forfeited. The conduct of Hull was directly within the terms of the sixteenth condition indorsed on the policy, and there was no possible escape from the conclusion that his policy was forfeited thereby, and hence the only contention in that case was whether the company had waived this forfeiture. Apart from other provisions of the policy now under examination, it is clear that an engine regularly employed in grinding bark for use in a tannery, in the process of tanning leather, is not a "steam engine temporarily employed for the purpose of threshing out crops of any kind," and is not within the sixteenth condition, and is not, therefore, the cause of forfeiture specified therein. It is manifest that this provision was intended to prohibit the use of engines for the purpose of threshing out crops in the vicinity of barns, and other equally inflammable farm buildings; and imposing, as it does, a forfeiture for such a use, it must be strictly confined, in its application, to cases within its terms, as written, and is not to be enlarged to include by implication another class of circumstances, neither within its letter nor its evident design. In the vital particular that the use made of the engine by the appellant was not a use prohibited, or at a place prohibited, by the sixteenth condition on the policy, the case at bar is widely distinguishable from Hull's Case. That condition cannot control this case, unless restrictions and inhibitions which are not there now are first imported into it by mere construction.

That this view of the limited scope and effect of the sixteenth condition is the correct one is made even more apparent by other and different provisions embodied in the seventeenth condition, which was obviously framed to meet a class of cases not covered by the sixteenth condition. While this latter condition provides, without qualification of any sort, that "this company will not become responsible for any loss or damage by fire * * * resulting from the use of any steam engine temporarily employed for the purpose of threshing out crops of any kind," the seventeenth condition, distinctly and in terms, recognizes the liability of the company for losses or damage by fire resulting from the use of other steam engines than those referred to in the sixteenth condition, and specifically prescribes what shall be done by the company and by the insured when such other steam engines are

Digitized by Google

employed, but it nowhere imposes a forfeiture. The seventeenth section or condition is in these words: "That in the event of an engine being stationed on the premises, and in close proximity to the buildings insured by this company, then, in that event, the president of the company shall appoint a committee of three discreet men, who shall be members of this company, who shall proceed forthwith to said property, to make a fair and impartial examination, in order to ascertain the amount of increased risk on account of said engine; and, if they shall find that the risk is increased thereby, then they shall take an additional premium note for such increase, upon which the assured shall pay ten per centum at the time of the execution, and said note to be subject to the same assessments as other notes of said company, to meet losses by fire happening to property insured by this company." The plain meaning of this is that, if an engine other than those referred to in the sixteenth condition is stationed on the insured premises, ascertainment shall be made, in the method pointed out, whether the risk has been increased thereby or not; and, if it be found that the risk has been increased then, it is provided, not that the policy shall be forfeited, but that an additional premium note shall be given, upon which 10 per cent. must be paid, but, if it be found that the risk has not been increased, then neither is the policy forfeited, nor is an additional premium note demandable. The employment, therefore, of such an engine as the seventeenth clause contemplates, does not result, under its terms, in a forfeiture of the policy, or even, necessarily, in increasing the risk; but if the risk be increased by the use of such an engine, and loss by fire is occasioned thereby, then the insurer, in the event that no additional premium note has been given, will be released from liability under the policy, unless it has neglected to appoint the committee and to make the examination provided for. But, if thus released, it would be upon altogether different principles. It would be released, if released at all, because it is the settled law, even in the absence of an express provision on the subject in the policy, that when the erection by the insured of an adjacent building—and, of course, the use by him of an adjacent steam engine—has caused a material increase of risk by fire to the property insured, and when the loss was produced by such increase of risk, a recovery on the policy would be denied. Insurance Co. v. Davison, 30 Md. 102. Under this seventeenth clause, it becomes the imperative duty of the president of the company, when a steam engine has been stationed on the premises, in close proximity to the buildings insured, to appoint a committee of three members of the company to examine forthwith whether there has been an increase of risk on account thereof. Good faith towards and frank dealing with the assured, no less than the explicit words of the provision itself, require that this duty should be discharged, if not "forthwith," upon the company's being apprised of the existence of the conditions on which its performance depends, at least with due and proper diligence thereafter. Obviously, a failure, for an unreasonable time after notice, to do that which it is the company's plain duty to do forthwith, offers no defense to a plaintiff's right to recover. The record shows that 10 days before the fire the plaintiff notified the defendant's general agent, whose duty it was to attend to all its business in his territory, that he (the plaintiff) was then using the engine for grinding bark, and that he was willing to do and to pay anything that might be necessary for the protection of the property in the event of fire, and that he wanted to be made safe in his insurance on the tan yard. This was notice to the company. May, Ins. § 152; Insurance Co. v. Wilkinson, 13 Wall. 222. We are not dealing with the question of the agent's power or authority to waive or vary a condition of the policy, but only with the proposition that notice of the character we are considering, given to the general agent of the company, is notice to the company itself. And it was notice to the company because it was the duty of the agent to communicate it to his principal. It can make no possible difference that the agent, when so notified, declined to give a permit for the use of the engine, because, under the seventeenth condition, no permit was needed, but another method was provided. Whether the period that elapsed between the date of this notice and the subsequent fire was a reasonable time within which the company ought to have appointed the committee of three members, under the seventeenth condition, was a question of fact for the jury to determine under all the attendant circumstances. Rokes v. Ins. Co., 51 Md. 519. Under this seventeenth clause, while there was no forfeiture declared, or even implied, there are two contingencies presented: There is the contingency that the use of the engine would increase the risk, under which two different aspects are presented; and there is the opposite contingency, that it would not. In the latter event the policy would in no way be affected, and the right to recover on it would not be impaired. In the event that the risk was materially increased, and no additional premium note was given, then the right to recover was not defeated unless the loss occurred, in whole or in part, from that increased risk; and this is a question of fact, for the jury to find. If, again, the risk was materially increased, and notice was given to the company, and no additional premium note was given, solely because of unreasonable delay on the part of the company in making an examination to ascertain the amount of the increased risk, and loss resulted by fire occasioned by such increased risk, still the company would be liable, because

Digitized by Google

it would not be permitted to invoke in its defense the failure of the plaintiff to give an additional premium note, when that failure was due exclusively to the company's own omission or neglect to perform its precedent duty within a reasonable time. In no view, then, that can be taken of the sixteenth and seventeenth clauses, was there a forfeiture of the policy.

The remaining causes of forfeiture stated in the policy and in the conditions thereto annexed are those which relate to alterations in the premises or buildings which increase the risks, and to the use thereof for the purpose of carrying on therein any trade or business which, according to the by-laws and conditions, class of hazards, and rates annexed to the policy, would increase the hazard. There is no evidence that there were alterations made in the premises or buildings after they were insured. When the policy was issued, the buildings used in the tannery business were described in the policy, and distinctly insured as buildings pertaining to that occupation, and it is not intimated that they were used thereafter for the purpose of carrying on any different trade or business. Nothing, then, in the structures themselves or in the business conducted therein, was changed or altered after the insurance had been granted; and unless placing and operating the engine 50 or 60 feet away from the bark-mill house amounted to an alteration in the insured premises, or to a use of them for carrying on a trade which, according to the class of hazards and rates annexed to the policy, would increase the hazard, there is nothing in either of those provisions which has the slightest reference to the case at bar. That the engine so placed and so operated did not amount to an alteration in the insured premises, in the sense in which the terms used in the policy are invariably interpreted, can admit of no doubt. Those terms mean an alteration in the thing insured. Insurance Co. v. Davison, 30 Md. 102. That an engine employed as this one was, was not a use of the premises for carrying on a trade or business which, according to the by-laws and conditions, class of hazards, and rates annexed to the policy, would increase the hazard, is equally free from doubt, because the by-laws and conditions do not expressly or impliedly so declare, and because there is no class of hazards or rates annexed to the policy at all. There is consequently no standard as to what would increase the risk, furnished by any by-law, condition, class of hazards, or rates. To avoid any misunderstanding, we repeat that if, without notice to the insurer, the use of the engine as described did in fact materially increase the risk, and if the loss was occasioned by that increased risk, the insurer would be relieved from liability. But these are facts to be found by the jury.

As there was no forfeiture of the policy, there could be no waiver of a forfeiture that never existed, and hence the evidence offered and objected to in the first, third, and fourth exceptions, tending to prove a waiver, was irrelevant, and was for that reason properly excluded. The plaintiff's first, second, and third prayers, which were confined to the question of waiver, were also properly rejected, because there was no question of waiver involved, and there could be none where there had been no forfeiture. The fifth and sixth prayers were wrong, and were properly rejected. As there was no forfeiture, there was no right in the company to cancel the policy, and a delay in an abortive cancellation was of no consequence, one way or the other, as respects the plaintiff's right to recover. The fourth and seventh prayers were right, and ought to have been granted. The fourth has relation to the knowledge of the agent being the knowledge of the company, and the seventh refers to the insurance in a different company. All of the defendant's prayers, except the second, were rejected, and that one ought to have been refused. Its vice is that it construes the policy to mean that the use of the engine, under the circumstances stated, of itself forfeited the policy. We have already discussed that question, and have reached a different conclusion. For the error in rejecting the plaintiff's fourth and seventh prayers, and in granting the defendant's second, the judgment must be reversed, and a new trial will be awarded. Judgment reversed, with costs above and below, and new trial awarded.

PATTISON v. HUGHES.

(Court of Appeals of Maryland. March 1, 1895.)

DEFAULT JUDGMENT—MOTION TO VACATE—MISSTATEMENTS OF PLAINTIFF'S ATTORNEY.

On a motion to vacate a default judgment, it appeared that the officer, being drunk, did not properly serve the summons, so that defendant was not informed thereby of the nature of the suit. Shortly afterwards, by inquiry of others, he discovered who was the attorney of the plaintiff, and, finding him in the court room, said to him, "Do you know what I am here for?" to which the attorney replied, "Yes; it is all over now; go home." The declaration was not in fact filed until six months thereafter, and the judgment was not obtained until three months later. *Held*, that the motion to vacate the judgment should be granted.

Appeal from circuit court, Howard county.

Action by Robert H. Hughes, executor, against Martin L. Pattison. There was a judgment by default for plaintiff, and, from an order denying a motion for a vacation of the judgment, defendant appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Thomas S. Hodson, Edward H. Kines, and T. Sherwood Hodson, for appellant. Jas. Mackubin, for appellee.

Digitized by Google

FOWLER, J. On the 30th of August, 1893, the late Henry E. Wooten, as attorney for the appellee, directed a summons to be issued against the appellant from the circuit court for Howard county, to answer an action at the suit of the appellee, as executor of Robert L. Ewing. The summons was duly issued, and the appellant was returned "Summoned" on the 2d of September. No other proceedings were taken in the cause until the 19th March, 1894, when Mr. James Mackubin entered his appearance, as attorney, for the appellee, and filed, for the first time, a declaration consisting of the common counts, the suit having been originally brought on titling. On the 18th June, 1894, being the first day of the June term, a judgment by default was taken by the plaintiff against the defendant, and the same day it was extended, upon proof before the court, for $257. Several months thereafter, on the 24th November, and, as he alleges, within three or four days of the time when he first heard of either the suit or the judgment, the appellant filed a motion to strike out the latter—First, because the summons was not served on him, and he had no notice of the suit or any opportunity of defense; second, because he had no notice of the suit or judgment until the 20th November, and proceeded without delay to file his motion; and, lastly, because he is not indebted to the plaintiff in any sum whatever, and had a perfectly good defense, of which he would have availed himself if an opportunity had been given him. In support of his motion the appellant relied upon the testimony of four witnesses,—himself, his wife, his son, and a neighbor, Mr. Earp. The latter was not present when the deputy sheriff called at the appellant's house, but the others all swear in the most positive manner that the officer was drunk on that occasion. The defendant says: "He was drunk. He fumbled around in his pockets as though he were looking for a paper. He took no paper out, nor did he read any to me, nor did I have any paper in my hand. He turned to go away, and I said to him, 'What is this for?' and he said, 'I don't know'; whereupon he got in his carriage, and went away." The appellant's wife says that her attention was first called to the deputy sheriff by one of the little children, who said to her, "Come and see the funny drunken man"; when she went to the door, and heard the officer say to her husband, "I want you to come to Ellicott City." She did not remember the day he told him to come. Her husband asked what for, and he said, "I don't know." The son says the officer was drunk, and acted like a drunken man. To use the language of the witness: "He was drunk, for no sober man would act as he did; and he said to my father, 'I want you to come to Ellicott City.' I don't remember what day he told him to come, and where and when it was,—some time in September. Father asked him what he was to come for, and then the officer told him that he did not know, and he produced no papers." There is not one word to contradict the above testimony in regard to the condition of the deputy sheriff while he was thus attempting to perform his official duty, although he was himself called by the appellee to testify. There being, then, a substantial admission that the officer who is alleged to have served the summons was in the condition testified to by the witnesses whose testimony we have just recited, his official acts cannot be received with that respect nor have that prima facie verity which, by the well-settled rule of law, would otherwise be accorded them. He does testify that he called on the defendant. He says: "I don't remember the time; I don't keep any papers. I remember going there a rainy day, and serving a summons on Mr. Pattison. I can't even state the year. I told him that I had a summons for him. I told him whose it was. It was raining that day, and I told him to take it in the house, and read it. He said that was all right. Then I returned him summoned. That is all I know about it that day." It appears, therefore, from the overwhelming weight of the evidence, that the appellant was not summoned. However, having learned that he was wanted at Ellicott City in September, he went there, and finding the officer, and no doubt anxious and hoping to get some definite information, he again asked for it. The only testimony as to what took place at this interview between the appellant and the deputy sheriff is that of the latter. He says: "The next time I saw Mr. Pattison was in the court room up here. He asked me about the bill that I summoned him on, and I told him that I knew nothing about it; that Mr. Vansant had it, as he kept the papers. He said that he was going to see Mr. Wooten. That is all the conversation I had with Mr. Pattison that day." And it appears that the appellant at once proceeded to call on Mr. Wooten, whom he found in the court room. He says: "I met Mr. Wooten. I said, 'Mr. Wooten, do you know what I am here for?' and he said, 'Yes; it is all over now; go home, Pattison.'" This interview took place in September, and the narr. was not filed for six months thereafter. Mr. Wooten having died in the meantime, and the judgment was not entered until the 18th June, some nine months after the appellant had been informed that "it was all over." And then, when we remember that it was the attorney of the appellee who gave this information to the appellant, it seems to us almost unnecessary to say anything more than that, in our opinion, he was, under all the circumstances of the case, justified in not making any further investigation. Assuming, though we think it extremely doubtful from the evidence, that the appellant had some indefinite sort of knowledge that he had been sued, yet having attempted, in good faith, to

Digitized by Google

find out what the suit was about, and who had sued him, and having been informed by the plaintiff, or, what amounts to the same thing, by his attorney, that it was "all over," he was not required to appear to the suit, even if he had had much more definite information and notice than he appears to have had. There is no question here of bad faith on the part of the appellee or his attorney, but that the appellant had a right to assume, after his conversation with Mr. Wooten, that the business, case, or whatever it might be, was over and ended, is too clear for controversy; and, this being so, it is equally clear the relief asked should have been granted. Common justice concedes to every man his day in court. Order reversed, and cause remanded, that the judgment may be stricken out.

SHORT v. STATE.

(Court of Appeals of Maryland. Feb. 27, 1895.)

CONSTITUTIONAL LAW—POLL TAX—PRIVILEGES OF CITIZENS.

1. Compulsory labor, imposed by Pub. Loc. Laws, art. 10, §§ 286–270, tit. "Dorchester County," upon persons residing in the several election districts of the county, for the purpose of keeping the roads in repair, with the privilege of providing a substitute or paying a stipulated sum in lieu of such personal service, is not a poll tax prohibited by the state constitution.

2. Const. U. S. Amend. 14, which declares that no state shall make any law which shall abridge "the privileges or immunities of citizens of the United States," does not control the power of a state over its own citizens.

Appeal from circuit court, Dorchester county.

Action by the state of Maryland against John H. Short. From judgment for the state, defendant appeals. Affirmed.

The defendant was notified by one of the supervisors of the public roads for its "Fork District" of Dorchester county to appear at a certain point on the public road under his charge, and "to labor" for one day on the road with "proper implements," by virtue of the authority conferred on the supervisors of the several road districts of Dorchester county by sections 268–270, art. 10, of Pub. Loc. Laws, tit. "Dorchester County," subtit. "Roads." Refusing to comply, he was arrested, and, being convicted, was sentenced to pay a fine of 75 cents and costs, and to stand committed until they were paid.

Argued before ROBINSON, C. J., and McSHERRY, FOWLER, BRISCOE, and ROBERTS, JJ.

Geo. M. Russum and S. T. Milbourne, for appellant. Atty. Gen. Poe and P. L. Goldsborough, for the State.

ROBINSON, C. J. By the Public Local Laws for Dorchester county, all able-bodied male residents of the county, above 20 and under 50 years of age, are compelled to labor two days at least in every year in repairing the roads of said county, with the privilege, however, of furnishing a substitute, or of paying to the road supervisor 75 cents for each day such person may be summoned to labor, the money thus paid to be expended in repairing the roads. And it further provides that any one neglecting or refusing to perform such labor, or to provide a substitute, or to pay 75 cents per day for each and every day he may be summoned to work, shall be guilty of a misdemeanor, and, upon trial and conviction before a justice of the peace, shall be fined 75 cents for each day's delinquency and costs, and shall stand committed until the fine and costs are paid. Pub. Loc. Laws, art. 10, §§ 268–270, tit. "Dorchester County." And the act further provides that any one aggrieved by the judgment of the justice of the peace may appeal to the circuit court. The main question, and the only one it seems to us about which there can be any real contention, is whether this local law is in conflict with the constitution, which declares "that the levying of taxes by the poll is grievous and oppressive and ought to be prohibited." Const. 1867, Declaration of Rights, art. 15. And, in construing the meaning of this article, we must bear in mind that the same declaration is to be found in the constitution of 1776, and in every constitution adopted in this state down to the constitution of 1867. So the question comes to this: Is compulsory labor imposed upon persons residing in the several election districts of a county, for the purpose of keeping the roads in repair, with the privilege of providing a substitute or the payment of a stipulated sum in lieu of such personal service, a "levying of taxes by the poll," within the meaning of the constitution? Such compulsory labor is, beyond question, a burden on the persons upon whom it is imposed, and, though it assumes the form of labor, it may be fairly considered, we agree, in the nature of tax. At the same time, when this article in the bill of rights is construed in the light of the legislation in regard to levying taxes by the poll in force when the constitution of 1776 was adopted, and in the light of the legislation in regard to compulsory labor on the public roads, also in force at that time, and which has continued in force down to the present, it is clear, we think, that compulsory labor for the purpose of keeping the roads in repair has never been considered as a poll tax prohibited by the constitution. A brief reference to the legislation in force when the constitution of 1776 was adopted will clearly show, we think, the nature and character of poll taxes the levying of which was declared to be grievous and oppressive and ought to be abolished. If we turn to Act 1715, c. 15, we find that all persons, males and females, free and slave, above the age of 16 years, are declared to be "taxables," and upon each person thus declared to be a taxable the commissioners of the several county courts were directed to levy a specified sum, to be paid in money or to-

Digitized by Google

bacco, for the support of the government; and this act providing for the levying of taxes by the poll continued in force down to the Revolution. And, in addition to the poll taxes thus levied for public purposes, Act 1702, c. 1, declaring the church of England to be the established church of the colony, also provided that a tax of 40 pounds of tobacco per poll should be levied each and every year for the support of the clergy, and this act continued in force down to the Revolution; and, strange as it may seem nowadays, the poll taxes to which we have referred were the only direct taxes levied for public purposes during the colonial period. Such taxes thus levied, without reference to the ability or the means of the "taxable" to pay, must necessarily have been in many cases burdensome and oppressive, and it was such levying of taxes by the poll that the constitution of 1776 denounced as being "grievous and oppressive," and which ought to be "abolished." And, while poll taxes were levied for public purposes, the public roads were made and kept in repair by compulsory road labor, and with this article in the constitution of 1776, prohibiting poll taxes, statutes compelling persons to labor on the roads for the purpose of keeping them in repair have been in force down to the present time, and this is the first time the constitutionality of such laws has been questioned. As early as Act 1704, c. 21, all laborers and servants were required to work on the public roads; and upon the refusal of such laborers to perform the services thus required, or the master to furnish his servants, the master and laborers were liable to indictment and punishment. This law was substantially in force when the constitution of 1776 was adopted, and continued in force for years after its adoption. And instead of being repealed, or being considered as repugnant to the article in the bill of rights of 1776, Act 1795, c. 37, recites "that whereas doubts have arisen, what description of persons are intended to work on the public roads under the existing laws to which this is a supplement, therefore be it enacted, that every able-bodied male person shall be and is hereby made subject to like personal service." And this act further provides for the payment of money in commutation of such personal service. And though this act has been amended from time to time, and most of the counties have been exempted from its operation, the main features of the act—the compulsory service, with the privilege of furnishing a substitute or paying a stipulated sum in lieu thereof—have been part of the local law of Dorchester, Somerset, and other counties down to the present time. In construing this article in the bill of rights of the constitution of 1867, being identical with the article in the constitution of 1776, it is but fair to presume that the framers of the constitution of 1867, and the people who adopted it, understood this limitation on the power to levy taxes by the poll in the sense in which it had been construed and acquiesced in for nearly 100 years. Similar statutes in other states have been in operation for years, and their validity, when questioned, has been fully sustained; and, referring to these statutes, Judge Cooley says: "Though the public burden assumes the form of labor, it is still taxation, and must therefore be levied on some principle of uniformity. But it is a peculiar species of taxation, and the general terms 'tax' or 'taxation,' as employed in the state constitutions, would not generally be understood to include it." Cooley, Const. Lim. (6th Ed.) 629; Cooley, Tax'n, 14.

And then, as to the objection that this local law is repugnant to that clause in the fourteenth amendment of the federal constitution which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," it is sufficient to say that the interpretation of that clause by the supreme court in the Slaughterhouse Cases, 16 Wall. 36, is a complete answer to this objection. There is a distinction, says Mr. Justice Miller, between citizenship of the United States and citizenship of a state. To become a citizen of the United States, it is only necessary that one should be born or naturalized in the United States; but to be a citizen of a state, he must reside within the state. Further he says: "It is a little remarkable, if this clause was intended as a protection to the citizen of a state against the legislative power of his own state, that the words 'citizen of the state' should be left out where it is so carefully used, and used in contradiction to 'citizens of the United States,' in the very sentence which precedes it;" and the supreme court held that this clause merely protected the "privileges and immunities" of citizens of the United States, and was not intended to control the power of the state governments over the rights of their own citizens; and, as to the privileges and immunities belonging to the citizens of a state, "the latter must rest for their security and protection where they have heretofore rested,"—that is, with the state in which the citizen resides. And again, in Bradwell v. State, 16 Wall. 130, referring to the same clause in the fourteenth amendment, Mr. Justice Miller, speaking for the court, says: "The protection designed by that clause, as has been repeatedly held, has no application to a citizen of the state whose laws are complained of." The appellant is a citizen of this state, and the law of which he complained as having abridged and interfered with his privileges and immunities is a law of his own state, and, this being so, the clause in the fourteenth amendment on which he relies has no application. The law of which he complains merely imposes upon him the same duty and obligation which it requires of all other persons within the ages designated by the statute, without making any distinction whatever on account of color or race. And there is no ground on which it can be

Digitized by Google

assailed as being repugnant to any of the provisions of the state or federal constitutions. For a breach of the duty imposed on the appellant and all others, it provides for a fair and impartial trial according to the law of the land, and upon conviction it provides that the offender shall be fined, and stand committed until fine and costs are paid. No one can question the power of the state thus to provide for the enforcement of its law and the punishment of all who violate it. As to the policy and wisdom of the law in question, it is quite sufficient to say that that is matter resting with the legislature, and not with the courts. Cooley, Tax'n, 437; Appleton v. Hopkins, 5 Gray, 530. Rulings affirmed.

GUNBY v. PORTER.

(Court of Appeals of Maryland. Feb. 27, 1895.)

ATTACHMENT AGAINST NONRESIDENT — AFFIDAVIT.

Code, art. 9, § 4, providing that in attachment proceedings against a nonresident the creditor "shall make affidavit that he knows or is credibly informed and verily believes that the said debtor is not a citizen of this state, and does not reside therein," is sufficiently complied with by an affidavit stating that "the defendant, not being a citizen of the state of Maryland, and not residing therein, is indebted," etc.

Appeal from circuit court, Wicomico county.

Action by Louis W. Gunby against Levin A. Porter, garnishee of William F. Causey. From an order sustaining the motion to quash the attachment, and from judgment entered in the case, plaintiff appeals. Reversed.

Argued before ROBINSON, C. J., and McSHERRY, FOWLER, ROBERTS, and BRISCOE, JJ.

R. P. Graham and H. L. D. Stanford, for appellant. E. Stanley Toadvin and Geo. W. Bell, for appellee.

BRISCOE, J. The appellant sued out an attachment in the circuit court of Wicomico county against the defendant, William F. Causey, a nonresident, of the state of Maryland, and attached certain goods in the hands of the appellee as garnishee. The garnishee was summoned, and at the trial moved to quash the attachment, because of the insufficiency of the affidavit. There were other reasons assigned in support of the motion to quash, but it is not material that they should be considered here. The motion was sustained, and from the judgment entered in the case this appeal has been taken.

It is contended that the affidavit is defective, because it does not sufficiently aver the jurisdictional fact of the nonresidence of the defendant. In the affidavit whereon the attachment was issued, the plaintiff avers that the defendant, not being a citizen of the state of Maryland, and not residing therein, is justly and bona fide indebted ——; and the clerk of the court before whom the affidavit was made certifies that the plaintiff made oath that the defendant is not a citizen of the state of Maryland, and doth not reside therein. And it is urged that this affidavit is defective because it fails to set forth the precise words of the statute, that the plaintiff "knows or is credibly informed and verily believes that the defendant is not a citizen of the state, and that he doth not reside therein." Code, art. 9, § 4. Now, there can be no doubt that proceedings under our attachment laws against the property of an absent debtor is a special remedy conferred by statute, and must be followed in the manner pointed out by the statute; but a substantial compliance is all that is held to be necessary. One of the jurisdictional facts, necessary to appear in the affidavit, as the foundation of the attachment, is the nonresidence of the defendant. In this case we have the positive and affirmative oath by the plaintiff that the defendant is a nonresident, which, we think, not only substantially complies with the statute, but is sufficient to support the attachment. Any additional statement, where the truth of the fact averred is not traversed nor denied, could add nothing to its validity. In the case of Franklin v. Claflin, 49 Md. 37, this court said: "We think it is clear that the jurisdictional fact need only be set forth with substantial accuracy, without negativing every possible conclusion to the contrary." And in Jones v. Leake, 11 Smedes & M. 593, a case somewhat similar to the one now under discussion, where a writ of attachment was quashed in the circuit court, because the affidavit whereon it was issued did not set forth in so many words that the facts sworn to were within the personal knowledge of the affiant, or that he had been informed or believed them to be true, was reversed on appeal by the court of appeals of Mississippi; and Mr. Justice Thatcher, in delivering the opinion of that court, said "that the statute, it is true, says that the facts upon which an application for an attachment is predicated shall be stated in the affidavit to be within the personal knowledge of the applicant, or that he is informed or believes the facts stated to be true. The addition of such a statement, after a positive affidavit that certain facts exist, would be mere surplusage, which the law never tolerates. * * * The substantial requirements of the act are complied with in this affidavit, which is enough to sustain its validity." And to the same effect are the decisions in cases where the legal sufficiency of affidavits in attachments cases have been passed upon by this court. Franklin v. Claflin, supra; Foran v. Johnson, 58 Md. 144; De Bebian v. Gola, 64 Md. 264, 21 Atl. 275; Dumay v. Sanchez, 71 Md. 509, 18 Atl. 890. We, therefore, think that the affidavit in this case was sufficient to support the attachment, and there was error in quashing the writ. So the judgment will be reversed, and a new trial awarded. Judgment reversed, and new trial awarded.

Digitized by Google

WHITMAN v. STATE.

(Court of Appeals of Maryland. Feb. 27, 1895.)

JUDICIAL NOTICE—LOCAL OPTION ELECTION.

1. Judicial notice cannot be taken of the result of an election to determine whether liquor should be sold in a town under Acts 1894, c. 484, providing for a resubmission of the question to the people thereof, and making all sales unlawful if the election should result against the sale of liquors.

2. The provisions of section 10, c. 484, Acts 1894, repealing all inconsistent acts, and providing that, if an election held thereunder in the town of Cambridge should result against the sale of liquors, such town should remain under the provisions of the existing liquor laws, except that it should be unlawful for any pharmacist or druggist to sell in said town, or in district No. 7 of the county, are unconstitutional in not being germane to the subject described in its title, which states that it is "An act to provide for an election to be held in the town of Cambridge * * * to regulate the liquor traffic therein; and repealing sections 207 to 213, inclusive, of article 10 of the Code of Public Local Laws, * * * so far as they may relate to and affect the town of Cambridge; and repealing and re-enacting with amendments section 218 of said article."

Error to circuit court, Dorchester county.

Indictment against E. J. Whitman for unlawfully selling intoxicating liquors. From the sustaining of a demurrer to defendant's plea that he was a licensed pharmacist and druggist, and from a conviction and sentence to imprisonment in the house of correction, defendant brings error. Reversed.

Argued before ROBINSON, C. J., and BRISCOE, ROBERTS, FOWLER, and McSHERRY, JJ.

Alonzo L. Miles, for plaintiff in error. Atty. Gen. Poe and P. L. Goldsborough, for the State.

McSHERRY, J. The appellant was indicted by the grand jury of Dorchester county for unlawfully selling intoxicating liquor to one Stack. The traverser demurred to the indictment, but the demurrer was overruled, and he then pleaded, first, that he did sell the liquor as charged, but that, at the time of so doing, he was a regular pharmacist or druggist, having a license to carry on the business of pharmacist or druggist; that the sale referred to in the indictment was made upon the written bona fide prescription of a regular practicing physician, and that he did not sell but once upon the same prescription. He also pleaded not guilty. To the first plea the state, by its attorney, demurred, and the court sustained the demurrer. The trial then proceeded upon the issue joined on the second plea, and the traverser, having been convicted, was sentenced to pay a fine and to be imprisoned in the house of correction. A petition was then filed asking that the record be transmitted to this court as upon writ of error for a review of the several errors assigned in the petition.

We need not pause to discuss the demurrer to the indictment, because the chief question involved arises on the state's demurrer to the first plea of the traverser. To understand that question, a brief reference must be made to some of the local legislation relating to liquors and intoxicating drinks in Dorchester county. By Pub. Local Laws, art. 10, §§ 207–219, the subject of liquors and intoxicating drinks is dealt with. The sale of spirituous, fermented, or other intoxicating liquors was prohibited in 12 of the 14 election districts of the county, but a proviso excepted from this prohibition regular pharmacists or druggists, who were expressly permitted, upon the written bona fide prescription of a practicing physician, to compound and sell such liquors. These 12 districts included district No. 7, which embraced within its limits the town of Cambridge. Section 217 contains provisions for submitting to the voters of any election district of the county the question as to whether liquor shall be sold in that district; but no such question can be voted on until a petition has been presented to one of the judges of the circuit court, and an order has been passed by him directing the election to be held. Section 218 prescribes how an election so ordered shall be conducted, and declares that, if a majority of the votes are cast "for license," the provisions of section 213 shall apply, and that section fixes a penalty for the sale of liquor by any one; whereas, if a majority of the votes cast are "against license," the provisions of sections 207 to 215, inclusive, shall apply; and these sections, as already stated, prohibit the sale of liquor except by druggists upon the prescription of a physician. The local legislation standing thus, the general assembly passed an act, being chapter 484 of the Acts of 1894, whose title will be considered later on. It was the obvious design and purpose of this act to resubmit to the people of Cambridge the question as to whether liquor should be sold in that town. Accordingly, minute and appropriate provisions were inserted in the act for the holding of an election on a designated day in the month of May, 1894, for ascertaining the sense of the voters of the town with reference to the granting of licenses for the sale of liquor in Cambridge. It was declared by the third section of this act that, if a majority of the ballots cast should have printed or written on them the words "for the sale of spirituous or fermented liquors," the commissioners of the town should make proclamation of the result; and that, on and after the 2d day of July following, it should be lawful for all persons to sell liquor within the limits of the town upon procuring the licenses, and complying with the other requirements set forth in subsequent sections of the statute; and that thereupon sections 207 to 213, inclusive, of the Public Local Laws, prohibiting the sale of liquor, should be repealed so far as the town of Cambridge was affected thereby. By the tenth

Digitized by Google

section of the act of 1894, it was provided that, if the election should result against the sale of spirituous or fermented liquors, proclamation should be made, and thereupon the town of Cambridge should remain under the provisions of the then existing liquor laws, except that it should thenceforth be unlawful for a pharmacist or druggist to sell in said town or in district No. 7 of the county any intoxicating liquors or medicated bitters producing intoxication, or any compound of which alcohol forms the chief or principal ingredient; and it further provided that "all laws inconsistent with this provision are hereby repealed, and any pharmacist or druggist violating this provision shall be liable, upon prosecution and conviction, to the penalties provided in section 7 of this act."

There is nothing in the record to indicate that this act of 1894 was either voted on by the people of Cambridge, or whether the majority of the votes cast were for or against the sale of liquor. The act by its explicit terms was only to become operative if the majority of the votes cast at the election directed to be held in May, 1894, were found to be in favor of the granting of liquor licenses. If that condition precedent did not occur, the act has no vitality. The repeal of the antecedent local option legislation, as embodied in sections 207 to 213 of the Public Local Laws, was dependent on the act of 1894 becoming effective, and the latter could only become effective if a majority of the votes cast at the election in May were in favor of license. As the record does not inform us what was the result of the election, if one was ever held, we cannot determine whether the act of 1894 became operative or not. There are many things of which courts will take judicial notice. 1 Greenl. Ev. §§ 5–7. Ordinarily, while they will take such notice of the geographical divisions of the state and of the location of the cities and towns thereof, they will not, in a criminal prosecution, supply by that means an omission to prove the venue. State v. Hartnett, 75 Mo. 251; State v. Burgess, Id. 541. And while, too, courts will take judicial notice of general elections and of the offices to be filled, they will not take judicial notice of the result of a local option election (Grider v. Tally, 77 Ala. 422), nor of the votes of municipal corporations (1 Dill. Mun. Corp. § 50). While we are bound to take notice of the provisions of the act of 1894, because it is a public law (Higgins v. State, 64 Md. 421, 1 Atl. 876), still we cannot take judicial notice of the result of the election directed to be held, and upon the result of which the efficacy of the act was made to depend. If, however, it be assumed, in the absence of anything to show the contrary, that the act of 1894 failed to become operative, so as to authorize the granting of licenses, then it follows, first, that the conditional repeal of the antecedent local option law, as embodied in sections 207 to 213 of the Public Local Laws, never developed into an actual repeal, and that the old law still remains in force precisely as it stood prior to the passage of the act of 1894, unless the provision we have cited from the tenth section of the latter act has enlarged and extended the prohibitory features of the Public Local Laws by excluding and abolishing the right which druggists possessed thereunder to sell liquor upon the prescription of a practicing physician. That the tenth section attempts to do this is obvious, but whether it has validly done so is the question which the traverser's first plea distinctly presents, because that plea relies upon the proviso in section 207, expressly exempting druggists from the prohibitory terms of the same section.

This brings us to the inquiry whether the title of the act of 1894 is sufficiently descriptive of the subject of section 10 to gratify the requirements of section 29 of article 3 of the state constitution. The title is in these words: "An act to provide for an election to be held in the town of Cambridge, Dorchester county, to regulate the liquor traffic therein; and repealing sections 207 to 213, inclusive, of article 10 of the Code of Public Local Laws, title 'Dorchester County,' subtitle 'Liquors and Intoxicating Drinks,' so far as the same may relate to or affect said town of Cambridge; and repealing and re-enacting with amendments section 218 of said article." The election which this act made provision for was distinctly stated in the title to be one to regulate, and not one to abolish, the liquor traffic in the town of Cambridge, and, so far as the title disclosed, was to have no relation to election district No. 7, of which Cambridge forms but a part. Any provision which was necessary or appropriate to carry into effective operation a scheme embodied in an act whose title declared that it was an act to regulate the liquor traffic in that town could have been constitutionally included under that title. But the total abolition of the liquor traffic is in no sense a regulation of it. The repeal of sections 207 to 213 was declared by the title to be a repeal only in so far as those sections related to or affected the town, and the single intimation of an intention to re-enact anything had reference exclusively to section 218. Now, it will be observed that section 10 of the act of 1894 does not stop with a declaration, which would have been unobjectionable, that, if the majority of the votes cast are against the sale of liquors, then the town of Cambridge should remain subject to the local option law, as it stood at that time; but it proceeds with broader, affirmative legislation, not even hinted at, much less described, in the title, and prohibits, in the most unqualified terms, the sale of liquors by druggists, not only in the town of Cambridge, but also in the entire seventh election district,—a very much larger territory than the town. Besides this, it repeals absolutely

Digitized by Google

by a general sweep, not alluded to at all in the title, all laws authorizing such sales by druggists in that whole election district. A power to regulate is not a power to abolish or destroy a trade. State v. Mott, 61 Md. 308; 1 Dill. Mun. Corp. § 323; Radecke's Case, 49 Md. 217. A power to regulate the liquor traffic in a town is not a power to abolish that traffic in a much larger territory which happens to embrace that town within its limits; and a repeal of designated sections of a law only in so far as they relate to a town is widely different from their repeal in so far as they affect a larger and another locality.

It is clear, then, we think, that not only does this tenth section of the act of 1894 contain legislation which is not described in the title of the act, but, beyond that, it enacts provisions which are foreign and palpably repugnant to the subject which the title discloses. There is not the faintest suggestion in the title to indicate that the body of the act contained under any contingency a single provision prohibiting, in the town of Cambridge, the sale of liquor by druggists, or the compounding by them of prescriptions whose chief ingredient is alcohol; and much less is there the most remote intimation in the title that such a prohibitory clause, applying to a whole election district beyond the limits of the town, was contained in the body of an act whose title professed that the act was one to regulate sale of liquor merely within the town. This tenth section is therefore not germane to the subject described in that part of the title which we have been considering; but, on the contrary, it is distinctly foreign to that subject, and must fall unless rescued by the last clause of the title. But this last clause, viz. "and repealing and re-enacting with amendments section 218 of said article," does not remedy the defect. As we have previously stated, section 218 contained provisions prescribing the mode for holding elections upon the petition of a certain number of citizens, and, by an order of a judge of the circuit court, to determine whether local option shall prevail; and the amended section 218 provides the mode for holding, under the same conditions, other elections, in districts other than the town of Cambridge, for the purpose of determining by a vote of the people whether licenses should be issued in such districts, and contains no word or phrase referring to section 10 of the act of 1894, or to any of its provisions as amendatory of section 218. In fact, this amended section 218 has relation exclusively to the results of elections to be held under the authority of section 217, and not to the result of the election to be held under the act of 1894, in the town of Cambridge. As a consequence of these views, we hold that section 10 of the act of 1894, whatever may have been the result of the election held under the act, is invalid, because repugnant to section 29 of article 3 of the constitution.

But there is another aspect of this case which requires a reversal of the judgment entered by the court below. It will be observed that section 10 of the act of 1894 was only to become effective in the event that a majority of the votes cast at the election provided to be held in May, 1894, should be against the sale of liquor. Consequently, even if it could be assumed that the section is free from constitutional objections, it, by its express terms, only became operative if a majority of the votes cast were against the sale of liquor. As we have said, there is no evidence and no averment in the record to show either that the election was held, or what its result was if held. We have stated that we could not take judicial notice of the result of that election, and, as there is nothing before us to show affirmatively that section 10 ever became operative by reason of a majority of the votes cast being against the sale of liquor, the provisions of section 207 of the Public Local Laws expressly allowing druggists to sell liquor must be treated as still in force. The state's demurrer to the traverser's first plea admitted the facts which brought the appellant within the scope of section 207, and the judgment of the court below sustaining the demurrer was therefore erroneous. For the error we have indicated, the judgment must be reversed. Judgment reversed, with costs.

COOKE v. BALTIMORE TRACTION CO.

(Court of Appeals of Maryland. March 1, 1895.)

STREET RAILWAYS—INJURY TO PERSONS ON STREET.

1. If a street-railway company, by adopting a motive power which has increased the speed of its cars, has thereby increased the risk of accident to others, it must enlarge in proportion the degree of vigilance necessary to avoid injuries.

2. Where a vehicle, rightfully on a public street and on its right side, was being driven past an intersecting street, and plaintiff, who was in the vehicle, looked to see if any cable car was coming towards him on this street, but saw and heard none, and then crossed, and the vehicle was struck by a car coming at full speed around the curve from behind, and without giving warning, the company was liable for gross negligence, and there was no contributory negligence on the part of the plaintiff.

Appeal from Baltimore city court.

Action by Theodore Cooke against the Baltimore Traction Company. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before ROBINSON, C. J., and BRISCOE, BRYAN, ROBERTS, PAGE, FOWLER, and McSHERRY, JJ.

Wm. P. Whyte and Jos. Whyte, for appellant. F. C. Slingluff and Ed. Duffy, for appellee.

McSHERRY, J. This is another of the numerous negligence cases which have come

Digitized by Google

Action by Mary A. Nickols, by Wilson Nickols, her agent, against William Jones, to recover a balance alleged to be due on a lease made by plaintiff to Joseph Chandler, signed by defendant as surety for the lessee, and which stated that the rent was $125. The action was commenced in justice's court, and taken on appeal by plaintiff to the court of common pleas. From a judgment for the defendant, plaintiff appeals. Affirmed.

The assignments of error are as follows: "(1) The court erred in its answer to the plaintiff's first point, the point and answer being as follows: 'Under the evidence in this case the jury must allow the plaintiff interest on at least $50.90 from April 1, 1893, to June 14, 1893, when the judgment was rendered by the justice. Answer of the Court: I cannot affirm that point. It depends, as I have said to you, upon whether or not there was a tender at the time designated. If there was, then the point should not be affirmed; if there was not, then it should be. It would depend upon that question, and I cannot, therefore, affirm that point.' (2) The court erred in its answer to the plaintiff's second point, said point and answer being as follows: 'If the jury believe it was never agreed between the parties in this case that Chandler's bill of $11.60 for work, etc., was to be treated as payment on account of the rent due on the written lease offered in evidence, such bill cannot be regarded as either payment or set-off, and their verdict must be for the full amount of the plaintiff's claim. Answer of the Court. I have already disposed of the principle involved in that point in my general charge, and I must disaffirm it.' (3) The court erred in its answer to the plaintiff's third point, said point and answer being as follows: 'If the jury believe that the parties to the lease in suit never agreed that the said bill was to be treated as payment on account of the rent specified in said written lease, then their verdict must be for $11.60, together with interest on said amount from June 14, 1893, to the present time, as well as interest on $62.50 from April 1, 1893, to June 14, 1893. Answer of the Court: That will depend upon what I have already said to you. I cannot affirm that point in the language in which it is put.' (4) The court erred in charging the jury as follows: 'Now, I say to you that, if Mrs. Nickols does owe Mr. Chandler for work done, then he is entitled to set it off against this rent.' (5) The court erred in ruling that Joseph Chandler, a witness for the defendant, should be allowed to answer the following question: 'Q. Did he give you the balance over and above this labor, except $11.60, to pay Mrs. Nickols, and did you tender her that money in payment of the rent? By Mr. Harris: We object to that. There is no plea of tenders. By the Court: The objection is overruled. To which ruling counsel for the plaintiff objects, and prays the court to seal a bill of exceptions thereto, which is done accordingly.' (6) The court erred in ruling that Wilson Nickols, a witness for the plaintiff, should not be allowed to testify to a conversation he had with Joseph Chandler, a witness who had testified for the defendant, in which conversation the said Chandler admitted having made a statement that he did agree to pay $25 rent, not agreed upon in the lease, which admission the said Chandler was asked about in cross-examination and denied. 'Q. In the conversation with you at the Turk's Head Hotel, in West Chester, after the suit began, did Mr. Chandler ever say to you that he did agree to pay the $25 extra, outside of the $125, and that he complained in that conversation that the reason he did not undertake to pay it was because you did not give him a certain amount of work? By Mr. Johnson: I object. By the Court: Was Mr. Jones present on that occasion? A. No, sir. Q. He was not present at the time Mr. Harris directs your attention to? A. No, sir. By the Court: The objection is sustained. To which ruling counsel for the plaintiff objects, and prays the court to seal a bill of exceptions thereto, which is done accordingly.'"

W. S. Harris, for appellant. George B. Johnson, for appellee.

PER CURIAM. This case depended mainly on questions of fact, as to which the testimony was more or less conflicting. It was therefore submitted to the jury, who, by their verdict for defendant, impliedly found all the material issues of fact in his favor. One of them was as to the credit of $11.60 claimed by defendant; another was his alleged tender of the entire balance of rent due plaintiff, etc. An examination of the record with reference to each of the six specifications has failed to convince us that there is any substantial error in either of the rulings recited therein. Judgment affirmed.

BRADLEY v. VERNON.

(Supreme Court of Pennsylvania. March 11, 1895.)

APPEAL—REVIEW—OBJECTIONS WAIVED—WITNESS FEES IN CHESTER COUNTY.

1. An instruction will not be held unfair and misleading, in the absence from the record of a greater part of the testimony.

2. Act Feb. 22, 1821, entitled "An act to amend and alter the fee bill" (7 Smith's Laws, 367), § 13, fixed the fees of witnesses residing more than one mile from the county seat at 62 cents per day, and those residing within a mile of such county seat at 50 cents. Act 1856 (P. L. 485) changed the rate for Chester county for witnesses residing outside the county seat only. Act Feb. 23, 1889, "to amend thirteenth section of an act entitled 'An act to amend and alter the fee bill,'" provides that "the fees to be received by witnesses shall be as follows, viz.: Each day's attendance at court, $1." *Held*, that witnesses residing in West Chester are entitled to $1 per day for attendance at court.

Digitized by Google

Appeal from court of common pleas, Chester county.

Action by Caleb H. Bradley against Joseph B. Vernon for the conversion of certain products of a farm leased by plaintiff to defendant's father. From a judgment for defendant, plaintiff appeals. Affirmed.

The opinion of the trial court relating to witness fees is as follows (Waddell, J.):

"The plaintiff excepts to the taxation of the defendant's bill of costs, and assigns several reasons for so doing: The first is that Isaac A. Vernon is an interested party, and therefore not entitled to fees. It is true a party to an action is not entitled to witness fees. Lutz v. Daniel, 2 Woodw. Dec. 12; Triebel v. Deysher, Id. 55. But there is nothing to show the person in question was a party to this action. He may have felt an interest in the result, and, no doubt, was interested in other litigation with this plaintiff, closely connected with this controversy, but he was not a party to this suit, and had no direct connection with it. We find no reason for depriving him of his fees, and must therefore dismiss this exception. The second exception is that a number of witnesses charged for, naming them, are residents of West Chester, and therefore only entitled to fifty cents a day, instead of one dollar, as claimed in the bill filed. This rate of charge is fixed by the act of February 22, 1821, which is entitled 'An act to alter and amend the fee bill' (7 Smith's Laws, 367). By the thirteenth section the fees of witnesses residing more than one mile from the county seat are fixed at sixty-two cents per day, and for those residing in or within one mile of the same the fees are fixed at fifty cents per day. The act of 1856 (P. L. 485) altered this rate for Chester county for all witnesses residing outside the county seat, while those residing in the county seat were to receive the same pay as was then paid them. The amount then paid them was fifty cents a day, and was fixed by the act of 1821. It was the only act which then provided for the pay of such witnesses, and while the act of 1856 repealed the act of 1821, so far as it related to witnesses residing outside the county seat, the latter act remained in force and applied to those witnesses residing in West Chester. No new provision was made for them. They simply continued to receive their compensation under the provisions of the thirteenth section of the act of 1821. This condition remained until the passage of the act of February 23, 1889. It is entitled 'An act to amend the thirteenth section of an act entitled "An act to amend and alter the fee bill," passed the twenty-second day of February, one thousand eight hundred and twenty-one, and increasing the compensation of witnesses attending court.' It provides 'that the fees to be received by witnesses shall be as follows, namely: Each day's attendance at court, one dollar.' This includes all witnesses, without regard to where they reside, and the act applies to all places governed by the act of 1821. Those localities in which the fees were fixed by some other act would not be affected by it, for it only purports to amend the act of 1821. As we have seen, the fees of witnesses in West Chester depend upon the act of 1821, and their fees must, therefore, be affected by the act of 1889. This fixes all such at one dollar per day. It would thus appear that the fees of witnesses in the county of Chester, outside the borough of West Chester, are regulated by the act of 1856, while those in the borough are determined by the act of 1889. If this is not so, then they can receive no compensation. The act of 1856 provides that for those witnesses 'who reside in the borough of West Chester the pay shall be the same as is now paid.' As we have seen, the act of 1821 was the only act which provided the pay for such witnesses, and this provision was made by the thirteenth section. The act of 1856 makes no specific provision for their pay; it names no amount of compensation; and hence, when the act of 1821 is repealed, they must go without pay, unless they come within the provisions of the repealing act of 1889. We are of the opinion that witnesses residing in the borough of West Chester are entitled to receive one dollar a day for each day's attendance at court, and must therefore dismiss this exception. The third exception is that two of the witnesses charged for are members of the bar of Chester county, and therefore not entitled to fees for attendance upon this court. This exception is well taken, under the ruling in McWilliams v. Hopkins, 1 Whart. 275, and must be sustained. The bill in this particular must be corrected. The fourth exception alleges that a number of the witnesses named were not in attendance during the trial, nor were they material. No evidence was offered to sustain this exception. The bill of costs as filed is supported by affidavit, and thus furnished prima facie evidence of its correctness in these particulars. Wadl. Costs, 60, 61. In the absence of proof to sustain the exception, we must dismiss it. The bill will be corrected in the particulars we have indicated."

The assignments of error are as follows:

"(1) The court erred in its general charge to the jury in relation to the error of $17.90, said charge in respect to said error being unfair to the plaintiff and misleading to the jury, the said portion of said charge being as follows: 'No allegation of mistake was made when that note was given. It was due in October, 1892, and it was given six months before that, which would be April, 1892, and this suit was brought over a year after. There was no allegation of any error. This defendant's attention was not called to any mistake. The note had passed out of his hands into another party's hands, but that did not prevent the plaintiff here calling this defendant's attention to it, because, if that

Digitized by Google

mistake existed, not only was that note entitled to be paid, but $17.90 more. But the defendant says, and he is not contradicted in this, that his attention was not called to this error from the time the note was given until this suit was brought. * * * Counsel calls our attention to the fact, and says that he thinks we committed an error when we stated that the error in the note was not spoken of until this suit was brought, and that his recollection is Mr. Bradley spoke of it in the arbitration in the other suit. My recollection is that Mr. Bradley said he did not speak of it at that time, but the jury will recollect the testimony, and whichever way it was you will bear it in mind,'—to which an exception was noted, as follows: 'Counsel for plaintiff excepts to the charge of the court, as follows: The court erred in stating, in substance, that there was no allegation of error in the note made by the plaintiff until suit was brought,'—and prays the court to seal a bill of exception thereto, which is done accordingly. (2) The court erred in its answer to the defendant's second point, the said point and answer being as follows: 'That if the jury believe that Caleb H. Bradley, after the transaction in controversy in this suit, brought a suit against Isaac Vernon which was pursued to judgment, and that Joseph B. Vernon was a dormant partner with him at the time of the contract, the cause of action was a joint one, that the judgment rendered in said suit extinguished the original cause of action, and is a bar to this suit, and the verdict should be for the defendant.' Answer of the court: 'As you will understand from what I have already said, gentlemen, I affirm that point. That I understand to be the law of the case.' (3) The court erred in deciding that witnesses who reside in the county town of West Chester are entitled to receive one dollar per day for attendance at court in the county of Chester. (4) The court erred in awarding an execution for the purpose of collecting one dollar per day as fees for six witnesses who resided in West Chester, and attended court in the case of Bradley v. Vernon, in the court of common pleas of Chester county, 72, January term, 1894."

W. S. Harris, for appellant. George B. Johnson, for appellee.

PER CURIAM. Appellant's omission to furnish us with the greater part of the testimony that was introduced on the trial offends against the seventeenth rule of court. In the absence of that testimony, he has no right to ask us to convict the court of error in charging as complained of in the first specification. It would be unfair to the court below, as well as to the appellee, for us to assume that the instructions were not fully warranted by the testimony in the case. As to the second specification of error, it does not appear that any exception was taken to the court's answer to the point recited therein. There was no error in ruling as stated in the third specification, nor in awarding execution for the witness fees referred to in the fourth specification. As presented to us, the record discloses no error that would justify a reversal of the judgment. Judgment affirmed.

EBY v. LEBANON COUNTY.

(Supreme Court of Pennsylvania. March 11, 1895.)

COUNTIES — NEGLIGENCE OF INDEPENDENT CONTRACTORS—INTERFERENCE BY COUNTY COMMISSIONERS.

1. Where independent contractors, while putting down a stone curb for a county, leave the trench and the pile of dirt unguarded and unlighted during the night, the county is not liable to a person who falls into the trench and is injured, in the absence of interference with and control of the work by the county.

2. Such interference is not shown by the facts that the county commissioners directed, as the contract provided, that the dirt should not be thrown on the grass, and furnished boards on which the dirt might be temporarily deposited "to protect the pavement"; or by testimony that "they directed in certain things that didn't suit them. * * * If they thought it would be better, they would give different directions. * * * If anything did not suit them, they would tell us in what way it didn't suit them, and then, of course, we changed it. * * * I remember their giving instructions once; I remember that we had to tear a part of it down."

Appeal from court of common pleas, Lebanon county.

Action of trespass by Milton Eby against the county of Lebanon, in which a compulsory nonsuit was entered. From a judgment refusing to take off the nonsuit, plaintiff appeals. Affirmed.

The opinion of the trial court is as follows (McPherson, J.):

"In April, 1891, a stone curb was being put down around Monument Park, in the city of Lebanon. The curb was to stand upon the line dividing the park from the pavement of a much-used public street, and, in order to obtain a suitable foundation, it was necessary to dig down along this line to a depth of two or three feet. The dirt thus removed was thrown upon the pavement, forming a pile of considerable breadth and height, and was allowed to remain during the night. Neither the trench nor the pile was lighted or guarded. After dark the plaintiff, who was walking homeward along the pavement, encountered the pile of dirt. Believing it to be on the outer half of the pavement instead of upon the inner half, he turned inwards to avoid it, and fell into the trench, which he did not see, and of whose existence he had no knowledge, thus sustaining the injuries complained of. The park belongs to the county, and the work was being done by agreement with the commissioners, but the plaintiff's claim was resisted, and he was nonsuited on the ground that the county was not liable because the work was being done, not by the county's servants but by a firm

Digitized by Google

of independent contractors, for whose negligence the county was not bound to respond. The principle is familiar (see Painter v. Mayor, etc., of Pittsburgh, 46 Pa. St. 213; City of Erie v. Caulkins, 85 Pa. St. 247; Borough of Susquehanna Depot v. Simmons, 112 Pa. St. 384, 5 Atl. 434; Improvement Co. v. Rhoads, 116 Pa. St. 382, 9 Atl. 852); and it is not denied that the written agreement in evidence between the county and the contractors relieved the county from liability, unless the commissioners so interfered with the conduct of the work as to control its methods, and thus, in spite of the contract, to become the responsible masters. Upon a careful review of the testimony, we find no evidence of such interference, and are therefore satisfied that the nonsuit was properly entered. No doubt the commissioners directed that the dirt should not be thrown upon the grass, for this was a mere repetition of one provision in the contract; and they probably furnished boards upon which the dirt might be temporarily deposited, doing this, as one witness said, 'to protect the pavement'; but this was in no sense an interference with the contractors' control. In the ordinary course, this dirt would be put upon the pavement, since it was forbidden to go upon the grass, and the commissioners simply recognized that fact when they took the proper steps to protect the pavement from injury. Even if this be regarded as acquiescence by the commissioners in the temporary use of the pavement, acquiescence is by no means control or direction, and in this instance it brought no liability upon the county. Certainly it could not be regarded as consent that the dirt should lie on the pavement after dark unguarded and unlighted, and these alone are the acts or omissions of which the plaintiff has a right to complain. There are one or two other vague statements about the alleged interference of the commissioners, as, for example: 'They directed in certain things that didn't suit them. * * * If they thought it would be better, they would give different directions. * * * If anything did not suit them, they would tell us in what way it didn't suit them, and then, of course, we changed it. * * * I remember their giving instructions once. I remember that we had to tear a part of it down.' But, obviously, such testimony is of little value. What were the 'certain things' which did not suit? What kind of 'directions' did the commissioners give? What changes were made? Was the tearing down of part the result of the commissioners' caprice, or was it because the work was not properly done? Nothing is said on these matters, and, without much more light than the plaintiff saw proper to furnish, it would be a mere guess to affirm such interference by the commissioners as made the county liable. In our opinion, the case is clear. Regretting the plaintiff's injury, we can only hold that, while the contractors may be liable to compensation, the county is not liable. The motion to take off the nonsuit is refused."

A. Frank Seltzer and B. M. Strouse, for appellant. Luther F. Houck, for appellee.

PER CURIAM. The judgment in this case is affirmed on the opinion of the learned court below on the motion to take off the nonsuit.

HOSTETTER v. UNITED BRETHREN MUT. AID SOC.

(Supreme Court of Pennsylvania. March 11, 1895.)

PLEADING—AFFIDAVIT OF DEFENSE—SUFFICIENCY.

Where plaintiff's statement sets out a cause of action founded on a number of papers and on numerous facts in pais extrinsic to the papers, and the affidavit of defense denies all liability under the papers and violation of contract stipulations, and alleges violation of contract obligations by plaintiff, judgment cannot be taken for want of sufficient affidavit of defense.

Appeal from court of common pleas, Lebanon county.

Action by Abraham Hostetter, for the use of Jefferson Schools and Edwin Hostetter, now for the use of Jefferson Schools, against the United Brethren Mutual Aid Society of Pennsylvania, to recover money paid defendant by Abraham Hostetter on assessments made against him as holder of a certificate of membership in such society. From an order overruling a motion for judgment for want of sufficient affidavit of defense, plaintiff appeals. Affirmed.

J. G. Adams, for appellant. S. P. Light, for appellee.

PER CURIAM. This is very clearly not a case in which judgment can be taken for want of a sufficient affidavit of defense. The plaintiff's statement sets out a cause of action founded upon a number of papers and upon numerous facts in pais extrinsic to the papers, and upon alleged violations of contract stipulations. The affidavit of defense denies all liability under the papers, denies all violation of contract stipulations, and alleges violations of contract obligations by the plaintiff. Important questions of fact are raised, which can only be determined by the verdict of a jury. Judgment affirmed.

FELTY v. DEAVEN.

(Supreme Court of Pennsylvania. March 11, 1895.)

PLEADING—AMENDMENT OF TITLE AFTER VERDICT.

In assumpsit, where it appears during the trial that plaintiff, after his cause of action arose, assigned for benefit of creditors, and that his creditors have not been paid in full, it is proper for the court after verdict to amend the title by adding the name of plaintiff's assignee.

Digitized by Google

Appeal from court of common pleas, Lebanon county; F. E. Meily, Judge.

Action by Peter Bates against Jacob Deaven to recover a balance alleged to be due plaintiff on a settlement made between the parties in 1884, for services rendered defendant. After the verdict was returned, the court amended the title to the case so as to read, "To the use of William B. Felty, assignee in trust for the benefit of creditors of Peter Bates." From a judgment for plaintiff, defendant appeals. Affirmed.

The action was commenced in 1892, and defendant pleaded non assumpsit, set-off, set-off with leave, and the statute of limitations. The trial was had, and the verdict was rendered on November 12, 1894. During the trial the fact appeared that after the alleged settlement plaintiff made an assignment to one Rhen for benefit of creditors; that Bates' creditors were not paid in full; and that Rhen was dead. On November 13, 1894, the court, on petition of Bates, appointed William B. Felty assignee in place of Rhen; and on the same day the court, on plaintiff's motion, amended the title so as to read, "To the use of William B. Felty, assignee in trust for the benefit of creditors of Peter Bates."

J. G. Adams, for appellant. Thomas H. Capp and George B. Schock, for appellee.

PER CURIAM. The questions of fact at issue in this case were fairly and correctly submitted to the jury, and quite as favorably to the defendant as the testimony would warrant. The jury has found for the plaintiff, as they well might do under the evidence, and, of course, we cannot disturb it. The only other question was as to the amendment. That this was properly allowed is too plain for argument. It consisted of nothing but adding the name of the plaintiff's assignee for the benefit of creditors. As the title was really in the assignee, the amendment was entirely proper, and could be made at any stage of the proceedings. This is the very object of the amendment law. Judgment affirmed.

In re LEBANON TRUST & SAFE-DEPOSIT BANK'S ESTATE.

Appeal of CARMANY.

(Supreme Court of Pennsylvania. March 11, 1895.)

INSOLVENT TRUSTEE—FOLLOWING TRUST FUNDS.

Where a bank, which is a trustee, simply places the trust money in its general funds, and does not invest it in any of its securities, and such money is not capable of being traced, on the insolvency of the bank a claim against the bank's assignee by the new trustee for the amount of the trust fund is not entitled to preference.

Appeal from court of common pleas, Lebanon county; F. E. Meily, Judge.

Audit and distribution of the assigned estate of the Lebanon Trust & Safe-Deposit Bank in the hands of Jacob M. Shenk, its assignee for benefit of creditors. From a judgment dismissing exceptions to and confirming the auditor's report refusing to allow the claim of C. W. Carmany, trustee of Eliza Palm, as a preferred claim, and allowing the trustee a pro rata share only of the fund for distribution, the trustee appeals. Affirmed.

The bank was authorized to act as trustee, assignee, guardian, etc., and previous to its insolvency it was appointed by the court of common pleas trustee of Eliza Palm, and it was such trustee when it became insolvent. Afterwards it was dismissed as such trustee, and C. W. Carmany was appointed as its successor.

B. M. Strouse and P. H. Reinhard, for appellant. Grant Weidman, for appellee.

PER CURIAM. The auditor found, and upon sufficient testimony, that, when the money which composed the fund for which preference was claimed in this case was deposited in the bank, it was simply placed in the general funds of the bank. No investment of it was made in any securities of the bank, nor was it in any way separated or individuated from the general funds. It was not earmarked in any way, and it is not even alleged that the original money deposited can possibly be traced or discovered. In such circumstances the obligation of the bank became simply a debt of the bank, and entitled only to the same recognition in the distribution as other unsecured debts. The case is clearly ruled by Thompson's Appeal, 22 Pa. St. 16; Bank v. King, 57 Pa. St. 202; and People's Bank's Appeal, 93 Pa. St. 107. The fund had become incapable of identification, and therefore there was nothing which could be specifically appropriated to the payment or liquidation of the appellant's claim. Judgment affirmed.

RITCHIE v. WALTER.

(Supreme Court of Pennsylvania. March 11, 1895.)

GUARANTY OF JUDGMENT NOTE—LIABILITY OF GUARANTOR.

Defendant, by contract indorsed on the the back of a judgment note given by M., guarantied the payment of the note "if the same cannot be recovered out of the property purchased of S.'s estate by said M. by deed this day delivered." *Held*, that such guaranty was special, and where the holder of such note forthwith entered judgment on it, and afterwards continuously kept alive the lien thus acquired on the land mentioned in the guaranty, he did all he was bound to do to continue the liability of defendant for the balance due after exhaustion of such land by sheriff's sale 17 years after the note and guaranty were given.

Appeal from court of common pleas, Bucks county.

Action by Amanda Ritchie, assignee of J. S. Rhoads, against John B. Walter, on a writ-

Digitized by Google

ten guaranty of payment of a judgment note. From a judgment for plaintiff, defendant appeals. Affirmed.

On April 16, 1874, John Cozens, administrator of the estate of Robert Service, deceased, executed and delivered to Howell E. McNair a deed of conveyance for a messuage and tract of land situated in county of Bucks, Pa., containing 90 acres, more or less, purchased by McNair for the sum of $7,200. On the same day McNair executed and delivered to Henry Schaffer a mortgage for $2,832.17, upon the farm, which was recorded that day. Also, on the same day, McNair executed and delivered to one John S. Rhoads a judgment note for the sum of $2,500, dated April 16, 1874, and payable on April 1st following, with interest and 5 per cent. attorney's commission; and on the same day judgment was entered thereon in the court of common pleas of Bucks county, to No. 517 of February term, 1874, and became a lien upon such land. At the time of the execution and delivery of the judgment note to Rhoads by McNair, to wit, April 16, 1874, John B. Walter, defendant, for a valuable consideration, entered into a contract of guaranty, indorsed and written upon the back of the note, whereby he guarantied the payment of said note and all moneys due and to become due thereon, provided the same could not be recovered out of the property purchased of Robert Service's estate by said McNair by deed the same day delivered. The lien of such judgment was duly revived by amicable scire facias against McNair three times, without the knowledge of or notice to the guarantor, the last revival occurring March 18, 1889. On March 30, 1880, John S. Rhoads, for a valuable consideration, assigned such judgment note and judgment and contract of guaranty to plaintiff, Amanda Ritchie. From the date of the entry of such judgment it remained a lien upon such tract of land continuously, until discharged by sheriff's sale on April 23, 1891, upon an execution issued thereon at suit of plaintiff, for the sum of $3,700. Out of the proceeds of the sale the plaintiff received $1,612.12 as a credit upon such judgment and execution, leaving a balance due her on April 23, 1891, of $1,051.46.

The assignment of error is as follows: "The learned judge erred in charging the jury as follows: 'Now, then, gentlemen, taking that as the nearest definition and most pointed instruction which can be given you as to what constitutes due diligence, you will inquire from all the facts in this case whether due diligence was used by Miss Ritchie in the collection of her claim, considering the character of the obligation, that it was given as a lien on real estate, and what, from all the circumstances in the case, was in contemplation of the parties when they entered into their respective undertakings, and also what the condition of the maker of the note was, the value of the property guarantied, for in effect this is a guaranty of the value of the farm bought; and you will determine from all the facts, taking into consideration this declaration of the supreme court, whether the plaintiff used due diligence in collecting the money out of the farm of Mr. McNair. If she did, then Mr. Walter is bound by his obligation to pay whatever it fell short of discharging the lien.'"

Hugh B. Eastburn, Geo. Ross, and J. F. Long, for appellant. Paul H. Applebach, Henry Lear, and Wm. & J. C. Stuckert, for appellee.

PER CURIAM. As was said in Campbell v. Baker, 46 Pa. St. 243: "When a guaranty is general,—that is, without having any of its terms fixed in the writing,—the law adds the usual conditions that there shall be due and unsuccessful diligence used by the creditor to collect the claim from the principal, unless it appears that all diligence would be hopeless. But the law adds or implies no such conditions where the parties themselves fixed the terms of the contract." In this case the defendant, by his contract under seal, indorsed on the judgment note, guarantied "the payment of the within judgment note and all moneys due and to become due thereon, if the same cannot be recovered out of the property purchased of Robert Service's estate by said Howell McNair, by deed this day delivered." This is a special, not a general, guaranty. By forthwith entering judgment on the note, and thus acquiring a lien on the real estate mentioned in the guaranty, and then keeping that lien continuously alive, the plaintiff did all that in good faith she was bound to do under the terms of the special contract. In view of the terms of the guaranty, we think the instructions recited in the assignment of error are substantially correct, and the judgment should not be disturbed. Judgment affirmed.

LEWIS et al. v. BURGESS, ETC., OF BOROUGH OF DARBY.

(Supreme Court of Pennsylvania. March 11, 1895.)

MUNICIPAL CORPORATIONS—CHANGE OF STREET GRADE—ASSESSMENT OF DAMAGES.

Under Const. art. 16, § 8, where the damages to a lot owner caused by change of street grade in front of such lot exceed the advantages that accrue to him, he is entitled to recover the difference between the advantages and disadvantages, though such owner requested the change to be made.

Appeal from court of common pleas, Delaware county.

Petition by Alonza Heaps and others for a jury to assess damages for a change of grade of street of Darby borough. The borough of Darby appealed from an award of the jury in favor of Susanna Y. Buchanan to the court of common pleas. By agreement the records were amended so that the name and title of the defendant should read

Digitized by Google

"The Burgess and Town Council of the Borough of Darby," and by substituting as plaintiff William H. Lewis and Fannie H. Lewis, administrators of the estate of William P. Lewis, deceased. From a judgment for plaintiffs, defendant appeals. Affirmed.

Lewis Lawrence Smith and Isaac Johnson, for appellant. Joseph S. Goodbread and J. T. Reynolds, for appellees.

PER CURIAM. The only error assigned is the refusal of the court to affirm the defendant's point for charge: "If the jury believe that the change of grade was made at the request of William P. Lewis, and made as he designated, and was a special advantage to him, the plaintiffs are not entitled to recover." In declining to affirm this point the learned trial judge rightly said, in substance, that although the jury might find that plaintiffs' intestate requested the change to be made, and it was done accordingly and was advantageous to him, yet, if the damages he sustained by thus changing the grade were greater than the advantages that accrued to him therefrom, he had a right to claim and recover damages measured by the difference between the advantages and disadvantages. That right he had under article 16, § 8, of the constitution, unless he waived it, or did something to estop himself from asserting this claim. There is no evidence of either in the case. The principle is so obviously correct that it needs neither argument nor citation of authority to support it. It is recognized in Jones v. Borough of Bangor, 144 Pa. St. 638, 23 Atl. 252, and other cases. Judgment affirmed.

BEAUMONT et al. v. BEAUMONT.

(Supreme Court of Pennsylvania. March 11, 1895.)

RECEIVER OF PARTNERSHIP—REFUSAL TO APPOINT.

The refusal to appoint a receiver of a partnership at the expense of some of the partners will not be disturbed where the supreme court cannot say that the refusal was not an exercise of sound discretion, since such appointments are within the discretion of the trial court.

Appeal from court of common pleas, Chester county.

Action by Mary E. Beaumont, administratrix of the estate of Theodore Beaumont, deceased; Margaret Beaumont; E. W. Lapp, guardian of Rhinewalt S. Beaumont, a minor child of Theodore Beaumont, deceased,—against Rush Beaumont, for the dissolution of a copartnership existing between plaintiffs and defendant, for an accounting, and for an injunction restraining defendant from receiving or collecting partnership moneys, etc., the appointment of a receiver, and other relief. From a judgment refusing to appoint a receiver, plaintiffs appeal. Affirmed.

Chas. H. Pennypacker, for appellants. Thomas W. Pierce and Butler & Windle, for appellee.

PER CURIAM. In their bill, appellants pray for—First, dissolution of the copartnership; second, decree for an account; third, injunction restraining defendant from receiving or collecting the partnership moneys, etc.; fourth, appointment of a receiver; and, fifth, other relief. The only subject that appears to have been considered on the hearing which preceded the decree of December 24, 1894, appealed from, was the appointment of a receiver. While the phraseology of the decree would appear to indicate undue haste and improvident action on the part of the court in refusing to make the appointment, an examination of the record does not warrant any such conclusion. We are not convinced that, in the circumstances, the action of the court was not entirely proper. Such appointments rest in the sound discretion of the court, and in exercising such discretion it proceeds cautiously, and is governed by a view of the whole circumstances of the case. No positive or unvarying rule can be laid down as applicable to all cases. If there be no danger to the property, and nothing to show the necessity or expediency of appointing a receiver, none should be appointed. Kerr, Rec. pp. 4, 5, 9; Bisp. Eq. § 577. In view of all the circumstances, as they appear to us from the record, we cannot say that the refusal of the court was not an exercise of sound discretion. One of the circumstances that was doubtless considered by the court was the fact that the copartnership in question would expire by its own limitation on the 28th of December, 1894,—only four days after the date of the decree. Appeal dismissed, with costs to be paid by appellants.

HOWETT v. PHILADELPHIA, W. & B. R. CO.

(Supreme Court of Pennsylvania. March 11, 1895.)

NEGLIGENCE—QUESTION FOR JURY.

Where the testimony is conflicting, or for any cause there is a reasonable doubt as to the facts, or as to the inferences to be drawn from them, negligence is a question for the jury.

Appeal from court of common pleas, Chester county.

Action by Davis Howett, by his father and next friend, Edwin Howett, against the Philadelphia, Wilmington & Baltimore Railroad Company for personal injuries caused by defendant's negligence. From a judgment for plaintiff, defendant appeals. Affirmed.

John J. Pinkerton, for appellant. Thomas W. Pierce, for appellee.

PER CURIAM. Defendant company's contention here is substantially the same as below, viz. that the court should have withdrawn the case from the consideration of the

Digitized by Google

jury by instructing them to render a verdict against the plaintiff on the ground that he was guilty of negligence which contributed to the injury of which he complains. We are all of opinion that it would have been error to have done so, for the reason that, upon the controlling questions of negligence and contributory negligence, the testimony was quite sufficient to carry the case to the jury. A careful consideration of all the evidence has convinced us that it tends to show that defendant's negligence was the proximate cause of plaintiff's injury. It has also satisfied us that, while there is some evidence of contributory negligence on the part of the plaintiff, the testimony relating thereto is not of such a character as would have justified the court in declaring, as matter of law, that he was guilty of negligence which contributed to his injury. These conclusions might be fortified by references to and discussion of the testimony, but that would consume time to very little, if any, purpose. Whenever there is a conflict of testimony, or, for any cause, there is a reasonable doubt as to the facts, or as to the inferences to be drawn from them, negligence is always a question for the jury. This case is clearly within the rule, and, inasmuch as the questions involved were fairly submitted to the jury in a fully adequate and unexceptionable charge, the verdict should not be disturbed. Judgment affirmed.

TRADESMEN'S NAT. BANK v. INDIANA BICYCLE CO.

(Supreme Court of Pennsylvania. March 11, 1895.)

ESTOPPEL IN PAIS.

Where goods pledged to one creditor come within the grasp of another creditor in reliance on the promise, by the latter to the debtor, not to levy on them, and it levies on and sells them, it is estopped, in an action for conversion by the pledgee, to deny the validity of the pledgee's title.

Appeal from court of common pleas, Philadelphia county.

Issue formed under the sheriff's interpleader act, in which the Tradesmen's National Bank is plaintiff and the Indiana Bicycle Company is defendant, to determine the title to certain bicycles and bicycle supplies levied on by defendant as the property of, and under an execution issued against, T. Henry Sweeting, and claimed by plaintiff under a warehouse receipt. From a judgment for defendant, plaintiff appeals. Reversed.

Charles Biddle and Wm. Rudolph Smith, for appellant. J. Martin Rommel, for appellee.

MITCHELL, J. It must be conceded that the storage receipt was not, under the evidence, such a warehouse receipt as gave the plaintiff a complete title, which could be asserted generally against a creditor levying on the goods. But this case depends on entirely different principles. The goods came within the grasp of the defendants in reliance on their promise not to levy upon them. As between the defendants and Sweeting, their judgment debtor, this promise might be unavailing for want of consideration; his goods, wherever found, being answerable for their debt. But plaintiff had an equity in them, and, if they had been delivered to it by Sweeting, the bank would have had a valid lien on them, which would have been good against defendants and all others. The goods were the property of Sweeting, and were out of the reach, for the time at least, of the defendants, for they were held by other parties or consignments by Sweeting. The latter says distinctly in his testimony that he informed Mr. Smith, the president of defendant company, that he had these goods out on consignment, and he would like to have them to meet his other liabilities, "to provide for the payment of the bank, or the meeting of this warehouse receipt, and Mr. Smith said he would not interfere with those things." Relying on this promise, Sweeting brought the goods to the defendant's place, and stored them there. It is a fair presumption that, except for this promise, Sweeting would have turned the goods over to the actual custody of the bank, which would have made its title good against everybody. But, even without this presumption, the goods were brought to the defendants' knowledge and within their grasp with notice that they were pledged to the bank, and in reliance on the promise not to interfere with them. As against the bank, defendants are estopped from denying the sufficiency of the setting apart to the bank and the validity of its title. To allow them to do so would be to allow them to profit by a breach of good faith, to the prejudice of the plaintiff. Judgment reversed, and procedendo awarded.

In re HAIN'S ESTATE.

Appeal of BENNETSCH.

(Supreme Court of Pennsylvania. March 18, 1895.)

LUNATICS—EXPENDITURES BY COMMITTEE—RATIFICATION BY COURT.

An expenditure by a committee of a lunatic which could have been authorized, having been made without permission, may be ratified by the court.

Appeal from court of common pleas, Berks county.

In the matter of the estate of Albert J. Hain, a lunatic. From an order refusing to strike off the confirmation of the account of Adam L. Hain, a former committee of the lunatic, J. Henry Bennetsch, the present committee, appeals. Affirmed.

Digitized by Google

Adam H. Schmehl and Richmond L. Jones, for appellant. Ermentrout & Ruhl, for appellee.

PER CURIAM. It is not denied that the court below could have authorized the expenditures complained of if the accountant had made application at the proper time. What it had the power to authorize, if done without permission it may ratify and approve. Whether this power should be exercised in any given case is not a question to be settled by the application of some general rule of law, but by the exercise of a sound judicial discretion, in view of all the surrounding circumstances. Fortunately, the courts have the power to do in such cases what ought in fairness and good conscience to be done. The court below seems to have exercised this power in the case now before us in a discreet and equitable manner, and we are not willing to disturb the conclusion reached. The accountant may not have been as economical of his expenditures in the care of the lunatic as he might have been; but it is clear that he was upright in the discharge of his trust, and that whatever unnecessary expenditures he made were in the interest of the personal comfort of his unfortunate ward. The order appealed from is affirmed, the costs of this appeal to be paid by the appellant.

KUGEL v. PAINTER et al.

(Supreme Court of Pennsylvania. March 11, 1895.)

LEASE TO RAILROAD COMPANY—CONSTRUCTION—GRANT—PRESUMPTION FROM USER.

1. A lease of land to a railroad company, "so long as the same shall be used for railroad purposes," recited in the preamble that the company "is now engaged in altering and improving the railroad depot," "for the purpose of more conveniently transacting the business of said company, and for the better accommodation of the public." *Held*, that the lease continued so long only as the land was used for "public" railroad purposes, and that on the conveyance of the land by the company to an individual, and the use of it for private railroad purposes, the lessor's successor in title could recover it.

2. In ejectment by the lessor's grantee against the railroad company and its grantees and assignees, a grant to the company will not be presumed from the use of the land for private railroad purposes for more than 21 years, where it appears that the railroad company paid the rent regularly, and it does not appear that plaintiff had notice that the company intended to abandon it.

Appeal from court of common pleas, Chester county.

Action of ejectment by Lena Kugel against the Pennsylvania Railroad Company, the West Chester Railroad Company, and Uriah H. Painter, Charles B. Lear, and Marshall H. Matlack, trading as Marshall H. Matlack & Co., and Joseph H. Derry. Defendant railroad companies filed disclaimers. From a judgment for plaintiff, defendants Uriah H. Painter and others, trading as Marshall H. Matlack & Co., and Joseph H. Derry appeal. Affirmed.

In 1857, J. J. Parker leased certain ground to the West Chester Railroad Company, at the annual rental of $25. He afterwards conveyed the land, subject to the rights of the company, and his grantees conveyed to plaintiff. The railroad company erected on the land a car house, and the rent was paid annually to the owner, until 1893, when plaintiff refused to receive it, and brought this action. In 1881 the railroad company assigned and conveyed all its rights in the car house, including the lease from Parker, to U. H. Painter, one of defendants.

The trial court charged the jury as follows (Clayton, J.):

"Like most cases brought before the courts for adjudication, the present one turns upon a very narrow point, and there is but one point in the case, and that will depend entirely upon the construction to be put upon the lease by which the railroad company acquired the right to use this strip of land. The law requires all writings to be construed by the court, and it is the duty of the jury to take from the court the construction it puts upon a written paper. The testimony of witnesses is always harmonized and construed by the jury. The foundation, therefore, of the title of the defendants to this strip of ground lies in this written lease. You will notice by the preamble to the lease that the 'West Chester Railroad Company, of the county of Chester, Pennsylvania, is now engaged in altering and improving the railroad depot fronting on Gay street, in the borough of West Chester, county and state aforesaid, for the purpose of more conveniently transacting the business of the said company, and for the better accommodation of the public.' That is the preamble to the lease. That is to say, the railroad company found itself hampered for want of room for the purpose of transacting its public business. A railroad company is a public corporation. A railroad is one of the highways of the state. It is operated by a corporation, but still it is a state institution. It is created for the purpose of accommodating the public, not for the accommodation of individuals. Every person has a right to travel over a public highway. Every individual has a right to travel on a railroad, subject only to certain reasonable regulations, such as behaving himself well, paying the toll, or paying a regular freight, in which there is to be no discrimination; all are to be treated alike. Now, it seems, for the purpose of conducting this public business, this railroad company found it necessary to enlarge its depot. When we come to look to the title of the railroad company for the ground upon which its depot stands, we find it was acquired by grant, and not by public condemnation. It bought, like an individual, the ground upon which it built

Digitized by Google

its depot. It was therefore the owner in fee of that improvement, and could sell it whenever in the judgment of the board of directors the exigencies of the case required. It did not require the intervention of the commonwealth to divest it of the title which it had to that piece of ground. It had bought it, and it could sell it. And when it once did exercise that right and sell the land upon which its depot stands, without inserting in the deed any restriction, or without preserving its right to use it as a depot, the right to use that as a depot at once ceased, and ceased forever. When, therefore, the depot was no longer to be used for the accommodation of the public, for the carrying of freight, or for the transporting of passengers, the condition contained in this lease was broken; for you will observe that in order to enlarge its depot it was necessary to go over on the land of a neighbor, and in order to get the right to build upon that land it leased this little strip of ground now in question. That lease was perpetual, so long as the depot was used for railroad purposes. It was perpetual upon two conditions,—one that $25 a year rent should be paid, and the other that the land should be used for railroad purposes. Whenever, therefore, the railroad or its lessees—persons holding under it—should cease to pay the rent or should cease to use the land for railroad purposes, the condition upon which the lease was made was ended, and the lease terminated, and the landlord would have a right to recover possession. Now, that is a brief statement of the facts as they are before you, and the only difficulty in the case is the proper construction to be put upon the words in this lease, 'for railroad purposes.' You will notice, after you get down from the preamble, and after we read the description of the property leased, these words: 'That the said John J. Parker, for the consideration hereinafter mentioned, has demised and leased by these presents, and by these presents doth demise and lease, unto the West Chester Railroad Company above named, and its assigns, so long as the same shall be used for railroad purposes, the following described tract of land.' You will observe it is in the lease, 'so long as the same shall be used for railroad purposes,' and the preamble says they were to be public railroad purposes, not private. The preamble says: 'For the accommodation of the public it became necessary to enlarge the depot,' and the lease shows that the land was leased for the purpose of carrying out that design, and that the lease was to continue so long as the land was used for railroad purposes.

"Now, gentlemen, I construe that to mean, so long as the land was used for public railroad purposes. I do not hold that it was necessary that it should be used as fully as it was at that time. I do not hold they were bound to build a larger depot if it became necessary, nor do I hold that they could not reduce their depot if the business did not require it as large as it was then. But I do hold that this land was to be occupied, at least partly, by a railroad depot, and not by an individual proprietor who intended to use it as a storage house or for some other purpose, or who intended only to use the railroad so far as it accommodated his individual ownership or rights in the property. And holding, therefore, that the kind of use for railroad purposes that the defendant was bound to observe was a public railroad, and not a private one, I hold that the defendants here, if you find that it is not a public depot, have no title, and the plaintiff is entitled to a verdict.

"Now, under the weight of the evidence, it would seem—the evidence, of course, is for the jury, except what is in writing, and they must take the construction put upon that by the court—the evidence would seem to pretty clearly establish that this depot is not used for railroad purposes any more. True, cars may be run into it, but the public have no general right to the use of that depot. They have got to ask privilege before they can get in there. They are trespassers if they go in without privilege. There is no means by which small parcels of freight can be transmitted; there are no agents to receive them; no bills of lading to be given for them; there is nobody to receipt for the freight, or to take down from whom it comes, or to whom it is to be transmitted. The only railroad use to which the land now seems to be subjected is the entry of cars at the will of the owner of the land, or to bring in cars freighted with his own merchandise. It does not seem to be used as a general railway freight or passenger station. I do not hold that it was necessary to maintain a passenger depot there. I think, under a liberal construction of this lease, the railroad company, if it continued to own the land, could have established a freight station there, and that would be within the meaning of the lease. But they certainly could not stop both, sell the land, and divest themselves of all title, and the landlord still be compelled to receive the rent, and allow them to use his land. He had the right when he leased either to sell them the land or lease it to them. For some good purpose the landlord saw proper to keep the title to his land, and he leased it. For some proper purpose the railroad company saw proper to exercise that right, and merely lease, and not buy. They could have condemned the land if they had seen proper. Perhaps they could have compelled him to let them have it for railroad purposes by paying the damages. But they got together and agreed upon the lease, and the agreement was that the lease should last so long as the depot was used for railroad purposes. If you are satisfied, therefore, under all the evidence, that it is not now used for general railroad purposes, using the words 'general railroad

Digitized by Google

purposes' as I have described, at least for the transmission of freight by the general public and not by individuals, and without asking permission, your verdict ought to be for the plaintiff.

"The defendants submit the following points: '(1) The assignment of the lease and disclaimer by the railroad company do not amount to an abandonment of the property for railroad purposes.' Answer of the court: I affirm that, that the mere assignment and disclaimer do not amount to an abandonment, but the facts of the case would seem to prove that it has been no longer used for railroad purposes such as I have described. '(2) The present user of the strip in question, under the undisputed facts of the case, is a user for railroad purposes, within the meaning of the lease, and the verdict must be for the defendants.' Answer of the court: I decline to so charge you. '(3) It being undisputed that freight is received and delivered in this depot in cars of the railroad company, and that the strip in question is embraced within the walls of the depot property, and is used in connection with the loading and unloading of this freight, there is no sufficient evidence of abandonment to justify a submission to the jury.' Answer of the court: I decline to so charge you. '(4) Unless the jury find that the property is no longer used for railroad purposes, the verdict must be for the defendants.' Answer of the court: That is affirmed. '(5) Under all the evidence, the verdict must be for the defendants.' Answer of the court: That is declined. '(6) The present use of the property, if not covered by the grant to the railroad company, having been continued, under the undisputed facts in the case, for 21 years and upwards before the impetration of the writ in this case, a grant for such use will be presumed, and no recovery can be had in this action.' Answer of the court: I decline to affirm that point, gentlemen, because it appears that the rent was regularly paid by the railroad company, and there is no sufficient evidence that the plaintiff had notice that the railroad company did intend to abandon it, and I therefore decline to affirm that point.

"If you agree with the facts as they appear to be established by the testimony, and by the papers which have been offered and construed by the court, you will say that you find for the plaintiff, and that you assess the damages for rents and profits at the sum of $26."

The assignments of error are as follows:

"(1) The learned judge erred in the answer to defendants' first point. Said point and answer are as follows: 'Point. The assignment of the lease and disclaimer by the railroad company do not amount to an abandonment of the property for railroad purposes. Answer. I affirm that, that the mere assignment and disclaimer do not amount to an abandonment, but the facts of the case would seem to prove that it has been no longer used for railroad purposes such as I have described.'

"(2) The learned judge erred in refusing to charge the jury according to the defendants' second point: 'The present user of the strip in question, under the undisputed facts of the case, is a user for railroad purposes, within the meaning of the lease, and the verdict must be for the defendants.'

"(3) The learned judge erred in refusing to charge the jury according to the defendants' third point: 'It being undisputed that freight is received and delivered in this depot in cars of the railroad company, and that the strip in question is embraced within the walls of the depot property, and is used in connection with the loading and unloading of this freight, there is no sufficient evidence of abandonment to justify a submission to the jury.'

"(4) The learned judge erred in refusing to charge the jury according to the defendants' fifth point: 'Under all the evidence, the verdict must be for the defendants.'

"(5) The learned judge erred in the answer to defendants' sixth point. Said point and answer are as follows: 'Point. The present use of the property, if not covered by the grant to the railroad company, having been continued, under the undisputed facts in the case, for twenty-one years and upwards before the impetration of the writ in this case, a grant for such use will be presumed, and no recovery can be had in this action. Answer. I decline to affirm that point, gentlemen, because it appears that the rent was regularly paid by the railroad company, and there is no sufficient evidence that the plaintiff had notice that the railroad company did intend to abandon it, and I therefore decline to affirm that point.'

"(6) The learned judge erred in that part of his charge wherein he said: 'When it [the railroad company] once did exercise that right and sell the land upon which its depot stands, without inserting in that deed any restriction, or without preserving its right to use it as a depot, the right to use that as a depot at once ceased, and ceased forever. When, therefore, that depot was no longer to be used for the accommodation of the public, for the carrying of freight, or for the transporting of passengers, the condition contained in this lease was broken.'

"(7) The learned judge erred in that part of his charge wherein he said: 'The preamble says, "for the accommodation of the public it became necessary to enlarge the depot," and the lease shows that the land was leased for the purpose of carrying out that design, and that the lease was to continue so long as the land was used for railroad purposes. Now, gentlemen, I construe that to mean, so long as the land was used for public railroad purposes.'

"(8) The learned judge erred in that part of his charge wherein he said: 'Holding, therefore, that the kind of use for railroad purposes that the defendant was bound to ob-

Digitized by Google

serve was a public railroad, and not a private one, I hold that the defendants here, if you find that it is not a public depot, have no title, and the plaintiff is entitled to a verdict.'

"(9) The learned judge erred in that part of his charge wherein he said: 'The evidence would seem to pretty clearly establish that this depot is not used for railroad purposes any more.'

"(10) The learned judge erred in that part of his charge wherein he said: 'If you are satisfied, therefore, under all the evidence, that it is not now used for general railroad purposes, using the words "general railroad purposes" as I have described, at least for the transmission of freight by the general public and not by individuals, and without asking permission, your verdict ought to be for the plaintiff.'

"(11) The learned judge erred in that part of his charge wherein he said: 'If you agree with the facts as they appear to be established by the testimony, and by the papers which have been offered and construed by the court, you will say that you find for the plaintiff.'"

William T. Barber, Gibbons Gray Cornwell, and R. T. Cornwell, for appellants. Butler & Windle, for appellee.

PER CURIAM. This case was carefully and ably tried, and little, if anything, remains to be added by us. The questions involved are so clearly and accurately presented in the charge of the learned judge who specially presided at the trial that it is unnecessary to restate them. An examination of the record, in connection with the several assignments of error, has satisfied us as to the correctness, not only of his construction of the lease of May 23, 1847, and other papers in evidence, but also of his instructions generally to the jury. In affirming defendants' fourth point, he rightly charged, in substance, that the verdict must be for the defendants, "unless the jury find that the property is no longer used for railroad purposes." The verdict for plaintiff necessarily implies a finding in her favor of the controlling fact in the case, viz.: That the property in controversy has ceased to be used "for railroad purposes," within the true intent and meaning of the lease of 1847, as construed by the court. The learned judge's answers to the remaining five points for charge submitted by defendants are also free from any substantial error. There is nothing in any of the specifications that requires further comment. None of them is sustained. Judgment affirmed.

BAUGH & SONS CO. v. MITCHELL et al.

(Supreme Court of Pennsylvania. March 11, 1895.)

WARRANTY—BREACH—PLEADING.

An affidavit of defense to a claim for price of oil which alleges that it was warranted pure and free from adulterants, by a letter from plaintiff acknowledging receipt of postal from defendant, stating that it had been referred to plaintiff's superintendent, and that he had reported that the oil "is guarantied, and all made exactly the same way, no change for years," and which further alleges that defendant sustained certain losses by reason of its impurities, is sufficient to carry the case to a jury.

Appeal from court of common pleas, Philadelphia county.

Action by the Baugh & Sons Company against Henry F. Mitchell and another, trading as Mitchell & Pierson, for price of four items of oil sold and delivered December 5 and December 20, 1893; and January 5 and February 20, 1894. Judgment for plaintiff for want of sufficient affidavit of defense. Defendants appeal. Reversed.

The affidavit of defense alleged "that plaintiff, before and at the time of the purchase of the oil as set forth in the statement of claim filed, promised and warranted defendants, in writing (a copy of which is hereto annexed), that said oil was and should be absolutely pure and free from adulterants of all and every kind, and, relying upon this promise and warranty, defendants purchased said oil."

Annexed were the following two letters from plaintiff to defendants, the first dated October 23, 1893, the second December 30, 1893:

"Gentlemen: We are in receipt of your favor of the 21st inst.; and appreciate your kindness in informing us that you can do better than the price we are charging you for our twenty-degree ice-pressed neat's-foot oil. We can also sell a strictly pure ice-pressed neat's-foot oil which will stand a cold test of thirty degrees for less money. We can furnish you with this article at 85 cts. per gallon, but we can make no abatement from the price of the oil which you have been getting, which will stand a cold test of twenty degrees. We have not been able in the past to supply the demand we have had for our twenty-degree cold test oil. Those of our customers who have tried cheaper oils, and spoiled their leather, have been only too glad to get back to our oil again. If you think the thirty-degree oil will suit your purpose, we should be pleased to supply you, but for winter work we do not recommend it."

"Gentlemen: We have referred your postal of the 29th inst. to our superintendent of the works, who makes the following report: 'The neat's-foot oil is guarantied, and all made exactly the same way; no change in the way of chilling, pressing, or bleaching for years.' You will see from the above that we have made no change in our process, and, as the material we use is precisely the same, we cannot account for this difference in the working of the last lot of oil shipped you. The trouble must have arisen from some other cause, as we have no complaints from other parties who are using the same oil."

Digitized by Google

Henry J. Scott, for appellants. Albert B. Weimer, Charles H. Bannard, and Frederick M. Leonard, for appellee.

GREEN, J. The plaintiff's claim is upon an ordinary book account for the sale of a quantity of 20-degree neat's-foot oil. The affidavit of defense alleges that the oil was warranted to be pure and free from adulterants, and then asserts that the oil sold was not free from adulterants, but, on the contrary, was impure and adulterated, and that the defendants had sustained heavy losses in consequence of the defects of the oil. The learned court below, it is alleged by the appellants, gave judgment for the plaintiff because there was no warranty disclosed by the affidavit of defense. It is true that the letter of plaintiff dated December 30, 1892, and which contains a copy of the warranty, does not describe a warranty in the same terms as the affidavit of defense alleges, but it does contain an acknowledgment of the receipt of a postal card from the defendants dated December 29th, and a reference of the postal to the plaintiff's superintendent, who reported that "the neat's-foot oil is guarantied, and all made exactly the same way; no change in the way of chilling, pressing, or bleaching for years." The defendants' postal of December 29th is not now in the case, and, without it, the full interpretation of the meaning of the plaintiff's letter is not certain. We cannot know at present what the contents of the defendants' letter were, and we think it is premature to declare judicially the meaning of the plaintiff's letter until the contents of the defendants' postal are seen, as they, doubtless, will be on the trial. We think it apparent that there, at least, might be a warranty which would sustain the defendants' contention. The plaintiff's letter of December 30th, certainly does contain an admission that there was a "guaranty" which may be a warranty, and that all the neat's-foot oil sold to the defendants was made in "exactly the same way; no change in the way of chilling, pressing, or bleaching for years." Just what this means may depend upon explanatory parol testimony as to the previous dealings of the parties. We think there is sufficient matter in the affidavit of defense to carry the case to the jury. We do not think the case of Railroad Co. v. Davenport, 154 Pa. St. 111, 25 Atl. 890, rules this case. The question raised there was in different circumstances. Judgment reversed, and procedendo awarded.

LABE et al. v. LEWIS BREMER'S SONS et al.

(Supreme Court of Pennsylvania. March 18, 1895.)

SALE—RESCISSION BY SELLER.

A seller cannot rescind the sale for fraud, in the absence of any trick, artifice, or false representations made by the purchaser to induce the sale.

Appeal from court of common pleas, Berks county; James N. Ermentrout, Judge.

Feigned issue framed under the sheriff's interpleader act, wherein Benjamin Labe and Jacob Labe, trading as Benjamin Labe & Son, are plaintiffs, and Lewis Bremer's Sons and Frederick Roland are defendants, to determine the ownership of certain tobacco levied upon by defendants as the property of Wisler & Whitman, and claimed by plaintiffs on the ground that the tobacco was purchased of them by Wisler & Whitman, and possession obtained, by fraud. From a judgment of compulsory nonsuit, plaintiffs appeal. Affirmed.

Greenwald & Mayer and Jacobs & Keiser, for appellants. Adam B. Rieser, E. H. Deysher, and Ermentrout & Ruhl, for appellees.

PER CURIAM. The defendants had caused a levy to be made upon certain Sumatra tobacco in the possession of Wisler & Whitman. The plaintiffs claimed to own it, and on their petition a feigned issue was awarded. They alleged, and to maintain the issue it was necessary for them to show, that they had been induced to sell the tobacco to Wisler & Whitman in the month of April, 1893, by fraudulent representations; and that upon the discovery of the fraud they had rescinded the contract, and reclaimed the goods. The evidence, however, failed to disclose any trick, artifice, or false representations made to induce the sale of the tobacco. The right to rescind did not exist unless the sale was brought about by fraud. Without proof of the fraud alleged, the plaintiffs had no case to submit to the jury, and the compulsory nonsuit was properly entered. The judgment is affirmed.

HARTMAN v. FICK.

(Supreme Court of Pennsylvania. March 18, 1895.)

PRIVATE WAY—OBSTRUCTION.

The owner of land, across which there is a private way for passage only, has the right to protect his fields by such a gate or other structure as will not unreasonably interfere with the use of the way.

Appeal from court of common pleas, Berks county; James N. Ermentrout, Judge.

Action of trespass by Ephraim R. Hartman against Franklin Fick to recover damages sustained by plaintiff by the removal by defendant of a gate erected by plaintiff across a way over his land. From a judgment for plaintiff, defendant appeals. Affirmed.

B. Y. Shearer and Ermentrout & Ruhl, for appellant. Rieser & Schaffer and Jefferson Snyder, for appellee.

PER CURIAM. This case was greatly simplified by what transpired in the court below at the conclusion of the trial. The plaintiff conceded the defendant's right of way over

Digitized by Google

his land, and the defendant conceded, in effect, that the gate erected by the plaintiff across the right of way for the protection of his fields was not an unreasonable obstruction to, or interference with, the right of passage. This left no question undisposed of, except that of the legal right of the owner of the land to protect his fields by such a gate or other structure as should not unreasonably interfere with the use of the way. The easement was only for passage. The land remained the property of the plaintiff, and he had a right to use it for any purpose that did not interfere with the easement. To do this, it might be necessary, under some circumstances, to enclose the way with the field over which it passes, and, if this is done with a reasonable regard for the convenience of the owner of the easement, it affords him no just ground of complaint. The tendency of our legislation is in this direction, and such is also the fair effect of Connery v. Brooke, 73 Pa. St. 80. The learned judge reached a correct conclusion, and the judgment is affirmed.

SMITH, KLINE & FRENCH CO. v. SMITH.

(Supreme Court of Pennsylvania. March 11, 1895.)

SALE — RESCISSION BY SELLER — FRAUD — WHAT CONSTITUTES — ACTION BY PURCHASER FOR BREACH OF CONTRACT — AFFIDAVIT OF DEFENSE — STATEMENT OF CLAIM — SUFFICIENCY.

1. Where a merchant is induced to sell certain goods at a certain price by the false statement of the purchaser that the former's rival in trade offers the same goods at such price, the seller may rescind.

2. In an action by the purchaser for breach of such contract, a statement in an affidavit of defense that plaintiff agreed with defendant that, if she would sell such goods at such reduced price, plaintiff would not lower the price to consumers, and would not interfere with defendant's other customers in any way, and that plaintiff, after receiving some of the goods, at once began to cut the price, and sell to other customers of defendant, thereby demoralizing the trade, and seriously injuring her business to an extent beyond plaintiff's claim, is insufficient to constitute a defense.

3. In assumpsit by a purchaser against the seller for breach of a contract of sale, a count in the common form, with exact dates, amounts, and particulars of the contract, and containing no irrelevant or impertinent matter, is not defective as setting out a cause of action more formally and elaborately than required by the act of 1875.

Appeal from court of common pleas, Philadelphia county.

Action by the Smith, Kline & French Company against Rebecca M. Smith to recover damages for breach of a contract of sale by defendant to plaintiff of a certain quantity of face powder. From a judgment for plaintiff, defendant appeals. Reversed.

The affidavit of defense is as follows: "Rebecca M. Smith, being duly sworn according to law, deposes and says: That she is a married woman, and the defendant in the above case, and that she has a full, just, and complete defense to the whole of the plaintiffs' claim of the following nature and character: That on August 31, 1892, and September 29, 1892, the time of the making of the contracts set out in plaintiffs' statement there were two persons engaged in making 'R. M. Hunter's Invisible Powder,' viz. deponent and one Charles M. Hooper, each of whom was in that business as competitors, as was well known to plaintiffs. On August 31, 1892, one L. E. Heyer, who was the purchasing agent of plaintiffs, and who was the only person with whom defendant had any dealing in relation to the subject-matter of this suit, stated to defendant that plaintiffs desired to purchase from defendant one hundred gross of boxes of said powder, but that said Charles M. Hooper had offered to sell the same to plaintiffs for $12 per gross, and that plaintiffs would give defendant the order if she would sell them at the same price as said Hooper, to wit, $12 per gross. Believing that said statement was true, and in reliance thereupon, defendant made the contract of August 31, 1892, as sued upon. In point of fact said statement was false and untrue, and was wholly a malicious lie of said Heyer, intentionally and wickedly made for the purpose of cheating and defrauding defendant into selling said powder far below its market price. On September 29, 1892, when the second of said contracts was made, the same fraud and deception were practiced upon defendant by said Heyer. Deponent cannot say that the prior allegation of an offer by said Hooper to sell said powder at the reduced price was in terms repeated by said Heyer, but all that was said and done was said and done by both parties on the basis that that malicious lie was the truth, and said Heyer knew that defendant was acting in reliance thereupon and was deceived thereby. Said Heyer also then agreed with defendant that, if she would sell said powder at said reduced price, plaintiffs would not lower the price to consumers and would not interfere with defendant's other customers in any way. Yet, after plaintiffs received the first one hundred gross thereof, they at once began to cut the prices, and to sell to other customers of defendant's, thereby demoralizing the trade, and seriously injuring her business to an extent beyond plaintiffs' claim in this case. Of the falsity of said representation, made, as aforesaid, by said Heyer, defendant had no knowledge whatever until some time after the last of said contracts was made, and after the one hundred gross were delivered, when defendant at once elected to rescind the same, and so notified plaintiffs. All of which facts deponent avers are true, and she expects to be able to prove them on the trial of the cause. And deponent further says she is advised by counsel and suggests to the court that plaintiffs' statement is insufficient in law upon which to found a judgment for want of an affidavit or a sufficient affidavit of defense, and also that plaintiffs have not in and by

Digitized by Google

said statement shown that they at any time made any endeavor to supply themselves with said powder to replace that which defendant refused to deliver, or that, if they had, it would have cost them the price alleged to be the market price in said statement, or that they have not purchased the same at a much less price or that they have suffered anything more than nominal damages."

Alex Simpson, Jr., and A. Atwood Grace, for appellant. James Collins Jones and Lewin W. Barringer, for appellee.

MITCHELL, J. It is not worth while to enter into the elaborate discussions in the cases about the right of a vendor to praise his wares, and the insufficiency of general affirmations of value and false representations, which the other party should have known better than to rely upon to justify a rescission. In Graffenstein v. Epstein, 23 Kan. 443, it was held that a false and fraudulent representation as to the market price of a commodity made by a purchaser, who knew the price, to a seller, who did not, would not avoid the contract. The opinion of Brewer, J., contains as strong a presentation of that view as we have found anywhere, but even it puts the case on the absence of any confidential relation between the parties, or peculiar means of knowledge on the part of the purchaser, as the article—wool—was one of general commerce, whose market price was matter of public knowledge, and could be ascertained by any one by reasonable effort and inquiry. We may concede all this,—though no Pennsylvania case has been cited which goes so far,—but what the defendant here sets up in her affidavit is not a mere opinion, or even a false representation, as to value, or market price, or other matter of general knowledge which the vendor was bound to know or to inquire about, but an explicit, circumstantial misstatement of a fact conducing and intended to influence the vendor's action, and whose falsehood she could not reasonably detect. A very slight knowledge of the competition of business will suffice to show that one dealer may be willing to sell under the market price to gain a new customer, and the inducement to the other to do likewise to retain a customer in danger of going over to his rival. An explicit, positive, false statement by the purchaser, of such fact, under such circumstances, is fraud which will justify a rescission of the contract.

The other matters of defense as to breaches of agreement not to cut prices, etc., are not averred explicitly enough to be available in the affidavit. Whether they were conditions or inducements of the sale or mere promises as to future action does not clearly appear.

The objections to the plaintiff's statement cannot be sustained. That it sets out the cause of action more formally and elaborately than is absolutely necessary under the act of 1887, and in so doing uses some of the language of the time-honored forms of declaration, is not a defect. The main requirement of the statement under that act is to secure to the defendant clear and exact information as to what is claimed of him. A common count in the old form, without a bill of particulars, would be demurrable for vagueness; but using the general form, with the insertion of the exact dates, amounts, and particulars of the contract sued on, but with no irrelevant or impertinent matter, could hardly be objectionable for furnishing too much information instead of too little. Judgment reversed, and procedendo awarded.

FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO. v. COMMONWEALTH TITLE INSURANCE & TRUST CO.

(Supreme Court of Pennsylvania. March 11, 1895.)

ACTION AGAINST STAKEHOLDER—PERFORMANCE OF CONDITIONS PRECEDENT.

A minor's guardian sold a lot on which an attachment against the minor's ancestor had been levied, and the purchase money was deposited with a stakeholder, under an agreement between the purchasers, the attachment plaintiff, and the guardian that the money should be paid to the guardian when the attachment was quashed, or if the attachment plaintiff, after obtaining judgment, failed to establish the liability of the land. *Held*, that the fact that the plaintiff in the attachment allowed 12 years to elapse without doing anything in the case did not entitle the guardian to sue the stakeholder for such money, the attachment suit being still pending.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by the Fidelity Insurance, Trust & Safe-Deposit Company, guardian of the estate of Dennis McCauley Pearson, a minor, against the Commonwealth Title Insurance & Trust Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

On April 4, 1884, one James Watt issued a writ of foreign attachment against Dennis McCauley, a resident of Maryland. As commanded, the sheriff attached certain real estate, consisting of vacant lots, situate in the city of Philadelphia. The Fidelity Insurance, Trust & Safe-Deposit Company, the plaintiff, held this real estate, at the time of the commencement of the present action, as the guardian of Dennis McCauley Pearson, a minor. In 1888 plaintiff sold one of these lots to James H. Stevenson and James L. Stevenson for the sum of $2,000, and conveyed it to the said purchasers. In order to remove the cloud on the title which existed by reason of the attachment, an agreement was entered into between the Fidelity Company, the purchasers, and the Pennsylvania Company for Insurance on Lives and Granting Annuities, executors under the will of James Watt, plaintiff in the attachment. Under this agreement the purchase money was deposited with the Commonwealth Title Insurance & Trust Company, the defendant. The certificate of deposit issued by defendant sets out that the money was to be held

Digitized by Google

under the provisions of such agreement. This agreement stipulated: "(1) That the lot in question, conveyed to James H. Stevenson and James L. Stevenson, should be discharged forever of and from the lien and operation of the attachment. (2) And it is also understood between the parties hereto that the Fidelity Insurance, Trust and Safe-Deposit Company, guardian and trustee as aforesaid, may apply to the court wherein said action of foreign attachment is pending to quash the aforesaid writ of foreign attachment, on the ground that the lot hereinabove described and attached in said writ was not the property of the said Dennis McCauley at the time of the issuing of the aforesaid writ, and that the said writ was unlawfully and improvidently issued. And, in case the Fidelity Insurance, Trust and Safe-Deposit Company, trustee and guardian, as aforesaid, shall succeed in quashing the aforesaid writ, or in case, after judgment obtained by the Pennsylvania Company for Insurance on Lives and Granting Annuities, executors as aforesaid, against the said Dennis McCauley, the said the Pennsylvania Company for Insurance on Lives and Granting Annuities, executors, as aforesaid, shall fail to establish that, notwithstanding the aforesaid deed from Dennis McCauley to Mary Ann Pearson, the lot or piece of ground hereinabove described is liable to be taken in execution in satisfaction of said judgment, then, and in either of said cases, the said $2,000 consideration money aforesaid, deposited with the Commonwealth Title Insurance and Trust Company, shall be paid back to the Fidelity Insurance, Trust and Safe-Deposit Company, trustee and guardian, aforesaid, freed and discharged from any liability, to be appropriated and applied in satisfaction of any such judgment, the said writ of foreign attachment notwithstanding."

R. N. Simpers and Charles Hart, for appellant. James Wilson Bayard and John G. Johnson, for appellee.

MITCHELL, J. This suit was prematurely brought. The defendant is a stakeholder, and only liable to plaintiff on certain conditions, which have not been performed. These conditions, so far as they authorise payment of the stake to the plaintiff, are that plaintiff shall succeed in getting the court wherein the attachment by the Pennsylvania Company for Insurance on Lives, etc., against the land is pending to quash the attachment, or that, after judgment obtained by the Pennsylvania Company, it shall fail to establish the liability of the land to be attached or taken in execution thereon. Neither of these conditions has been fulfilled. It is argued by appellant that the Pennsylvania Company, having allowed 13 years to elapse without doing anything, must be deemed to have failed to establish the liability of the land to the attachment. But this argument overlooks the right of the Pennsylvania Company to a hearing. The attachment suit is still pending, and may yet result in favor of the Pennsylvania Company; and, notwithstanding the lapse of so long a time, the latter cannot be adjudged to have failed until that suit has been heard and determined. The appellant, however, is substantially correct in its interpretation of the agreement on which the rights of the parties rest. As a stranger to the attachment suit, the plaintiff had no standing to intermeddle with it, or to require the Pennsylvania Company to do anything with regard to it. But by the agreement of December, 1888, the Pennsylvania Company recognized plaintiff's interest in the land and in the litigation, and, having agreed to the substitution of the plaintiff's money for the land, has subjected itself to certain duties to the plaintiff; one of which is to go on, and bring the attachment to an end. It was not in the contemplation of the parties that the Pennsylvania Company should do nothing, and simply keep the plaintiff's money tied up in the deposit, with no benefit to either. The agreement authorizes the plaintiff to intervene in the attachment, and move for its dissolution; and, on the other hand, puts on the Pennsylvania Company the duty of prosecuting its attachment to a successful termination by the establishment of the liability of the land. Appellant's only mistake was in proceeding in the first instance against the stakeholder, and not against the Pennsylvania Company under the agreement. This it might do by bill in equity, or by a rule in the attachment suit to intervene and compel the plaintiff therein to go on or be nonsuited. So far as the case now appears, the equity powers of the court in which the attachment is pending are sufficient to afford relief, and the plaintiff has standing to invoke them by virtue of its rights under the agreement. After that suit is determined in its favor, and the conditions of the agreement thereby fulfilled, the plaintiff will be in position to demand the surrender of the fund by the present defendant. Judgment affirmed.

COMMONWEALTH ex rel. WHITMAN et al. v. RAMSAY.

(Supreme Court of Pennsylvania. March 11, 1895.)

ELECTION CONTEST—TRIAL—FAILURE TO DISPOSE OF PETITIONS AND MOTIONS—CERTIORARI—REVIEW.

1. In an election contest, the failure of the trial court to dispose of the petition of signers of the original petition for leave to withdraw from the latter, of a motion to strike off all the names of persons alleged not to be electors of the proper ward, and of a motion to quash, before proceeding to the final hearing, is not a fatal irregularity, where their disposition is not pressed.

2. On certiorari to review proceedings in an election contest, the supreme court can only see that the successive steps taken in the trial were in accordance with the statute, and cannot review the conclusions on the merits.

Digitized by Google

Appeal from court of quarter sessions, Berks county.

Action by the commonwealth of Pennsylvania, on the relation of William A. Whitman and others, against Charles H. Ramsay, to contest the election of defendant to the office of select council of the Thirteenth ward of the city of Reading, Pa. There was a judgment for relators, and defendant brings certiorari. Affirmed.

Stevens & Stevens and George S. Graham, for appellant. Henry D. Green and Herbert R. Green, for appellee.

WILLIAMS, J. This is a certiorari, and it brings up for review nothing but the record. The evidence heard, and the opinion rendered, by the court below it is well settled form no part of the record, and are not before us, although they are printed in the appellant's paper book, and have aided us materially in understanding the position of the case. The record begins with the petition and the order of the court for notice to the respondent, and it shows the procedure in the case down to the final decree. The petition of five of the persons who signed the original petition for leave to withdraw therefrom, the motion to strike off the names of two persons alleged not to be electors of the proper ward, and the motion to quash, appear on the record, and are undisposed of, except as the final decree may be said to involve their denial. The reasons why they were not disposed of do not appear on the record, nor are they made to appear by any evidence of a refusal by the learned judge to hear them. Their disposition may not have been pressed, so far as we can know from what is before us, and the mere failure to make a disposition of them before proceeding to final hearing is not, under such circumstances, a fatal irregularity. Our attention was drawn upon the argument to the disposition alleged to have been made by the learned judge of the votes of several persons who voted on opposite sides, and whose qualifications as found by him are printed in parallel columns. We might be unable to see in some of these cases why, upon the facts, he has stated one vote was held to be legal and another to be illegal, if an appeal had been given in this class of cases, and we were required to review them on their merits. But an appeal is not given. The merits are not before us. Upon this writ it is our duty to see that the successive steps taken in the investigation are in accordance with the statute that has prescribed them, but with the conclusions of the court below or its reasons for adopting them we have no concern. In common-law actions the evidence is no part of the record. If reduced to writing, and placed on the files, it does not thereby become a part of the record. France v. Ruddiman, 126 Pa. St. 257, 17 Atl. 611; Poor District of Warsaw Tp. v. Poor District of Knox Tp., 107 Pa. St. 301. In such actions facts may be put upon the record by the parties, in a case stated, by the court by allowing a bill of exceptions, and by the jury by means of a special verdict (Bank v. Earley, 113 Pa. St. 477, 6 Atl. 236); but, unless brought on the record in one of these ways, they form no part of it. But in proceedings like that before us, that are creatures of a statute and are provided for a specific purpose, we must look to the statute for the extent to which the judgment is reviewable. In this case no form of review is provided. Our supervisory control is that only which may be exercised on certiorari, and that does not extend to a review of the questions decided. For this reason we must overrule the assignments of error. We affirm the judgment, because upon the record before us we have no power of review.

EVANS v. SMITH et al.

(Supreme Court of Pennsylvania. March 11, 1895.)

WILLS—CONSTRUCTION—ESTATE DEVISED.

A devise to testator's wife of "all my estate * * * in fee simple, to own, use, enjoy, and dispose of * * * as she may deem proper and right, the same as I might or could do if living," is not limited or restrained, so as to reduce it below a fee simple, by the provision ordering and directing that whatever real estate might not be sold or disposed of by his wife in her lifetime should be sold and converted into money as soon as convenient after her death; or by the provision giving to his grandson $500 "out of any moneys belonging to my estate after the death of my wife"; or by the provision giving to his children "the residue of my said estate after the death of my said wife," and after the bequest to the grandson.

Appeal from court of common pleas, Schuylkill county.

Ejectment by Henry Evans against William E. Smith and others for an undivided one-fourth of certain land. Judgment for plaintiff. Defendants appeal. Affirmed.

Plaintiff and defendants both claim the land under the will of William Evans, plaintiff, claiming that the will gave the property in fee to testator's wife, and that plaintiff, as one of her four heirs, took it under the intestate laws, she having died without a will. Defendants contend that testator gave his wife only a life estate, with remainder to his children, Rachel, Margaret, and David, through whom defendants claim.

The will provided: "(1) I do direct that my body be decently interred, and that my funeral be conducted in a manner corresponding with my estate and situation in life, and that after my burial my hereinafter named executors shall erect around my grave, as soon as can conveniently be done, a suitable inclosure, large enough in which my beloved wife can after her death also be interred alongside of myself. Said inclosure shall be constructed as follows, to wit: Four suitable cut-stone posts to be sunk deep enough into the ground to make a substantial fence around said inclosure, the railing to be made

Digitized by Google

of wrought-iron pipe, and to be fastened from post to post, painted and put up and made in a workmanlike manner, and that a suitable head and foot stone shall be erected to my grave; this to be done and performed by my hereinafter named executrix as to my interment, and as to the interment of my said wife the same shall be done by my children, or the survivor or survivors of them, or such administrator de bonis non cum testamento annexo of this my last will and testament out of any estate which may be left after the death of my beloved wife. Item. I give and bequeath unto my said beloved wife all my estate, both personal, real, and mixed, in fee simple, to own, use, enjoy, and dispose of the same as she may deem proper and right, the same as I might or could do if living. Margaret shall have the household furniture. Item. I further hereby order and direct that whatever real estate that may not be sold or disposed of by my said wife in her lifetime, that the same shall, as soon as can conveniently be done after her death, sold and converted into money by such administrators as is hereinbefore named. Item. I give and bequeath to my grandson Henry Evans, son of George Evans, deceased, the sum of five hundred dollars out of any moneys belonging to my estate after the death of my said wife, to be put on interest until he is twenty-one. Item. I give and bequeath to my three children, Rachel, Margaret, and David, the residue of my said estate, after the death of my said wife, and after the bequest to my said grandson, Henry Evans, to be divided into three shares. My two daughters shall share and share alike, but my said son, David, shall have one hundred dollars more for his share than either of my two daughters; and in case of death of either of my said three children, Rachel, Margaret, and David, in default of heirs, then such share or shares shall go to the survivor or survivors of them, share and share alike; and, in case either of my said three children shall die leaving lawful issue, then the share of such deceased child shall go to such issue. Item. I do further order and direct that should my said grandson, Henry Evans, die without lawful issue, his said share shall go to my said three children, or the survivor or survivors of them, or their issue, share and share alike. And, lastly, I do hereby constitute and appoint my beloved wife, Elizabeth Evans, sole executrix of this, my last will and testament."

J. W. Ryon, for appellants. J. W. Moyer and James Ryon, for appellee.

GREEN, J. We think it quite clear that every clause of this will which is supposed to limit or restrain the effect of the devise in fee simple to the wife of the testator has been considered and adjudged in the numerous decisions we have heretofore made. In Jauretche v. Proctor, 48 Pa. St. 466, which is the leading case, the words of the third and fourth articles of the will were much more restrictive than any of the words in the will we are considering. The words of the third article in that case were an absolute prohibition against any disposition of the estate by the devisee during her life. We held that it was only a restraint upon the power of alienation, which was void as against the fee. The fourth article of that will was almost precisely the same as the residuary item in this. We held it to be a gift, not of the residue of the testator's estate, but of the estate of the devisee unconsumed by her,—and hence it could not be considered as being intended to reduce her fee-simple estate in the whole. The same is true of the third item of the present will. It is merely a direction to sell whatever of the estate she may not have sold or disposed of during her life. It is a recognition of her right to sell and dispose of the whole estate, and not a restraint upon her estate under the will. These are all the points of contest in this case, but these and a number of others, which have no existence here, have all been adjudged in favor of the estate of the devisee in the cases which have followed Jauretche v. Proctor. It will only be necessary to indicate some of them by reference, to wit: Presbyterian Church v. Disbrow, 52 Pa. St. 219; Bowlby v. Thunder, 105 Pa. St. 173; Hopkins v. Glunt, 111 Pa. St. 287, 2 Atl. 183; McIntyre v. McIntyre, 123 Pa. St. 329, 16 Atl. 783; Good v. Fichthorn, 144 Pa. St. 287, 22 Atl. 1032; Boyle v. Boyle, 152 Pa. St. 110, 25 Atl. 494; and Levy's Estate, 153 Pa. St. 174, 25 Atl. 1068, 1070. Judgment affirmed.

RINER v. RINER.

(Supreme Court of Pennsylvania. March 11, 1895.)

LIMITATION OF ACTIONS—ACTION BY ADMINISTRATOR—WAGERING LIFE INSURANCE POLICY—COLLECTION BY BENEFICIARY — LIABILITY TO ASSURED'S ESTATE.

1. Where a beneficiary of a wagering life insurance policy collects the money due on the policy, limitations do not begin to run against the right of the legal representative of the assured to sue for the money until administration is granted.

2. Gross laches in taking out letters of administration will not affect the running of the statute.

3. Where the beneficiary of a life insurance policy, who has no insurable interest in the assured, collects the money due on the policy, he is liable to the legal representative of the assured therefor.

Appeal from court of common pleas, Schuylkill county.

Action by Beneville Riner, administrator of the estate of Rebecca Riner, deceased, against John Riner, administrator of the estate of George Riner, deceased, to recover money collected by defendant's intestate of the Prudential Mutual Aid Society of America, of Harrisburg, Pa., on a life insurance policy, of which George Riner was the

Digitized by Google

beneficiary, issued by such society on the life of Rebecca Riner. From a judgment for plaintiff, defendant appeals. Affirmed.

Rebecca Riner procured a policy on her life, in the Prudential Mutual Aid Society of America, for $3,000, in favor of George Riner, her nephew. George Riner paid all the fees and charges therefor, and subsequent assessments. Afterwards, on November 6, 1880, Rebecca Riner died, and on March 23, 1881, George Riner, the beneficiary, received $2,171.12 from the insurance company in full payment of the policy, and surrendered it to the company. George Riner died December 20, 1886, and on August 15, 1887, plaintiff was appointed administrator of the estate of Rebecca Riner. August 22, 1889, plaintiff brought this action to recover the money collected by George Riner on the policy, and interest.

J. W. Moyer and J. W. Ryon, for appellant. Nicholas Heblich and A. W. Schalck, for appellee.

GREEN, J. After a most attentive study of the very able argument of the learned counsel for the appellant, we feel obliged to say that we regard both the questions discussed on this appeal as settled and controlled by our previous decision. Marsteller v. Marsteller, 93 Pa. St. 350, decided that, if no cause of action accrued prior to the death of the party entitled, the statute of limitations did not commence to run until administration was granted. In the opinion Mr. Justice Trunkey said: "A cause of action does not exist unless there be a person in existence capable of suing or of being sued. When one receives money belonging to the estate of an intestate, after his death, and before administration granted, the statute runs, not from the date of the receipt, but from the grant of administration." The decision was put upon this broad ground, and not upon the special facts of that case. In Amole's Adm'r's Appeal, 115 Pa. St. 356, 8 Atl. 614, we again affirmed this doctrine, and in other cases before and since. And the same rule is held by the English courts. Murray v. East India Co., 5 Barn. & Ald. 204. In this case it was not possible that any right of action could have accrued during the life of Rebecca Riner, nor, indeed, until after the money was received by George Riner. Hence, when the cause of action did accrue, it could only be to her administrator. It must be conceded that there was gross laches in taking out administration, but that circumstance does not seem sufficient, under the authorities, to defeat the right of action. We make this decision with the greatest reluctance, and only by the sheer force of our prior rulings. But it is intolerable that there shall be a right of action continuing for an indefinite time simply because those who are entitled to take out administration neglect or refuse to do so; and it is to be hoped that the legislature will grant relief by extending the statute of limitations to such cases, and providing that it shall commence to run from the death of the decedent. This will give six years in which to take out letters before the claim will be barred, and that length of time is surely enough. On the subject of the illegality of the contract, our decisions in numerous cases, beginning with Gilbert v. Moose, 104 Pa. St. 74, and followed by Downey v. Hoffer, 110 Pa. St. 109, 20 Atl. 655, Ruth v. Katterman, 112 Pa. St. 251, 3 Atl. 833, and many other cases, leave us no alternative but the affirmation of the judgment of the court below, except the reversal of all of them. This we are unwilling to do. Judgment affirmed.

J. G. BRILL CO. v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. March 18, 1895.)

MUNICIPAL CORPORATIONS — STREET GRADING — DAMAGES TO ABUTTING LANDOWNER.

In an action by an owner of suburban lands against a city for damages caused by a depression made in a street on which the land abuts, where it appeared that no streets had been opened through the land and the surface had not been graded, it was error to admit evidence that the value of the tract had been reduced a certain amount more because of the uncertainty as to what the city might do afterwards in regard to opening streets through it, and charge that, if the uncertainty of the city's action in connection with the opening of future streets affects the value of property, then the jury can find that the property is worth less because the city has not defined its future policy in regard to the grade of such streets, and to refuse to charge that any damage to be occasioned by the opening of streets in the future could not be now considered, but could be recovered when such streets were actually opened.

Appeal from court of common pleas, Philadelphia county.

Action by the J. G. Brill Company against the city of Philadelphia to recover damages to plaintiff's lands caused by depressions made by the grading of the street on which the land abuts. From a judgment for plaintiff, defendant appeals. Reversed.

E. Spencer Miller, Asst. City Sol., and Charles F. Warwick, City Sol., for appellant. Francis Rawle and George S. Graham, for appellee.

WILLIAMS, J. The plaintiff is the owner of a tract of land lying in the outskirts of the city of Philadelphia containing 36 acres. It is irregular in shape. Its surface has not been graded. No streets have been opened through it by the city or the owner. At one of its angles it has a front of 400 feet on Bridge street. This street has been depressed by the action of the city, in order to avoid a grade crossing of the Philadelphia & Trenton Railroad, whose tracks adjoin the plaintiff's land. This was a proceeding to determine the damages suffered by the plain-

Digitized by Google

tiff in consequence of the depression of Bridge street so as to secure an undergrade crossing at this point. The plaintiff gave evidence to show the effect of the depression upon the value of his Bridge street front; and then proceeded to show by real-estate dealers that the value of his tract, not fronting on this street, had been reduced at least $10,000 more because of the uncertainty as to what the city might do hereafter in regard to opening streets through it. The learned judge was asked by a written point to withdraw this evidence from the jury, and instruct them that "any damage to be occasioned by the opening of streets in the future could not be considered now, but could be recovered when such streets were actually opened." This instruction was refused, and the evidence submitted to a jury as proper to be taken into consideration. He said: "But if the uncertainty of the city's action in connection with the opening of future streets affects the value of property, as Mr. Ritchie thinks it does, then you can find that the property is worth less because the city has not defined its future policy in regard to the grade of these streets." This instruction is assigned for error. It assumes that the city is under a duty to the landowners to "define its future policy" in regard to the opening of streets over their suburban lands, and to indicate with certainty the grades on which each one will be opened when the time for opening it arrives. If no such duty exists, then the failure of the city to furnish the information required will afford no cause of complaint, and will justify no assessment of damages against it. No statute or rule of public policy has been brought to our attention that binds such a duty upon the city. We are aware of none. If for any purpose the city should undertake to render such a service to real-estate owners it would not be bound to continue it, nor would it be bound by its own action in that regard. Councils cannot bind their successors, nor can they bind themselves by a declaration of "future policy." Such a pronunciamento is not within the powers or duties of a municipal government, and it would confer no rights and impose no obligations. Resolutions and ordinances directing the opening and grading of streets, no matter how clearly or strongly they show the purpose of the city at the date of their passage, may be modified or repealed to-morrow, and property owners affected thereby may be greatly disappointed, and the value of their property affected, but such loss of a prospective gain is not a cause of action. It is damnum absque injuria. But if the ordinance remains unrepealed, and is at the proper time carried into execution by the actual opening and grading of the street, the injured landowner has then a cause of action for the actual injury sustained. The city must pay for the land it takes, and the injury it does, 'n the opening of streets. It is not liable for what it intends or threatens to do; much less for what a landowner may conjecture the consequences of possible action in the future. Some people speak of having suffered great losses, when they really mean that they have missed an opportunity to make great gains. If they had known what was to happen, or if they could have foreseen the "future policy" of some person, corporation, or government, on whose action the value of some commodity was to depend, they could have made the proper purchase or sale at the proper time to have realized a substantial advance. That is really the complaint of the plaintiff. He does not quite know when or how the city will open streets across his land. If he did, he would know better how to deal with the property. But, because "of the uncertainty of the action" of the city, he cannot deal with it to the same advantage as he could do if the "future policy" of the street department, so far as it affects his land, was known to him now. The city cannot foresee the course of future developments any better than the plaintiff. It is her duty to open streets when they are needed to accommodate the public, and not till then. She must fix the grade when the time comes to open the streets, and she will then be liable for the injury actually sustained by the landowner. For the purpose of determining the amount of this injury, each street stands by itself, and must be separately considered. If the city at some future time shall open streets over the plaintiff's lands, and the grade adopted for one or more of them shall affect the plaintiff injuriously, he will then be entitled to recover the damages he may suffer by reason of the opening or grading of each. But until then, non constat that any street will be opened or any injury be done. The first and third assignments of error are sustained. The second is not sufficiently definite or intelligible to enable us to understand its purpose. The judgment is reversed, and venire facias de novo awarded.

STACKHOUSE v. VENDIG et al.

(Supreme Court of Pennsylvania. March 11, 1895.)

DANGEROUS PREMISES—CELLAR DOOR IN SIDEWALK—NEGLIGENCE.

1. In an action for injuries sustained by plaintiff in falling over a partly open cellar door in the pavement in front of defendants' hotel, in the daytime, it appeared that the city ordinances permitted areas, cellar doors, doorsteps, and porches in the sidewalk, provided they did not project more than 4½ feet from the house line; that the cellar door was properly constructed, was within the prescribed limits and, when the accident occurred, was only slightly open, and did not project as high above the sidewalk as an ordinary door step or porch. *Held*, that defendants were not negligent.

2. One who, in the daytime, stumbles over a partly open cellar door in the sidewalk, which he fails to see from want of attention, is negligent.

Digitized by Google

Appeal from court of common pleas, Philadelphia county.

Action by S. Townsend Stackhouse against Charles H. Vendig and Moses Lichten, trading as Charles H. Vendig & Co., for personal injuries sustained by plaintiff by stumbling and falling over a cellar door in the pavement or sidewalk in front of defendants' hotel. From a judgment for plaintiff, defendants appeal. Reversed.

George P. Rich, for appellants. Edmund Randall and H. Gilbert Cassidy, for appellee.

GREEN, J. The plaintiff received his injury by stumbling over an iron door which was set in the pavement close to the building line of the defendants' house. The accident occurred about noon of a day in the month of June. It was therefore in broad daylight, when there was no difficulty in seeing the door if any attention was given by the plaintiff to his steps. He had to step down from a stone doorsill 2½ inches high above the pavement in moving away from the building. The cellar doors were 2 feet 9 inches square, and each door was 16½ inches in width. The distance of the doors from the house line is 3 or 4 inches. The doors were made of iron, in the usual manner, were properly set in the pavement, and were in every respect strong and safe for the purpose for which they were intended. There was a coal hole out near the curb, through which coal was introduced. The architect who was employed to erect the building testified without any contradiction that these doors were not coal chutes, but cellar doors, "and constructed in the very best possible manner." Also that they "were constructed for the purpose of taking in and out materials to and from the cellar, and for light and ventilation of the cellar," and that it is usual in Philadelphia to have such openings for lighting and ventilating cellars, and that these openings were reasonably necessary for these purposes. He also said that "in Philadelphia it is usual and customary to find areaways and cellar doors next to the house line, and close to entrances." He said further that "to be of service as ventilators, they must be kept open." Upon these subjects there was no dispute in the testimony. It was not found by the referee that there was any negligence in having or maintaining such a structure, or that there was any defect in the structure or position of these doors. The city ordinances of Philadelphia permit areas, cellar doors, doorsteps, porches, and similar obstructions in the sidewalk, provided they do not project more than 4 feet 6 inches from the house line. Ordinances Sept. 23, 1864, § 11; April 5, 1866, § 1 (Brightly's City Digest). The extreme projection of these doors from the house line was just about 3 feet, which was 18 inches within the line. So far, then, as to the doors themselves, their position and their structure, there is not a scrap of testimony in the case, and there is no finding of the referee, that there was the least degree of negligence on the part of the defendants. Had the plaintiff, therefore, stumbled over them when they were shut, of course he would have no cause of action. The only finding of negligence of the defendants which the learned referee makes is in the following words: "That it was negligent in the defendants to keep them open at an elevation not sufficiently high to attract the attention of the eye, and yet so high that a foot passenger who should step upon them would most likely be tripped; and this is particularly so in view of their location, partly in front of a door to a largely frequented hotel." This, of course, is a finding of negligence by way of inference. The referee thought it was negligence to keep the door raised, for a reason which he states. So far as the facts are concerned, there is no dispute. The question to be considered is whether the inference of negligence made by the referee is correct. That depends upon several considerations. If such doors were kept raised in the middle of the footwalk, they would constitute an obstruction to the travel, and their maintenance in such a place and such a position would certainly constitute negligence. But if a doorstep were projected into the middle of the footwalk, that also would be negligence, whereas it would not be negligence to maintain such a step within a reasonable distance of the house line. The city ordinances may well be considered as furnishing the criterion of distance from the house line within which it would not be negligence and without which it would be negligence to maintain a doorstep or other lawful structure appurtenant to a house in the city. There is quite a number of such structures or appliances, all of which are essential to the comfortable occupancy of the dwelling houses and the business places of the city. As described in the city ordinances they are areas, cellar ways, cellar doors, doorsteps, porches, and area fences and railings. They will be found designated in several city ordinances appearing in Brightly's City Digest, at pages 808, 809. These ordinances prescribe that the structures in question shall be deemed nuisances if they project more than 4 feet 6 inches into the footway of streets of certain widths, or if they reduce the width of the footway to be less than a certain number of feet in streets of different widths. These structures, therefore, which comply with the requirements of the ordinances, are by necessary implication lawful, and it is not negligence to maintain them. Hence, if a person passing on the footwalk stumbles over any of them that are within the prescribed distance from the house line, he cannot hold the owner guilty of negligence for maintaining them. Thus there are innumerable doorsills or sin

Digitized by Google

gle steps all over the city which project into the footway from the level of the door different distances, less or equal to the authorized distance of 4 feet 6 inches. There are in the city vast numbers of such instances, also short flights of doorsteps extending similarly into the footway, so numerous that they cannot be computed. Now, it is perfectly obvious that if a pedestrian stumbles over one of these sills, or the bottom step of a flight, he has no cause of action. Yet in the present case there is but one ground upon which a recovery can be based, and that is that the plaintiff stumbled over these cellar doors. They were raised no higher than many of the doorsills referred to, and not so high as the vast majority of the bottom doorsteps, and yet it is claimed, and found by the referee, that it is negligence to maintain a pair of cellar doors 8 inches above the level, when he could not possibly find that such an elevation of a door sill or step would be negligence. It would not be negligence to maintain the cellar doors at their own level; it would not be negligence to maintain a door sill or step at the same level; but it is negligence to maintain the cellar doors at the same or a less level than the steps. Why? The only reason given by the learned referee is that the pedestrian might not see them. But the same reason precisely would apply to the case of a door sill or step. The omission to see the obstruction, whatever it is, will not only be no proof of negligence on the part of the owner, but it is positive proof of actual negligence on the part of the pedestrian, and this is well established by the authorities, as we shall presently see. In this particular case there was a reason for the slight elevation of the cellar doors. The referee found that they were kept in this position "for the purpose of lighting and ventilating the cellar." As that is a perfectly legitimate use of them, and was one of the reasons why they were built, it must be conceded that, in itself, it constitutes no ground for a charge of negligence. Another reason why such a use of them is no proof of negligence is that the doors were so close to the building line, and so far out of the way of the travel on the sidewalk, that the owner is not bound to take precautions against foot traveling at such a place; and this also has been decided by this court. Still another reason is that the owner has a right to presume that every traveler in the streets and on the sidewalks of a city will use his eyes sufficiently to protect himself from colliding with obstructions, and this also we have decided. In this case it is obvious that, in order to make out negligence in the owner, negligence in the foot passenger must either be overlooked or disregarded.

We will now examine the authorities applicable to the facts of the case. In the case of King v. Thompson, 87 Pa. St. 365, the plaintiff sustained injuries by falling into an opening in the sidewalk, at a cellar window of a building of the defendant, on Liberty street, in the city of Allegheny. The opening was for the purpose of light and ventilation, and was also used for taking in coal. It was about 15 inches in width, 3 feet in length, and projected from the wall of the house about 16 inches. It was several feet deep, and had no cover or guard. The accident occurred at night. The street lamps were burning, and there was a light in the window just above the hole. The plaintiff stepped into the hole, and was severely injured. A verdict and judgment were recovered in the court below, which we reversed. Mr. Justice Paxson said: "If the opening was merely the usual and customary opening of cellar windows in Allegheny, and was reasonably necessary for the purposes of light and ventilation, it certainly could not be held to be a nuisance; nor could it fairly be said that the owner was guilty of negligence in maintaining it. * * * It must be borne in mind that the opening came out only about sixteen inches from the cellar wall. In order to fall in, the plaintiff must have walked so close to the window as to touch it with her dress. She was also within the line of the doorsteps, which usually project twice the distance into the sidewalk that the opening did. No prudent person walks within sixteen inches of the house when passing over the sidewalks of a city. It cannot be done without peril. It is proper enough to hold owners of property to a reasonable care over it, yet at the same time persons using public streets ought also to exercise some little caution. Without it, there is hardly a street in Allegheny or Pittsburgh where, by reason of some slight inequality in the pavement, a trifling hole, or a loose stone, the passer-by may not fall and sustain injury." The decision goes further than is necessary for the present case. The cause of the injury there was an open and unguarded hole in the sidewalk, several feet deep, and it was night when the accident occurred. Yet we held that the proof of these facts did not make out negligence on the part of the owner, and did furnish proof of negligence on the part of the plaintiff; whereas, in this case, there was no hole in the pavement, there was a perfectly visible obstruction, consisting of a lawful structure in use for a lawful purpose, and the accident occurred in broad daylight. The plaintiff admitted on cross-examination that when he came out of the door he turned "sharp around," and went close to the wall, and stumbled over the doors, which he says he could have seen if he had looked towards them. A disinterested witness, who saw him when he stumbled, and was within a few feet of him, said that when he came out and stumbled over the door he was looking at the Terminal Building on the opposite side of the street, "with his eyes looking up." As a matter of course, he could have seen the

Digitized by Google

doors if he had looked at all where he was going, and for not doing so he was clearly guilty of contributory negligence. On that subject the case of Robb v. Connelsville Borough, 137 Pa. St. 42, 20 Atl. 564, is directly in point. There a woman, in the early evening, was walking along the street, and came to a cross street, where the plank walk had been raised a few inches above the level of the street on which she was walking. She did not look for any obstruction, and admitted she could have seen it if she had looked. She stumbled at the point where the walk was raised, and fell, receiving injury. She sued the borough for damages for her fall, but the court below thought she was guilty of contributory negligence in not looking where she was going, and nonsuited her, and we sustained the nonsuit. Our Brother Mitchell, delivering the opinion, said: "That the reasonable care which the law exacts of all persons in whatever they do involving risk of injury, requires travelers, even on the footways of public streets, to look where they are going, is a proposition so plain that it has not often called for adjudication. But it has been expressed, or manifestly implied, in enough of our own cases to constitute authority for those who need it. Thus in Barnes v. Sowden, 119 Pa. St. 53, 12 Atl. 804, the court below instructed the jury that 'persons who walk along the footways or cross the streets of our city are bound to use their own faculties. * * * The plaintiff was bound to use her eyes. Not that she was to keep her eyes constantly and at every moment upon the pavement, but she was bound to do what people walking along the streets ought to do as they walk the streets, in order to use them safely.' It was held that even this instruction was, under the evidence, too favorable for the plaintiff; that the obstruction was such as she was bound to see, and that her negligence was too clear to be left to the jury." In Buzby v. Traction Co., 126 Pa. St. 559, 17 Atl. 805, Mr. Justice Mitchell said, delivering the opinion: "Even on the sidewalk, specially devoted to the use of foot passengers, a man is bound to look where he is going, and this duty is still more imperative when he is about to cross the middle of the street, where horses, wagons, and cars have equal rights with himself, and where each is bound to take notice of such other rights, and to use his own with due regard thereto." In the case of Seddon v. Bickley, 153 Pa. St. 271, 25 Atl. 1104, we held that the presence of a gang plank of a steamboat, lying flat upon its surface in the usual place on the deck of the vessel, across the path to a staircase leading from the lower to the upper deck, is not a fact sufficient in itself to entitle a passenger who has stumbled over the plank to recover damages from the owner of the steamboat for the injury sustained. In Farley v. Traction Co., 132 Pa. St. 58, 18 Atl. 1090, we held that a passenger on a street-railway car, who stumbled over the sheathing of a wheel, which projected above the floor, but was plainly visible, had no right of action, and could not recover, both because there was no proof of negligence on the part of the defendant and there was affirmative proof of contributory negligence on the part of the plaintiff. The court below, in granting a compulsory nonsuit, which we affirmed, said: "There was nothing hidden from his view which contributed to his fall. He fell simply because he took no care as to his movements, and hence stumbled over a conspicuous part of the car. The same carelessness would cause a passenger to stumble over many other parts,—over the steps by which he entered, over the sill of the door, or, indeed, any part of the car over which it is possible for a heedless person to stumble." And so here the plaintiff stumbled because he took no heed of his movements. Had he been looking where he was going, he would necessarily have seen the cellar doors, and avoided them. His accident was his own fault. He stumbled over a lawful structure, in a lawful place, which was being used for a lawful purpose, and in such circumstances he can recover nothing from the defendants. On the trial it was proved without contradiction that from 400 to 500 persons passed through this same entrance every day, making a total of about 150,000 persons in a year, and in all that time there had been no other accident but this. It is impossible to understand how any reasonable inference of negligence of the defendants can be drawn in such a state of the testimony, or how any other inference than of contributory negligence of the plaintiff can satisfy the undisputed facts of the case. Judgment reversed.

HART v. HART.

(Supreme Court of Pennsylvania. March 18, 1895.)

EXECUTION—CLAIM FOR EXEMPTION—HOW MADE—TIME OF MAKING.

1. A claim for the benefit of the exemption law need not be in writing.

2. A claim for exemption may be made within a reasonable time after defendant has notice of the writ of venditioni exponas, provided it does not delay the sale of the goods or the land levied on.

Appeal from court of common pleas, Berks county; James N. Ermantrout, Judge.

Action by William Hart against Eli Hart, in which there was a judgment for plaintiff, on which writs of venditioni exponas were issued for the sale of defendant's real estate. Defendant claimed the benefit of the exemption law, and obtained a rule requiring plaintiff to show cause why the sum of $300 should not be decreed to him out of the proceeds of the sale. From a judgment making the rule to show cause absolute, Alice Hart, a lien holder, appeals. Affirmed.

Digitized by Google

J. H. Jacobs and H. P. Keiser, for appellant. Ermentrout & Ruhl, for appellee.

PER CURIAM. This case was rightly decided in the court below. A claim for the benefit of the exemption law need not be in writing. Keller v. Bricker, 64 Pa. St. 379. It may be made within a reasonable time after the defendant has notice of the writ, provided it does not delay the sale of the goods or the land levied on. The judgment is affirmed.

In re SUNDAY'S ESTATE.

Appeal of KOLLER et al.

(Supreme Court of Pennsylvania. March 18, 1895.)

WILLS—TESTAMENTARY INTENT—EVIDENCE.

Instruments in the form of judgment notes, payable one day after date, drawn in favor of the maker's children, and executed while a will of his, giving part of his personal property to his wife, was in existence, will not be held to have been executed with testamentary intent, on the testimony of H., who wrote and witnessed them, that the maker asked him to keep them till he called for them, and, if he did not call for them, to deliver them to the parties in whose favor they were executed after his death, and that they were not called for; and on the testimony of one of the maker's daughters that, about a year after the date thereof, he told her "he had made out papers so that it would cover all his personal property after his death to go to his children," and that he said H. had done all his writing for several years, though he did not say who wrote these papers or who kept them, but simply that they would get them after his death.

Appeal from orphans' court, Berks county.

In the matter of the estate of George Sunday, deceased. Christiana Koller and others propounded several instruments for probate as codicils to the will of deceased. Probate thereof was refused by the register of wills, and from a judgment sustaining such decision they appeal. Affirmed.

The opinion of the court below was as follows:

"On the 20th day of August, 1894, the appellants propounded to the register of wills, for probate, as a codicil or as codicils to the will of the said George Sunday, seven paper writings, signed and sealed by the said George Sunday, of which the following are copies:

A.

"'$2,000. Hamburg, Pa., July 22, 1891. One day after date, I promise to pay to Christiana Koller (wife of Jas. A. Koller), or order, two thousand dollars, without defalcation, for value received. And, further, I do hereby authorize any attorney of any court of record in Pennsylvania, or elsewhere, to confess judgment therefor and release errors; and I hereby also waive all stay of execution from and after maturity of the above note. Witness my hand and seal, the day and year above written. [Signed] Georg Sunday. [L. S.] Witness present: Sol. K. Hoffman.'

B.

"'$2,000. Hamburg, Pa., July 22, 1891. One day after date, I promise to pay to John S. Sunday, or order, two thousand dollars, without defalcation, for value received. And, further, I do hereby authorize any attorney of any court of record in Pennsylvania, or elsewhere, to confess judgment therefor and release errors; and I hereby also waive all stay of execution from and after maturity of the above note. Witness my hand and seal, the day and year above written. [Signed] Georg Sunday. [L. S.] Witness present: Sol. K. Hoffman.'

C.

"'$2,000. Hamburg, Pa., July 22, 1891. One day after date, I promise to pay to Louisa Merkel (wife of Thos. D. Merkel), or order, two thousand dollars, without defalcation, for value received. And, further, I do hereby authorize any attorney of any court of record in Pennsylvania, or elsewhere, to confess judgment therefor and release errors; and I hereby also waive all stay of execution from and after maturity of above note. Witness my hand and seal, the day and year above written. [Signed] Georg Sunday. [L. S.] Witness present: Sol. K. Hoffman.'

D.

"'$500. Hamburg, Pa., July 22, 1891. One day after date, I promise to pay to Annie Jacoby (wife of Frank G. Jacoby), or order, five hundred dollars, without defalcation, for value received. And, further, I do hereby authorize any attorney of any court of record in Pennsylvania, or elsewhere, to confess judgment therefor and release errors; and I hereby also waive all stay of execution from and after maturity of the above note. Witness my hand and seal, the day and year above written. [Signed] Georg Sunday. [L. S.] Witness present: Sol. K. Hoffman.'

E.

"'$500. Hamburg, Pa., July 22, 1891. One day after date I promise to pay to Charles L. Hoffman, or order, five hundred dollars, without defalcation, for value received. And, further, I do hereby authorize any attorney of any court of record in Pennsylvania, or elsewhere, to confess judgment therefor and release errors; and I hereby also waive all stay of execution from and after maturity of the above note. Witness my hand and seal, the day and year above written. [Signed] Georg Sunday. [L. S.] Witness present: Sol. K. Hoffman.'

F.

"'$500. Hamburg, Pa., July 22, 1891. One day after date, I promise to pay to Catharine Hoffman, or order, five hundred dollars, without defalcation, for value received. And, further, I do hereby authorize any attorney of any court of record in Pennsylvania, or elsewhere, to confess judgment therefor and

Digitized by Google

release errors; and I hereby also waive all stay of execution from and after maturity of the above note. Witness my hand and seal, the day and year above written. [Signed] Georg Sunday. [L. S.] Witness present: Sol. K. Hoffman.'

G.

"'$500. Hamburg, Pa., July 22, 1891. One day after date, I promise to pay to George R. Hoffman, or order, five hundred dollars, without defalcation, for value received. And, further, I do hereby authorize any attorney of any court of record in Pennsylvania, or elsewhere, to confess judgment therefor and release errors; and I hereby also waive all stay of execution from and after maturity of the above note. Witness my hand and seal, the day and year above written. [Signed] Georg Sunday. [L. S.] Witness present: Sol. K. Hoffman.'

"The register of wills having declined to admit the said writings to probate, as a codicil or as codicils to the will of George Sunday, on the ground that they were not of testamentary character, the proponents of the writings, the payees therein named, took this appeal.

"George Sunday, the decedent, died on the 27th day of March, 1893, leaving, to survive him, a widow, Catharine Sunday, and the following issue, viz.: (1) John S. Sunday, a son; (2) Christiana Koller, a daughter; (3) Louisa Merkel, a daughter; (4) the children of Mary Hoffman, a deceased daughter, viz. Charles L. Hoffman, George R. Hoffman, Annie Jacoby, and Catharine Burkhart; and (5) the child of George Sunday, a deceased son, viz. Minnie Christiana Sunday. He had been twice married, and all of the above-named issue are descendants by his first wife, who died in the year 1866. About 1868 he married his second wife, Catharine, who survived as his widow, and who died on the 3d day of June, 1893, and whose personal representative is Joel M. Hoch, the appellee. George Sunday had no issue by Catharine, his second wife. He was seised and possessed of real and personal property. On the 20th day of September, 1878, he executed a will, to which appellants allege said writings are codicils, which was admitted to probate on the 7th day of April, 1893, by which he disposed of his estate, as follows: 'Item. I give and bequeath to Minnie Christiana Sunday, a minor child of my son George W. Sunday, deceased, the sum of one dollar. Item. I give and bequeath to my wife, Catharine, the one-third of my personal estate absolutely, and the interest of the one-third of the real estate during her natural life. Item. All the rest, residue, and remainder of my estate, real and personal, of whatsoever kind or nature the same may be (and the one-third of my real estate after the decease of my wife), I give and devise the same unto my four children, to wit, John Sunday, Christiana, the wife of James A. Koller, Mary, the wife of Jacob A. Hoffman, and Annie Louisa, the wife of Thomas D. Merkel, share and share alike, and to their heirs and assigns, forever.' The said will having named no executor, administration c. t. a. was granted to John S. Sunday, one of the above-named children, who, on the 18th day of April, 1894, filed his account upon the personal estate of the decedent, showing a personal estate for distribution of $4,814.91. The account was called for audit June 4, 1894, and an adjudication thereof filed August 8, 1894. The writings now propounded as codicils to the said will of the decedent were presented at the said audit of the account of the administrator c. t. a. as obligations of the decedent, and payment thereof demanded; but it appearing that the notes were without consideration, and that they had not been delivered by the decedent, the claims made upon them were disallowed. They were then presented to the register of wills for probate as codicils to the said will of the decedent, and were refused probate by him, as stated above, on the ground that they were not shown to be of testamentary character.

"Have they been proven to be testamentary? The writings themselves containing none of the features of a testamentary act, extrinsic evidence has been resorted to by the proponents to show that, while not in form testamentary, they were executed by the decedent with the intention that they should operate only after his decease, and as codicils to his will. The evidence adduced to prove them testamentary is as follows: Solomon K. Hoffman testified that he is a justice of the peace at Hamburg, this county, and that he wrote and witnessed the said writings for the decedent, and that they were written by him and executed by the decedent on the day they bear date, i. e. July 22, 1891; that the payees named in the notes are children and grandchildren of the decedent; that, on the date of the notes, the decedent came to his office, and asked him to write such notes, and that, when he had written them, decedent signed them, and that he (the witness) signed as witness to their execution; that, after they had been signed by the decedent and witnessed by the witness, the decedent requested him to 'keep the notes until he [the decedent] called for them, and, if he [the decedent] did not call for them,' that then he (the witness) 'should deliver them to the parties to whom they were given, after his [decedent's] death'; that that was all that was said, and that decedent never called for the notes, and never gave him (the witness) any other instructions in regard to them; that about one month after decedent's death, he (the witness) delivered the notes 'to the parties to whom they were made,' as decedent had instructed him; that the decedent told him 'to draw judgment notes'; that decedent fixed the amount and 'time of payment,' as they appear in the notes; that the de-

Digitized by Google

cedent did not tell the witness why he gave the notes; that he could not say that Catharine Sunday, widow of the decedent, knew of the notes, and that she did not elect to take under the intestate laws; that he never wrote any other papers for the decedent in which the children were interested. Christiana Koller testified: That she was the daughter of the decedent, and lives in Chester county. That she knows her father's handwriting, and that the notes are signed by him. That in the month of June, 1892, she visited her father, at his home in Windsor township; and that on the 17th or 18th of that month she returned to her home, in Chester county. That her father drove her from his home to the railroad station at Hamburg; and that, on the way to the station, he, in the course of conversation, told her that 'he had made out papers so that it would cover all his personal property after his death to go to his children.' That he said 'he thought that the widow had plenty to live on from the income of the farm, the real estate, and, if she did not, we should see that she would have plenty to live on.' That 'he said we should divide the money equally among the children, whatever the amount would come to, if it did not reach the personal property; we should divide the money equally among us. He said he did not mean to take any money of the real estate. He said he wanted the real estate for her to live on; she could comfortably live on that.' That he said Squire Hoffman had done all his writing for several years; that he wrote all his papers, but did not say that he had written these papers, and did not say who kept them. That he said they would get the papers 'after his death.' That he did not say what kind of papers he had made, but said, 'I have made papers.' That he did not say that the widow was not to have any of the personal property, but did say that the papers 'would cover the personal property,' and that she had plenty of income off the rest. That he said 'what was left of the personal property we were to divide among ourselves, and see that the widow had plenty to live on.' And that he did not say that the widow was not to have any of the personal property. The foregoing is all the testimony submitted upon the question of testamentary intent. A number of witnesses testified that the signatures to the notes were in the handwriting of George Sunday, the decedent; and the payees named in the notes testified that their respective notes were delivered to them after the decedent's death.

"In 1878, thirteen years before the seven notes were executed by the decedent, he made and duly executed a will in the usual form. By it he gave his wife, Catharine, precisely what she would have received under the intestate law. When he went to Solomon K. Hoffman, on July 22, 1891, to have the papers written, he told him 'to draw judgment notes' payable one day after date, and to 'keep the notes until he called for them, and, if he did not call for them,' he 'should deliver them to the parties to whom they were given, after his death.' It is manifest from his conduct that the decedent knew what he was doing on the 20th of September, 1878, when he made his formally executed will, and on the 22d of July, 1891, when he directed the drawing of, and duly executed, the seven judgment notes. There is no ambiguity or uncertainty in either act, but, on the contrary, each is intelligently done with its appropriate legal formality. There is not a particle of evidence in the case to show that the decedent intended the notes to be other than what they purport to be,—obligations or evidences of indebtedness; and that they were accepted by the payees from Mr. Hoffman as of that character is shown by the fact that they presented them for payment at the distribution of the personal estate of the decedent. It is quite probable that the decedent thought it was immaterial to the validity of the notes as obligations whether they were delivered in his lifetime or after his decease; and there is nothing in his conduct which shows that he intended them to operate in any other way than as judgment notes. While it is undoubtedly true that no particular form is necessary to a testamentary act, yet it is also true that all acts are not testamentary, and that where a decedent has done two acts, one of which is distinctively testamentary in form, and the other and later act is as distinctively nontestamentary in form, and is couched, with strict technical propriety, in the apt language of contract, there is no reason for holding the latter testamentary, without clear proof of fraud, accident, or mistake. In speaking of the cases where writings not in form testamentary have been allowed to have that effect, it is said in 1 Williams, Ex'rs (Ed. 1877) 141, that 'no case has gone the length of deciding that, because an instrument cannot operate in the form given it, it must operate as a will. The true principle to be deduced from the authorities appears to be that if there is proof, either in the paper itself or from clear evidence dehors—First, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it, if considered as a will; secondly, that death was the event that was to give effect to it,—then, whatever may be the form, it may be admitted to probate as testamentary. And there seems to be this distinction in the consideration of papers which are in their terms dispositive and those which are of an equivocal character: That the first will be entitled to probate, unless they are proved not to have been written animo testanti; whilst in the latter [where the writing is equivocal] the animus must be proved by the party claiming under them.' And, at page 142, the author says: 'But it is essentially requisite that the instrument should

Digitized by Google

be made to depend upon the event of death, as necessary to consummate it; for where the paper directs a benefit to be conferred inter vivos, without reference, expressly or impliedly, to the death of the party conferring it, it cannot be established as testamentary.'

"The papers in question here are perfectly clear, intelligible, and unambiguous in their meaning, and the conduct and declarations of the decedent are not inconsistent with them. They are judgment notes which would have become effectual if delivered in his lifetime, and nothing which he said or did at their execution denoted or implied that he did not intend to deliver them in his lifetime, or that their operation was to depend upon, and to be postponed to, the event of his death.

"The cases which have been chiefly relied upon by the appellants as illustrating the supposed testamentary character of the notes are Wareham v. Sellers, 9 Gill & J. 98, and Carey v. Dennis, 13 Md. 1. In Wareham v. Sellers the writing offered for probate was as follows: 'August the 12th, 1836. This will sertify that I do assighn, and gave all my personal property unto George Wareham—that is to say, one silver wach, one chest, one beaurough, and sum carpenters' tools, besides two notes of hand, one two hundred dollars, and one of eighty-nine dollars, and eighteen dollars book account. Signed by me, in the presence of Thomas Sa-his ter. Philip X Sellers.' The proponent was mark there allowed to prove declarations of the decedent made at the time of executing the paper, and also the circumstances under which it was executed, in order to show its testamentary character. The court gave no reason for the ruling, but the reason probably was the rather equivocal character of the writing. The case does not show that the paper was ever established as a will. In Carey v. Dennis a father executed two bonds in favor of his sons, and delivered them to a third party, with directions 'to take care of them, and deliver them to the sons in case he died without a will.' Suit having been brought upon the bonds against the administrator, to enforce payment of them as obligations of the decedent, it was held that, not having been delivered to the sons by the decedent in his lifetime, they were not valid obligations. The court expressed the dictum that they were testamentary, because they were to operate only in case the father 'died without a will.' Admitting, for the purpose of this case, that the bonds in Carey v. Dennis would, if the question had been before the court, have been held to be testamentary, the difference between the fact there and here is palpable. In that case the proof was 'clear' that the bonds were to operate only in case of the father's death without a will,—in other words, as and in lieu of a will; whereas here there is no proof that the notes were to be in any way dependent for their efficacy upon the death of the maker either with or without a will. I do not think that the decedent intended the notes here to be a part of his will, but, if he did have any such intent, it has not been proved, as the statute requires, by two witnesses. Testamentary intent is the very breath of life of a will, and, of course, must be established by two witnesses. In Hock v. Hock, 6 Serg. & R. 47, Gibson, J., said: 'Proof of execution must be made by two witnesses, each of whom must separately depose to all facts necessary to complete the chain of evidence, so that no link in it may depend on the credibility of but one. Where the evidence is positive, there can be no difficulty, for the witnesses then attest the simple fact of execution itself; but, where the evidence of one or both is circumstantial, each must make proof complete in itself; so that, if the act of assembly were out of the question, the case would be well made out by the evidence of either. Circumstantial proof cannot therefore be made by two or more witnesses alternating with each other, as to the different parts of the aggregate of circumstances which are to make up the necessary sum of proof; the evidence of each not going to the whole.' In Combs' Appeal, 105 Pa. St. 155, Mr. Justice Trunkey said: 'Wills differ from other instruments, in that two witnesses are required to authenticate them.'

"As the notes contain no evidence of an intention of the decedent that their operation should be dependent upon the event of his death, such testamentary intention must be proved aliunde, by the testimony of two witnesses. There is but one witness, Solomon K. Hoffman, who testifies to any declarations of the decedent which certainly relate to the notes; the testimony of Mrs. Koller being so general as not necessarily to apply to them. She testifies that her father did not say that Hoffman had written the papers of which he spoke to her, and did not say Hoffman had them; that her father did not say what kind of papers Hoffman had made, but said, 'I have made papers'; that he did not say that the widow was not to have any of the personal property, but did say that the papers 'would cover the personal property,' and that the widow had plenty of income off the rest; and that he said that what was left of the personal property the children were to divide among themselves, and to see that the widow had plenty to live on. I do not see in the testimony of Solomon K. Hoffman any satisfactory evidence that the decedent intended that the operation of the notes should depend upon the fact of his death; and in this respect Mrs. Koller's testimony is equally deficient. Besides, the declarations of the decedent to Mrs. Koller were so general that they neither identified nor sufficiently described the papers to which he referred; and there is nothing in his declarations to her not consistent with the writings themselves, regarded mere-

Digitized by Google

ly as judgment notes. Catharine Sunday, the widow, had lived with her husband, the decedent, for 25 years. His will, which was proved before her death, gave her precisely what she would have received if he had died intestate. She seems to have known nothing of these notes when she died, and appears to have had no motive to refuse to take under the will, and to elect to take under the intestate law. If these notes are established as codicils to the will of the decedent, her interest in the personal estate will be most materially affected. With such a result flowing from a decision admitting the notes to probate as testamentary, the evidence of their testamentary character should be clear.

"I do not think that the evidence submitted to prove the notes testamentary is sufficient for the purpose, and the decision of the register of wills refusing to admit them to probate as codicils to the will of George Sunday is therefore affirmed; and the appeal of the proponents is dismissed; the appellants to pay the costs."

D. Nicholas Schaeffer and Cyrus G. Derr, for appellants. James H. Marx, for appellee.

PER CURIAM. The questions on which this case depends have been treated by the learned judge of the court below with so much thoroughness and clearness that we affirm the judgment on his opinion. We concur fully in his conclusions, and in the process of reasoning by which he has reached them.

CITY OF READING v. REINER.

(Supreme Court of Pennsylvania. March 18, 1895.)

DEFECTIVE SIDEWALK — JUDGMENT AGAINST CITY —LIABILITY OF ABUTTING PROPERTY OWNER.

A lot owner is liable to a city for the amount of a judgment paid by it and obtained by a person who fell into an unguarded area in the sidewalk in front of such lot, while it was in possession of a tenant, though such tenant is also liable where the area was in the same condition at the time of the injury as at the time the tenant took possession.

Appeal from court of common pleas, Berks county; James N. Ermentrout, Judge.

Action by the city of Reading against Catharine Reiner to recover the amount of a judgment paid by plaintiff, obtained against it by Henry F. McNerney in an action for injuries caused by falling into an unguarded area in the sidewalk in front of defendant's premises. From a judgment for plaintiff, defendant appeals. Affirmed.

The opinion of the trial court is as follows (Ermentrout, P. J.):

"At the trial the defendant presented, inter alia, two points, which were reserved. They are as follows: (1) That under the evidence of the plaintiff the verdict must be for the defendant; (2) that under all the evidence in the case the verdict must be for the defendant. From April 1, 1890, to April 1, 1892, the property known as 'Harugari Hall,' No. 48 South Sixth street, Reading, was leased to one Thomas Tracey, who carried on the saloon business there. On the night of September 19, 1890, McNerney, coming out of the saloon, fell into an areaway extending into the sidewalk belonging to the property, was injured, brought suit against the city, and recovered damages. The proceedings in this court, upon appeal to the supreme court, were affirmed. See case of McNerney v. City of Reading, 150 Pa. St. 611, 25 Atl. 57. The city, in the present action, in reimbursement, seeks to recover from the defendant the amount which the city was compelled to pay.

"It is contended there can be no recovery, because of the lease to Thomas Tracey, and his possession thereunder; that it was his duty, and not that of Catharine Reiner, to have closed the areaway, and kept it closed when not in use; that it was reasonable and practicable for Tracey to have temporarily, during his tenancy, covered and guarded the areaway by means of a loose slat door, hurdle, or other device; that by the exercise of ordinary caution on his part it could have been kept closed when not in use; that it was his duty to do so; and that the owner of the property, having so leased to Tracey, cannot be held responsible. It is clearly shown and admitted that Catharine Reiner had notice of the pendency of the action against the municipality, and could have defended it. Therefore, in accordance with the doctrine of Brookville Borough v. Arthurs, 130 Pa. St. 501, 18 Atl. 1076, she is held to be concluded as to the existence of the defect or nuisance, as to the liability of the corporation to the plaintiff in consequence thereof, and as to the amount of damages the injury had occasioned. But she is not estopped from showing that she was not under obligation to keep the street in safe condition, and that it was not through her fault that the accident happened. Was she, then, under the admitted facts of this case, legally liable to keep the areaway in safe condition? By the will of John B. Reiner the property was devised to her absolutely. Being thus absolute owner, she leased to Tracey, and the relation of herself to Thomas Tracey was that of landlord and tenant. For years previous to the creation of this tenancy, and at the time of its creation, when Tracey was placed in possession, and up to the time of the accident complained of, the areaway was in precisely the same condition. In other words, it is not a question of repair, but it is a question of original construction, and the original construction being permitted to continue. The erection or maintenance of a guard rail, loose slat door, hurdle, or other device, is not a matter of repair falling upon the tenant in the absence of an agreement to the contrary. 'Repair' means to restore to sound and good condition after injury or partial destruction. Pittsburg & B. P. R. Co. v. City of Pittsburg, 80 Pa. St. 72. To repair a

Digitized by Google

building is to replace it as it was, or to restore after injury or dilapidation. Douglass v. Com., 2 Rawle, 264. In Bears v. Ambler, 9 Pa. St. 193, the tenant in possession was held liable for an injury resulting from the grate over a vault under the highway in front of his premises being out of repair, the law of the case being thus stated by Justice Rogers: 'A tenant or occupier is always liable for an injury caused by his neglect, irrespective of any contract between him and the landlord or owner of the property. So far as the public is concerned, it is nothing to them who may be ultimately liable for repairs. It is the duty of the tenant or occupier, in the first instance, to keep the ways in such order as not to endanger others, whatever may be his agreement with the landlord or owner of the premises. In the absence of any contract to the contrary, the tenant is bound to keep the premises in repair. The tenant always is—the landlord may, under peculiar circumstances, be—liable for an injury sustained by a third person, arising from negligence. It may be remarked that when the landlord leased the premises the grate was in good repair. See remarks of trial judge.' In the case of Payne v. Rogers, 2 H. Bl. 349, cited by the supreme court in support of their ruling, there was a verdict for plaintiff against the defendant as the owner of a house in the occupancy of one Platt, his tenant, for an injury sustained by the plaintiff by his leg slipping through a hole in the foot pavement into a vault or cellar, owing to some plates or bars which went under the pavement being out of repair. It was urged the action ought to have been brought against the actual occupier of the house. It appeared, however, that there was evidence given of repair actually done by the landlord, and it was held that where it is shown it was the landlord's duty, under an agreement, to repair, there the landlord was liable as well as the tenant. The case of Coupland v. Hardingham, 3 Camp. 398, cited by counsel for the defendant, is also referred to, wherein it was held that it is universally the duty of the occupier of a house having an area fronting a public street so to fence it as to make it safe to passengers, and, although the premises had been exactly in the same situation as far back as could be remembered,—many years before the tenant was in possession,—it was held that, however long the premises might have been in this situation, as soon as the tenant took possession of them he was bound to guard against the danger to which the public had been before exposed, and that he was liable for the consequences of having neglected to do so in the same manner as if he himself had originated the nuisance. But the case nowhere exempts the landlord from liability, and therefore it is in strict accord with Bears v. Ambler, supra, and the general current of authorities, that, so far as the public is concerned, it is nothing to them who may be ultimately liable for repairs; that, in a case of the present character, the tenant occupier as well as the city are equally liable to be proceeded against, just as the citizen injured may prefer.

"The unguarded areaway nuisance having existed at the time of the lease, the landlord cannot get rid of her liability. We have an illustration of this principle of law in Knauss v. Brua, 107 Pa. St. 85; Fow v. Roberts, 108 Pa. St. 489; Wunder v. McLean, 134 Pa. St. 334, 19 Atl. 749,—wherein it was held that: 'An owner of property cannot escape liability for an existing nuisance thereon by demising it to a tenant, and putting him in possession. Such liability will not take the place of, nor in any manner affect, that of the landlord. For a nuisance to a dwelling on adjoining property, arising in consequence of leakage from a cesspool on demised premises, the landlord will be responsible in damages, when the leakage was caused by its improper construction, or by a defective condition, through lack of repairs, in existence at the time the tenant took possession.' In Fow v. Roberts, 108 Pa. St. 491, it was said: 'We do not doubt but that, in the absence of an agreement to repair, the landlord is not liable to a third party for a nuisance resulting from dilapidation in the leasehold premises whilst in the possession of a tenant. To make the lessor so liable, the effect must be one that arises necessarily from a continuance of a use of the property as it was when the tenant took possession of it. But the converse of this proposition is also true. If the premises are so constructed, or in such a condition, that the continuation of their use by the tenant must result in a nuisance to a third person, and a nuisance does so result, the landlord is liable.' If we understand the case of Brookville Borough v. Arthurs, 152 Pa. St. 334, 25 Atl. 551, rightly, the question sought to be raised by the defendant is expressly ruled against her. The report of the case shows (page 335, 152 Pa. St., and page 551, 25 Atl.) the court below refused to admit evidence that the defendant (the owner) was not in possession of the property, but that it was leased to another, and that the sidewalk was in good condition at date of lease. The action of the court being assigned for error, the supreme court said: 'We are not prepared to say there is any error in either of them. There appears to be no error in the record that requires a reversal of the judgment;' and the verdict below against the property owner was affirmed. Defendant refers to the case of Schott v. Harvey, 105 Pa. St. 222. We do not see how this applies to the case under discussion. It involved the interpretation of the act of June 11, 1879, making it the duty of owners or managers of manufactories or the owners or landlords of tenement houses to provide permanent fire-escapes, etc., and imposing a penalty of $300 for failure to comply with the provisions of the act. The actual owner in

Digitized by Google

fee had leased the factory to a tenant. The supreme court held that by the word 'owner' they intended such an owner as is in the possession and occupancy of the premises, who has the immediate dominion and control over it, and the manner of whose use of it makes a fire-escape necessary; that the act was in the disjunctive, the duty being imposed upon the owner or landlord; that a reasonable construction would seem to be that it was intended to reach the person in possession with a power of control; that a factory is something more than a building; and that the duty attached clearly to the occupant in possession, who places the operatives in a position of danger, and enjoys the benefit of their services. We therefore have come to the conclusion that, inasmuch as the defective areaway was in existence at and before the time when the landlord, defendant, made her lease to Tracey, continuing unchanged to the time of the accident, the landlord cannot escape her obligation and liability in the case. Rule for new trial is discharged. Rule for judgment non obstante veredicto in behalf of the defendant is discharged, and judgment is directed to be entered in favor of the plaintiff upon the verdict."

Baer & Snyder and Cyrus G. Derr, for appellant. William J. Rourke, City Sol., for appellee.

PER CURIAM. The dangerous character of the areaway extending into the sidewalk in front of the defendant's premises was settled in McNerney v. City of Reading, 150 Pa. St. 611, 25 Atl. 57. McNerney, who was injured by falling into the areaway, recovered damages for his injury from the city in that case. The city now seeks reimbursement from the owner of the property. The building with the unguarded opening in the sidewalk was built by her predecessor in title, and was in the actual possession of a tenant at the time the injury happened. It is probable the city could have recovered from the tenant in possession, but the owner is also liable, as is well shown by the learned judge of the court below; and we affirm this judgment upon his opinion given upon the disposition of the motion for judgment non obstante on the points reserved.

CITY OF READING v. BITTING.

(Supreme Court of Pennsylvania. March 18, 1895.)

MUNICIPAL CORPORATIONS—LICENSE OF MILK WAGONS.

Act May 23, 1889, art. 5, § 3, which confers on cities of the third class power to collect a license tax, inter alia, on drays, hacks, carriages, and other vehicles used in the city for hire, does not empower a city of such class to charge a license on milk wagons, under an ordinance which does not profess to be an exercise of the police power of the state for the regulation of trade in milk.

Appeal from court of common pleas, Berks county.

Action by the city of Reading against John H. Bitting to recover a license on defendant's milk wagon. From a judgment for defendant, plaintiff appeals. Affirmed.

William J. Rourke, City Sol., for appellant. Henry C. G. Reber, for appellee.

PER CURIAM. The ordinance under which the city seeks to collect a license for the defendant's milk wagon does not profess to be an exercise of the police power for the regulation of the trade in milk. Its title is "An ordinance authorizing and providing for the levy and collection of license taxes within the city of Reading." The authority is claimed under the act of May 23, 1889, which, in article 5, § 3, confers on cities of the third class the power to collect a license tax, inter alia, on drays, hacks, carriages, omnibuses, carts, wagons, street-railway cars, and other vehicles used in the city for hire or pay. We do not think the delivery wagon of the baker, the butcher, the dry-goods dealer, or the milkman is within the purview of this statute. The court below was right, therefore, in holding that the defendant was not liable for the license imposed by the city upon the wagon he used in delivering milk to his customers; and the judgment is now affirmed.

In re BOYER'S ESTATE.

(Supreme Court of Pennsylvania. March 11, 1895.)

WILL CONTEST—MENTAL INCAPACITY—DENIAL OF ISSUE—WHEN PROPER.

In a will contest based on mental incapacity, it appeared that the will was made 2½ years before testator died, when he was 86 years old; that for several years he was afflicted with rheumatism, and for six years before he died, by reason of a fall, which contestants claimed was caused by paralysis, he was confined to his bed; and that his legs were contorted, and his hands almost useless. The evidence for contestants was to the effect that after the fall he was subject to "flightiness," delusions, or temporary "mental aberration," occurring during the first two years as often as once a week, and lasting, in the longest instance, 18 hours, but was indefinite as to the frequency of the occurrence of such condition after that time; and all the persons who testified to such facts, during the same period made with him contracts, settlements of long business transactions, of services under him, and of the purchase of property, for which they received their pay directly from him. A physician, who never saw him, testified that such bodily suffering as testator endured would weaken his mental powers; that his hallucinations evidenced mental aberration; and that a continuity of them would render him unfit to do business or make a will. It did not appear that the will was unjust. *Held*, that an issue was properly denied.

Appeal from orphans' court, Schuylkill county.

Petition by Jacob Boyer and Stephen Grenslinger for an order requiring executors of the estate of Benjamin Boyer, deceased, and

Digitized by Google

his heirs and devisees, to show cause why the will of the decedent should not be set aside. From a judgment refusing an issue, Jacob Boyer appeals. Affirmed.

The opinion of the trial court was as follows (Weidman, J.):

"This is an appeal from the register's decision, refusing to certify an issue to determine the testamentary capacity of the testator. The petition was filed by the testator's son, Jacob Boyer, and his son-in-law, Stephen Grenslinger, averring undue influence and a want of testamentary capacity. Voluminous testimony was heard by the register, and the petition refused. The will is dated July 9, 1890. Testator died at the age of 88, on January 14, 1893. The will was admitted to probate on January 20, 1893. The testimony shows that for many years prior to his death the testator had suffered to such an extent from rheumatism that he was obliged to use two canes to support himself in walking, and that for six years prior to his death, by reason of a fall, he was confined to his bed, requiring the constant attendance of a nurse. His lower limbs were contorted, and his hands were almost useless.

"Stephen Grenslinger, his son-in-law, testifies that he knew testator about 33 years, and that about 6 years before his death he was stricken with paralysis, and that after that 'his thoughts were not any more as they had been before.' He says that he attended him at that time with Jacob Boyer and Edward Alspach, and was there frequently afterwards. That one time he said, 'Kill me; I will give you the value of all I have.' 'Often he said, "They are here on the fields; they throw the rails around for me."' That Alspach (a legatee) told him in 1890, at Orwigsburg, before the will was made, 'If the old man will make his will as I want it, I will do everything for nothing.' The talk about throwing the rails around 'was in 1888 or 1889 to 1890.' 'He said, "The Gypsies are here; they are throwing my rails away, and are digging up my land, and I notified them often, but they will not stop."' Was there in 1889 and 1890. 'You could talk a few words with him that were correct, and the rest of the time you could not.' Was there again in 1892. 'Then you could talk one sensible word with him, and then the rest was all about digging up the land and building a town there.' After he was sick he never talked about what land he had; but he sold Jacob Boyer two fields before this will was made, and Jake paid him for it, and had the deed, and yet he gave it away again in his will. He made a will 15 or 18 years ago, while the old lady was still living; made six wills altogether. It is witness' opinion that for six years testator was not fit to make a will. Witness admits that testator paid him $850. On cross-examination he admits that he was only once or twice at testator's house within six years, though living within 2½ miles. One of these occasions was in the fall of 1892. At first he said that the old man sent for him, and afterwards admits that he does not know whether the old man sent for him or not. He also admits that in the 24 or 25 years that his wife had the $850 no interest was paid. He further admits that he also had borrowed $500 at another time, and claims to have paid that off in a settlement. He states that this settlement was made by 'Squire Boyer, who is dead, in the presence of Jacob Boyer, Charles Arnold, and the old man; that Boyer did all the reckoning and counted the money on the foot of the bed, in the presence of the old man; that this settlement was made by a small payment in cash, and allowing him credit for services rendered to the old man during 30 years or more. He states that he during the old man's lifetime consulted counsel about having some one appointed to take care of his business. Never said he was crazy. At another time, in February, 1891, he started a suit for this purpose. He states that Jacob Boyer bought two pieces of land from the old man. For the first he agreed to pay $1,500 in 15 years; for the second (15 acres), $450. He objected to the price of $22, and finally he (witness) told Boyer he would be satisfied with $30 if the other heirs were. Boyer was to keep the deed until the land was paid for.

"William L. Strouse worked for the old man a great deal from 1885 to 1891. The first nurse that they had was Bill Heiser, for two years; then Charlie Arnold. Witness plowed for him. One day the old man looked out of the window, when Heiser and the witness were sitting there, and said: 'Up there they are throwing down the fence for me. If I could holler, I would holler to them.' Then Bill Heiser said, 'The fence maker is here; he will make the fence again.' A few days afterwards I was there again, and he said, 'Up there they are with two teams in my field, and are hauling corn fodder out of it.' Then Heiser said, 'Just let them haul.' 'This is only a short time he would talk that way, and then he would talk right again.' 'Q. Was this often that he talked this way? A. It was not just so very often that he talked that way to me, but it was afterwards when I was there again. Q. What then? A. That he said I should go out to the barn and nail fast the boards at the gable end, that the cows were going in. Then he looked out of the window, and I went back, and walked behind the barn, and stood there a little while, and come back again. There were none loose. And then he said, "Well, have you got them fast?"; and I said, "No, there were none loose"; and he looked out again, and said, "Yes, they were"; and he got cross at me, and I said, "Well, they were not loose"; and he said, "Yes, they are loose." Then I did not say anything more, and he talked rational again. It was his

Digitized by Google

idea that the cows would tumble into the barn. This was in 1889. In 1890 he related to witness conversation that he had had. Then I told him, "Father, I was along; I heard this"; and then he said, "Oh, well, I am so short in my memory." Q. How did he relate it? Did he relate it right or wrong,—the conversation? A. He related it pretty nearly as the conversation had taken place, only that he did not remember any more that I had been along.' He was asked whether, in his opinion, the old man was fit to make a will. His answer was: 'That is pretty hard to say, but if I should give a judgment I would have to say that he was too short in his memory. He could not put his things together. He talked so short that he could not put them together.' On his cross-examination this witness admits that the old man employed him, and made his own bargain, and that he was sound enough until 1889. He did not remember seeing Grenslinger there in 1889 or 1890. The old man himself paid him his wages, and in 1888 or 1889 sold witness a wagon and some trees,—the last may have been in 1890. 'Q. He would not have me understand and swear here that he was making a bargain with an insane man or a lunatic? A. I would not swear he did not have his senses; his senses were good enough to talk with him about this wood. Q. When you say that you judged that he was not fit to make a will because he talked about the fence being torn down and about people plowing his land, you mean that at the time when he was flighty,—at such time he, of course, was not competent to make a will or transact any business,—do you not? A. No; I do not call him fit at such times. Q. That is, during the times that he was flighty? A. I cannot say that he was just out of his head, but he was too short in his recollection, and could not put those things together. Q. At other times, when he was well and talked rational, then he was just as fit to make a will as you or anybody else? A. No; I will not say that; he was too short in his memory. Q. Then your only reason for giving this answer is because he was short in his memeory, as you say? A. Yes; that is what I mean. I could not see that he could do it.'

"James Fritz worked for the old man a few years back. In 1890 or 1891 he swore that the old man was short in his memory, and not fit to attend to business. 'Q. How did it come that you swore that the old man was not fit to do his business? Tell us that. A. Because he could not help himself; we had to lift him around. Q. You swore that he was short in his memory? A. Yes. Q. How did you come to make that out,—you and Sol. Boyer? A. We made it out so; the older he was getting, the shorter he was getting in his memory. Q. Did you hear him say anything about fence or anything of that kind? A. No. Q. What did you hear him say? A. All that I know is, I was boarding at Strouses',—that is last winter a year,—and then I came there, and went in, and he said: "Did you see they are building a wall up above there, and nobody will stop them; and they should not laugh over this, but I had to tell the wife; and after they were down they were saucy yet, and stood on the top of the wall and danced." That was last winter a year, but I could not say in what year or the date. That is all I can do for you.' On cross-examination he said that at this time the old man took several newspapers, read them regularly, and talked over what he read; that when this affidavit was made, in 1891, 'this intention was not to make the man out a lunatic, but simply to have somebody appointed to take care of his money.' Grenslinger said that there ought to be a man appointed over him; that money was coming in; that this would be taken care of; but not to make him out insane; "and any man," he says, "that says that he is insane, tells an untruth"; for fear some one would steal the money, there being strange men in the house. 'The old man had read in the paper that we had sworn that he was insane, and I told him just what we did swear to, and laid my watch and money down at the bed near him, and said to him, "Now you get this"; and he said, "I cannot"; and I said to him, "That is just what we swore to." ' And further on: 'Q. Of course, you did not mean to swear at that time that the old man was insane, or out of his mind? A. No; I did not; but, of course, he was sometimes so, and other times different. William Heiser was the first nurse brought in by Stephen Grenslinger and Jacob Boyer to attend to the old man, after his fall about six years before his death, and attended him for two years, whilst he was in bed, helpless in both legs and one arm. Q. State whether or not the trouble that he had affected his mind,—what ailed him. A. I do not know whether—He was a good many days out of his mind, and some days he was pretty good again. Q. * * * What did he say that made you think that he was out of his mind? A. I cannot mention all the— Q. Give us some of the things. A. I was there with him, and he called me there at his bed, and told me to go out there, and put them men away; they are tearing that fence away (he looked out the window), and cattle would go in the cornfield and eat the corn. "Why," says I, "there is nobody there." "Yes, there is," says he; and he got cross at me; and I says, "There is nothing there"; and he got kind of cross, and he said, "I got you here for that purpose,—to attend to me." I said, "I will attend to you, but I cannot attend to that; there is nothing there." Q. Did he say anything about Gypsies tearing down his fence? A. He said there was a party of fellows there; I cannot recollect whether he said who they were. He wanted to go off one time, and he said, "There is two horses out there; I want you to hitch them up for me"; and he said I

Digitized by Google

must go. Q. Where did he want to go to? A. He did not tell me; he wanted to go off. I said, "Pap, you cannot." He said, "I can go horseback, then." I said, "Oh, no!" That was in the afternoon that he was that bad, and then in the night, about eleven o'clock,—well, all evening. I always slept in the next room, and he wanted to go off. Said there was a horse out here, now he must go off. I said, "I said it is dark; you cannot go off"; and he said, "Yes, sir." He got kind of cross at me, and wanted me to give him his cane. I would not give it to him; he had no use for it. So I talked to him as good as I could, and then he got a little quiet, and I left the door open, and had my eye on him all the time, and he worked his legs out over the bed, and, if I had been two or three minutes later, he would have fell out. I went in. He had his legs hanging out over the bed, and I lifted him back. That was pretty often that he talked that way.' He had such a spell about every week while witness was there. The longest spell of this kind lasted an afternoon and night. He never carried on a connected conversation while he was there that the witness could remember. He also talked about troubles about his lines and surveyor, but witness doesn't know what that was about; also about his fences, but not about the cows getting into the gable end of his barn. Witness does not know how the old man was when he made his will. 'Q. I mean when you were there; you were there two or three years before. My question is directed to the time when you were there. Was he or was he not at that time fit to make a will? A. He might have been fit sometimes, and sometimes he was not. Sometimes you could not notice on him; you know that he was all right, but when he got those spells on him he was contrary again me; it was so to me.' Again he says: 'That I cannot just answer. When he made the will I was not there. I could not. If I had been there when he made the will, then I could tell whether he was solid or not, but on that I cannot, for I have not been there. I was there when he got Boyer there,—Squire Boyer,—and they had some man in there that he did not want, and he made him cross out, and put another man in his place.' 'Q. I ask you whether you think he had sufficient mind, even when you were there,—not when the will was made,—to make a will, in your judgment. What is your judgment about it? A. I cannot say any more; he may be right and may be wrong.' He was a witness to one will. His signature is to the will dated April 25, 1880. The old man was not satisfied with the executor, and put Jerry Long in,—Boyer did it. Witness was in the room. Old man said that he and the executors had some words, and he put the third man in with them. He told Boyer he wanted it so. 'Only visited the old man once or twice after I left there.' Once went down with Jake. Ordinary conversations both times. The old man made the bargain to employ him. When the old man needed money he asked for it, and the old man would put it out on his lap, and give it to the maid. 'Don't know whether the spells were caused by fever,—no doctor'; but he didn't look to witness as feverish when he had these spells. 'Q. Was not Mr. Boyer in such a condition at any time while you were with him that he could fully know all that was going on,—all the property he had? A. To the best of my knowledge, I do not believe he was. It might be, but I took it so in my mind.' But on cross-examination says that he never talked to him about his property, or listened to him when he did talk about his family affairs.

"Ellen Brosius was a neighbor. Took two peaches to him in 1892. Had known him from childhood. Lived half mile away. Did not go to see him after. This time went to his bedside, and gave him the peaches, and asked him whether he still knew me. He replied: 'No; I do not know you, and I never did know you.' 'Then he said whether we saw that brown cow in the field at the fence, and there was none there.' She had not seen him for seven years before that.

"John Dress was a neighbor, and worked for the old man there pretty often. 'Q. And talked to him pretty often? A. Not so often. I passed the house. Q. Occasionally talked with him? A. Yes. Q. Did he say anything to you about the people stealing his land or rails, or anything of that kind? A. None of that. Q. In what way did he talk,—flighty, or would he talk about one thing, and then get off that and go to something else? A. Yes.' 'Had been there during 1890, and can't say anything about his condition in the 4 or 5 years that he was bedfast.'

"Stephen Grenslinger, the son-in-law, recalled, says: 'Visited old man in 1889; next in 1891, when he served the notice on him. When he attended him he said, "Look in that corner, and look here in this bed,—what is there?" I said, "There is nothing there"; and he said, "Yes; there is something there"; and so he said it often when I was there; and I was there, and he said, "Kill me,—knock me dead,—and I will give you my whole worth." Nobody present but witness when the old man said this.'

"Jacob Boyer, a son of the testator and a contestant, says that, six years before his death, he was stricken with paralysis, and oftentimes he talked disconnected. 'A few years before his death I was with him frequently, and then again last winter (1892) before he died. Had money transactions with him. Had to get money for Heiser. Don't remember whether father counted the money or not. Had to take it to him.' 'Q. Was he present when the old man talked about fences getting away or taken away from him by the Gypsies or people,—did he hear that? A. Yes. Q. When was it and

Digitized by Google

what did he say? A. That was during the whole time, for six years back, and then for the last few years it was very bad. Q. How often did he hear him talk that way when he was there? A. Often,—every time I was there. * * * A. Sometimes I was there every few days, and then towards the last I was not there perhaps for a month at a time. Q. But when he was there he talked in that way about people taking his fences away and ground away,—running off with it? A. Yes. Q. About every time you were there he did that, did he? A. Yes; towards the last; especially last summer. Q. Did he hear him say anything about the cows getting into the gable end of the barn? A. That I do not know; but in the field, where there were none. Q. Talk about cows in the field, and there were none there? A. Yes. Q. Did he talk about the doors walking around the house,—did he refer to that? A. Oh, yes. Q. That was about the way he talked when you went to see him, is it, towards the close of his life? A. Yes. (Note. Offered to show that witness had paid for the 15-acre tract; also deed for some tract to witness.) Got the deed from Squire Boyer. Father had given it to him when the deed was executed, and I got it from him in the spring of 1889. It was executed in June, 1888. Squire Madden wrote a paper that I should have it, and I carried it to father to sign (but that was for the 95-acre tract, not the 15-acre tract). That order didn't mention the 15-acre tract, but he got both deeds, and had both recorded at the same time. Boyer gave him the deed, and held the note until it was paid. The receipt in 1888 was in full of the 95-acre tract. Father then signed the receipt himself. Q. Then your father was able to write, and sensible enough to sign a receipt, at that time, was he not? A. He did at that time. Q. Then he was not crazy at that time, yet? A. At times then he was able to talk fairly well. Q. When you transacted this business with him, and paid him these hundred dollars and got this receipt, of course he was able to attend to business, was he not? A. Yes; that time, of course, he could do it, but sometimes he made nothing but a cross every time but this once.' The last will requires him to pay over again the $400 for the 15-acre tract, and that is one reason why he is fighting it. Reminded that the last will was made July 9, 1890, he was asked whether at that date he still owed the $400. He finally said that the will had been written a year before he paid the note. Does not know that his father had paralysis when he fell. Sol. Boyer, the executor, did his writing and figuring for him, not the witness. 'Never took out of the drawer more money than father wanted. Always had to lay his money for current expenses in his writing book; the other money, in his drawer.' 'Only visited father a few times the last year,—nearly every Sunday the year before that.' 'Father said, "Cattle was there in the field; nice brown cow. They were hauling corn fodder through the field."' 'Q. What made him talk then about the fences being down or people pulling fences down? A. He used to get spells. Q. And then when he got spells that way he would imagine that they tore the fences down and that the cows were in the field? A. Yes. Q. How long would these spells last? A. They fetched me one time that it lasted a day and a night. Q. That was the longest time the spell lasted, was it not? A. I was not there all the time; I cannot say. His condition was changeable; sometimes he would be flighty and talk imaginary things, and then at other times he would be sensible and rational. Sometimes he could talk just as a man would to his son that was tending to his business; tell me what to pay and what it was paid for. Didn't always say what he wanted with the money, but wanted so much, and didn't give me the particulars.'

"Frank Boyer, called by contestants, says that he had business with the old man, who counted the money itself, and counted it right. Witness is a grandson.

"There is no scientific testimony in the case on the contestants' part showing that the old man suffered from paralysis at the time of the fall. The helplessness that resulted was due, according to the evidence, to the severity of his rheumatic attacks, which had so contorted his muscles as to deprive him of the use of his lower limbs and one of his arms. During all of the years of his sickness he seems to have managed his farm, for the last six years from his bed, employing his servants, fixing their wages, and personally supervising the payments, calling to him his son and others to make calculations for him, and to write the papers which he was not able himself to write. During the last six years both Stephen Grenslinger and Jacob Boyer made settlements with him,—the first, in the presence of Squire Boyer, in reference to services rendered to the old man during a period of 30 years and upwards; the second, shortly before his death, involving $450 purchase money for 15 acres of land; and the third, in 1888 or 1889, for the purchase of 95 acres of land, made 20 years before that.

"A careful review of this testimony shows that none of the contestants' witnesses were present when the will was made. Stephen Grenslinger and Jacob Boyer, the two contestants, William Heiser, his nurse, Strouse and Fritz, who labored on the farm, all testify that at times the old man was subject to hallucinations, imagining that the Gypsies were carrying away his fence rails, or the cows breaking into the gable end of his barn, etc. Grenslinger for several months after the old man's fall seems to have had ample opportunity to observe his condition. After that time, although he was a son-in-law and living only 2½ miles from the old man's home, his opportunities were limited, as his testimony

Digitized by Google

shows that he was not an habitual visitor, and, as we understand his testimony, only visiting him twice; one of these occasions being in the fall of 1892, after the will had been made. Strouse worked on the farm from 1885 to 1891, and confirms the statement that testator was subject to hallucinations. Heiser, who acted as his nurse for a couple of years after his fall and saw him several times afterwards, says that these hallucinations occurred about once a week while he was employed there, the longest spell lasting an afternoon and one night. Jacob, above referred to, says that these hallucinations continued during the six years from the time of his fall to his death, occurring every time he was there, and for the last few years being very bad. All of these witnesses express the opinion that he was unfit to make a will, or express their doubts of his testamentary capacity. Grenslinger says that after his fall the old man was rational only to the extent of a few words at a time, and the rest of the time he was irrational. Strouse says that the old man himself complained of the shortness of his memory, and in witness' opinion was not 'just out of his head,' but was 'too short in his head to put his things together,'—'too short in his memory' to do it. Fritz thought, and so swore in the proceeding instituted in 1891 against the old man, that he was not insane, but short in his memory, and physically unable to attend to business; sometimes out of his mind,—at other times different. Heiser never knew him to carry on a regular conversation, but did not know how he was when he made his will. Sometimes while he was there the old man was fit to make a will, and sometimes he was not.

"While these witnesses held opinions their testimony shows that, during this time that they were doubtful of his fitness, or believed him unfit, mentally, to attend to business, they were themselves doing business with him to some extent. Grenslinger settled with him, with the aid of a squire, a transaction in reference to two loans involving counterclaims for services, extending over a period of 30 years. Strouse entered into his employment under a bargain made with the old man; bought a wagon from him; bought trees from him, he thinks, as late as 1890 (the year the will was made); and thinks that the old man was sound enough when these bargains were made. Fritz says that while he was about him the old man regularly read the newspapers and talked over what he had read. Heiser was a subscribing witness to the will. He says that the old man required the scrivener to make a change in the executors named. He made his own bargain with the old man about his employment as nurse; saw him count money in settlements with the housekeeper; still he does not believe that he knew all of his property and what was going on; but never talked to him about his affairs. Jacob bought land from his father, and claims to have settled with him during this time, frequently disbursed money for him, always acting under his father's directions; that his flightiness was only by spells, and that when he was free from them he could talk properly about business, and that he had a number of times obeyed his orders about such disbursements without inquiry or being informed of the particulars. Frank Boyer, grandson, was called to prove that testator was unfit to attend to business, but only testified that in a transaction that he had with him the old man counted the money correctly himself. Ellen Brosius swore that she had known the testator all her life, and during his sickness took him a couple of peaches; that the old man said that he didn't know her, and never had known her; but she also said that she had not seen him for seven years when this occurred. Solomon Boyer's affidavit was also presented, which was made in the proceeding instituted in 1891, in which he swore to the old man's mental incapacity to attend to business. He was called as a witness in favor of the will, and is one of the executors. In his testimony, in this case he says that he never swore to anything more than that the old man was physically unable —not mentally—to attend to business, and that the affidavit now produced is different from the one he swore to. There is other evidence contradicting him. As, however, his allegations in that paper are merely general, it is not considered necessary to further refer to this at this time. Grenslinger also says that the old man several times offered all that he was worth if some one would kill him. He also testifies that the old man's fall was the result of paralysis. So does Jacob, the other contestant, but on cross-examination says that he does not know that. If paralysis was the cause of the fall, this fact rests upon the assertion of Grenslinger, who was, of course, not an expert. Dr. Bland, a physician of prominence, testified as follows, viz.: 'Q. Mr. Boyer was a very old man, with inflammatory rheumatism, with his limbs drawn up, and he had lain in that position for years. Now with delusions under which the old man labored, and lying in that condition, what effect would the infirmity have? A. It would likely affect his physical and mental condition. His sufferings would produce a mental weakness, and, under these circumstances, a delusion might become a mania before he died.' He also said that if [he] had become a monomaniac it would render him unsafe in business matters; that, if the delusions had a continuity, the man would be unfit to make a will; that, when he was relating these imaginary occurrences testified to by Heiser, he had no doubt that the old man was suffering from mental aberration.

"The fact that he has made a number of wills at different times, making very different dispositions of his property, in some of which he cuts off some of his children from an inheritance, is referred to also as an evidence of testamentary incapacity. Grens-

Digitized by Google

linger also testifies to the fact that the last will devises real estate—the 15 acres—which he had already sold in his lifetime. The first will offered in evidence is dated April 23, 1880. He gave to his wife $300 in cash or personal property, and the use of his farm that he then occupied during her natural life, directing his executors to sell the farm after her death. The personal property he directed to be appraised and sold. To his son Jacob he devised the farm of 100 acres that he then occupied, 'but he must pay me first $1,500, as following, to wit, $100 this spring, and $100 on the first of April cash, and every year until the above sum is paid, no interest to be charged until the 1st of April, 1890, then the interest will be charged. My son Jacob will, after he has paid the above sum of $1,500, stand equal in share with my other children.' To his two grandchildren, daughters of Catharine Wildermuth, deceased, $600 each, no charge to be made against them for the support that he had given them, and, if either should die without an heir, the remaining child to be the heir; and, if both should die, 'without heirs,' then said sum should fall back to the estate. To the heir of his son, Lewis Berger, now deceased, $500, to lapse if he died without 'any heir.' 'The remainder of all my money' to be divided equally, share and share alike, to my children, viz. Jacob Boyer, Sarah Grenslinger, Mary Alspach, Matilda Long, and Amanda Long. 'The following amounts I have already given to my children, and my executors shall so charge them with said amounts; to my daughter Sarah, intermarried with Stephen Grenslinger, the sum of $800; to Mary, intermarried with Edward Alspach, the sum of $500; to Matilda, intermarried with John W. Long, the sum of $500; and to Jacob Boyer the sum of $500. No interest to be charged on this money. Item. It being perfectly understood that children Jacob, Sarah, Mary, Matilda, and Amanda shall share and share alike. And in case that my wife, Delilah, could not live from the farm I bequeath unto her, then she shall draw from the funds due me from my son Jacob Boyer such amounts of money as she needs.' Then he appoints Jacob Boyer and Stephen Grenslinger executors. On June 11, 1888 (his fall having occurred in 1886), he made a codicil, witnessed by William Heiser and Daniel L. Boyer, his nurse and his scrivener, containing only two items, viz.: The first provides that if any of his children shall be dissatisfied with his will, and begin any quarrel, such child shall be 'debarred, and shall not receive one cent as legacy of my estate after my decease.' The second item appoints Jeremiah Long as an executor to assist the other two. On April 9, 1890, another codicil was added. It recites that he had made a will about March 8, 1889, which he now recalls, which shall be null and void and of no effect whatever, and that 'the will and testament I have made on the 23d of April, A. D. 1880, shall be my true and lawful will and testament, and no other,—none whatever. But shall make the following changes: That since I have made my will and testament on the 23d of April, A. D. 18?0, my daughter Sarah, intermarried with Stephen Grenslinger, has received her full share belonging unto her, and that I have also appointed Stephen Grenslinger as one of my executors, which I now also recall, and appoint Solomon Boyer in his stead. I also appoint John W. Long instead of Jacob Boyer as one of my executors. It being perfectly understood that my son-in-law John W. Long, Jeremiah Long, and Solomon Boyer shall be my executors. This is a codicil to be added to and taken as part of the last will and testament of Benjamin Boyer, bearing date April 30, 1880.' This will was witnessed by Daniel L. Boyer, his scrivener, and Charles Arnold, his nurse.

"The contested will is dated July 9, 1890; and Samuel H. Madden, the scrivener, and Charles Arnold, the nurse, are the witnesses. By it he bequeaths $500 to Sarah Sawl, daughter of his son Lewis Boyer, deceased; $300 to Emma Wildermuth, and $300 to William Wildermuth, children of his daughter Catharine, deceased; 'and to my children Sarah, intermarried with Stephen Grenslinger, and to Jacob Boyer, each the sum of $5, they having had and received their full share of my estate during my lifetime.' He then bequeathed to Mary Alspach, Matilda Long, and Amanda Long each $1,000; 'and the balance of my estate shall be divided into five equal shares, and paid to my children, to wit, Mary Alspach, Matilda Long, and Amanda Long, and the other two shares to the children of my said son Lewis Boyer, deceased, and my daughter Catharine, deceased, or their heirs. All money that my said children have had and received of me in my lifetime, for which I hold their promissory notes, shall be deducted from their respective shares of my estate, irrespective of the statute of limitation, or any law to the contrary notwithstanding, in order to equalize the several shares; my said daughter Sarah and Jacob as aforesaid having received all they are to have of my estate. The fifteen acres land mentioned in a former will, for which I had made a deed to my son Jacob, which he has since received and recorded without my order, which was in the hands of Daniel Boyer, Esq., for safe-keeping, he shall hand over to my said executors within six months after my decease, or pay for the same the sum of four hundred dollars to my executors.' Further, he directs his burial and the erection of a marble tomb to mark his grave; directs his executors to sell his real and personal estate at public sale, giving them power so to do; and appoints John W. Long, Jeremiah Long, and my trusty friend Solomon Boyer executors, revoking all other wills.

"These wills are cited as containing evidence of the incapacity of the testator and

Digitized by Google

of undue influence exercised upon him. Grenslinger says that in this last will the old man gave away the property (15 acres) which he had sold to Jacob. But Jacob admitted, on his cross-examination, that he did not pay the purchase money to the old man until after the will was made. He claims to have paid it to him since then. If he did then, what is said in the will about the transaction does him no harm. His admission that he paid the old man the money since the will was made shows that the old man's mind was clear as to that part of the transaction and that the money was due. This provision clearly indicates that the old man believed that he had never signed the order (which Madden drew) to Daniel Boyer to hand over the deed to Jacob. The deed had been given to Daniel Boyer to hold until the purchase money was paid; and it is a striking fact that, in corroboration of the old man's assertion in his will that Jacob got the deed without his order, the purchase money was paid after that, according to Jacob's evidence, and that the order is signed by Benjamin Boyer in his own handwriting, whereas all of the wills in evidence he signed with his mark.

"Assume all of this testimony to be true and uncontradicted, and what does it prove? It proves that from the time of his fall the old man was subject to 'flightiness' or delusions, or temporary 'mental aberration,' occurring, according to Heiser and others, during the first two years after his fall, as often as once a week, and lasting in the longest instance an afternoon and a night. After that the evidence is not definite as to the frequency of their recurrence, and the witnesses who testify to these instances are all persons who themselves during this period had business transactions with the testator, in which they made contracts with him, settlements of long business transactions, of services under him, of the purchase of property, and received their pay directly from him; there being no proof that any of these matters were settled without his consent and control. Dr. Bland, who says that he never saw the patient, says, however, that such bodily suffering as this old man experienced would weaken his mental powers; that the hallucinations to which he was subject evidenced mental aberration; a continuity of them would amount to monomania; and monomania would render the subject unfit to attend to business or make a will. This evidence would not support a verdict against the will. Not one of the contestants' witnesses said that the old man was continuously under these delusions. They all stated that these delusions were merely temporary. Not one of them was present when the will was made. Heiser was present, and a subscribing witness to the codicil by which Long was made an executor in the former will, and says that the testator insisted upon it. That a will is unjust is only material here as showing mental incapacity or undue influence. But a careful reading of this testimony does not satisfy me that this will was unjust. When to this showing is added the testimony adduced in favor of the will, there is still less reason for reversing the conclusions of the register. Madden, who drew the last will, says that the testator was as sane as he ever was, and gave him all of the directions that are contained in it. Many neighbors testify to his mental soundness and business capacity, and to his reasons for changing his executors. There is no proof that there was any undue influence, except what may be inferred from the fact that the beneficiaries of his will lived near him, and were much with him, and that those excluded from the benefits of the provisions (towards the end of his life) were not. Dr. Schultz attended him, and says that he never had paralysis. Dr. Halberstadt and Dr. Hartman both examined him, at the time of the proceeding in court in 1891 (the will having been made in 1890), and concluded that his mind was not impaired. Under these circumstances, it is not considered necessary, in view of the conclusion reached as to appellant's testimony, to go into detail as to the testimony produced by the respondents. And now, September 3, 1894, issue refused."

W. F. Shepherd, and Jas. A. Rinck, for appellant. A. W. Schalck, for appellee.

PER CURIAM. The review of the testimony contained in the opinion of the learned court below satisfies us as to the correctness of the conclusion reached. For the reasons stated in the opinion we affirm the decree of the court below refusing the issue. Decree affirmed.

CITY OF READING v. KRAUSE'S ESTATE.

(Supreme Court of Pennsylvania. March 18, 1895.)

MUNICIPAL LIENS—CERTIFICATION OF UNPAID TAXES.

Under Act May 23, 1889, requiring the city treasurer at a certain time to certify schedules of unpaid taxes to the city solicitor, to be registered by him as liens, certification by the treasurer is essential to authorize filing of the liens.

Appeal from court of common pleas, Berks county.

Action by the city of Reading against Charles H. Krause's estate to enforce a municipal lien. Judgment for defendant. Plaintiff appeals. Affirmed.

The opinion of the court below was as follows:

"The only question which it is necessary to consider in disposing of these rules is that raised by the points reserved,—whether, under the undisputed circumstances recited

Digitized by Google

therein, it was competent for the city of Reading to lay the lien upon which this sci. fa. issued. If there was no authority for that, there can be no recovery. Upon the question of the right to lay the lien, the fact set forth in the points reserved would seem to be necessarily controlling,—that upon the books of the city treasurer the taxes sought to be thus enforced appear marked as having been duly paid during the years for which they were respectively assessed. The conclusive effect of this entry, so far as the right of lien is concerned, is manifest from a proper reading of the statutory provisions by which the collection of taxes is regulated. These provisions are contained in the act of May 23, 1889 (P. L. pp. 277, 317, et seq., art. 15). Under them, the assessment being completed, and the copies of it by wards having been placed into the hands of the city treasurer on or before June 1st, the taxes are immediately payable to him, with the addition of certain percentages after September 1st. Section 7. On and after November 1st it is his duty to place into the hands of the tax collectors duplicates of such taxes as then remain unpaid. Section 8. Within five months thereafter, each tax collector, having paid over monthly sums collected by him, indicating the properties, which thereupon are to be credited by the treasurer upon his books (section 9), is required to make out and deliver to the treasurer a schedule of the taxes still unpaid in his duplicate, with descriptions of the properties liable therefor, etc. (section 10); and these schedules, or a copy thereof, the treasurer is then to certify to the city solicitor, to be registered by him as liens in the prothonotary's office (section 11). This method but slightly differs from that provided by Act May 23, 1874 (P. L. pp. 230, 249, 250, § 36). Thereby the treasurer was required to receive taxes up to the 1st day of January succeeding the completion of the assessment, after which date duplicates were to go into the hands of the collectors; and, after January 1st of each year, the treasurer was to place correct and detailed statements of taxes then remaining unpaid into the city solicitor's hands, who was thereupon to register them as liens.

"That, under either enactment, the certification of taxes as unpaid by the treasurer is a condition precedent to the right of the solicitor to register them as liens, can admit of no doubt, either upon the express terms of the statute or upon principles of common sense. There is nothing in his powers or duties as defined by section 40, Act 1874, or article 10, Act 1889, that gives him any right to lay liens in the name of the city, except for such claims as come to him from the proper and appointed source. Neither is there any authority in him to overhaul the books or accounts of any other municipal officer with a view of determining himself whether this or that claim has been paid, or whether a lien should be filed for the one or the other. To invest him with a power or an authority such as I have indicated would be to introduce infinite confusion into the municipal affairs, and the existence of either is not, as I understand the position of the city solicitor in this case, asserted by him. As the law officer of the municipality, charged with the 'superintendence, direction and control' of the 'law matters of the city,' the validity of his action in instituting any legal procedure in its name must depend upon his right to act, either given by specific statutory language or by the proper department of the municipal government under a general statutory direction. His power to lay a lien for alleged unpaid taxes being thus conditioned, there can be no pretense that the requirement of their certification to him by the treasurer is merely directory, and that, if they are brought to his notice in any other way, he may still exercise the power. Where a thing required to be done is a condition precedent to the exercise of a power granted or the performance of a duty imposed, it is necessarily essential to the existence of the power or duty, and, being of the essence thereof, cannot be anything but mandatory. Norwegian Street, 81 Pa. St. 349, 354. Of course, the direction as to the time when the certification is to be made, etc., does not stand upon the same plane with the requirement of certification itself. The former may very well be deemed directory only, upon the familiar principle that, where a statute fixes a time for the performance of a duty by public officers, and there is no substantial reason apparent from the statute itself, from other statutes or from the consequences of delay, why the act might not be as well done at some other than the appointed time, the naming of the latter will ordinarily be so treated. State v. Lean, 9 Wis. 292. And see Pittsburg v. Coursin, 74 Pa. St. 400; Magee v. Com., 46 Pa. St. 358; Torrey v. Inhabitants of Millbury, 21 Pick. 64. In the present case, however, the difficulty is not merely as to the time when the city solicitor received the notice of these taxes as unpaid; the trouble is that there was admittedly no certification of them to him by the treasurer for the purpose of registering them as liens, in conformity with either the act of 1874 or that of 1889.

"Neither, under the circumstances, could there have been any such certification. It is too manifest to admit of any discussion that the statement or certificate to be placed into the hands of the solicitor by the treasurer, as contemplated by either statute, is not one to be made up by the treasurer upon the basis of his personal knowledge apart from or in disregard of the records required to be kept by him. The subjecting of a citizen's property to a lien for taxes alleged to be unpaid is entirely too serious a matter to permit the imputation of any such design to the legislature. Obviously, the statement or certificate of the treasurer, in so far as it can

Digitized by Google

become authority for the imposition of a lien, must be based upon the facts disclosed by his books, and cannot contradict them. If it were otherwise, no man could buy a property within the limits of the city, without running the risk of having it charged in his hands with taxes assessed years before, though, before purchasing, he had examined the municipal records, and found them to declare the fact of payment; and, of course, there could be no defense for him if the city could show that the entries made by the treasurer were false. The hardship of holding the city bound, to the extent of forbidding a lien, by the act of its treasurer, honest or dishonest, cannot be compared with the disastrous consequences of the opposite doctrine to the property holder. The former has its remedy upon the bond given by the treasurer; the latter might have practically no remedy. The community can guard against frauds upon itself by the selection of a faithful official; the individual has ordinarily no alternative but to put up with any one chosen by a majority of the voters. In the present case, the books of the city kept by its treasurer showed payment of the taxes for which this lien was laid. It was therefore beyond the power of any succeeding treasurer to certify them as unpaid, and, as a necessary consequence, beyond the power of the solicitor to register them as liens. This statement does not involve a denial of the right of the city to recover taxes, marked 'Paid' upon its books, but in fact unpaid, from the property holder against whom they are assessed. It goes no further than to negative the right to enforce them by a lien against the property itself in the first instance. The verdict of the jury, under the charge of the court as to what constitutes payment of taxes by one who is at the same time city treasurer, establishes the fact that the taxes were not paid. I have no doubt as to the correctness of the instructions, and I am not called upon to express any as to the correctness of the finding of the jury upon the single question submitted to it. But I am quite clear that, notwithstanding that finding, there can be no judgment upon it for the city. Of course, there is neither in this conclusion, nor in what has been said as leading up to it, anything that can reflect upon the action of the city solicitor in instituting this proceeding. The questions raised by it are important ones, and being, at least in some aspects, fairly debatable, and unsettled by any previous adjudication, they are such as, under existing circumstances and in view of pending litigation between the city and the bondsmen of the defaulting treasurer, might properly be brought before the court; and the verdict of the jury, though ineffectual in this case, may not be without value to the city.

"The rule for a new trial is discharged, and the rule for judgment non obstante veredicto is made absolute."

William J. Rourke, City Sol., for appellant. Herbert R. Green and A. G. Green, for appellee.

PER CURIAM. The taxes for which the municipal lien in this case was filed appear upon the books in the office of the city treasurer to be paid. The question on which this case turns is therefore not whether they are in fact paid, but whether the necessary preliminary steps have been taken to authorize the filing of the lien. Upon this question we agree with the learned judge of the court below. The lien is the creature of a statute, and, if the directions of the statute have not been complied with, the right to the lien does not exist. The fact that the directions of the statute have not been complied with is made very clear by the learned judge, and this sustains the conclusion reached by him that the lien is without legal authority or value. The judgment is therefore affirmed.

SPRING CITY GASLIGHT CO. v. PENNSYLVANIA, S. V. R. CO.

(Supreme Court of Pennsylvania. March 18, 1895.)

CONDEMNATION PROCEEDINGS — DAMAGES — INJURY TO GAS PLANT — INSTRUCTIONS — EVIDENCE — WITNESS — COMPETENCY.

1. In proceedings to condemn unoccupied land of a gas company, which supplied the boroughs of S. and R. with gas, it was error to charge that in ascertaining the market value of such land, if the jury found that its highest available use at the time of the taking was that of gas plant, they might consider the future growth of S. and R., and the resulting increase in the demand for gas; and if, by the location of the railroad through the property, its availability has been partly destroyed, this might be considered so far as it affects the market value of the property as a whole immediately after the taking.

2. Where the gas company, in such a case, sought to treat the unoccupied land taken as part of its gas plant, and claimed $25,000 damages, on the theory that the value of its plant was impaired, evidence that the capital stock of the company was $25,000 was admissible.

3. In such a case, a witness who is acquainted only with the value of the gas plant and of gas structures and machinery generally, and does not know the value of the land owned by the company, or of land in its vicinity, is not competent as an expert.

4. It is not error to refuse a motion to strike out certain evidence, where part of it is admissible.

Appeal from court of common pleas, Montgomery county.

Proceedings by the Pennsylvania, Schuylkill Valley Railroad Company to condemn land of the Spring City Gaslight Company for railroad purposes, in which the gaslight company appealed from the award of the viewers. From a judgment of $10,000 in favor of the gaslight company, the railroad company appeals. Reversed.

The Spring City Gaslight Company is a corporation located at Royersford, and has

Digitized by Google

its works located on ground near such borough. The borough of Spring City is on the opposite side of the Schuylkill river, and the two boroughs are connected by a bridge. The gaslight company supplies the two boroughs with gas, and had inclosed about 1½ acres. The land taken by the railroad company consisted of a quarter of an acre of the inclosed, but unoccupied, ground of the gas company.

Charles H. Stinson, C. Henry Stinson, and William F. Solly, for appellant. E. L. Hallman, Wm. Rennyson, and N. H. Larzelere, for appellee.

WILLIAMS, J. The general principles relating to the exercise of eminent domain, and compensation to be made to those against whom it is directed, are very familiar, though they seem at times to be forgotten. The power to take is a prerogative of the government. It is to be exercised only in the interest of the public. It may be granted to municipal and other corporations to promote such municipal improvements and such business enterprises as are calculated to advance the general welfare. Private interests must give way when the public good requires it, and the power by which this is compelled is that of eminent domain. Its exercise may sometimes involve inconvenience or positive hardship to the private citizen; but it is the state or its grantee that enters, and for a purpose that the government has deemed of sufficient general importance to make such entry justifiable. But the state or its grantee must make "just compensation" for the property taken or destroyed. What is a just compensation in any given case may be said to be a mixed question of law and fact. The law provides a general formula. The jury applies this formula to the facts in each particular case. The just compensation is such a sum as shall equal the difference between the fair market value of the property entered before the entry and after it. What that sum is must be determined by the jury from evidence relating to that subject. If an entire lot is taken, its value at the time of taking determines the amount of the damages. If part only is taken, the jury should ascertain the value of what remains, and the difference between this and the value of the whole before the entry was made fixes the measure of damages. That difference is a "just compensation" to the individual for what has been taken from him for the use or benefit of the public. This rule is easy of statement, and it is within the easy comprehension of laymen who serve as jurors. It has been laid down in a multitude of cases, and is settled as well as repeated decisions can settle any legal principle.

The first assignment of error complains that this rule was disregarded by the court below in the affirmance of the plaintiff's first point. This point asked an instruction to the jury that "in ascertaining the market value of the property in question, if the jury find that its highest available use at the time of the taking was that of gas plant, they have a right to consider the future growth of the boroughs of Spring City and Royersford, the increased demand for gas, as far as these considerations affect its market value; and if the jury further find that, by reason of the location of the railroad through the property, its availability has been curtailed, lessened, or partly destroyed, they have the right to consider these questions as far as they affect the market value of the property as a whole immediately after the taking." The affirmance of this point without qualification opened the door to conjecture upon subjects incapable of present ascertainment, and was calculated to confuse rather than aid the jury. It permitted them to conjecture the "future growth" of Spring City and Royersford without limit as to the distance to which their conjectures might extend. It then permitted them to conjecture an increased demand for gas to light the cities they had imagined to exist in "the future," —a demand so greatly increased that the company could not supply it with its present facilities and such additional ones as the remainder of the land would enable them to provide; and that the company might then suffer loss on account of its inability to meet such increased demand. They were invited to make use of these results of their conjectures to fix the market value of the land taken. No more speculative and imaginary considerations affecting the value of the land taken could have been thrown into the jury box. The damages should have been ascertained by fixing the fair market value of the plaintiff's land before the taking and its value immediately after the taking. The difference would have represented the actual loss, and therefore the "just compensation" necessary to make the plaintiff whole.

The third assignment of error must also be sustained. The plaintiff sought to treat this unoccupied land as part of its gas plant, and assess the damages sustained upon the theory that the value of its plant had been impaired. No part of its actual plant was taken, injured, or destroyed. Its operations were not interfered with in the slightest degree. Yet it was claimed, and testimony was given tending to show, that the gas plant had suffered in damages to the extent of $25,000. What had actually taken place was the appropriation by the defendant of a quarter of an acre of ground, which the gas company had never occupied except by including it within its general inclosure. If this piece of ground was to be treated as a part of the gas plant, and its value fixed upon that basis, it is too clear to admit of argument that the value of the plant as a whole before the entry was made upon it was not only a proper, but a necessary, subject of investigation. What was the plant worth be-

Digitized by Google

fore the entry and what was it worth immediately after were the questions the jury had, upon that theory, to determine; and the difference between these values would represent the loss sustained. The amount of the capital stock was some evidence upon the subject of actual value, and it was competent, therefore, to place this before the jury. The same thing is true of its net earnings. If its entire capital stock had been but $25,000 or $30,000, and it had paid but little or nothing in the way of profits to the holders, the absurdity of the demand for $25,000 in damages to a plant that had not been interfered with except by the reduction of the area of its unused land, and that was worth as a whole no more than was thus claimed, would have been apparent. If the land taken was to be valued as land merely, then the capital stock, the volume of the business, and its character as to profits were immaterial; but if the land was to be treated as part of a gas plant, and damages were to be assessed on that basis, then the value of the plant was a pertinent, and, indeed, a necessary, inquiry.

The fourth assignment of error requires some notice. It complains that the motion of counsel for defendant to strike out the whole of the testimony of John Slingluff was refused. Some portions of it ought to have been stricken out, but some portions of it were admissible, and we cannot say it was error to refuse the motion as made. The assignment suggests the question, however, as to the extent to which expert testimony is competent in a case like this. One who is familiar with the value of land in the vicinity of the land taken might be offered as an expert upon that subject; but a knowledge of values in Philadelphia or Norristown would not qualify a witness to speak as an expert of values in Royersford. So a man might be familiar with the value and use of the appliances necessary to the production of gas, so as to be qualified to speak as an expert of the value and effectiveness of the machinery and fixtures used in any given gas works; but, unless these are injured or their operation interfered with by the entry complained of, it is not easy to see what place there is for such an expert in the witness box. In this case the machinery and structures of the gas works were untouched. Its productiveness was not diminished in the slightest degree. There is still room within the inclosure to increase the capacity of the works, if an increase should become necessary; but up to the time of the entry by the defendant, and up even to the time of the trial in the court below, no such increase had been found necessary. The plaintiff had been deprived of one-quarter of an acre of unoccupied land, and of nothing more. Mr. Slingluff did not pretend to know the value of the land. He said: "I am not acquainted with the market value of real estate generally in the locality or the improvements. * * * I can't say that I know the value of any properti cluding improvements, in Royersford." expert knowledge related to machine producing gas, and the process of facture, neither of which was involv this controversy. But it is contended inasmuch as the land taken was withi exterior lines of the tract owned by the tiff, and upon which its gas works we uated, it was therefore part of the gas This is a non sequitur. The fact state not support the conclusion. Whate necessary or convenient to the produ storage, and distribution of gas is part gas plant. On the other hand, that wh not used or needed for use in the actual ness of the company is not a part plant, though owned by the gas com What may happen in the next generat the neighboring villages should become is a possibility that does not concern the They might as well conjecture whethe would not cease to be used altogether illuminant, and its production be aband The question is one of actual value market value at the time of the appr tion. What was the property of the pany worth before it was entered by t fendant? What was its worth immed upon such entry? The difference repr the loss, if any, that has been sust The judgment is reversed, and a venire de novo awarded.

SEWELL v. MOORE.

(Supreme Court of Pennsylvania. Mar 1895.)

NEGLIGENCE—FAILURE TO ERECT FIRE ESC ACTION FOR INJURIES—EVIDENCE.

1. Act June 11, 1879 (P. L. p. 128), re certain buildings to be provided with "a nent, safe, external means of escape the in case of fire," subject to approval of t commissioners or other officers. Act Ju 1885 (P. L. p. 68), amending the prior a scribes in detail the nature and mode o struction of such escapes, and provide nothing therein shall prohibit one from se and erecting any other device, "being a nent, safe, external means of escape, sub the inspection and approval of the cons authorities." *Held*, that a failure to erect cape conforming to the method and deta scribed, or, in case of variance, to obtain proval of the proper authorities, does not the owner liable to a person injured in quence of a fire, irrespective of any questi negligence or proximate cause; but he ma another kind at his own risk that it shall "permanent, safe, and external," and be to the approval of the proper authorities.

2. Act June 3, 1885 (P. L. p. 70), re fire commissioners and other officers to ex and test fire escapes, and, if found satisf to grant a certificate of approval: "there lieving the party to whom such certificate sued from the liabilities of fines, damage imprisonment imposed by this act." *Held* the absence of such certificate imposes no ity on the owner which would not oth arise from the facts, but puts on him th den of showing that he has complied wi statute by building such escapes as it re

Digitized by Google

or other permanent, safe, external escapes substantially equivalent.

3. In an action against the owner of a building for personal injuries, on the ground that he failed to provide fire escapes as provided by statute, a certificate of approval of the fire escapes erected by defendant, issued after the fire, is not admissible.

4. Act June 3, 1885, § 3 (P. L. 70), providing that in case of fire occurring in any building of a certain class, in the absence of fire escapes, approved by certificate of certain officials, the owner shall be liable in an action for damages in case of death or personal injuries sustained in consequence of such fire, makes the owner liable for injuries received in consequence of a fire only when the absence of fire escapes contributes to the injuries.

5. Where the owner of a building provides a sufficient and safe fire escape, he is not liable to a person injured in consequence of a fire in the building, if the use of such fire escape was prevented by his tenant's locking the door leading to the fire escape, though the escape provided was not such as was required by law, and was not approved by the proper authorities.

Appeal from court of common pleas, Philadelphia county.

Action by Elizabeth Sewell against James C. Moore to recover damages for personal injuries caused by failure of defendant to provide a fire escape to his building, occupied as a factory by a tenant, by whom plaintiff was employed. From a judgment for plaintiff, defendant appeals. Reversed.

On March 3, 1892, a fire occurred in the building, and plaintiff jumped from the window of the third floor, where she worked, and was injured. The defense was that defendant provided fire escapes which were approved by the building inspector and by the factory inspector, under Act May 20, 1889 (P. L. p. 245); that such act in part superseded Act June 3, 1885 (P. L. p. 68), which requires buildings to be provided with fire escapes, and under which the action was brought; and that the inability of plaintiff to use such escape was caused by the tenant locking the door leading to it from the third floor.

The specifications of error are as follows:

"(1) The trial judge erred in excluding the answer to the question proposed by the defendant, and stated in the bill of exceptions, as follows: 'Q. I hand you a certificate of approval of the fire escape of Mr. Moore's mill, issued February 4, 1893. Does that certificate, which was issued by the board of fire escapes of Philadelphia, approve of a fire escape in 1893 on this building, which was precisely identical with that of 1891? (Objected to. Objection sustained. Exception granted to the defendant.)'

"(2) The trial judge erred in excluding the evidence of factory inspector George J. McCrane, as stated in the bill of exceptions, as follows: 'Q. Did you, as factory inspector, visit the mill of Mr. Moore? A. Yes, sir. Q. Did you make a report of it in accordance with law? A. Yes, sir. Mr. Beck: What is offered to be proven by this witness? Mr. Sellers: By the act of May 20, 1889 (P. L. p. 245), it is provided, by section 12: "That if the inspector of factories find that * * * the means of egress in case of fire or other disaster is not sufficient or in accordance with all the requirements of law, * * * he shall notify the proprietor of such factory * * * to make the alterations or additions necessary within sixty days. * * *" I offer to prove that, in pursuance of this duty, he visited these tower fire escapes, and he considered them to be perfectly safe and proper for escape from fire. (Objected to.) The Court: The duties of the factory inspector are more comprehensive than those of the board of fire escapes. Its functions, so far as this act was concerned, were merely to inspect and test, or approve or disapprove, of the fire escapes. Factory inspectors are charged with more comprehensive and different duties,—among others, that of inspecting all modes of egress, not only those for escape during fire, but all others, and other duties that may be related to those of the fire commissioners; but they do not take the place of the other body, and his approval would in no sense take from the plaintiff her right of action. It is purely statutory, and I therefore refuse the offer. (Exception granted to the defendant.)'

"(3) The trial judge erred in excluding the evidence as to the kind of fire escape, as stated in the bill of exceptions, as follows: Mr. Sellers reads section 27 of the act of 1893 (P. L. p. 373), by which it is provided: 'All buildings to be hereafter erected, * * * factory or workshop, more than two stories in height, shall have at least one stairway, accessible from each apartment, which shall be inclosed with brick walls, * * * and shall have no interior openings other than the doors from which it is an exit, * * * shall be provided with a tower fire escape, inclosed in incombustible material, adjoining one of its fronts. * * * Such fire escape shall be held and taken as a fire escape under the act of * * * June 3, 1885.' 'Now, I desire to prove that is the kind of fire escape defendant had. (Plaintiff objects. Objection sustained, and exception granted to the defendant.)'

"(4) The trial judge erred in excluding the evidence as to the usage in building fire escapes, as stated in the bill of exceptions, as follows: 'Q. The plan of tower fire escapes, which you adopted as a mechanical engineer, are those the plans actually adopted in the large mills in the northeastern section of the city which have been erected during the last ten years? (Objected to. Objection sustained. Exception granted to the defendant.)'

"(5) The trial judge erred in not affirming the first point presented by the counsel for the defendant, as stated in the bill of exceptions, as follows: 'That if the jury believe that the fire escape for which the certificate of approval of February 14, 1893, was issued, is identical with that in the factory burned, then it affirmatively appears that

Digitized by Google

the owner is relieved from the liability imposed by the act of June 3, 1885, and the verdict should be for the defendant.'

"(6) The trial judge erred in not affirming the second point presented by the counsel for the defendant, as stated in the bill of exceptions, as follows: 'If the jury believe that the factory inspector, in accordance with section 12 of the act of May 20, 1889 (P. L. p. 245), found that the means of egress in case of fire was sufficient, then the verdict must be for the defendant.'

"(7) The trial judge erred in not affirming the third point presented by the counsel for the defendant, as stated in the bill of exceptions, as follows: 'Defendant is not liable for the act of the tenant in locking the door, and, if the jury believe this was the proximate cause of the injury, the verdict must be for the defendant.'"

Leon H. Folz, David Jay Myers, and David W. Sellers, for appellant. James M. Beck and William F. Harrity, for appellee.

MITCHELL, J. The learned judge directed a verdict for plaintiff, leaving to the jury only the amount of damages, on the view that the statute required the construction of a fire escape in exact conformity to the method and details prescribed, or, in case of any variance, the approval of the proper municipal authorities, as a mandatory requirement, the absence of which would create a liability to any person injured in consequence of a fire in the building, irrespective of any questions of negligence or proximate cause. The statute will not bear so severe a construction. The act of June 11, 1879 (P. L. p. 128), required certain buildings to be provided with "a permanent, safe, external means of escape therefrom in case of fire," leaving the determination of the means to be adopted to the individual owners, subject to the examination and approval of the fire commissioners or other proper officials. A supplement was passed June 1, 1883 (P. L. p. 50), and an amendment to the supplement on June 3, 1885 (P. L. p. 65), neither of which is material to the present case. On the same day, however, as this last act, June 3, 1885 (P. L. p. 68), was passed an amendment to the act of 1879, which is the statutory law in force at the time of this accident. This act prescribes in great detail the nature and mode of construction of the external fire escape required, but also has a proviso that "nothing herein contained shall prohibit any person * * * from selecting and erecting any other and different device, design or instrument, being a permanent, safe, external means of escape, subject to the inspection and approval of the constituted authorities for that purpose." The result of this act, with its proviso, is that while a design and mode of construction of fire escape are prescribed which, if followed, will absolutely exempt the owner from the penalties and liabilities of the act, yet he is left at liberty to erect one of a different kind at his own but at his own risk that it shall prove manent, safe, and external," and that it be subject to the inspection and approv the proper authorities.

What, then, is the effect of a failure t tain such approval? The act of 1879 ma the duty of fire commissioners and othe cials to examine and test fire escapes design and construction not being presc by the act), and, if found satisfactor grant a certificate of approval. The section imposed certain penalties and li ties for failure to comply with the act, will be discussed later on. The effect failure to get a certificate of approval thus left undefined. In the second a 1885 (P. L. p. 70), however, the provisio a certificate of approval was substan re-enacted, and it was expressly a "Thereby relieving the party to whom certificate is issued from the liabiliti fines, damages, and imprisonment im by this act." The effect of this clause not admit of doubt. The certificate o proval is conclusive evidence of nonlia under the act, but it is not a mandato quirement, and its absence creates no li ty that would not otherwise arise fro facts. It is evidence only, and the sole of its absence is to put on the owner th den of proof that he has complied wit tion first by building a fire escape in ac ance with its directions, or, under the viso, has made a permanent, safe, ex escape, which is substantially equiv It follows that the evidence offered te to show the erection of a proper and suf escape, as permitted by the proviso to s 1 of the act of 1885, should have been a ted.

The evidence offered in the first a ment was not admissible, not for the re on which it was excluded, but becau was not of the required rank as the evidence. The officer who issued the c cate would have been a competent wi as an expert, but his certificate is onl missible by force of the statute, and extends only to certificates given on exa tion and test before the happening o fire.

The second, third, and fourth assignm of error are sustained.

The seventh assignment must also be tained. The defendant's third point sh have been affirmed. Section 3 of the a 1885 gives the right of action in these w "Every person * * * neglecting or r ing to comply with the requirements of tion one, in erecting said fire escapes, be liable to a fine," and be deemed guil a misdemeanor, etc. "And in case o occurring in any of said buildings in th sence of such fire escape, approved by tificate of said officials, the said pers corporation shall be liable in an actio damages in case of death or personal ries sustained in consequence of such

Digitized by Google

breaking out in said building, * * * and such action for damages may be maintained by any person now authorized by law to sue, as in other cases of similar injuries." The construction that this raises an absolute liability for all injuries on the happening of a fire, whether the absence of a fire escape had any connection with such injuries or not, would make the owner responsible for results of which his act was not the cause, or, as in the present case, for acts of another over which he had no control. A construction which would make the law of such doubtful constitutionality should not be adopted, unless the language renders it imperative. There is no such compulsion here. The last clause of the section quoted—that actions "may be maintained by any person now authorized to sue, as in other cases of similar injuries"—shows clearly that what the legislature had in mind was the large and well-known class of actions for death and injuries caused by negligence. This act added another to that class. The failure to build a fire escape was made an act of negligence, for which a liability attached to the owner, but, as in other cases of the same class, a liability only to those injured in consequence of such negligence. There could be no better illustration of the wisdom and justice of this view than the present case. The undisputed testimony is that the fire escape was safe, sufficient, and effective when it was once reached. All the people on the fourth floor escaped by it uninjured. The difficulty was in the locking of the door that led to it on the third floor. The plaintiff got to this door in time, and had it been open, as it should have been, she could have escaped without injury, as did the others who came to it, some of them after she did. The only proximate and effective cause of the injury was the locking of the door, and that, according to the testimony of Taylor, the boss weaver, was done by him, at the order of his employers, the tenants. It was not the act of the defendant, or of any one over whom he had control or for whose actions he was responsible. The statute does not make him liable except for the consequences of his own act, and there was no evidence on which the jury should have been permitted to find that plaintiff's injuries were the result of anything defendant did or omitted. Judgment reversed.

In re YOUNG'S ESTATE.

(Supreme Court of Pennsylvania. March 18, 1895.)

ASSIGNMENT—TO HUSBAND AND WIFE—IN SEVERALTY—ENTIRETIES—LACHES.

1. An assignment of a mortgage to D. and his wife, E., "to have and to hold to the said D. and E., his wife, their heirs and assigns, forever, in equal moities or half parts, as tenants in common; that is to say, one full equal moiety or one-half part unto the said D., his heirs, executors and assigns, and the other full equal moiety or one-half part to E., her heirs, executors, and assigns," does not vest title in the husband and wife as tenants by the entireties, so that on the death of either the other becomes owner in severalty of the entire mortgage, but the assignment is of one-half the mortgage debt to each in severalty.

2. Where the words of an assignment to husband and wife leave in doubt the question of whether it is to them in severalty or as tenants by the entirety, the circumstances of the assignment and the character of the entire transaction may be considered.

3. One who neither appeals from the confirmation of the account of an executrix nor applies for a review of the account, cannot, more than eight years after the confirmation, during which time he has been free from disabilities, open the confirmation by indirection by an application to have the executor of the executrix file an account showing the disposition made by her of a mortgage to her testator.

Appeal from orphans' court, Philadelphia county.

David Young filed a petition asking that Henry K. Fox, executor of Elizabeth Young, deceased, executrix of David Young, deceased, be required to file a supplemental account of said Elizabeth Young as executrix of David Young, deceased. From a decree dismissing the petition, petitioner appeals. Affirmed.

W. H. Woodward, for appellant. Wm. Henry Fox and David Wallerstein, for appellee.

WILLIAMS, J. It appears from the petition and answer that David Young was, in 1879, the owner of certain real estate in Philadelphia. He sold it in that year to C. E. Johnson for $12,000, payable one-half in cash, and one-half in mortgage secured on the premises. Elizabeth Young, the wife of David, refused to join her husband in executing a deed to the purchaser, unless she was paid $3,000 out of the purchase money. Her husband finally agreed to this, the deed was executed, and delivered to the purchaser, and the money and the mortgage turned over to Young. But some $4,000 of the money seems to have been required to pay liens upon the land sold, and it became necessary to pay Mrs. Young out of the mortgage. In order to do this, Young assigned the mortgage to H. K. Fox, his attorney, who immediately reassigned it to David Young and Elizabeth Young, his wife, "to have and to hold to the said David Young and Elizabeth Young, his wife, their heirs and assigns, forever, in equal moieties or one-half parts as tenants in common; that is to say, one full, equal moiety or one-half part unto the said David Young, his heirs, executors and assigns, and the other full, equal moiety or one-half part to Elizabeth Young, her heirs, executors, and assigns." Our first question is over the effect of this assignment by Fox to David Young and Elizabeth Young. The orphans' court held that it vested the title to the mortgage in the husband and wife as tenants by the entireties, so that, upon the death of either, the survivor became the owner in sev-

Digitized by Google

eralty of the entire mortgage. The general rule that a conveyance to husband and wife as such, whether they are described in the deed as tenants in common or as joint tenants, vests in them an estate as tenants by entireties, is well settled. The reason of the rule is clearly stated by Blackstone in the second volume of his Commentaries, on page 182, thus: "If an estate in fee be given to a man and his wife, they are neither properly joint tenants nor tenants in common; for, husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, 'per tout et per my;' the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor." This is the rule in this state. In Johnson v. Hart, 6 Watts & S. 319, the conveyance was in express words to the husband and wife as tenants in common, but we held, in accordance with the rule just stated, that they were tenants by entireties. Being one person in law, a conveyance to them as husband and wife was necessarily a conveyance to the survivor. But it by no means follows that a grantor cannot convey to them as individuals. Nobody ever doubted that the husband was competent to take in severalty; and, under recent legislation, the competency of the wife to take and hold real estate as her own is just as clear as that of the husband. As to this subject, the legal unity of the husband and wife has been so far impaired as to enable the wife to use and enjoy her separate estate free from any right of possession or control by her husband. The cases cited by the appellant do not reach the real point of contention. The whole line of cases from Lodge v. Hamilton, 2 Serg. & R. 491, down to In re Bramberry's Estate, 156 Pa. St. 628, 27 Atl. 405, is fairly within the rule as laid down by Blackstone. Perhaps the most frequently cited case is that of Stuckey v. Keefe's Ex'rs, 26 Pa. St. 401, and we fully approve, and are ready in any proper case to follow, the doctrine there stated. It was restated in Re Bramberry's Estate, supra, by our Brother McCollum, very clearly. He said, in substance, that words which in a conveyance to unmarried persons would create a joint tenancy or a tenancy in common, would create, where the grantees were husband and wife, and they were so named in the conveyance, a tenancy by the entireties. The converse of this proposition is equally true, viz. that where the deed would create neither a tenancy in common nor a joint tenancy in unmarried persons, it will not create a tenancy by the entireties, though the grantees may be described as husband and wife. This is illustrated by a case put by Preston in his treatise on Estates (volume 1, p. 132), as follows: "A lease is to be made to three persons,—to A. for life, to B. in tail, and to C., his wife, for years. Here each takes in severalty, for a several estate is granted to each." Lew J., in commenting on the case put by ton, said, in Stuckey v. Keefe's Ex'rs, su "We do not see how it could be other The wife, under her lease for years, acqu no interest in her husband's estate in and could have no claim to hold it as vivor in case of the death of the husb and the husband, by virtue of a convey to him in tail, acquired no interest in wife's term. The interest which each w acquire in the estate of the other would be through the grant to the party acqu it, but would be such as the law of mar carves out of the estate granted to hi her companion." In other words, the na of the thing granted and the words of grant are to be taken into consideratio well as the existence of the marriage tion between the grantees. With this tinction in mind, let us now turn to th signment from Fox to David and Eliza Young, and see what, and in what ma it grants to each. It transfers the w mortgage debt to the grantees, and in a of habendum clause undertakes to des the interest which each shall take. It they shall hold in equal moieties or onc parts as tenants in common. This show intent that they shall not take by entire but as tenants in common. But the assi seems at this point to have recalled the that he was transferring, not real, but sonal, property, the evidence of a debt, he immediately adds by way of explana "That is to say, one full, equal moiet one-half part, unto the said David Y his heirs, executors, and assigns, and other full, equal moiety or one-half pa the said Elizabeth Young, her heirs, utors, and assigns." This was a gra each in severalty. If David Young sh die, this assignment, in express words, ried his half to his heirs, personal r sentatives, or assigns, and not to his as survivor. If Elizabeth Young had before her husband, her one-half of mortgage was her separate estate, t disposed of by her will, or to go into hands of her personal representative for posal under the intestate laws. Withou planation by the grantor, the words used to describe the respective interest his grantees would have given them a interest, to which a right of survivor would have attached by operation of the relied on by the court below. But the g tor did not leave his intention to stand words about whose effect he evidently uncertain, but proceeded to put in words, words of whose meaning he felt just what he intended, and what was e ly in accordance with the understandin all the parties. These words give one of the mortgage debt to each in sever and provide for the sale by either of h her part without the assent of the other, in case no sale should be made, carry

Digitized by Google

share of each to his or her heirs or personal representative. To hold otherwise would be to disregard and absolutely to subvert the intention of the assignor, and the arrangement under which the assignment was made. If Fox had executed two assignments,—one to the wife, her heirs, and assigns for one-half of the mortgage; and the other to the husband for the remaining half, to hold for himself, his heirs, and assigns,—it is not likely that this contention would ever have arisen. He really did this, but put both instruments in the same paper. Their effect is precisely the same it would have been if he had separated them, and executed and delivered each by itself. If the intent was left in doubt upon the terms of the paper, instead of being, as it is, quite plain, recourse could be had to the circumstances out of which the assignment grew, and the character of the entire transaction could be taken into the account, in order to resolve the doubt and settle the meaning of the instrument. Taylor v. Birmingham, 29 Pa. St. 306; Dexter v. Billings, 110 Pa. St. 135, 1 Atl. 180. All the evidence was before the court. It appeared that the property belonged to David Young. His wife demanded, as the price of her joining in the deed, that she should have $3,000 out of the purchase money. Her husband yielded to her demand. The assignment by Young to Fox, and the assignment of the same mortgage in equal half parts to Young and to his wife, was the method resorted to to carry out the bargain between Young and his wife, and give to her the $3,000 out of the purchase money, to hold as her separate property, free from the control and the survivorship of her husband. But we are nevertheless of the opinion that the decree must be affirmed. The laches of the petitioner were properly held to be a fatal barrier in the way of the relief sought. He is the grandson of David Young and Elizabeth Young. She survived her husband, and was the executrix named in his will. She settled her account as executrix, and it was duly confirmed. She survived the confirmation of her account more than eight years. During about eight years of this time the petitioner was of full age. He neither appealed from the decree of confirmation nor applied for a review of the account. He waited till her death, and till her executor is engaged in the settlement of her estate, and then asks by this petition that her executor be required to file an account showing the disposition made by his grandmother of the one-half of the mortgage held by David Young under the assignment by Mr. Fox. This is, in effect, an attempt to open by indirection the decree of confirmation made upon the final settlement of Elizabeth Young as executrix of David Young. That decree stands unappealed from, and it cannot now be disturbed in the manner attempted. For this reason the petition was rightly dismissed, and the decree of the orphans' court is affirmed.

FRAME v. FELIX et al.

(Supreme Court of Pennsylvania. March 18, 1895.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—VALIDITY OF CONTRACT—AWARD TO LOWEST BIDDER—EQUITY JURISDICTION.

1. In the making of contracts for construction work under authority from the councils of the city of Reading, the board of water commissioners is a mere department of the city government, and hence must comply with Act May 23, 1889, art. 4, § 6, requiring certain work for the city to be awarded to the lowest responsible bidder.

2. The fixing by board of city water commissioners, in specifications for work to be done, of a minimum price to be paid for labor, and the awarding of a contract on the basis of such specifications, is a violation of a statutory provision requiring such work to be awarded to the lowest responsible bidder, and void.

3. One who is a taxpayer and property owner in a city may invoke equity jurisdiction to set aside the action of a city board in awarding a contract in violation of law.

Appeal from court of common pleas, Berks county; G. A. Endlich, Judge.

Action by A. Lincoln Frame against George H. Felix, Matthan Harbster, Frank A. Tyson, and Frederick P. Heller, commissioners of the water department of the city of Reading, Howard E. Ahrens, and the city of Reading, for an injunction. From a judgment for plaintiff, defendants appeal. Affirmed.

The opinion of the court below is as follows (Endlich, J.):

"The bill filed December 20, 1894, in this case avers (1) that plaintiff is a citizen and taxpayer of the city of Reading owning real estate within the same taxable for municipal purposes; (2) that the said city is subject to the acts of May 23, 1874 (P. L. 230), and May 23, 1889 (P. L. 277); (3) that Felix and others named as defendants are commissioners of the water department of said city, under the provisions of said acts; (4) that, having resolved to construct a new inlet at the Maidencreek pumping station, they prepared plans and specifications, and invited proposals on the basis thereof, the same stipulating that none but citizens of the United States shall be employed by the contractor upon said work, and that the minimum wages to be paid by him to such employés shall be $1.50 per day; (5) that the contract was on December 18, 1894, awarded to the defendant Ahrens, upon his proposal made on the basis of said specifications, and that an agreement is about to be executed with him accordingly; (6) that the prevailing market price of labor in Reading is from $1 to $1.25 per day; (7) that the stipulation as to the minimum wages to be paid is illegal, unconstitutional, and void; and (8) that the said agreement, if executed, will do plaintiff irreparable injury. The prayers are (a) that the proceedings in awarding the contract be declared void; (b) that defendants be restrained from executing the proposed agreement; and (c) general relief. A preliminary

Digitized by Google

injunction was granted. The answer (which it was agreed by counsel should stand as the answer of all the defendants) admits all the averments except the third, which is qualified by the statement that the commissioners of the water department are governed by the act of March 21, 1865 (P. L. 458), and the sixth, seventh, and eighth, which are denied. The cause was tried and argued before the court on January 8, 1895.

"Upon the basis of the admissions in the pleadings, of the testimony taken, and of such matters as the court, under rule 27, § 5, takes judicial notice of, I make the following findings of facts:

"(1) The plaintiff, A. Lincoln Frame, is a citizen and taxpayer of the city of Reading, and the owner of real estate in the said city taxable for municipal purposes. (Plaintiff's request for findings of fact No. 1 granted.)

"(2) The city of Reading is a municipal corporation, having accepted and being subject to the provisions of the act of the legislature entitled 'An act dividing the cities of the state into three classes,' etc., approved May 23, 1874, being a city of the third class, and is also subject to the provisions of the act of legislature entitled 'An act to provide for the incorporation and regulation of cities of the third class,' approved May 23, 1889. (Plaintiff's request for findings of fact No. 2 granted.)

"(3) George H. Felix, Matthan Harbster, Frank A. Tyson, and Frederick P. Heller, four of the defendants, are commissioners of the water department of the city of Reading, which department is governed by the provisions of the act of March 21, 1865 (P. L. 458), and the supplements thereto; the former providing, in section 4, that said commissioners shall have power 'to purchase such materials as shall be requisite for keeping said waterworks in good repair, but not for the construction of new works, without the consent and direction of councils'; and that 'no new work of construction * * * shall be undertaken by said commissioners, without the consent of councils being first had and obtained.' (Plaintiff's request for findings of fact No. 3 modified.)

"(4) In pursuance of an ordinance of the councils of the city of Reading of March 23, 1894, providing as follows:

" 'Section 1. Be it ordained, etc., that the sum of $35,000 be and the same is hereby appropriated to the department of water for the fiscal year of 1894, to purchase an additional pumping engine for use at Maidencreek pumping station, and to make such alterations to the present pumping station as shall be necessary for the accommodation of said engine. * * *

" 'Sec. 2. That the board of water commissioners be and are hereby authorized and directed, immediately after the approval of this ordinance, to advertise for proposals for said pumping engine and alterations to building, and award contracts for the same to such party or parties as they may deem
er for the best interests of the city. *
—The said commissioners of the wate
partment, having resolved to construct a
inlet at the Maidencreek pumping stati
the said city, prepared plans and spec
tions therefor, and invited proposals fo
said work, on the basis of the said
and specifications; and that in the
specifications it was stipulated that the
son to whom the contract should be awa
should not employ any laborer, artisa
mechanic upon the said work who was
citizen of the United States, and that
contractor should not pay less for labo
the said work than $1.50 per day for
person employed. (Plaintiff's request
findings of fact No. 4 granted, with th
dition of the ordinance under which the
missioners were acting.)

"(5) A number of proposals were mad
the said work upon the basis of the said
ifications, and the said commissioners o
water department, on the 18th day of
cember, A. D. 1894, awarded the contrac
the said work to Howard E. Ahrens, o
the defendants, who had made one of
proposals on the basis of the said spec
tions, and, unless restrained, will execu
agreement with the said Howard E. Al
for the performance of the said work i
cordance with the terms of the said
and specifications. (Plaintiff's request
findings of fact No. 5 granted.)

"Under these findings of fact, and a
plicable to them, I make the following
ings of law:

"(a) In the inviting, awarding, and co
sion of contracts for new work of cons
tion under authority of the councils o
city of Reading, the board of water com
sioners is bound to act in conformity
the provisions of Act May 23, 1889, a
§ 6; and the authority given it by the
nance of March 23, 1894, respecting the
struction or alteration at the Maidenc
pumping station, must be understood as
ing been given and as exercisable by
board subject to said provisions.

"(b) The fixing by the board of water
missioners, in the specifications for the
to be done at the Maidencreek pumping
tion, of a minimum price to be paid for l
and the inviting of proposals and the aw
ing of the contract upon the basis of
specifications, are a violation of the s
tory requirement in Act May 23, 1889,
4, § 6, that such work be awarded to
lowest responsible bidder, and therefore
(Plaintiff's request for findings of law
substantially granted.)

"(c) The plaintiff, as a citizen, taxp
and property owner in the city of Rea
has a right to invoke the equity jurisdi
of this court to set aside the action of
board of water commissioners in the p
ises, and to restrain the execution of
proposed agreement between it and the

Digitized by Google

fendant Ahrens in pursuance of said action.

"(d) The plaintiff is entitled to a decree in accordance with the first and second prayers of his bill, with costs. (Plaintiff's request for findings of law No. 4 substantially granted.)

"The reasons which seem to compel the decision I have just indicated are (without regard to the order of the findings) the following:

"1. The present bill falls clearly within the category of bills quia timet,—'a well-settled branch of equity jurisdiction.' Wheeler v. Philadelphia, 77 Pa. St. 338, 348; Wells v. Bain, 75 Pa. St. 39; Baird v. Rice, 63 Pa. St. 489; Page v. Allen, 58 Pa. St. 388. Nor can the standing of a citizen and a taxpayer, when money is to be raised by taxation or expended by the municipal treasury, to proceed in equity to test the validity of the proposed action claimed by him to be illegal, be questioned at this day (Wheeler v. Philadelphia, supra; Sharpless v. Mayor, etc., 21 Pa. St. 147; Moers v. City of Reading, Id. 188; Mott v. Railroad Co., 30 Pa. St. 9; Page v. Allen, supra; Mazet v. City of Pittsburgh, 137 Pa. St. 548, 20 Atl. 693), the recognized grounds of such standing being special injury to his interests as a taxpayer, and want of a common-law remedy. See Bisp. Eq. § 424; 1 Spell. Extraord. Relief, § 614, 717; Mott v. Railroad Co., supra. It is therefore unnecessary for him to show any injury likely to result to him from the alleged illegal action, different in kind from that common to all other citizens and taxpayers, and inferable, as a matter of law, from the illegality of the proposed expenditure of the public money. The fact of a threatened injury entitling him to a relief is necessarily involved in the establishment of the illegality of the intended municipal action. Hence I have deemed it needless to make any special finding, as a finding of fact, that the contract here in question, if executed, will do irreparable injury to plaintiff. (Plaintiff's request for findings of fact No. 7 refused, etc.)

"2. It was decided in Reading v. Shepp, 2 Pa. Dist. R. 137, upon careful consideration of all the pertinent statutes, that the special act of 1865, creating and governing the water department of the city of Reading, is not repealed by the provisions of the act of 1874, providing a system by which cities of the third class may purchase the franchises, etc., of existing water companies, nor by those of the act of 1889, empowering such cities, having become the owners of waterworks, to establish water departments; and that, therefore, the water department of the city of Reading is governed by the act of 1865 and its supplements, and not by the general laws of 1874 and 1889. The question then arises whether, in inviting proposals and awarding contracts, the board is required to conform to the provisions of article 4, § 6, of the last-named enactment, which is as follows: 'All work and materials required by the city shall be furnished, and the printing, advertising and all other kinds of work to be done for the city, shall be performed under contract, to be given to the lowest responsible bidder, under such regulations as shall be prescribed by ordinance.' It was decided in Bork v. City of Buffalo, 127 N. Y. 64, 25 N. E. 355, that a provision in the charter of the city of Buffalo prohibiting the same from entering into a contract for any work or improvement exceeding certain prices, and with certain exceptions, 'until the assessment therefor has been confirmed,' did not apply to the board of park commissioners of said city, or to the contracts made by them; but that the provisions mentioned had reference to contracts made by the regular officers of the municipal government, and not those made by a separate department possessing independent corporate powers. It appears from the opinion of Mr. Justice Vann in that case that the park commission was organized by a special statute passed 1869, subsequently to the enactment of the charter of the city, forming no part of it, and in no way dependent upon it; creating an independent department of the city government, and clothing it with power to locate parks, lay out approaches thereto, appropriate and condemn lands for these purposes, make rules for the regulation, government, and protection of the parks, etc., all powers which were to be exercised by the commission independently and without the consent or approval of any other body or officers. In 1885 the provisions of the statute of 1869 were incorporated in a revision of the city charter as one of the titles of the same, with the apparent object of having all the laws relating to the city government in its various departments embraced in a single statute, for the sake of convenience. The park commissioners were not, however, in terms, made city officers, but were still given 'sole and exclusive power by contract or otherwise to open, grade, construct, repair and maintain the roadways,' etc., without leave or license from the council or other agency of the city. Of the cost of improvements determined upon by the commission (not exceeding the limitation of the statute as to amount), it was made the duty of the city council to raise one-half by local assessment. The contract in question was executed in form by 'the city of Buffalo by the park commissioners.' Between the relation of the statute creating the Buffalo park commission to the charter of the city of Buffalo, and that of the act of 1865 to the previously enacted charter of the city of Reading and the act of 1889, which is its present charter, as well as between the relation of the park commissioners to the city government of Buffalo and that of the Reading water board to the city government of Reading, there are certain points of resemblance, so obvious that they need not be pointed out. But the points of distinction are no less striking though created by spe-

Digitized by Google

cial statutes, separate from and forming no part of the charter of the city of Reading, with certain powers and duties defined by the legislature beyond the control of the city councils, and unaffected (as far as its composition, rights, methods, and privileges, and the resulting liabilities of property holders are concerned) by subsequent general legislation. The Reading water board is, nevertheless, not a separate body, possessing powers independent of the city councils in the management of the water department, or the construction of or contracting for new work within the same. By section 4, Act 1865, it is required to perform all such duties relating to the management of the department as the city councils may, consistently with the act, impose upon it; to submit, whenever called upon, estimates of the expense of new works, alterations, etc., contemplated by councils in the water works; to carry out, with the aid of the city police, the regulations of councils as to the use of water by the residents of the city; and, while permitted to purchase such materials as may be requisite for keeping the works in repair, it is denied the right to do so for the construction of new works without the consent and direction of councils, and forbidden to undertake any such new work except with their consent. Without going any further, therefore, it seems very clear that the water board, existing and acting under the statute of 1865 and its supplements, is, nevertheless, at least in all matters in which it is made subject to the direction of councils, but a department of the city government,—an established agency of the city for carrying on one branch of the municipal affairs. If it were needful, this conclusion might be fortified by a comparison between the relations of the Reading water board, under the statutes here governing, and the relation of the Sewickley water commissioners to that borough, under the enactments applicable to it, passed upon in Commissioners v. Sewickley Borough, 159 Pa. St. 194, 28 Atl. 169, where it is said by Mr. Justice Green, at page 198, 159 Pa. St., and page 169, 28 Atl.: 'They are mere officers, through whose agency the works were constructed, maintained, and operated.' If, however, the Reading water board is not a separate body, possessing independent corporate powers, but a mere department or agency of the city government, in the construction of new waterworks, then it is too plain for argument that the inviting and awarding of a contract for that purpose by the board at the direction of councils is the act of the city, through the agency of the board; and so are the execution of the contract and the work of construction. But, the city being required to do all such work by contract to be given to the lowest responsible bidder, it cannot be pretended that it may evade that requirement by acting indirectly through the agency of the water board. It was held in Re Emigrant Industrial Sav. Bank Y. 388, that the city of New York, be quired to do all public work exceeding tain amount by contract to be awarded lowest bidder, could not escape that ment as to a particular part of such w delegating the doing of it to the par missioners in such manner as they 'deem expedient and for the best inte the city and property owners.' It that when the city councils, by the or of March 23, 1894, authorized the board to engage in the work of const a new inlet at the Maidencreek pumpi tion, and for that purpose to advert proposals and award contracts, it n conclusively held to have intended a ance on the part of the water board w 1889, art. 4, § 6; and what is implied i or ordinance is just as much a part what is expressed. U. S. v. Babbit, 1 61; Hanchett v. Weber, 17 Ill. Ap Siegel v. Lauer, 148 Pa. 236, 23 Atl. 9 a word, in inviting proposals and av a contract in this case, the water boa bound by the requirement that mu work is to be given to and done lowest responsible bidder, and to m specifications accordingly. Has it c with that requirement? If not, then, said by Denio, J., in Brady v. May 20 N. Y. 312 (a case arising under a enactment), it does not require any ar to show that the proceeding was n void and conferred no rights upon t son to whom the contract was award

"3. The provision that contracts for ipal work shall be given to the lov sponsible bidder does not have sole ence to the more pecuniary ability contractor, but involves a discretion part of the municipal authorities in lection of the agency best fitted for t formance of the work, etc., required v. Mitchell, 82 Pa. St. 343; Findley of Pittsburgh, Id. 351; Douglass v 108 Pa. St. 559; Interstate Vitrified etc., Co. v. City of Philadelphia, 1 St. 477, 30 Atl. 383. But, that di being granted, the purpose of the pr which 'was based upon motive of economy, and originated, perhaps, i degree of distrust of the officers to the duty of making contracts for t lic service was committed' (Brady v or, etc., supra, per Denio, J., at pag clearly was 'to secure to the city t efit and advantage of fair and jus petition between bidders, and at th time close, as far as possible, every to favoritism and fraud in its varied (Mazet v. Pittsburgh, 137 Pa. St. Atl. 693, per Sterret, J., at pages 5 137 Pa. St., and page 693, 20 Atl.), insure 'the accomplishment of the v the lowest price by subjecting the c for it to public competition' (In re 20 Hun, 301, per Brady, J., at pag

Digitized by Google

n order to effectuate this purpose, it is manifest that, where something is to be done hat is required to be submitted to competition, every essential part of it that goes o make up the whole of it must be submitted to such competition. In re Paine, 26 Hun, 431. If any one essential part can be withdrawn from competition, so may others; nd in the end it will be found that contracts will be let to the lowest bidder on ome single trifling element, while as to all important items there has been no competition at all. Such was, indeed, the case in Brady v. Mayor, etc., supra. Upon items making up seven-eighths of the expense of he work to be done no bids were asked; but a pretense of compliance with the statute was made by awarding the contract to the owest bidder, upon the items making up the remaining one-eighth of the entire expense. This was held clearly a violation of the law. Nor can it make any difference in principle whether items be withdrawn from competition by permitting (as in Brady v. Mayor, etc., supra) the contractor to charge for them as he pleased, or by stating in advance what will be allowed for the same. Thus, in Re Mahan, supra, it was held that when the statute requires a public officer to advertise for bids for work to be performed, with a view to awarding the contract to the bidder, he cannot lawfully, in such advertisement, fix an arbitrary price to be paid for certain specified kinds of work, included in that for which the bids are asked; e. g., in advertising for bids for the construction of a sewer, he cannot fix $4 per cubic yard as the price to be paid by the municipality for all rock excavation. 'If,' says Brady, J., 'the items of rock excavation may be omitted from the contract to be made by arbitrarily stating an allowance for it, the same course may be pursued as to the other items, and the advertisement made, therefore, to cover a few only of the items constituting the whole work to be done.' Accordingly, a contract made upon the basis of such an advertisement, and embodying its objectionable feature, was declared to be illegal. The principle of this decision, affirmed on appeal in 81 N. Y. 621, was followed under similar conditions in Re Mauger, 23 Hun, 558; Re Manhattan Sav. Inst., 82 N. Y. 142; Re Merriam, 84 N. Y. 596; Re Metropolitan Gaslight Co., 85 N. Y. 528; Re Paine, 26 Hun, 431. The fact that the assesments laid to pay the amounts accruing to the contractor upon such contracts were in the earlier cases vacated, in the later simply reduced, is irrelevant here; the reason for the adoption of the latter rule, obviously justified where the work had been done, and the application was to avoid contribution on the part of property holders benefited to its expense, being, together with the rule itself, inapplicable here. It seems, therefore, to be beyond question that, under a provision requiring the submission of contracts for municipal work to competitive bidding, and the awarding of them to the lowest responsible bidder, it is not lawful to fix, in the specifications, on the basis of which the proposals are invited, any arbitrary sum to be paid for any part or item of the work to be done; and that the fixing of such a sum for any part or item of such work renders illegal the entire proceeding and the contract to which it may lead. Nor is it material whether the sum so fixed be or be not, in point of fact, in excess of what it is likely that the competition among the bidders would have made it. Says Brady, J., in Re Mahan, supra: 'In the consideration of this case it was thought that, inasmuch as it did not appear that the price allowed for rock excavation by the commissioner of public works was in excess of what would have been demanded by any contractor, the petitioner did not sustain any injury by the omission mentioned, and was not aggrieved, therefore, by any substantial error. But reflection upon that theory has led to the conviction that that is not enough to override the plain terms of the statute.' Manifestly this must be so. If not, the requirement to submit public work to competitive bidding could be practically disregarded by municipal officers whenever they might feel disposed to take the chance of being stopped by the taxpayers, and, in case they should be, of finding the ways and means of proving that the expenditure was not in excess of what it would probably have been had they obeyed the statute. Such a condition of the law would be simply intolerable, and cannot for one moment be thought of as a possible thing.

"Now, the difficulty with the specifications and proposed contract in this case is that the former undertake to fix arbitrarily and in advance the price of one of the important elements entering into the expense of the work to be done thereunder, by the stipulation that the contractor shall pay to the persons employed by him in the performance of the contract not less than $1.50 per day as wages. I am not going to decide, because, as I have shown, it is unnecessary to decide, whether or how much that is in excess of average wages paid to persons employed in the kind of work contemplated in these specifications and this proposed contract. The evidence offered by plaintiff upon this subject might, when objected to, have been excluded, which would have prevented any counter evidence by defendants on the subject. For that reason I have marked as refused the plaintiff's sixth request for findings of fact and his second request for findings of law. All that I am bound to say or that is proper for me to say is that, by attempting to fix in the specifications, on the basis of which proposals were invited, the minimum rate of wages to be paid by the contractor, the water board has withdrawn from possible competition

Digitized by Google

one of the essential elements of the work, every part of which it was required to submit to competition, and that thereby its invitation of proposals for the remainder of the work, its award of the contract therefor, and the proposed execution of said contract have been rendered illegal as in contravention of the mandate of the statute.

"It may, in view of prevailing conditions, be unfortunate that the case before me had arisen at this time, and it may be, as urged at the hearing, that the plaintiff's motives for bringing it here, beyond these disclosed by the record, were not the most commendable. But, the case being here, every question necessarily to be passed upon in its decision is, of course, to be determined upon recognized legal principles, and upon no other consideration; and with the plaintiff's hidden motives the court has nothing to do. Mazet v. City of Pittsburgh, 137 Pa. 548, 20 Atl. 693. It is, moreover, to say the least, extremely doubtful, and from what was said upon the argument it would hardly seem to be supposed by any one, that the fixing of a minimum rate of wages to be paid to laboring men in the performance of municipal contracts ever does put into the pockets of a single one of them employed by the contractors one penny more than what his labor would at the time command in the community. The wages of labor are not controllable in that way. If the average wages paid for labor of the kind required are equal to the rate thus prescribed, such a stipulation is an entirely nugatory one. If the average is less, the contractor, whoever he may be, will ordinarily pay just what the average is, and nothing more. In either event the laboring man will be none the better off because of such a stipulation, unless it be enforceable under a valid contract. But I am not now deciding, because it is not before me, that every contract between a municipality and a contractor containing a stipulation as to the minimum rate of wages to be paid by the latter is necessarily void, or that such a stipulation in any such contract is unenforceable. Nor, for the same reason, am I deciding anything as to the right of the city or any department to fix the wages to be paid to laboring men employed directly by it. I am dealing here only with the question of its right to prescribe in its specifications and invitation for bids the rate of wages to be paid by others in the performance of such works as it is required by law to throw open to competitive bidding and to award to the lowest bidder, and with the question of the legality of a contract to be made, in the face of such a requirement, upon the basis of specifications so framed and conditioned in advance of the bidding and awarding of the contract. Neither am I passing upon the city's right, in such work and such contract, to require the employment of American citizens only, and to insist upon the same,—a question which is not material to the decision of t
and I repeat that I am not decid
the average rate of wages in this
or is not $1.50 per day, or that t
required in the performance of the w
templated by the proposed contract
ought to be obtained at a less rate o
I am simply deciding that in asking
posals as to that work, and in fra
specifications therefor as the basis
proposals, the water board had no
fix, in advance, any rate of wages to
by the contractor, whether it be too
too low, and that, therefore, its past
tended action in the premises canno
tained.

"Counsel may prepare and submit
er decree to be entered in this cas
cordance with the foregoing decisi

William J. Rourke, City Sol., fo
lants. Stevens & Stevens and C
Derr, for appellee.

PER CURIAM. The important
in this case is raised upon the spec
forming part of the proposed cont
the new inlet and pumping station
be built by the water department
city of Reading. These specification
the contractor to employ no one not
of the United States, and to pay n
less sum for his labor than $1.50
The point made by the plaintiff is t
specifications are not consistent
provisions of Act May 23, 1889,
§ 6, which require that such work
let to the lowest responsible bidd
learned judge of the court below, in
ings of law marked "(a)," "(b)," "
"(d)," has sustained the contentio
plaintiff and fully vindicated his
We affirm it for the reasons so clear
in these findings. The question disc
the remainder of the opinion, affec
organization of the water departm
fendant, is not raised by the assign
error, and we express no opinion u

BROWNING v. KEMPTON.

(Court of Chancery of New Jersey.
1895.)

PROMISSORY NOTE—CONSIDERATIO

A partner gave a note to a
whose business the firm succeeded, and
years made no demand for surrender,
demand had been made on him for pay
branch of the business was established
the payee's knowledge, and the maker'
submitted to a judgment on a like n
by him. *Held* sufficient to show that
was given for the interest in the busin

Bill by William J. Browning agai
liam B. Kempton. Dismissed.

E. A. Armstrong, for complainant
Hugg, for defendant.

Digitized by Google

BIRD, V. C. Browning files his bill of complaint asking for a decree directing Kempton to refrain from prosecuting a suit at law for the recovery of the amount of a certain promissory note given by the former to the latter, and directing the latter to surrender said note for cancellation. The note was given under the following circumstances: Kempton was engaged in the mercantile business, on Market street, Philadelphia, in the year 1882, and had been so engaged since the year 1865. At the last-named period, Browning, being then a mere boy, went into the employ of Kempton, and continued in his employ until the close of the year 1882. At the close of the year 1882, Kempton expressed a desire to retire from business, and to transfer his interest in his stock of goods to others. A copartnership was formed under the name of Crap, Vanderveer & Co. The names of the individuals forming the company were Crap, Browning, Vanderveer, and Glass. The terms of the copartnership were reduced to writing, but the writing has not been produced, and all trace of it seems to have been lost. According to the testimony of Browning and Crap, they had no other interest whatsoever in the concern than to draw their salaries. But at the very beginning, viz. on the 1st day of January, 1883, both Browning and Crap gave to Kempton a promissory note, by which they promised to pay to Kempton $5,000, with interest, in one year from the date thereof. They both swear that this represented Kempton's interest in the partnership, and that the notes were given for no other purpose whatever. On the contrary, Kempton swears that the notes were given to secure to him the interest which they took in the stock of goods conveyed by him to the partnership. The stock of goods transferred to the partnership was inventoried at $85,000. Glass and Vanderveer paid $10,000 to Kempton, and Browning and Crap gave the notes referred to. The firm remained liable to Kempton for the balance of the value of the stock as inventoried. It is in evidence that from time to time the firm made payments upon this liability to the amount of $18,000. The firm continued in business for three years. At the termination of the first year Browning renewed his note to Kempton, adding thereto the amount of one year's interest, which note was made payable in one year from its date. At the end of the second year the third note was made by Browning to Kempton, adding thereto the interest of the amount of principal of the second note. This note was put in suit by Kempton, and it is the suit upon this note which Browning asks to have enjoined. The complainant insists that he never had any interest in the business beyond that of compensation for his services, which was fixed at the sum of $1,800 a year; that he engaged in it solely at the instance of Kempton, and for his benefit; and that he had nothing to do with the arrangements or negotiations which terminated in the formation of the copartnership, and arranged all the details thereof with respect to the payments that were to be made by the other partners, and also with respect to the continuance of Kempton's own interest as represented by Browning and Crap. He also says that Kempton was in constant consultation with the members of the firm respecting the conduct of the business during its entire continuance. He gives an instance, namely, the project of removing their place of business further to the west, on Market street, which was opposed by Kempton. This Kempton admits. According to Kempton, the notes given by Browning and Crap for $5,000 each represented their interest in the copartnership, and not his. He insists that he had no other interest in the concern than to receive therefrom the value of the stock of goods which he assigned and transferred to it, a part of which value was represented by the said notes. His claim is, first, that Browning entered into the negotiations, became a partner, and executed and delivered this note to him at the commencement, and that that note was renewed at the beginning of each business year thereafter, including the interest due at the end of each preceding year. These notes were placed in the possession of Kempton, and retained by him until he commenced an action at law upon the last one. The business was commenced in 1883, and at the termination of the third year it was wound up. From that time for four or five years Kempton retained the possession of these notes, and Browning never asked that they should be surrendered. That Kempton was lawfully possessed of this note casts the entire burden upon Browning if he would relieve himself from his liability to pay according to the tenor of the note. It ought to be observed that Browning, at the time he engaged in this business as one of the copartners, was in no sense a mere novice, and unskilled in business, or unacquainted with the ordinary ways of tradesmen. He had been salesman for many years for Kempton, and thereby had undoubtedly acquired considerable knowledge of the methods by which business men either bind or discharge themselves to or from obligations with others. In the third place, there is no doubt but that Kempton made claims upon Browning to discharge his liability, although Browning says that he never made any claim on account of this note until about the time the action at law was begun. There is no doubt but Kempton wrote to Browning demanding payment. Kempton says that he demanded payment of those notes. Browning says that it was a general demand, without reference to any specific liability. Kempton's letter to Browning cannot be produced. Browning was asked, "What were you indebted to Mr. Kempton for on which he wrote you?" to which he answered: "The firm of Crap, Vanderveer & Co. was indebted to him, and I was one of the individual members of

Digitized by Google

the company. That is all I was indebted to him." He also says that in about the year 1890 Kempton asked him if he could not pay him something on account. "Q. You say it was on account of this indebtedness to Mr. Kempton of Crap, Vanderveer & Co. to Mr. Kempton? A. Yes, sir. Q. There was indebtedness? A. Yes, sir. Q. Outstanding? A. Yes, sir." These admissions upon the part of Browning seem to me to be entirely in conflict with his first insistment that he only represented Kempton, and that he and Crap were but another name for Kempton. If they were but figureheads as between themselves and Kempton, then most evidently they were as free from any legal liability to Kempton on account of the debts of the partnership as they were on account of the promissory notes which they had given. If the one part of the transaction was mere form, the other was equally so. Hence, when he admits that as a member of the firm of Crap, Vanderveer & Co. he was liable, not to the creditors of the concern, who knew nothing of the secret negotiations between him and Kempton, but to Kempton himself, the very foundation upon which he rests his case seems to be removed. And, notwithstanding that Crap, in his testimony, corroborates Browning as to the relations which they sustain to Kempton, the fact that he submitted to a judgment at law upon the note which he gave to Kempton, making no other defense to it than an advance by him to Kempton of $250, which was allowed, is plenary proof that his testimony is to be taken with many qualifications. In the fourth place, it appears that the copartnership established a branch at Carlisle, about which Kempton knew nothing, and that the result of the undertaking was very unfortunate. As urged, it would seem that, if Kempton was interested in any sense beyond the recovery of the balance due him for the transfer of the stock, he would have been consulted before the firm engaged in an enterprise of this character, especially when two of the members claim that they were his confidential agents or servants, and had no interest in the business, except as they represented Kempton, and to draw their salaries. In the fifth place, Crap admits, as I understand his testimony, that these notes were to be paid out of the business. The question was: "Then you mean to say that if there was anything made out of the business it was to go toward paying those notes? A. Most assuredly I mean to say that." He further says: "I was a partner in the firm, and, if there was any money made, I suppose Mr. Kempton was to get it. Q. So you were a partner, and Mr. Kempton was to get all the money? A. I am making my answer. I was a partner in the firm. Q. As a partner, were you to be liable for the losses, if any, and, if you had any profits, were you to receive them? A. Yes, sir." The result of this investigation seems to be that Kempton was desirous of getting out of the business, and to that end nership was formed by Crap, Browni derveer, and Glass, under the name Vanderveer & Co. Articles of copar were prepared, and signed by each four persons last named, fixing their providing that they should each shar profits and losses, and that they sho the stock of goods of said Kempton. so understood (whether it was so e or not does not appear) that Vander Glass should each put in $5,000 in c that Browning and Crap should als $5,000, either in cash or merchand that whichever—whether cash or m dise—it was to be furnished by K According to Crap's statements, this derstood by Vanderveer and Glass. furnished the merchandise, and to Crap and Browning the notes refe the Browning note being the one upo the action at law was begun. Giv statement—which is fully in accorda the testimony of both Crap and Bro the most favorable interpretation there does not seem to be the slightes for the execution and delivery to of the note in question, if there was consideration for it than that insist by Browning, namely, that it was show the extent of Kempton's interes concern, so far as Browning was co The facts that Kempton wanted t lieved of the business, and that th to share in the profits or losses, and t were liable to Kempton for any indeb upon the part of the firm to him, g to such strong presumptions against ing as entirely to overcome the rea fered by him in asking for an injun will advise that the bill be dismisse costs.

COLVIN v. PITNEY et al.

(Court of Errors and Appeals of New March Term, 1894.)

Appeal from court of chancery.

Bill by the executors of Catherine C. deceased, against Sarah H. Colvin and to determine the priority of mortgag From the judgment (26 Atl. 928), Sarah vin appeals. Affirmed.

Joseph P. Osborne and George W. C appellant. Henry C. Pitney, Jr., and H. Vredenburgh, for respondents.

PER CURIAM. Decree unanimously ed, for the reasons given in the court cery.

In re WILKINS' WILL.

BUZBY et al. v. DARNELL.

(Court of Errors and Appeals of New March Term, 1894.)

Appeal from prerogative court.

A decree of the orphans' court, admitt last will and testament of Mary M. Wi

Digitized by Google

probate, was reversed in the prerogative court, on the appeal of Henry Darnell, guardian of Joshua W. Hurley (26 Atl. 676); and Mark H. Buzby and others, executors, appeal. Affirmed.

Mark R. Sooy, for appellants. Jerome B. Grigg and Samuel H. Grey, for respondent.

PER CURIAM. Decree affirmed, for the reasons given by the ordinary.

DEPUE, GARRISON, LIPPINCOTT, REED, VAN SYCKEL, BROWN, and KRUEGER, JJ., for affirmance. DIXON and BOGERT, JJ., for reversal.

ENGLE et al. v. DARNELL.

(Court of Errors and Appeals of New Jersey. March Term, 1894.)

Appeal from prerogative court.

A decree of the orphans' court, admitting the last will and testament of Mary M. Wilkins to probate, was reversed in the prerogative court on the appeal of Henry Darnell, guardian of Joshua W. Hurley (26 Atl. 676); and Samuel T. Engle and others, legatees, appeal. Affirmed.

Eckard P. Budd, for appellants. Jerome B. Grigg and Samuel H. Grey, for respondent.

PER CURIAM. Decree affirmed, for the reasons given by the ordinary.

DEPUE, GARRISON, LIPPINCOTT, REED, VAN SYCKEL, BROWN, and KRUEGER, JJ., for affirmance. DIXON and BOGERT, JJ., for reversal.

MORRIS & E. R. CO. et al. v. NEWARK PASS. RY. CO.

(Court of Errors and Appeals of New Jersey. March Term, 1894.)

Appeal from court of chancery.

Bill by the Morris & Essex Railroad Company and the Delaware, Lackawanna & Western Railroad Company against the Newark Passenger Railway Company. On order to show cause why preliminary injunction should not issue. Order discharged, and injunction denied (29 Atl. 184), and complainants appeal. Affirmed.

F. McGee and J. D. Bedle, for appellants. E. Q. Keasbey for respondent.

PER CURIAM. Order affirmed for the reason given by the chancellor. Decree unanimously affirmed.

CONGREGATION OF SONS OF ABRAHAM v. GERBERT.

(Court of Errors and Appeals of New Jersey. Feb. 21, 1895.)

OPTION TO PURCHASE LAND—ACTION FOR BREACH.

Lease to A. for five years, with a covenant that A. shall have a further term of five years from the expiration of the term thereby created, if lessee gives three months' notice of his intention to take such further lease, and with the further covenant that, if A. desires to purchase the demised premises, the lessor will at any time during the tenancy thereby created or agreed upon convey said premises to A. for the sum of $7,000. A. gave due notice of his election to take a second term, and remained in possession, and during such second term demanded a deed, which the lessor refused to give. *Held*, that A. was entitled to damages arising from the loss of his bargain by the refusal of the lessor to convey.

(Syllabus by the Court.)

Error to circuit court, Essex county; Childs, Judge.

Action by the Congregation of the Sons of Abraham against Peter Gerbert, executor of John Snyder, deceased. There was judgment for defendant, and plaintiff brings error. Reversed.

Coult & Howell, for plaintiff in error. Colie & Swayze, for defendant in error.

VAN SYCKEL, J. John Snyder, in his lifetime, on the 1st day of March, 1884, made a lease under seal of premises in the city of Newark, known as "No. 226 Washington Street," for the term of five years from April 1, 1884. The said lease contained the following covenants: "And the said John Snyder further covenants and agrees to and with the said party of the second part that he will let and demise to them the premises hereby demised for a further term of five years from the expiration of the term hereby created, and upon the same terms as to amount and payment of rent, if the said party of the second part shall so desire, and shall give notice thereof at least three months before the expiration of this lease; and further, that if the said party of the second part shall desire to purchase the demised premises, that he will at any time during the tenancy hereby created or agreed upon, for the consideration of seven thousand dollars, sell and convey by warranty deed, with the usual full covenants, free and clear of all incumbrances, the demised premises to the said party of the second part, or such person or persons as they shall desire, upon their giving to him, his heirs, executors, or administrators, notice that they desire such conveyance; such conveyance to be made within thirty days after the giving of such notice, and the payment of rent to cease at the delivery of such deed, and, if not delivered within said thirty days, then said rent to cease at the end of that time." On November 5, 1888, the plaintiff served a notice on Snyder that the plaintiff desired a further lease for five years from the expiration of the then current term. The plaintiff continued in possession, and on June 1, 1892, served upon the executor of Snyder and upon his heirs at law a notice that the plaintiff elected to purchase the premises in question, and demanded a deed in accordance with said lease, which the defendant refused to give. The only question submitted to this court is whether the plaintiff was entitled to recover damages in the court below for breach of the agreement to convey. The language of the covenant in regard to another term is that "Snyder will let and demise the premises for a further term of five years from the expiration of the term hereby created,"

Digitized by Google

while the language with reference to the conveyance is that "he will, at any time during the tenancy hereby created or agreed upon, sell and convey." Two tenancies are here referred to: First, the tenancy for five years, expressly created by the terms of the lease, and correctly described as the term thereby created; second, the further tenancy for five years at the option of the lessee, which was agreed upon and provided for in the lease. Effect must be given to all the words used in the clause last cited. If the right to a conveyance was not to extend beyond the first term, that agreement would have been clearly expressed by the word "created," as used in reference to the right to a further lease. The addition of the words "or agreed upon" must have been inserted to enlarge the right to a conveyance, to give something more than the word "created" would have passed; otherwise they are of no force. They are apt words to entitle the lessee to a conveyance at any time during the term which was, at its option, to follow the term created; and a reasonable interpretation of the contract requires that signification to be imputed to them. The second term was created by the service of the notice in due time. By force of that notice, under the covenants of the lease, the further term agreed upon was created; no further writing was necessary. The option to purchase continued during this second term, and the plaintiff was entitled to damages arising from the loss of its bargain.

CRAMER v. WATER COM'RS OF NEW BRUNSWICK.

(Supreme Court of New Jersey. Feb. 21, 1895.)

MUNICIPAL CORPORATIONS — POWER OF WATER COMMISSIONERS TO DISCHARGE SUPERINTENDENT.

The board of water commissioners of New Brunswick had legislative authority to employ necessary assistants, officers, and agents, and, under their power, employed the plaintiff as general superintendent for a term of years, at a fixed salary. Being discharged before the end of his term, he brought this suit for an installment of his salary. *Held*, that he did not hold a public office, and that he could not be so discharged, and that his action was well brought.

(Syllabus by the Court.)

Action by one Cramer against the water commissioners of New Brunswick. Verdict for plaintiff. Heard on the rule to show cause why new trial should not be granted. Rule discharged.

Argued November term, 1894, before BEASLEY, C. J., and DEPUE and VAN SYCKEL, JJ.

A. V. Schenck, for plaintiff. R. Adrain, for defendant.

BEASLEY, C. J. By the act approved March 27, 1873, the mayor and common council of New Brunswick were authorized to purchase the property and franchises of the New Brunswick Water Company. By section 2 of this enactment it is provided: "That the said water works shall be conducted and m by a board of commissioners to be ap by the common council, who shall ho office for three years, one-third of the appointed yearly; that all the authorit ers and duties relative thereto now ex or performed, or that hereafter may l cised or performed, by the said compar be exercised and performed by the sa missioners (except as thereinafter pr and, in pursuance of this authority, t commissioners may appoint and emp proper assistants, officers, agents and necessary or convenient for the p aforesaid, at such compensation as th deem reasonable, and shall take fro treasurer and such other officers and as they may appoint such bonds and for the faithful performance of their d they may deem proper." By virtue of thority thus conferred, the board of sioners, on the 8th day of February, 1 tered into an agreement under seal, w plaintiff, whereby it agreed, in consid that he would discharge all the wo services incumbent upon and to be per and discharged by him as general tendent of the waterworks of the said New Brunswick, under the direction board of commissioners thereof, "fr day of the date hereof, for and during period and term of five years," to pay plaintiff the yearly sum of $2,500, i monthly payments. There was also nant on the part of the plaintiff that h not engage in any business incompatil the discharge of the functions thus sti to be performed. At the trial of the was shown that on the 12th June, 189 meeting of the board of water commis a resolution was adopted declaring th tion of superintendent of the New Bru water department, occupied by C. mer," to be vacant. On the same occa other person was appointed to fill t from which the plaintiff was thus e Upon being informed of this action board, the plaintiff notified it that t tract would be insisted on, and tender self ready to perform his side of it. now brought this suit for a monthly ment of his salary. The jury, under struction of the trial judge, found in vor, and the present motion is to se that verdict.

It is insisted on the part of the defen the contract sought to be enforced in tion is illegal, on the ground that the ant had not the competency to enter and, in the second place, if this first be untenable, that the office held by th tiff was a public one, and that, conseq his tenure of it could at any time be at the will of the defendant.

The argument in support of the negs the power of the defendant to bind it the contract in question was that the the contract was made to outlast the term of the body of commissioners.

Digitized by Google

force of this contention is not apparent. The agreement is made with the corporation, that is subject to no change, although the persons managing its affairs be inconstant. The statute in no degree limits the period for which the commissioners "may appoint and employ" all proper assistants, officers, agents, and clerks. The duration of the employments thus authorized not having been prescribed by the legislature, it mentally follows that it has been left to the honest judgment of the commissioners. The contract, on this ground, is not assailable.

Nor has the second objection more potency. The plaintiff neither was nor is the incumbent of a public office. He is an employé of this corporate body, and nothing more. Public offices are in general, if not always, directly created by the legislature itself, the municipal authorities selecting the persons to perform their functions. The position held by the plaintiff is the creature of the board of commissioners. It is entirely unknown to the statute. But for the contract in question, the commissioners could at any moment have abolished the position of superintendent of the works,—a power wholly inconsistent with the theory that the office is a public one. Nor is there anything in the nature of the employment itself that calls for the presence of a public functionary. Every one of its duties can be discharged by a private agent. The result is that the court finds no indication in the terms of the statute nor in the character of the power conferred of a legislative intent to authorize the defendant to create a public office, the consequence being that the plaintiff is to be regarded as a private employé. With such an agent the defendant was competent to contract, and cannot avoid any of its obligations thus assumed. Speaking of the compensation of municipal officers, Judge Dillon, in his work on Municipal Corporations (section 171), says: "But where the services to be performed are professional or private, rather than public or official, an employment under an ordinance for a fixed time, at a fixed sum for the period, has been held to be a contract, and not subject to be impaired by the corporation." For this doctrine is cited the case of Chase v. Lowell, 7 Gray, 33, which, in all its essential facts, is identical with the case in hand.

Let the rule be discharged.

DESTEFANO v. CALANDRIELLO.

(Supreme Court of New Jersey. Feb. 21, 1895.)

PRACTICE—CERTIFYING CASE.

Under the practice act, the circuit court must settle all disputed facts before it can send such case to this court as one of doubt and difficulty.

(Syllabus by the Court.)

Case certified from circuit court, Hudson county, for advisory opinion; before Justice Lippincott.

Action by Nicholas Destefano against N. Calandriello. Heard on certified case. Dismissed.

Argued before BEASLEY, C. J., and DEPUE, VAN SYCKEL, and ABBETT, JJ.

Jos. A. McCreery, for the motion. Gilbert Collins, opposed.

BEASLEY, C. J. A judgment in attachment was entered in the circuit court of the county of Hudson for the plaintiff's claim, no other creditor having intervened. The plaintiff and defendant having compromised their controversy on the basis of the acceptance of a less sum than the amount recovered, the judgment was canceled of record by virtue of a warrant to enter satisfaction in accordance with the method prescribed in section 23 of the act concerning judgments (Revision, p. 523). There seems to be no doubt that, with respect to form, this judgment in attachment was extinguished by this procedure; but it being alleged that such satisfaction was collusive and fraudulent, as it made no provision for the payment of the costs of the attachment proceedings, and as the parties had consciously disregarded the rights of certain assignees of an interest in the judgment, a motion was made in the circuit court to set aside the cancellation of the judgment that had been effected in the manner stated. A rule to show cause and to take testimony was granted. After the hearing, the following rule, signed by the circuit judge, was entered, viz.: "This case is certified to the supreme court on the question whether the rule to show cause be made absolute or discharged."

It thus appears that this court is called upon to settle, in the first instance, the facts which are in dispute in this course of litigation. The testimony is in conflict with respect to the central fact whether, when the defendant made his settlement with the plaintiff, he was aware of the equitable rights of the assignee. He has denied, under oath, that he had such knowledge. The function we are now asked to perform cannot, we think, be exercised by us. The statute authorizing the circuit court to call for an advisory opinion does not give this court the capacity to decide questions of fact. It requires the circuit judge to make and state the case. This has not been done, and the proceedings, therefore, must be dismissed.

DOOLITTLE v. WILLET.

(Court of Errors and Appeals of New Jersey. Feb. 21, 1895.)

REVIEW OF EVIDENCE — LIABILITY OF EXECUTOR.

1. In review by writ of error, the facts as found in the court below must be taken as true, whether found by a jury, or by the court where a jury is waived, if there is any view of the evidence which will sustain such finding.

2. Judgment will be against an executor per-

Digitized by Google

sonally upon a contract made by him for the benefit of the estate he represents.

(Syllabus by the Court.)

Error to circuit court, Middlesex county; before Chief Justice Beasley.

Action by Theodore Willet against Henry N. Doolittle. Plaintiff had judgment, and defendant brings error. Affirmed.

Chas. T. Cowenhoven, for plaintiff in error. W. Strong & Sons, for defendant in error.

VAN SYCKEL, J. This suit was brought to recover the price of brick sold and delivered by Willet to Doolittle. Doolittle, at the time of the delivery of the brick, was one of the executors of Lewis L. Carlisle. Carlisle, in his lifetime, was a dealer in brick. His son Frederick and one McDonald were in charge of his business at the time of his death. Doolittle allowed them to remain in charge of the business as his agents, and the business was continued as before. The case was tried in the court below without a jury, and judgment was rendered in favor of Willet. This court will not review the finding of facts. If there is any view of the evidence which will sustain such finding, the judgment will not be reversed.

The witness Bowne testified that all the orders for the brick were given by McDonald after the death of Carlisle, and consequently at a time when McDonald was admittedly the agent of Doolittle for that purpose. That testimony, if true, will support the judgment. The facts as found in the court below must be taken as true, whether found by a jury, or by the court where a jury is waived. The only question for this court is whether the judgment resting on such facts is well founded. The case thus presented is that of a judgment against an executor personally upon a contract made by him or his agent for the benefit of the estate which he represents. The personal liability of the executor cannot be doubted. It is settled by two cases in this court: Laible v. Ferry, 32 N. J. Eq. 791; Wild v. Davenport, 48 N. J. Law, 129, 7 Atl. 295. The judgment below should be affirmed.

LAWSON et al. v. NICHOLSON et al.

(Court of Errors and Appeals of New Jersey. March 4, 1895.)

PAYMENT TO ONE NOT AUTHORIZED TO RECEIVE.

1. The mere possession of a bond and mortgage by a person not the obligee will not warrant the payment thereof to such possessor.

2. A scrivener, under a special authority for that purpose, received payment of interest on a bond and mortgage. Afterwards the obligee delivered the bond and mortgage, with other papers, wrapped up in paper, which was tied and sealed, to the scrivener, for safe-keeping. The scrivener surreptitiously broke open the bundle of papers, and abstracted therefrom the bond and mortgage, and received payment of the principal due thereon, and then absconded. *Held*, that such payment was invalid.

(Syllabus by the Court.)

Appeal from court of chancery; I Chancellor Green.

Bill by Malvina Lawson and others a William C. Nicholson, Isaac Carson, others to compel defendants to pay plainants the principal and interest d the mortgage which was alleged to been fraudulently surrendered to d ants. From a decree (25 Atl. 191) di ing the bill, complainants appeal. Rev

Bergen & Bergen and John B. Uhl appellants. Peter L. Voorhees, for res ents.

BEASLEY, C. J. The essential fac this case may be thus summarized: O cember 22, 1868, Samuel A. Cook and A. Cook, having fallen in debt to Ma Lawson, who is now Mary L. Birch one of the appellants, in the sum of $ delivered to her their bond of that running for a year, the interest being able semiannually. The bond was se by a mortgage on property in the cou Camden. These instruments were d by one Charles Leslie, a scrivener, re in Philadelphia. Immediately upon the ecution they were delivered to Miss Ma Lawson, who retained them in her ow session until they were put in the cu of the above-mentioned Charles Les the time and in the manner hereafter s On the 12th December, 1866, the title mortgaged premises became duly vest conveyances, in one Mary Carson, wh the 12th December, 1872, transferred, the laws of this state, for the benefit creditors, among other property, the premises, to Isaac Carson, her ass About three months after,—that is, o 20th March, 1873,—Carson, the assignee and conveyed the mortgaged lands t Nicholson for the sum of $4,545.96, th signee undertaking to clear off the ex mortgage of $3,000. With this view finding this latter bond and mortgage possession of the scrivener, Leslie, he the money secured by them to him scrivener, and had the incumbrance celed on the record. Shortly after this action, the scrivener absconded with money, so that the question whether the ment and cancellation of the appel mortgage were legal or of essential i tance is the only point sub judice. obvious that in this inquiry the probl be solved is, was Leslie, the scrivene agent of the appellants in the affa question? It is not, and cannot be, pr ed that he was such in point of fact. evidence is undisputed that Miss L now Mrs. Birckhead, the appellant, had the intention, and never did by e sion, confer such authority upon hi the agency claimed existed, it must been by imputation of law from the ci stances incident to the transaction. a case ever regulated, and regulated w

Digitized by Google

by the doctrine of estoppel, for the question always, in such investigations, is, has the obligee acted in such a way as to lead the obligor or his representative reasonably to the conclusion that the alleged agent had the right to receive payment of the obligation? It is deemed that it is at all times to be regarded as a fact to be ascertained by a construction of the given circumstances, and not, as seems to be indicated in some of the authorities, as a thing to be regulated, in some instances, by legal definitions. It is a matter of fact to be interpreted by such rules as are applied in other cases of the same class. The inquiry, then, is, was the assignee, Carson, justified in concluding from the facts before him that Leslie, the scrivener, was the agent of the mortgagee, with authority to receive payment of the moneys secured? In looking through the facts in proof, but a single circumstance has been observed having a tendency to render reasonable in any degree whatever an affirmative reply to this interrogatory. That fact is that, at the time of the satisfaction of the bond and mortgage, Carson found them in the hands of the scrivener. This was the sole circumstance that could in the slightest manner have affected his conduct. As to the incident that these securities had been originally, many years before, drawn by this scrivener, it is not anywhere intimated that the respondent had any knowledge of the subject. These documents, as has been stated, were, as soon as they had been executed, taken by the mortgagee into her own possession; and there was no ground for any supposition that they had ever been under the control of the scrivener until the occasion on which he had produced them for payment. It is true that both Miss Carson and her trustee had paid interest on the bond, but such payments had been made, not by reason of the bond or its accompanying mortgage being in charge of the scrivener, but in pursuance of an express direction to that effect. The appellant authorized Miss Carson and her assignee to pay the interest on these securities, and such an authorization repels in its very terms the supposition that the principal moneys could be passed to the agent so designated. In conformity to the agency thus limited, the interest on the $3,000 was, as it grew due, paid to the scrivener, in the first place, by Miss Carson, and subsequently by her assignee; but on such occasions neither the bond nor mortgage was produced, nor did either of these persons have any ground to suppose that such securities were in charge or under the control of the agent receiving such interest. It follows, therefore, as Carson, the assignee at the time he attempted to take up the bond and mortgage in question, had no knowledge that those instruments had been drawn by the scrivener to whom he made payment, and that he had paid interest under a special authority so to do, that the only basis of his conduct was the fact that he found the securities in the possession of the person with whom he dealt. That a person in possession of a bond is thereby shown to have the right to receive the moneys it calls for is a doctrine that has neither decision nor dictum for its sanction. If such a doctrine prevailed, it would deprive investments in such securities of much of their supposed safety. Such, fortunately, is not the law. Therefore, in the present case, if these securities had been confided to this man Leslie in such form that, without any misconduct on his part, it would have been in his power to manifest his possession of them, such unconditioned fact would have offered not the least ground for the inference of an agency to cancel them on the receipt of the moneys due. The present decree could not stand in the presence of such a showing as this. Much less can it be supported when the important fact is added that the securities were not intrusted to Leslie with the right to exhibit them in the way supposed. They came to him in this wise: He having offered to put all the valuable papers of the appellant in his fire-proof safe, accordingly they were put up by her "at her own house in a bundle, covered with strong, gray paper, tied with strings crossed and recrossed, and sealed with sealing wax. It was a large bundle, more than two feet square." It was by breaking into this bundle, and by criminally abstracting the securities in question, that Leslie got them into his hands. Under these circumstances the moneys were paid upon them by Carson without a question. For this court to validate such a payment would be to establish a rule in view of which it would not be prudent for a man to make any person the custodian of his documents of this kind, or to permit them to pass out of his own sight. Let the decree be reversed, and a new one entered, reviving and reinstating said bond and mortgage.

BRADNER v. ROFFSELL.

(Court of Errors and Appeals of New Jersey. March 4, 1895.)

BREACH OF BUILDING CONTRACT—FRAUD—INSTRUCTIONS.

In an action upon a building contract, which required the certificate of an architect as a condition precedent to the liability of the owner to pay the contract price, it appeared that such certificate had not been procured, and that there had been deviations from the plans and specifications in the erection of the building, notably in the substitution of a "balloon" frame for the "tie" frame contracted for. Evidence was admitted, over the owner's objection, that a balloon frame made a stronger and better house. The cause was tried upon the doctrine of Chism v. Schipper, 51 N. J. Law, 1, 16 Atl. 316. The jury were charged that the certificate, if not waived, might be dispensed with only by proof that the certificate was withheld by fraud on the part of the architect, and that "it would

Digitized by Google

be prima facie evidence of fraud if the architect withheld his certificate without any substantial reason for so doing." *Held* that, considering the course of the trial, this instruction must be construed as permitting the jury to find such fraud, notwithstanding conceded material variations from the contract, if, in their judgment, such variations, under the circumstances, did not afford a substantial reason for withholding the certificate, and was erroneous.

(Syllabus by the Court.)

Error to supreme court.

Action by Harriet Roffsell, administratrix, against Robert D. Bradner. Plaintiff had judgment, which was affirmed by the supreme court (29 Atl. 317), and defendant brings error. Reversed.

The action was begun in the Monmouth circuit by Harriet Roffsell, administratrix of Joseph Roffsell, deceased, against Robert D. Bradner, as builder and owner, upon a claim under the mechanic's lien law. The declaration as filed contained two counts upon a building contract under seal, made between Bradner and Joseph Roffsell, the common counts for work and labor done and materials furnished for Bradner by Joseph Roffsell in his lifetime, and other common counts for work and labor done and materials furnished for Bradner by the plaintiff. Upon demurrer the first two counts were stricken out. The general issue was pleaded to the common counts. The circuit court sent the cause to the common pleas for trial. The trial resulted in a verdict for the plaintiff. Exceptions were taken to the admission of evidence, to the charge and refusals to charge. Bradner sued out a writ of error from the supreme court, which affirmed the judgment of the common pleas. Thereupon he has removed the cause here for review by this writ of error.

Frank Bradner, for plaintiff in error. Hawkins & Durand, for defendant in error.

MAGIE, J. (after stating the facts). The record discloses two claims on the part of the defendant in error. One claim is upon implied contracts between her intestate and the plaintiff in error, and is a claim in a representative capacity; the other is upon implied contracts between her and plaintiff in error, and is necessarily a claim in her own right. As the judgment upon each of these claims must be different, it was obviously irregular to join them in one action, and the court of common pleas erred in refusing to compel the administratrix to elect between the inconsistent claims, and purge the record of the improper counts. The judgment is entered in favor of defendant in error as administratrix. If there was no legal error in the trial, and a real question in controversy between the defendant in error, as administratrix, and the plaintiff in error was fairly and fully tried, and such a judgment is proper thereon, then there is ample power to amend the record by striking out the common counts framed to present her personal claim, and so to support the judgmen
the bills of exception show that the
ment cannot be supported upon the co
counts of the declaration framed to p
the administratrix's claim in her repre
tive capacity. That claim was for wo
labor done and materials furnished by
testate in his lifetime to Bradner,
an implied contract to pay therefor. T
question in controversy between the
was different. It arose upon an expre
tract under seal made between Bradn
the intestate, which the administratrix
ed had been partly performed by the
tate before his death, and had been
wards completed by her as his admi
trix. This contract was produced and
by the administratrix. It was not adm
on the issue made by the record, and d
support the claim disclosed in the co
counts. But, if the real question in
versy between the parties was fairl
fully tried, and this judgment is the
result of the trial, there is power
by adding pleadings presenting the
really tried, and so to support the judg
At the same time I must express dis
bation of the conduct of the cause in t
spect. The administratrix, having n
claim, and produced evidence in s
thereof, which required amended plea
failed to ask liberty to amend. Plain
error repeatedly, but in vain, appealed
trial court to require the proper amen
No amendment being made, he then de
ed a nonsuit on the ground that ther
no evidence to support the claim whi
peared in the record. This was refuse
in my judgment, such refusal was error
power of amendment bestowed upon
of review, and liberally exercised by
was not intended to encourage coun
make up a record of general pleading
then to try the case upon evidence req
special pleadings. When such a diver
from the record is plainly disclosed, I
it the duty of the trial court, if no a
ment of the pleadings is asked for and
to deal with the case as it appears
record. So the supreme court, in its
of this case, points out the necess
amended pleadings, and indicates its
tion to allow such amendment. Yet th
ord comes to this court unamended, a
the judgment be affirmed here in thi
dition of the record, the defendant in
may bring an action on the contract, a
record would not support a plea of
recovery by plaintiff in error. But
trial plaintiff in error did not rest up
exception to the refusal to nonsuit o
ground. He proceeded with a defense
ed at the real question in controvers
closed by the evidence adduced by t
ministratrix. If, then, that question
fairly tried without error of law, the r
to nonsuit was not injurious to him, an
court, notwithstanding the delinquen

Digitized by Google

the defendant in error in this respect, ought to permit such amendment of the pleadings to be made as will support the judgment.

Whether the administratrix was entitled to recover upon the contract made between her intestate and Bradner having been the real question tried, we are to consider whether any legal error intervened in the disposition thereof. By the contract, the intestate had agreed to erect for Bradner, and upon his land, a building, and Bradner had agreed to pay therefor $3,196.51, by installments, according to the progress of the work, upon a certificate of one Umbach, an architect, 'to the effect that the work is done in strict accordance with drawings and specifications, and that he considers the payment properly due." Payment of the contract price under the terms of such a contract does not become due until the condition precedent is performed by the production of the required certificate, or by satisfactory proof that such production has been waived by the owner or excused by circumstances. The supreme court has determined that the production of such a certificate will be excused if the architect has fraudulently withheld it, although the owner is not in collusion with him, or a partaker of his fraud. Chism v. Schipper, 51 N. J. Law, 1, 16 Atl. 316. The case before us was tried upon the doctrine laid down by the majority of the supreme court in Chism v. Schipper. The arguments and briefs of counsel before us have not assailed that doctrine, and for the purposes of this case it may be deemed not to be in question. It appears by the bills of exceptions that the administratrix failed to produce the required certificate of Umbach, but claimed that the evidence established a waiver of its production by Bradner, or an excuse for its nonproduction because of the fraud of the architect. The waiver was claimed upon a letter of Bradner's counsel, inclosing a list, made by the architect, of alleged omissions and deviations from the contract, with the amount he claimed should be allowed therefor by way of deduction from the contract price ($376.88), and proposing to pay all the contract price except that sum. The inclosure made by the architect is not printed. If it amounted to a certificate of completion in all respects except those for which an allowance was claimed, it had no binding effect upon the parties. Mackinson v. Conlon, 55 N. J. Law, 564, 27 Atl. 930. The waiver, if any there was, grew out of the letter, and was properly confined by the trial court to so much of the unpaid price as exceeded the deduction claimed. But the verdict was for the whole of the unpaid price, and must obviously have rested upon the fraud of the architect in withholding a complete certificate. In presenting that subject to the jury the trial court charged that: "If not waived, it [the certificate of the architect] may be dispensed with only by proof that the certificate was withheld by fraud on the part of the architect. It would be prima facie evidence of fraud if the architect withheld his certificate without any substantial reason for so doing." An exception was taken to the last sentence of this instruction, and an assignment of error is based thereon. In the supreme court this instruction was justly deemed open to objection because the use of the word "substantial" tended to substitute the judgment of the jury for the decision of the architect. In Chism v. Schipper, the learned chief justice, who delivered the opinion of the majority of the court, carefully pointed out the need of watchful judicial supervision over the determination of juries on this question, and declared that the architect's conduct could not be impeached for want of skill or knowledge, or because his judgments do not agree with those of others. To instruct a jury that they may find fraud from the withholding of such a certificate without a substantial reason, is to permit them to determine what are substantial reasons, and if, in their judgment, there are none, then, though the architect's judgment may be honestly otherwise, to convict him of fraud. This objection to the instruction under review was deemed by the supreme court to have been obviated and rendered harmless by other parts of the charge, which pointed to evidence tending to show that the architect had expressed satisfaction with the building, and promised a certificate, and to the express statement that the court would not charge that there was evidence of fraud nor that there was no evidence of fraud, but would leave that question to the determination of the jury. This was considered to show that the case was left to the jury solely as matter of fraud. I quite agree that the case was thus left to the jury, but am unable to perceive how that cured the erroneous direction that fraud might be inferred upon improper or insufficient grounds. In my judgment, this instruction was intended, and must have been understood by the jury, to permit such an inference.

The bills of exception show that there were some deviations in the construction of the building from the terms of the contract, which were conceded to have taken place. The most material of such conceded deviations was the substitution of a "balloon" frame for the "tie" frame called for by the contract. There was a contest over other deviations and omissions claimed by Bradner. But, taking what was conceded to be true, it is obvious that a certificate that the building had been completed in strict accordance with the drawings and specifications would have been untruthful. The cause was plainly tried upon the theory that, if the building erected was as good as or better than it would have been if erected according to the contract, it would charge the owner with liability upon the contract. This appears from the admission of evidence of-

Digitized by Google

fered by defendant in error in making her case, and objected to by the plaintiff in error, to the effect that a balloon frame made a stronger and better house than a tie frame. The theory is manifestly erroneous, for the owner is entitled to have the house he wanted and contracted for, and the contractor cannot satisfy his contract by erecting a house materially different, even though it be better. Taking the course of the trial in consideration, the construction which this instruction must bear is this, viz.: that the jury might find fraud in the withholding of the certificate by the architect, notwithstanding conceded material variations from the contract, if, in their judgment, such variations, under the circumstances, did not afford a substantial reason for not giving the certificate. With respect to the deviation from the contract plan which has been instanced as the most material of those conceded to have occurred, I have not overlooked the fact that the architect learned of it during the erection of the building. At what stage of the work he first learned it is not clear, but it may be inferred that it was after the frame was up and covered. It appears that he took no steps to stop the work. It does not appear that he had power to do so. But that deviation occurred during the lifetime of the contractor, and the uncontradicted evidence of the architect was that when he discovered it he brought it to the notice of the contractor, who promised to make a proper deduction from the contract price. It is argued that the architect, by this conduct, gave permission to proceed with the work as if there had been no deviation, and so his refusal to give a final certificate was fraudulent. If the architect had been the agent of the owner, he might have agreed with the contractor for the substitution of a balloon for a tie frame, or he might have ratified such substitution by subsequent conduct; and in either case he would have bound his principal. But the architect was not agent of the owner, but an arbiter between him and the contractor. He possessed no power to alter the contract, or to permit it to be departed from. If he had agreed with the contractor that the latter might deviate from his contract, and erect the building differently, and that, notwithstanding such deviation, he would certify to the work as performed according to the contract, he would, in the absence of the consent of the owner, have been guilty of fraud; but it would not have been a fraud upon the contractor, who would have been in pari delicto, but upon the owner. The evidence did not justify, nor was there any contention, that the owner had consented to that or any other deviation from the contract plans and specifications. The conduct of the architect after knowledge of the particular deviation from the contract now under consideration did not affect the owner. Nor did it excuse the contractor from production of the architect's certif There is nothing in the evidence of th chitect's knowledge of this particular d tion to mitigate the error in the instru to the jury on the question of fraud. out considering other questions raise shall, for the error before pointed out, to reverse the judgment below.

RUNYON v. WILKINSON GADDIS &

(Court of Errors and Appeals of New Je March 4, 1895.)

BROKERS' COMMISSIONS—ACCEPTANCE OF C TRACT BY PROPOSED PURCHASER.

1. A broker employed to sell the bu and property of a mercantile corporation, writing whereby his principal agreed to pa a commission of 5 per cent. on the pric principal might agree to receive when ac received, communicated to a proposing pu er the principal's offer to sell at a certain and on certain terms of payment. The p ing purchaser cabled the principal: "Accep half cash, half debentures. Contract ma The price and terms thus described substan agreed with those named in the offer. *Held* the cablegram did not constitute an unqu acceptance of the offer, but one qualified contents of the contract therein said to been mailed.

2. Upon receipt of the contract, it was that it did not contain an agreement to pur by the proposing purchaser, but only gav an option to purchase at the price and named. The principal thereupon withdre offer. *Held*, that upon this evidence there nothing to submit to a jury, because the had not brought the parties together in a pleted contract of sale and purchase, or pro to his principal a purchaser able and willi buy at the price and on the terms fixed.

(Syllabus by the Court.)

Error to supreme court.

Action by Orrin E. Runyon against W son Gaddis & Co. to recover commissio broker. Defendant had judgment, and tiff brings error. Affirmed.

Samuel Kalisch, for plaintiff in Henry Young, for defendant in error.

MAGIE, J. The assignments of erro based upon a single exception taken t ruling of the trial judge in granting a suit after the plaintiff below had reste case. Runyon, the plaintiff in error, plaintiff below. His action was bro against a business corporation, know Wilkinson Gaddis & Co., to recover con sions upon an employment as a brok sell the business and property of said poration. His declaration contained c upon a written contract of employment, also the common counts. At the tria produced and proved a writing, execute said corporation and himself, whereby, reciting that the corporation had place business in his hands for sale to English ties seeking investments in this country corporation agreed, concerning such sale the commission thereon, to pay him a

Digitized by Google

mission of 5 per cent. on the price it might agree to receive, when actually received by it, and he agreed to accept the commission thus payable. After this proof, it is obvious that the contract furnished the sole ground for recovery in the action. The labor and service which were proved were referable to the contract, and gave no right to recover under the common counts. Hinds v. Henry, 36 N. J. Law, 328. Therefore, to maintain his case, Runyon must establish, by proof sufficient to be submitted to a jury, that he had earned his commissions under the written contract relating thereto. This he could only do by effecting a sale, or at least bringing to his principal a purchaser able and willing to buy at the price and on the terms fixed by it; for his written employment left his employer free to fix both the price and terms of the sale it was desirous to make.

The contention here is that, when the nonsuit was granted, the evidence was sufficient to justify a jury in finding that Runyon had earned his commissions by bringing together Wilkinson Gaddis & Co., and one Seligsen, of London, who did business under the name of Hopcraft, Wilson & Co., and (to quote the brief of counsel) "that a valid contract of sale was entered into between them." If such was the case, the nonsuit was error. It is unnecessary to state the evidence in detail. It will be sufficient to present the facts proved which show the single point on which the case turns. Hopcraft, Wilson & Co., on September 17, 1889, addressed a letter to one Martin, who was working with Runyon to effect this sale, referring to the business in question, and proposing to take the matter in hand upon the following, among other, lines, viz.: Consent must be given to form an English limited liability company; the price of business, including plant, machinery, buildings, stock-book debts, and good will, to be $1,800,000; the capital of the company to be divided into 5 per cent. debentures, 7 per cent. preference shares and ordinary shares; and the vendor was to take the whole issue of debentures, £150,000, also £50,000 of preference shares, and the remainder of the price, about £170,000, in cash. Wilkinson Gaddis & Co., on October 22, 1889, wrote to Hopcraft, Wilson & Co., referring to the offer of the latter to form an English limited liability company, and accepting the same, but requiring the payment of all the purchase price of $1,800,000, except £150,000 of debentures, to be in cash. As the minds of the parties did not meet as to the terms of payment proposed, it is obvious that no completed contract arose from these letters. But the letter of October 22d was a proposition which, until withdrawn, Hopcraft, Wilson & Co. might accept. Passing over various unimportant communications by letter or cable, it appears that on March 13, 1890, Hopcraft, Wilson & Co. cabled to one Lawrence (who was also acting with Runyon) a message which, as interpreted, contained an offer of £350,000 for the business in question, and a statement that it was "the most" they would give. This message was communicated to Wilkinson Gaddis & Co., who on March 14, 1890, wrote to Runyon, declining the offer, and notifying him that they considered the negotiations at an end. Notwithstanding this termination of the negotiations, Wilkinson Gaddis & Co., on March 15, 1890, addressed a letter to one Veit (who was also interested with Runyon), and they thereby renew their offer to sell at the price of $1,800,000, but fix the terms of payment as one-half in bonds and one-half in cash, and expressly state that the renewed offer is made upon condition that it is accepted and a deposit made in a New York bank by April 15th, after which date they absolutely withdrew the offer. On April 11, 1890, Hopcraft, Wilson & Co. cabled to Wilkinson Gaddis & Co.: "Accept 370; half cash, half debentures. Contract mailed." It is conceded that "370" means £370,000, which about represents the price named in the letter of March 15th. It is upon this message, read in connection with the previous letters, that plaintiff in error now contends that he ought to have been permitted to go to the jury upon the question whether or not a completed contract of sale did not arise therefrom. But this contention rests upon an inadmissible construction of the cablegram. It was not an unqualified acceptance of the offer of sale. On the contrary, it was qualified by the connection of the acceptance with the contract which it stated had been mailed. It was an acceptance according to the contents of that contract. Such was the construction given to the message by the trial judge, and in that there was no error.

The contract in question came to Wilkinson Gaddis & Co. on April 18, 1890. It was signed by Hopcraft, Wilson & Co.; and had it contained the stipulations called for by the correspondence between the parties, and a positive agreement to buy, it might well be argued that the broker had earned his commissions. But, on examination, it appears that it differs in material respects from the propositions and offers of the letters. Nor does it contain any agreement to purchase the property in question. On the contrary, there is a provision that Wilkinson Gaddis & Co. shall sign it, and forward it to a London banker, with instructions to deliver it to Hopcraft, Wilson & Co. on payment of £2,000 on account of the purchase price; but, if they neglect to pay that sum within one week after notice of the arrival of the agreement, then the agreement is to be null and void, and neither party shall have any claim upon the other for compensation or damages. There is a further provision that if the £2,000 are paid, but subsequent installments of the purchase price called for by the contract should not be paid, then that sum is to be retained as liquidated

Digitized by Google

damages, and the agreement is to be null and void, and neither party is to have any claim against the other. Counsel could not and did not contend that this contract expressed the terms on which Wilkinson Gaddis & Co. were willing to sell. As the cablegram accepted their terms according to the contents of the contract, which did not conform thereto, there was no completed sale. Nor can it be said that Hopcraft, Wilson & Co. were willing to buy on those terms. Their contract mailed was designed to secure them an option to purchase, and not to bind them to do so. This was the view taken at the trial, and it properly led to a nonsuit. The judgment should therefore be affirmed.

DODD v. FISHER.

(Court of Errors and Appeals of New Jersey. March 9, 1895.)

FORECLOSURE SALE — LIABILITY FOR DEFICIENCY.

Fisher deposited with the solicitor of the complainant the sum of $1,000, to get a postponement of a foreclosure sale for 90 days, upon the understanding that if the property, when sold, should not bring enough to pay the decree, then enough of the deposit to pay the deficit should be retained. After the expiration of the 90 days, the property was put up for sale, and struck off to a bidder who announced that he could not pay the 20 per cent. required by one of the conditions of the sale. The solicitor for the complainant advised the sheriff to let the bid stand. The bidder turned out to be irresponsible, and, upon a resale, the property brought a less sum. *Held*, that Fisher's right under his contract was to have the property sold after the expiration of the 90 days, in the manner in which judicial sales are regularly conducted; that the sheriff had the right to consult with the solicitor of the complainant in respect to his course of conduct under the circumstances; and that the solicitor had the right to give his advice; and, unless such advice was given under such circumstances as to indicate a disregard of Fisher's rights, the deposit of Fisher is not discharged from liability to make good the deficit.

(Syllabus by the Court.)

Error to circuit court, Essex county; before Justice Depue.

Action by John W. Fisher against Harriet M. Dodd. There was judgment for plaintiff, and defendant brings error. Reversed.

F. W. Stevens, for plaintiff in error. Colie & Swayze, for defendant in error.

REED, J. This cause was tried before the court, a jury having been waived. The facts proved were these: There was a decree in a suit in foreclosure, held by Harriet M. Dodd against Carrie E. Meres and others. The sheriff had advertised the property of Carrie E. Meres to be sold on October 6, 1891. The sale was adjourned from time to time until December 18, 1891. On that date, Fisher, for the purpose of affording Meres an opportunity to save the property, made an arrangement for the further postponement of the sale for 90 days. To secure the complainant, who held the decree, against any loss that might result to her from delay, Mr. Fisher paid over to her sol Mr. Dawson, the sum of $1,000. The fo ing receipt embodies the terms upon the $1,000 was paid to Mr. Dawson, held by him: "Received from John W. er the sum of one thousand dollars, in sideration of which I agree to postpon sale of premises in above suit for the of ninety days (90) from the date h unless said sale is ordered to be previ held by decree of this court, with the u standing that if, on such a sale of said ises, there should not be realized enou pay in full the decree heretofore obta and the costs in this cause, said one sand dollars, or so much thereof as m required, is to be applied to make goo deficiency so arising, the balance, if to be returned to the said John W. F it being also understood and agreed said one thousand dollars is to be paid by me to Robert T. D. Easton, and th personal liability for said money or i payment is looked for or assumed o part, as I am acting merely as the att of all the parties concerned. Or in the said John W. Fisher should at any during said ninety days, or before a sal sire to purchase said mortgage and d the said one thousand dollars is to b plied on acount of the purchase money of. Dated Newark, N. J., Dec. 15th, Henry H. Dawson, Atty." Nothing was during the 90 days, and on March 15t property was put up and sold. It was bi and sold to Michael Barrett, as the att of a Mr. Chapin, for the sum of $7,450. sum was sufficient to pay the amount decree of Mrs. Dodd, together with the and accrued interest up to that time. of the conditions of the sale was tha purchaser would be required to pay 2 cent. of the purchase money at the clo the sale, and sign an acknowledgme his purchase. Another condition was in case of any person purchasing an complying with the conditions, the pro would be offered for sale a second and the first purchaser was to reap no fit therefrom, and be held answerable f loss and expense occasioned thereby. Barrett signed the conditions, and, asked for the deposit, said: "We canno it to-day. We have not got the mo The sheriff consulted Mr. Dawson, the plainant's solicitor, who was present; the solicitor told him to waive the pay of the 20 per cent. Mr. Barrett's client Chapin, refused to take the property, another order for sale was obtained; on August 23, 1892, the property was s Mrs. Dodd, the complainant, for $6,550. Dodd retained the $1,000 deposited by F to compensate her for the differenc tween this sum and the amount of th cree. Fisher sued to recover the sum posited, on the ground that Mrs. Do

Digitized by Google

precluded from holding the deposit by reason of the conduct of her attorney, Dawson, at the sale on March 15th. This conduct was his assent that the bid of Barrett should stand without the deposit of the 20 per cent. This view of the effect of Dawson's conduct was recognized by the trial court, and Fisher was permitted to recover the amount of the deposit.

Fisher may be regarded as surety to the extent of the deposit that the property, in case of a delay for his benefit for the prescribed period, would bring enough to pay the decree of the complainant. But the duty of the complainant towards Fisher sprung out of the contract contained in the receipt. His express obligation was to delay the sale so far as he should be able to postpone it for the period of 90 days. After the termination of that period, a duty was implied to proceed in the ordinary way to have the primary fund applied to the payment of his decree. At least, this duty would arise after notice from Fisher that he desired the complainant to so proceed. There was nothing in the contract which changed in any way the manner in which the complainant should proceed after the expiration of the period of delay for which Fisher bargained. The machinery for selling the property was to be again put in motion, and if the sale, when made, was accomplished in the same manner as ordinary judicial sales are required to be conducted, Fisher had no ground for complaint.

In conducting a sale of this kind, the officer is bound to pursue the statutory requirements prescribing his duty. He is also amenable to the orders of the court whose decree he is executing, whether those orders are contained in the decree itself, or are made during the progress of the cause. Aside from such statutory or judicial directions, the officer is necessarily invested with a considerable degree of discretion in respect to the time and manner of executing his writ. This discretion is essential to prevent sacrifices of property. Adjournments are, as a rule, discretionary with the sheriff. Skillman v. Holcomb, 12 N. J. Eq. 131; Morris v. Woodward, 25 N. J. Eq. 32. For bad faith, or a clear abuse of this discretion, the officer may probably be held responsible. Hoagland v. Todd, 37 N. J. Law, 544. But the discretionary power of an officer is not limited to the propriety of making adjournments. In carrying on a sale, complications may arise which will call for the judgment of the officer as to the course of conduct which had best be taken to subserve the interests of the parties interested in the result of the sale. If a purchaser fails to comply with the conditions of a sale, it is optional with the sheriff either to make a resale or to execute the first sale. Woodhull v. Neafie, 2 N. J. Eq. 409. If a purchaser refuses to make good his bid, the officer may reopen the sale, and sell for a less price; and such sale will not be set aside, although the first purchaser afterwards offers to complete his purchase. Judson v. O'Connell (Sup.) 14 N. Y. Supp. 92. The sheriff is not bound to accept the bid of an insufficient purchaser. Den v. Zellers, 7 N. J. Law, 153. In exercising the discretion with which an officer is invested, it is entirely proper for him to consult those for whose advantage he holds his writ. It may be not only proper, but his duty in some instances, to consult primarily the party or attorney who sued out the writ; but he may take the counsel of any party who is interested in the fruits of the sale. He may take the sentiments of any or all such persons into consideration in making up his judgment in respect to the proper course to pursue.

Now, the complainant was, notwithstanding the deposit of Fisher, still interested in securing a good sale of the property. She was compelled to buy in the property at the last sale, to save her decree, although she was secured by the deposit. Mr. Dawson, as her solicitor, had the right to advise the sheriff; and so long as he was counseling in good faith, and his conduct did not indicate a disregard for Fisher's rights, he was acting within the line of his duty towards his client. If he had released the security which he held, or had directed the sheriff to do so; if, after the bid had been made in conformity with all the conditions of the sale, he had ordered the sheriff to discharge the contract, if that were possible (Shann v. Jones, 19 N. J. Eq. 254),—a different question would have arisen. What happened was this: Barrett had bid and signed the conditions. He then announced that he did not have the 20 per cent. to pay down. His announcement of that fact seems to have been positive and definitive. The predicament which then confronted the sheriff was whether he should allow the bid to stand, although no deposit had been made, or whether he should reopen the sale, with an absolute certainty of a less bid. I say an absolute certainty of a less bid, for Barrett was the highest, and in fact the only, bidder. The sheriff consulted Mr. Dawson, and Mr. Dawson advised that the bid should be permitted to stand. Barrett, a reputable lawyer, had assured them of the responsibility of his principal, Chapin, for whom he was bidding. Now, because it happened that the bid turned out to be unenforceable, because of Chapin's irresponsibility, that fact cannot affect the question of Dawson's good faith at the time he gave his counsel. His conduct must be regarded in view of his information and environment at the time; and unless, when so regarded, it exhibits bad faith towards Fisher, or a disregard of Fisher's rights, there was no breach of duty towards the latter. The rule adopted upon the trial was more stringent than this, and therefore the judgment should be reversed, and a venire de novo awarded.

Digitized by Google

MILLER v. TEETER.

(Court of Chancery of New Jersey. March 19, 1895.)

LIMITATION OF ACTIONS—ACKNOWLEDGMENT.

1. A request by the mortgagor to a third person to write to the mortgagee concerning a mortgage which he holds against the farm of the mortgagor, saying that he had made arrangements to pay it off, and telling him to produce it in person, or to send it to some friend, and in that case he would remit by check, is such an acknowledgment as to prevent the operation of the statute of limitations.

2. An acknowledgment of a liability made to a third person, with the understanding that such acknowledgment should be conveyed to the creditor, will be as binding upon the debtor as if it were made to the creditor directly.

(Syllabus by the Court.)

Bill by Andrew Miller against Isaac Teeter to foreclose a mortgage. Decree for complainant.

Geo. A. Angle, for complainant. Geo. M. Shipman, for defendant.

BIRD, V. C. This bill is for the foreclosure of a mortgage. The answer sets up the bar of the statute of limitations. After no little hesitation, I have come to the conclusion that this defense has been overcome. The evidence which clearly supports this view is the acknowledgment of the debt by the defendant to a third person, about seven years before the statute would begin to run, in a request that such third person communicate with the creditor. What he said and what he requested will appear by the communication following, which was mailed to the creditor. Teeter, the debtor, was visiting such third person, whose name was Titman; and on such visit he requested Titman to write to Miller, the creditor, concerning the mortgage, which request Titman complied with the next day. Among other things he said: "He [referring to Teeter] wishes me to write to you concerning that mortgage you hold against his farm. He has made arrangements to pay it off. He would like you to bring it out, if it is possible for you to come; and, if you cannot come, you can send it to some responsible man, and let him send you a check for the money." In Murray v. Coster, 20 Johns. 576, it appears that counsel for the defendant wrote to the complainant, pursuant to instructions, that they would pay the claim without interest, in order to avoid litigation, reserving the right to plead the statute of limitations; and the court held this a sufficient acknowledgment to take the case out of the statute. I think that where such acknowledgment is made to a third person, with the express directions or clear intention upon the part of the debtor that such acknowledgment should be communicated to the creditor, the statutory bar will not avail the debtor. Although there are many authorities which hold that an acknowledgment of the debt to a stranger will prevent the intervention of the statute by the debtor, there are a large number to the cont yet I think, wherever the question has considered, when the purpose of the d in making the acknowledgment to a ger was that it should be communicat the latter to the creditor, the creditor m ly upon it. Parker v. Remington, 15 300, 3 Atl. 590; Wakeman v. Sherman, Y. 85, 92; In re Kendrick, 107 N. Y. 1 N. E. 764. In De Freest v. Warner, 98 217, it is declared (page 221): "Where t knowledgment is to a stranger, and pears that it was the intention that t knowledgment made to him should be municated to and influence the creditor just as effectual to defeat the statute o itations as if it had been made direc the creditor or his authorized agent."

There are other facts and circumstan the case, but less decisive, and theref will not dwell upon them. The com ant, on the 15th day of January, 188 dorsed $20 upon the bond secured by mortgage as a payment. The defendar nies having made any payment at that He says that $20 was paid to the com ant about that time by his wife, but t was for a wholly different purpose. In the defendant's wife and another person was present at the time, and heard the versation, sustain the defendant. But the complainant has seen fit voluntari make such a credit, whether it was done the view of preventing the operation o statute of limitations or not, I think th ought to be held accountable therefor.

I will advise that the complainant titled to the amount due upon his mort with costs.

Principal on mortgage.....		$6
Interest, 6 years, 8 months, 20 days..		2
		$9
Cash paid November 1, 1868	$100 00	
Interest, 3 years, 2 months, 7 days.....	19 12	
Cash paid January 7, 1872..	500 00	6
		$2
Interest on $293.08 to March 20, 1895, being 23 years, 2 months, 12 days..		4
		$7
1889, January 15th. By cash	$ 20 00	
Interest for 13 years, 2 months, 8 days.....	16 64	
		$6

BRINDLEY v. LAWTON.

(Court of Chancery of New Jersey. Marc 1895.)

EQUITY—RESCISSION OF IMMORAL CONTRA

A bill which rests on the allegatio the complainant's intestate gave a certi of stock to the defendant in consideration f living thereafter in illicit relations with and which prays for a surrender of such tificate, will be stricken out on motion, be it shows that the contract was illegal an moral.

(Syllabus by the Court.)

Digitized by Google

Bill by James Brindley, administrator, against Fanny Lawton, to recover certain shares of corporate stock. Heard on motion to strike out portions of the bill as scandalous and impertinent. Motion granted.

W. D. Holt, for the motion. Edwin R. Walker and G. D. W. Vroom, opposed.

BIRD, V. C. The complainant shows that he is the administrator of John Brindley, deceased; that the decedent left a widow and three children him surviving; that at the time of his death he actually lived and cohabited with the defendant, Fanny Lawton; that the decedent was, at the time of his death, entitled to the possession and was the owner of a certificate of stock of a certain pottery, which certificate represented 20 shares of the stock of said company, of the par value of $100 per share; that said certificate was afterwards ascertained to be in the possession of the defendant, Fanny Lawton; and that, when the possession thereof was demanded of her by the complainant, she refused to surrender the same, and claimed that it had been given to her by the said John Brindley, deceased, in his lifetime. The bill then charges "that, even if the pretense so last as aforesaid made of the said Fanny Lawton be true, nevertheless the said gift of stock by your orator's said father to the said Fanny Lawton is absolutely null and void, as being against public policy and good morals, because your orator's said father gave the said stock, if at all, to the said Fanny Lawton, as an inducement to and consideration for her living with him thereafter in a state of adultery, and that the said Fanny Lawton, in consideration thereof, thereafter did live with your orator's said father in open adultery, and was so living with him at the time of his death." The motion is to strike this out because it is impertinent and scandalous. Since this is the foundation of the complaint, the whole structure must stand or fall with it. The allegation is that the certificate was given to her upon consideration of her submission to him in committing the crime of adultery. The gift is alleged to have been made before the offense against the law and good morals was committed. Can a court of equity grant relief in such case by compelling the donee to surrender the possession of the thing given as compensation for her part in the offense? Prof. Pomeroy, in speaking of contracts that are void or voidable because of their illegal or immoral character, says: "Among the most important and familiar illustrations are the following: Contracts based upon the consideration, either past or future, of illicit sexual intercourse, or stipulating for such future intercourse, or in any manner promoting or furnishing opportunities for unlawful cohabitation or prostitution." 2 Pom. Cont. § 936; 1 Story, Eq. Jur. § 296. That the contract presented by the bill was illegal and immoral is so declared in the bill itself. Will the court aid either party in asking for a rescission? The answer to this was in the negative in the case of Ellicott v. Chamberlin, 38 N. J. Eq. 604. In that case, in order to induce the resignation of an executor, he was offered $10,000. After the payment of $5,000 in cash and the assignment of a bond and mortgage for $1,300, a promissory note was given for the remaining $5,000. After the payment of $2,500 on this note, an action at law was begun for the recovery of the amount due thereon. A bill was then filed in this court, presenting the whole transaction, and asking that the action at law be enjoined. The bill was dismissed by the chancellor. An appeal was taken. In delivering the opinion of the court of errors, Mr. Justice Parker used the following language: "There is no doubt that Mrs. Ellicott could have successfully resisted payment of any part of the money she agreed to give Mr. Chamberlin for the renunciation of his executorship, had she interposed defense; but she chose voluntarily to pay the greater part of the money, and she cannot now recover what she has paid. She was a participant in an illegal contract for the purpose (as the evi dence shows) of obtaining for herself the administration of the estate. If a contract be illegal as against public policy, its invalidity will be a defense while it remains unexecuted. If the illegal contract be in part performed, and money has been paid in pursuance of it, no action will lie to recover the money back. Smith, Cont. 259. The law will not assist either party to an illegal contract, and, the parties being in pari delicto, it will leave them where it finds them. If the contract be still executory, it will not enforce it; and, if already executed, it will not restore the price paid nor the property delivered. Setter v. Alvey, 15 Kan. 157. Mrs. Ellicott cannot, therefore, compel the payment of the money she gave Mr. Chamberlin on the agreement or on the note, nor can she compel the assignment to her of the Yauger bond and mortgage, as prayed for in her bill. To that extent the contract has been executed. But she can resist the payment of the balance of the note, for which suit has been brought. Her defense to the note can, however, be made in a court of law, and therefore the suit in the circuit court, already commenced, should not be enjoined. The bill was properly dismissed by the chancellor without costs. Johns v. Norris, 27 N. J. Eq. 485; Slocum v. Wooley, 43 N. J. Eq. 451, 11 Atl. 264. With these cases before me, it is needless that I should go further. The motion to strike out must prevail, with costs.

Digitized by Google

DALY v. ELY. GNECCO v. GENTELLE. Ex parte LEHLBACH, Sheriff. Ex parte SKINNER, Special Master.

(Court of Chancery of New Jersey. March 16, 1895.)

COSTS — SALE ON EXECUTION — DISBURSEMENTS — LEGAL ADVERTISING — SHERIFF'S FEES.

1. The act of April 14, 1891 (P. L. p. 416), does not have the effect of repealing the act of March 20, 1857 (P. L. p. 381; Revision, p. 412), as amended by the act of March 6, 1863 (P. L. p. 180; Revision, p. 413), or of altering the rate of charges for publication of legal notices established by that act, unless a special contract be made in that behalf.

2. A special master of this court is not one of the persons designated in the act of April 14, 1891, and is not thereby authorized to pay the rates of charges for advertisements therein named.

3. Query, is a sheriff authorized by that act to agree to pay those rates on an execution issued out of this court?

4. A sheriff who in good faith makes an advertisement of property under execution, and is prevented from attending the sale thereunder by the payment of the debt before the day of sale, is, nevertheless, entitled to the fee allowed by the statute for advertising the property for sale.

(Syllabus by the Court.)

Two bills, one by William D. Daly against Addison Ely, and another by Grobatto Gnecco against Mary Gentelle. Heard on motion to fix certain fees.

Addison Ely, in pro. per. S. A. Besson, for special master. Cortlandt Parker, for respondent.

PITNEY, V. C. The dispute common to both cases is as to the amount of fees for publishing advertisements of sale to be allowed to the newspaper publishing the same. Another dispute, in the one case, is as to the amount of execution fees a sheriff is entitled to charge upon an ordinary fi. fa. de bon. et ter. issued out of this court.

First, with regard to the fees for advertising: The statute of March 20, 1857 (P. L. p. 381; Revision, p. 412), entitled "An act to regulate and establish a uniform rate of charges for legal advertising in New Jersey," fixed the lawful charge as follows: "The price for publishing any legal notice, sheriff's sale or any order, citation, summons or any other proceeding or advertisement required by law to be published in any newspaper shall be forty cents per folio (one hundred words) for the first insertion, and twenty cents per folio for each subsequent insertion after the first." By a supplement to this act passed March 6, 1863 (P. L. p. 180; Revision, p. 413), this rate was increased to 60 cents per folio for the first insertion, and 30 cents per folio for each subsequent insertion. And so the law stands at this time. By the act of April 9, 1875 (P. L. p. 89; Revision, p. 1049), one of the two newspapers in which sales of land are advertised is required to be printed and published at the county seat. By the act of April 14, 1891 (P. L. p. 416), entitled "An act to regulate the price of legal advertising," it was enacted "that it al lawful for all officers and boards c county or municipality of this state for official advertising in the daily ne pers published in cities of the first an ond class at the rate of ten cents per li the first insertion, and five cents per li each subsequent insertion, and no The second section contains a repealer previous conflicting acts.

The advertising by the sheriff and master in these cases was made in ne pers of the character designated by th of 1891; and the question is whether newspapers are entitled of right, and absence of special contract, to charg rates named in the act of April 14, 18 are confined to those fixed by the March, 1857, as amended by the act o (Revision, pp. 412, 413). It is to be ob that this act of 1891 does not purport a supplement to the original act upo subject above cited, which contains eral, comprehensive, and peremptory tion of the whole field of legal adver and yet it is entitled "An act to regula price of legal advertising," and from thi one would expect an equally compreh treatment of the subject. But, wh come to the actual enactment, we find, first place, that it deals with a limited of advertisers, and not with all legal tisements; and, in the second place, it only with a limited class of newspaper daily newspapers published in cities first and second class, leaving the wide of publication quite untouched. It see me that such an act can in no sen termed "An act to regulate the price o advertising." In the next place, it is observed that it does not fix the rate the newspaper is entitled to charge sense in which that is done by the g act above cited, but fixes a limit b which the particular officer or board p ing the advertisement may not go in m payment. It does not say that such officer or board shall pay so much, a more; or that such newspaper shall be tled to charge so much, and no more simply that it shall be lawful to pay so and no more. The natural force of thi guage is to confine and limit the pow contract of the persons named, and not the amount which the newspaper may c in the absence of contract. I am una construe it as interfering with or rep the act of 1863, except to the extent stated. The original act, in my judg stands as prima facie measure of pric payment, in the absence of contract.

But the further point was taken tha ther the sheriff nor the special master is in the class to whom the power of incr payment is given; and that, if the sher properly classed as an officer of the co still, in procuring this advertisement, h not acting as such, but was acting as th

Digitized by Google

cial officer of the court of chancery; and that the true construction of the act of 1891 is that the advertisement for which the officer is authorized to pay the price therein named must be an advertisement by or on behalf of the county or municipality of which he is an officer, and does not apply to an advertisement made by the sheriff when acting as the officer of the court of chancery. I am inclined to think that this point is well taken. The court of chancery is not obliged by law to send its process to any particular officer. It may send it to one of its own officers, as a special master, or to a person specially appointed; and, when a process is sent to a sheriff, he does not execute it by virtue of his office as sheriff of the county, but as an officer of the court of chancery. The advertisement is not made by or on behalf of the county or any municipality. The result of adopting this view would be that advertisements of sale ordered by the court of chancery, or of land taken by process issued out of the court of chancery, are not such advertisements as are referred to and covered by the act of 1891.

The point just dealt with is undoubtedly good so far as relates to the special master. He is not an officer of any county or municipality of this state. But, whether I am right or not with regard to the view above suggested as to the relation of the sheriff to this court, the result is the same for another reason. There is in this case no proof of any express contract between either of the parties and the proprietor of the newspaper. In the case of the special master, he had no right or power to make any such contract, and his limit in that respect was presumably known to the proprietor of the newspaper who published his advertisement. If, therefore, the proprietor expected to charge at a higher rate than that fixed by the act of 1863, he should have so stated to the master before inserting the advertisement, and have stipulated for such payment. In the absence of such stipulation, he must be presumed to have been satisfied with compensation at the rate fixed in the act of 1863, and can be allowed and paid no more by the master. I am of the opinion that the same consideration applies to the case of the sheriff. There is no proof before me that anything was said between the sheriff and the proprietor of the newspaper in Essex county as to the price which should be charged in this case; and, in the absence of such stipulation, the presumption is that the rate fixed by the act of 1863 applies, and the charge for advertising in the sheriff's case must be reduced accordingly.

The other question raised is as to certain execution fees charged by the sheriff, viz. advertising the property for sale,—$3.50. This item is based upon the provision in the statute regulating fees (Revision, p. 405), as follows: "Advertising the property for sale, provided the sheriff or deputy sheriff shall attend in pursuance of the advertisement, $3.50." The property in this case was duly and fully advertised for sale, but, as soon as the defendant heard of the advertisement, he appeared at the sheriff's office, and paid the execution, thereby stopping the sale; and he now contends that, although the sheriff has done all the work required by the statute to be done in the way of advertising in order to earn the fee of $3.50, he is yet not entitled to receive it, unless, in point of fact, he does actually attend in person or by deputy in pursuance of the advertisement. I do not think that construction is the proper and fair one. The proviso was intended to prevent the sheriff from charging the fee where he advertises, and then of his own accord voluntarily abandons, the sale, and pays no attention to it. It ought not to be construed as giving the defendant the power to permit the sheriff to incur the labor and trouble of advertising, and then come in and pay the debt, and thereby prevent the sheriff from receiving the fee given by statute. Such construction ought not to be adopted unless it is unavoidable. I think the sheriff is entitled to that fee.

The result is that the charge for advertisement in each case must be cut down to 60 cents per folio for the first insertion, and 30 cents per folio for each subsequent insertion.

KUSER et al. v. WRIGHT.

(Court of Errors and Appeals of New Jersey. March 5, 1895.)

CORPORATE MORTGAGE — VALIDITY — ATTACK BY RECEIVER.

1. The Ott & Brewer Company was incorporated under the laws of this state with three directors. Our statute provides that to transact business there must be at least three directors elected, and that, when a director ceases to be a stockholder, he shall also cease to be a director. Bell, one of the directors, made an assignment for the benefit of creditors, after which the other two directors executed chattel mortgages to three of the appellants, who loaned money to the corporation at the same time, and took the mortgages without notice that Bell had ceased to be a stockholder. *Held* that, as to third parties dealing in good faith with the company, without notice of any infirmity in the title of Bell as a director, he must be regarded as a director de facto, and thus the company had, when the security was given, three directors, as required by law.

2. The fact that no notice was given to Bell of the meeting of directors at which the mortgage was authorized to be executed does not affect its validity. That is a subject into which the mortgagee was not bound to examine.

3. The receiver of an insolvent corporation cannot successfully assail a mortgage given by the corporation because it was executed for an antecedent debt.

(Syllabus by the Court.)

Appeal from court of chancery; before Chancellor Bird.

Bill by John Wright, receiver of the Ott & Brewer Company, against Anthony R. Kuser and others. There was a decree for complainant (28 Atl. 719), and defendants appeal. Reversed.

Digitized by Google

G. D. W. Vroom, Edwin R. Walker, and Chauncey H. Beasley, for appellants. James Buchanan, for respondent.

VAN SYCKEL, J. The Ott & Brewer Company was organized under the laws of this state, with three directors, viz. Brewer, Tucker, and Bell. In June, 1891, Bell made an assignment for the benefit of creditors, and soon after that left the state. In November, 1891, the Ott & Brewer Company, by the two directors, Brewer and Tucker, executed a mortgage on its real estate and certain goods and chattels to the First National Bank of Trenton, to secure a pre-existing indebtedness. This mortgage was recorded as a real-estate mortgage, but was not sworn to or recorded as a chattel mortgage. In August, 1892, the said company, by the same two directors, executed three several chattel mortgages to A. R. Kuser, John L. Kuser, and Albert Brewer, respectively, to secure to each of them the sum of $5,000 at that time loaned by them to the said company. In May, 1893, a bill was filed in the court of chancery alleging that the said the Ott & Brewer Company was insolvent, and thereupon John Wright was appointed receiver of the said company. The receiver exhibited his bill to set aside all these mortgages. The alleged infirmity chiefly relied upon is that two directors had no power to establish a lien upon the property of the corporation.

Our act concerning corporations (section 16) provides "that the business of every such corporation shall be managed and conducted by the directors thereof, who shall respectively be shareholders therein." Section 17 provides: "The directors shall not be less than three in number, and they shall be chosen annually by the stockholders at such time and place as shall be provided by the by-laws of the company, and shall hold their office for one year, and until others are chosen and qualified in their stead." Section 20 provides that "when any vacancy occurs among the directors, or secretary or treasurer, by death, resignation, removal or otherwise, it shall be filled for the remainder of the year in such manner as may be provided for by the by-laws of the said company." Section 47 provides that "it shall not be lawful for any person to be elected a director of any body corporate in this state issuing stock, unless that person shall be, at the time of his election, a bona fide holder of some of the stock thereof." Section 48 provides that "when any person, a director of any body corporate, shall cease to be a bona fide holder of some of the stock thereof, he shall cease thereupon to be a director thereof." The point made against these mortgages is that under our statute there must be at least three directors to manage the corporate business; that by the assignment made by Bell for the benefit of his creditors he ceased to be a stockholder, and by force of the statute ceased at the same time to be a director, of the company, th by leaving the corporation without a b of directors legally qualified to conduc affairs. That such a result justly or leg flows from these premises cannot be con ed. It is apparent that dealing with t corporate bodies would be in the hig degree hazardous and unsafe if the pu without notice in fact, is chargeable in with knowledge of a latent infirmity in title of every director of the company. doctrine so destructive to the security of mercial transactions, now so largely ducted by corporate action, has no sup in the law. The receiver stands for the poration, and cannot impeach any act w the corporation itself could not successf assail. Bell's original title to the offic director was good. It is not denied tha was legally elected. The corporation him out to the public as one of its duly thorized agents by failing to declare his o vacant and electing his successor.

In Doremus v. Dutch Reformed Churc N. J. Eq. 349, Chancellor Vroom said t "where the original title of an officer is s cient, though good cause of amotion shown, even in a case where the charter clares that for such cause of amotion officer shall vacate his office, the office is determined until there be an amotion." also said that, "where persons are officer facto, they are in colore officii, and their will be valid until they are lawfully ous and more especially as they respect third sons they are binding on the corporati The authorities are cited in the opi This rule has never been departed fro this state. Vice Chancellor Van Fleet in chanics' Nat. Bank v. H. C. Burnet Man Co., 32 N. J. Eq. 236, adopted it. He t declares that: "If the officers selected ar eligible, or are elected irregularly or illeg but are allowed by the proprietors of the poration to take control of its property, to exercise its functions and powers, they come officers de facto, and as such may for and bind the corporation. An office facto is one who has the reputation of b the officer he assumes to be, and yet is n good officer in point of law. From a early time it has been held that the act de facto officers are binding upon the co ration until they are lawfully ousted, e cially so far as their acts create right favor of third persons." That such is current of authority will appear by refer to the books. Mining Co. v. Anglo-Cal nian Bank, 104 U. S. 192; Beach, Priv. C §§ 233, 234; Ang. & A. Corp. § 287. In Jose Sav. Bank v. Sierra Lumber Co., 63 179, a director who had ceased to be a st holder, no judgment of ouster having pronounced against him, was held to director de facto, and his acts valid a third persons. Mr. Taylor, in his work Private Corporations (sections 187, 188), a stating the rule as formulated in the c

Digitized by Google

above cited, says that: "It is submitted that this statement of the rule does not give sufficient prominence to the principle of estoppel, on which the rule depends,—a principle which, in its application to the responsibility of corporations for the acts of de facto officers, may be stated thus: If a body of men, acting as a corporation, permits certain persons to act openly as corporate officers, or if it is permitted by the directors, assuming them to have had the power to appoint the officer in question, the corporation will not, to the detriment of persons who in good faith have acted on the assurance that the persons acting as officers were the officers they assumed to be, be permitted to impeach the validity of their acts and contracts on the ground that such persons were not legally corporate officers." Bottomley's Case, in 16 Ch. Div. 681, is not in conflict. In that case the contest was between the company and its own stockholders. Five directors were necessary to conduct the business. After one became disqualified by insolvency, the other four took proceedings by which they attempted to enforce a forfeiture against some of their stockholders. Sir George Jessel, M. R., held that the shareholders were entitled to have the business of the company conducted according to the articles of the association in relation to that proceeding. As between stockholders and the company, that was the correct rule. In Re County Life Assur. Co., 5 Ch. App. 288, a policy signed by three de facto directors of the company was enforced in favor of the party insured. Lord Justice Giffard observed, in delivering his judgment, that he did not hesitate to say that the business of companies could not be carried on if this was not held to be the law. As to the public, Bell was clearly a director de facto, and the corporation was represented in the affair before us by three directors, as required by the statute. This court has adjudged that, as in favor of creditors and third persons dealing with a corporation in good faith, the regularity and validity of its organization, effected under color of its charter, cannot be impeached, and the acts of its officers, who are officers de facto under color of an election, are binding on the corporation. Water Co. v. De Kay, 36 N. J. Eq. 548. A majority of the directors of a corporation, in the absence of any statutory regulation, is a quorum, and such majority, when convened, can do any act within the power of directors. Wells v. Rubber Co., 19 N. J. Eq. 402. Under these cases, the fact that no notice of the meeting of directors at which the mortgages were authorized was given to Bell cannot affect the validity of these securities. That is a subject into which those who are dealing with a corporation are not bound to inquire. That duty falls on the company alone, when it holds out its officers as its accredited agents. Nothing like an approach to safety could exist in transactions with corporate bodies if such an obligation was laid upon third parties contracting with them. After the most careful inquiry, the question would still be open to controversy. The assignment by Bell for the benefit of creditors was not constructive notice to the appellants that he had ceased to become a shareholder. Actual notice must be shown, and that was not proven. Those only are chargeable with constructive notice of the assignment who seek to establish a title to his individual property. The company is estopped from denying the authority of one who is de facto a director, and in that capacity authorized to represent it. The fact that the mortgage to the bank was executed to secure an antecedent debt does not impair its standing as between the corporation and its creditor. It was taken in good faith, and it was as much the duty of the company to pay the debt as though it had been contracted at the date of the mortgage. Loom Works v. Vacher (N. J. Sup.; Feb. Term, 1895) 31 Atl. 306. So far as the mortgage to the bank is a lien upon personal property, it must be postponed to the chattel mortgages, because the bank failed to record it as a chattel mortgage. The decree below should be reversed, with costs in this court and in the court below, and the securities of the appellants established in accordance with the views herein expressed.

STATE (McNEAL PIPE & FOUNDRY CO., Prosecutor) v. LIPPINCOTT, Tax Collector.

(Supreme Court of New Jersey. March 15, 1895.)

MUNICIPAL CORPORATIONS—ORGANIZATION — CONSTRUCTION OF STATUTE.

1. The "Act to incorporate the city of Burlington," approved March 4, 1851, created a municipal corporation over territory lying within the township of Burlington, and not including the whole of that township. *Held*, that a legislative intent is shown thereby to create a dual municipal government over such territory, and that, if there was a debatable question as to such construction of the act, the contemporaneous and long-continued exposition exhibited in the usage and practice under it would require such construction to be given to it.

2. The act above cited empowered the city of Burlington to regulate and keep in repair the streets and highways therein. *Held*, that the city was thereby given the exclusive power and charged with the exclusive duty of maintaining and keeping in repair such highways therein; but the township of Burlington retained power to maintain and keep in repair the highways of the township outside of the city limits, and remained charged with that duty.

3. Since the voters within the township continued to have a voice in the determination of the amount to be raised for township roads, and the township assessor remained charged with the duty of assessing the sum so determined upon all the property within the township, *held*, that an assessment of such a road tax may lawfully be made upon property within the limits of the city of Burlington; the act being capable of such a construction, and the contemporaneous and continuous exposition of the acts in that respect justifying and requiring such construction to be adopted by the court.

(Syllabus by the Court.)

Digitized by Google

Certiorari by the state (McNeal Pipe & Foundry Company, prosecutor) against one Lippincott, collector of taxes, to review an assessment. Assessment affirmed.

This certiorari brings up an assessment of taxes imposed upon prosecutor by the assessor of the township of Burlington. It appears by a stipulation of counsel that the municipality known as "The Inhabitants of the City of Burlington," which was incorporated by the "Act to incorporate the city of Burlington," approved March 4, 1851 (Laws 1851, p. 149), covers territory which lies within the township of Burlington, but does not include the whole township. It also appears that the assessor of the township of Burlington in 1892 assessed, for county, state, school, and township taxes, property of prosecutor lying wholly within the city of Burlington, and that the tax brought up was imposed by such assessment. It also appears that the township tax thus imposed includes an appropriation for the maintenance of roads. It further appears that, since the incorporation of the city in 1851, it has been the uniform practice of the township officers to assess taxes in this mode upon the property within the city; and that during all that period voters within the city have taken part in town meetings and elections, have been elected to and served in township offices, and the two municipal corporations have been treated as covering the same territory, and including the inhabitants and voters within the city. The stipulation also shows that the constant practice under the acts has been to raise a township tax for roads, to include the territory of the city in the township road districts, and to expend the road tax in those districts on roads without the city limits, and on roads within the city limits outside of the "thickly built up portion of the city." The city taxes are expended, among other things, upon streets within the "built-up" part of the city.

Argued November term, 1894, before DIXON, LIPPINCOTT, and MAGIE, JJ.

Howard Flanders, Samuel W. Beldon, and Grey & Grey, for prosecutor. Jos. H. Gaskill, for defendant.

MAGIE, (after stating the facts). The first question for decision is whether the assessor of the township of Burlington can lawfully include in his assessment property lying within the city of Burlington, and impose on the owners thereof such taxes as a township assessor is authorized to impose. It is settled in this state that the legislature may create local political divisions and governments, covering the same territory and of a dual character, and may endow each with the power of taxation, for the purpose of performing their respective functions. Hoey v. Collector, 39 N. J. Law, 75; Baldwin v. Fuller, Id. 576, 40 N. J. Law, 615; Auryansen v. Improvement Commission, 45 N. J. Law, 113. This question must be determined by a construction of the act of 1851, incorporating the city of Burlington. My examination of tha has led me to the conclusion that it ev a legislative intent to create over the ter affected thereby a dual government; le the township with at least some of its ers and functions undisturbed, and cre a city government with the powers and tions granted by the act. In my judg such a construction is necessary, becaus erwise the inhabitants of the city would been without representation in the c board of freeholders; they would have without authority or officers to care for pers, or to raise money for that purpose there would have been no mode by taxes for state or county purposes could been imposed on persons or property the city. If, however, there was a debe question as to the true construction o act, then, as the interpretation I have cated is clearly admissible, we shou bound, by the contemporaneous and co ous exposition exhibited in the usage practice under it, to give it that constru State v. Kelsey, 44 N. J. Law, 1. The is that the objection, so far as it relates whole tax, cannot prevail.

It is next contended that the tax befo so far as it includes money raised for cannot lawfully be imposed on perso property within the city. The first ment is that the power originally vest the township, in respect to the making, ing, repairing, and keeping in order of was, by the act of 1851, taken away granted exclusively to the city, so far highways within its limits were conce By that act the city was granted the to regulate and keep in repair the street highways therein, and to pave and them, and also the power to raise by ta money necessary for that purpose. Th is also given power to lay out and streets and highways therein. Such a has been construed to be exclusive, an implication, to deprive the common pl the power to lay out and open streets viously vested in that court. Town of port v. Cherry, 51 N. J. Law, 417, 1 299; Id., 52 N. J. Law, 544, 20 Atl. 970. plying a like rule of construction to the of power to the city to regulate and streets and highways therein, it would sarily be held to be exclusive, and th would be construed as impliedly dep the township of the powers in that re which it previously possessed. Upon construction of the acts, the dual go ments existing over the territory in qu consisted of the city, having exclusive over the maintenance and repair of ways therein, and therefore charged wi exclusive duty of maintaining and ke in repair such highways; and the tow deprived of any power over the street highways of the city, and therefore dis ged from any duty in respect thereto, b taining all other powers, including th

Digitized by Google

maintaining and keeping in repair the wards of the township without the city limits, its duty in respect to which remained unimpaired. Do the long-continued usage and practice disclosed by the stipulation exhibit a different construction and require the courts to follow it? In my judgment, they do not. In the first place, a different construction of the acts is impossible and inadmissible, and in such case the contemporaneous construction to the contrary of the plain meaning of the law is inapplicable. In the next place, the stipulation does not disclose a different construction. It does not show that the township tax for roads was imposed for a purpose other than one for which such a tax could lawfully be imposed. All that appears is that a township tax for roads was imposed, and, as the township was empowered to raise money for roads without the city limits, such a tax was within its power, and must be assumed to have been imposed for such a purpose. Nor would the illegality of its imposition be shown by the fact that moneys thus raised had previously been erroneously expended on roads within the city limits, or even by proof that the moneys raised by this tax had been thus erroneously expended.

It only remains to determine whether such a township road tax can lawfully be imposed upon property within the limits of the city. This question is by no means free from difficulty. My examination of the acts has led me to the conclusion that such was the legislative intent. It is clear that the voters residing within the city limits remain voters of the township, and are therefore entitled to vote at town meetings on all questions, including the determination as to the amount to be raised for roads. It is not conceivable that it was intended to leave them possessed of this power if the money they voted for such purpose was to be raised wholly from property of those outside the city limits. The assessor of the township remains charged with the duty prescribed by the general township act, and is thereby required to impose a tax for all moneys voted to be raised by the township upon the property of the whole township. Such, at least, is a possible construction of the acts, and it is the construction which has always been adopted in practice. This result is not entirely satisfactory, because it obviously produces some inequality of taxation. This inequality is not produced by the imposition on city property of a tax for roads without the city, because, had no city been created, such contribution must have been made. It results from the fact that, by the grant of exclusive power over its highways, the city becomes wholly responsible for them, and loses such contribution towards their maintenance and repair as the property without the city limits would otherwise have made. But this charter was accepted by the city, and has been its rule of action for over 40 years. Such being the apparent intent in this legislation, effect must be given to it, unless it is beyond legislative authority or obnoxious to constitutional prohibitions. The purpose of the tax being one which townships are charged with, and it being laid with uniformity upon all property in the township, it seems to be within the power of the legislature. The tax is imposed under the general township act, and by the uniform rules therein prescribed, and does not fall under the constitutional prohibition. The result is that I think the tax before us should be affirmed, with costs. The like result is reached in the other cases argued with this, and presenting the same question.

GERLI v. POIDEBARD SILK MANUF'G CO.

(Court of Errors and Appeals of New Jersey. March 4, 1895.)

PARTNERSHIP—POWER OF MEMBERS—SALE—CONTRACT OF—STATUTE OF FRAUDS.

1. A chose in action accruing to a partnership from a transaction in the ordinary course of its business may be transferred by a single member of the firm.

2. A written memorandum of the terms of an order for the purchase of goods, signed by an agent of the buyer, and a written acceptance of the order, signed by an agent of the seller, constitute a valid contract within the statute of frauds.

3. When the seller of goods has agreed to deliver them in installments, and the buyer has agreed to pay the price in installments which are proportioned to and payable on the delivery of each installment of goods, default by either party with reference to any one installment will not ordinarily entitle the other party to abrogate the contract. Blackburn v. Reilly, 1 Atl. 27, 47 N. J. Law, 290, reaffirmed.

4. If the buyer of goods to be delivered on a subsequent day gives notice to the seller before the day of delivery that he will not accept them, and in an action by the seller for the breach of contract it appears that, even if the notice had not been given, it would have been a physical impossibility for the seller to tender the goods at the proper time, the seller will not be entitled to more than nominal damages.

5. Where a contract is made for the sale and delivery of goods in installments, and the vendor fails or neglects to make the delivery of the first installment at the time agreed upon, the purchaser may rescind the entire contract. Per Van Syckel, J., dissenting.

(Syllabus by the Court.)

Error to circuit court, Hudson county; before Justice Lippincott.

Action on a contract by Paul Gerli against the Poidebard Silk Manufacturing Company. From the judgment both parties assign error. Affirmed.

Carrick & Hughes, for plaintiff. Collins & Corbin, for defendant.

DIXON, J. On March 28, 1893, C. & E. Gerli, Fratelli & Co. entered into a contract to sell and deliver in New York to the Poidebard Silk Manufacturing Company 30 oales of extra Piva new silk, deliverable, 10 bales July 20th to 25th, 10 bales August 15th, and 10 bales September 1st to 10th, each

Digitized by Google

installment to be paid for 60 days after delivery, at $5.90 per pound. In consequence of the lateness of the new crop, it was impossible for the sellers to make delivery of the first 10 bales within the time specified, and on July 27th the buyer extended the time for such delivery until August 1st. On that date, the impossibility still continuing, the buyer notified the sellers that it canceled the contract because of the default, and would decline to receive any of the merchandise ordered. On August 15th the new crop of silk had not yet arrived in New York, but it arrived before September 10th. Under these circumstances, one of the members of the selling firm assigned the firm's rights in the contract to Paul Gerli, the plaintiff, and thereupon he brought this suit against the buyer to recover damages arising from the refusal to accept the installments of August 15th and September 1st to 10th. At the trial the justice denied the right to damages for the installment of August 15th, and directed a recovery of the damages as to the installment of September 1st to 10th. On exceptions taken at the trial, each party has assigned error. The errors assigned by the purchaser will first be considered.

1. That the claim for damages was assignable, so as to authorize the assignee to sue thereon in his own name, is clear on the words of the supplement to the practice act, approved March 4, 1890 (P. L. 1890, p. 24). It was "a chose in action arising on contract." Such a chose in action belonging to a partnership may be transferred by a single member of the firm. Story, Partn. § 101.

2. The contract was fully proved within the statute of frauds. Evidence introduced on behalf of the defendant showed that its general manager had written and signed a memorandum of the order given for the goods, in which were stated all the terms of the proposed contract, and that thereupon the agent of the sellers had sent to the buyer a written acceptance of the order, duly signed. Such proof was sufficient. Browne, St. Frauds, § 346.

3. The other exception pressed by the defendant below is that the trial justice denied the right of the buyer to rescind the contract on the nondelivery of the first installment of silk. The general rule on this subject was thus laid down by this court in Blackburn v. Reilly, 47 N. J. Law, 290, 1 Atl. 27: "In contracts for the sale of goods, to be executed by a series of deliveries and payments, defaults of either party with reference to one or more of the stipulated acts will not ordinarily discharge the other party from his obligation, unless the conduct of the party in default be such as to evince an intention to abandon the contract, or a design no longer to be bound by its terms." In the case cited this rule was enforced against the buyer. In Trotter v. Heckscher, 40 N. J. Eq. 612, 4 Atl. 83, this court, and in v. Adams, 56 N. J. Law, 38, 27 Atl. 1 the supreme court, enforced it against seller. That the conduct of the vendor the present case did not evince an in tion to abandon the contract, or not to bound by its terms, appears beyond disp They failed to deliver the July installm because it was impossible to do so, off to deliver other silk which they consid equally valuable, expressed their willing to come to an equitable arrangement their default, and, on the first intimation purpose on the part of the vendee to scind the contract, they protested against right of rescission, and insisted that should be permitted to make the subseq deliveries. They showed a design the opposite of repudiation. Nor do we anything in this contract or the circums ces of the parties from which it can sonably be inferred that the parties inte the delivery of each installment of sil be a condition precedent to the contin obligation of the contract. So far as pears, the usefulness to the buyer of an stallment did not at all depend upon prompt delivery of prior installments, full indemnity for every default could b cured by action based thereon. So that, u the rule before declared, it would seem the attempt to rescind was illegal. The fendant, however, insists that the rul not applicable to the present case, bec the seller's fault consisted in failing t the first thing required to be done in formance of the contract; and Norringto Wright, 115 U. S. 188, 6 Sup. Ct. 12, is s as an authority for this distinction. On ciple, I do not see that, for such a pose, the first act to be done stands up different footing from subsequent acts. default in that does not make it more tain than do other defaults that the p aggrieved cannot get exactly what he tracted for; for that default, as well as others, he may be compensated by suit; by that default, as readily as by others may obtain an unconscionable advantag he is entitled to rescind or retain the gain as self-interest may dictate. As dence of repudiation or abandonment, performance of the first thing required t done may be more persuasive than if promisor had partially carried out his tract, but, as a basis on which a righ rescission is to be supported, it cannot, n ly because it is first in order of time, any greater importance than later defa In Norrington v. Wright, ubi supra, the p tiff had contracted to ship from Europ the defendant in Philadelphia 1,000 ton rails in each of the months February, Ma April, May, and June; in February he shipped 400 tons, which the defendant received and paid for, not knowing that than the required quantity had been ship in March the plaintiff had shipped 885 t

Digitized by Google

and the defendant, on learning of these deficiencies, declared the contract terminated. The court held that he was justified in doing so. I am not sure that I perceive definitely the principle on which this decision was rested. But the case seems now to be cited for the following paragraph in the opinion of the court: "The seller is bound to deliver the quantity stipulated, and has no right * * * to compel the buyer to accept a less quantity; * * * and, when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once." I cannot but think that there is here some confusion of thought. If a contract of sale requires the delivery of all the goods at once, and the seller tenders only part at the time specified, certainly the buyer may refuse to accept the part; but it is scarcely accurate to say his refusal is based upon a rescission of the contract. He has simply refused to do what he never agreed to do. But if the goods are to be delivered in installments at different time, and the seller tenders one installment on the day specified, then, if the buyer refuses to accept it, plainly his refusal must rest upon a different foundation. He had agreed to accept such a tender, and his refusal can be justified only on the idea that he has become released from that agreement. That is to say, with reference to the point we are now considering, it must appear that his agreement to accept the installment tendered was dependent on the due performance by the seller of another promise, which he had failed to perform. We are thus brought to the real question in all bargains of this nature, whether, on the proper construction of the contract, the performance of any particular stipulation by one party is a condition precedent to the continuance of obligation upon the other party; and logically this must be the question as well with regard to the first stipulation as the subsequent ones. On this question this court adopted the general rule that when the seller has agreed to deliver the goods sold in installments, and the buyer has agreed to pay the price in installments which are proportioned to and payable on the delivery of each installment of goods, then default by either party with reference to any one installment will not ordinarily entitle the other party to abrogate the contract. We were led to the adoption of this rule because it seemed to be supported by the greater strength of judicial authority, and to be most likely to promote justice. We see no sufficient reason for abandoning it. The rule governs the case in hand, and maintains the right of the plaintiff to recover damages for the defendant's refusal to accept the third installment of silk. Therefore, as against the defendant, the judgment is not erroneous.

The plaintiff below assigns error upon the exclusion of his claim for damages because of the refusal to accept the installment deliverable August 15th. In this there was no substantial error. Conceding that the defendant's repudiation of the whole contract before August 15th absolved the sellers from the duty of tendering an installment on that date, and gave them an immediate right of action against the defendant for a breach of contract, nevertheless, when it appeared, as it did on the trial, that by no possibility could the sellers have made tender of the silk due August 15th, because the silk did not arrive in New York until a later day, it became evident that as to that installment the sellers suffered no loss by the breach.

There are other assignments of error in the record, but, as counsel did not notice them in argument, we assume that they are all involved in the matters above decided, or are waived. The judgment should be affirmed.

(March 5, 1895.)

VAN SYCKEL, J. (dissenting). In March, 1893, Gerli contracted to sell and deliver to the Poidebard Silk Company 30 bales of new silk; 10 bales to be delivered between July 20th and 25th, 10 bales August 15th, and 10 bales between September 1 and 10, 1893. Gerli could not deliver the first installment, and so informed the silk company, nor was Gerli able to deliver the second installment. After the failure to deliver the first installment, the silk company gave notice to Gerli that it rescinded the contract, and would refuse to accept the future deliveries. For the refusal of the silk company to accept the last installment, deliverable in September, Gerli brought this suit, and recovered damages in the trial court. The only question in the case is whether, under these circumstances, the purchaser had a right to rescind the contract.

Where goods are sold to be delivered at a specified time, the purchaser is not bound to accept them at a subsequent time. 2 Benj. Sales, p. 892; 2 Chit. Cont. p. 443; Behn v. Burness, 3 Best & S. 757; Bowes v. Shand, 2 App. Cas. 455; Lowber v. Bangs, 2 Wall. 728; Davison v. Von Lingen, 113 U. S. 40, 5 Sup. Ct. 346. In Clark v. Wright, 5 Phila. 489, Hare, J., said that the buyer was not responsible unless tender was made at the time and place specified; that no case, he believed, could be found where an executory contract for the sale of chattels has been taken out of the strict rule of the common law by equity, on an equitable principle. In Jones v. U. S., 96 U. S. 24, Mr. Justice Clifford pronounces this rule to be a rigid one, so that the vendee is not constrained to accept goods unless delivered or tendered at the time agreed upon. If, therefore, the contract had been to deliver the 30 bales at one time, the right of the buyer to rescind on failure of the vendor

Digitized by Google

to deliver on the day named would be so clear that it would not be debatable. In what respect does the case under discussion differ in principle? It is an entire contract for the delivery of 30 bales, although to be in installments. It cannot, even plausibly, be contended that the contract is severable or divisible. The bargain was a unit, embracing all of the 30 bales, and not three separate, independent contracts for 10 bales each. It cannot be seriously asserted that the contract was for anything other than 30 bales, or that there was any implied term in it that the vendee would accept damages as a substitute for such deliveries as were not made by the vendor, and still be under obligation to receive such deliveries as the vendor elected to make. Damages are adjudged for breach of contract; they are not given as part performance of the contract. It is true that the failure to make the first delivery left in the purchaser the option to insist upon delivery of the subsequent installments, which option he would exercise only in case the market value of the goods did not depreciate; and in that respect he would have the advantage of the other party to the contract. The same result would follow if the 30 bales were to have been delivered in bulk; for in that case, also, the vendee would not elect to rescind, but would insist upon the execution of the engagement, if there was a rise in the market price. The advantage in position which in such case the buyer occupies arises from the fact that he has performed, or is ready to perform, on his part, while the other party is in default; and such advantage therefore has a just basis. No case has been brought to the attention of the court where the vendee has been held to the execution of the contract where he announced his election to rescind after the seller failed or refused to make the first delivery. Hoare v. Rennie, 5 Hurl. & N. 19, is precisely in point, recognizing the right of rescission in a case as that before us. This case was criticised in Simpson v. Crippin, L. R. 8 Q. B. 17, but in Honck v. Muller, 7 Q. B. Div. 92, Lord Justice Bramhall says that Hoare v. Rennie has never been overruled; that in Simpson v. Crippin the court evidently did not understand it. He approved of the decision in Simpson v. Crippin, and distinguishes Hoare v. Rennie by the fact that in the former case there had been part performance of the contract, and it could not, therefore, be undone. Lord Bramhall further pertinently remarks that "it has never yet been held that a man may break his contract, render the performance of the whole impossible, and, though nothing has been done under it, insist on the performance of the remainder." In Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, Mr. Justice Gray discusses the English cases very elaborately, and shows clearly that there is no support in the law for the doctrine that the vendor, after he himself is in default as to the first delivery, can enforce performance of the remaining part of the bargain by the vendee. He most confidently asserts that in mercantile transactions an agreement to deliver goods at a specified time is to be regarded as a warranty, upon failure or nonperformance of which the party aggrieved may repudiate the whole contract; that "the seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and, when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have if it had been agreed that all the goods should be delivered at once." This case was approved in Rolling-Mill v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882, and is unchallenged authority in the federal courts. In Blackburn v. Reilly, 47 N. J. Law, 290, 1 Atl. 27, the buyer accepted five weekly deliveries, and paid for them without objection. He refused afterwards to accept the sixth delivery, not because it was not in time, but for the reason that he objected to the quality of the goods previously accepted and paid for. This court held that under these circumstances the buyer could not rescind, but must resort to his action for damages for the defects in the goods which had been furnished. That case was properly decided under the prevailing rule which applies to rescission. It is the admitted rule that rescission cannot be resorted to where part of the contract has been executed, and the parties cannot be placed in statu quo. The entire contract must be rescinded, or there can be no rescission. Under the rule on which the judgment below is based, if there is a contract for 12 successive monthly deliveries, the vendor may refuse to make 11 of the deliveries as the due days arrive, and still hold the vendee to the acceptance of the twelfth delivery. Such a doctrine will be startling to the business community. It needs no discussion to show that in those pursuits where supplies are essential to the employment of labor no business enterprise can be conducted with safety or success under such a rule. A contract for goods in installments is thereby perverted into an agreement to engage in a succession of lawsuits, if the vendor so elects, for such damages as the purchaser may be able to recover, as a substitute for what he expressly bargains for, and during all this period the purchaser cannot safely secure his needed supplies elsewhere, because he cannot know, until the due days arrive, whether the vendor will make further default. The injustice of such an exposition of the law is even more conspicuous when we consider that in many cases the purchaser will be compelled to seek

Digitized by Google

redress in the courts of another state, or in those of a foreign country. I cannot assent to a doctrine so subversive of certainty and success in commercial transactions. In my opinion, the judgment below should be reversed.

MIDDLETON v. GRIFFITH.

(Court of Errors and Appeals of New Jersey. March 4, 1895.)

NEGOTIABLE INSTRUMENTS — INDORSEMENT AND TRANSFER—CANCELLATION OF INDORSEMENT—OFFER OF EVIDENCE.

1. A delivery of a promissory note is necessary to its transfer by indorsement.

2. The fact that an indorsement in blank is made by the payee on a promissory note is not evidence that he has transferred the note, or that he is not the owner of it, if the note still remains in his possession, and is produced by him.

3. The fact that the indorsement of the payee is left uncanceled on a promissory note will not ipso facto prevent his recovery; but from his possession and production of the note it will be presumed that the note was not delivered under the indorsement, or that, if it was so delivered, it was taken up by him.

4. If a person who indorses a bill or note to another, whether for value or for the purpose of collection, comes again to the possession thereof, he is to be regarded, unless the contrary appears, as the bona fide holder and owner of such bill or note, and is entitled to recover thereon, without producing any receipt or indorsement back to him; and he may strike the subsequent indorsements and his own from the bill or note, or not, as he may think proper.

5. While parol evidence is admissible in a suit by the payee to recover of the maker, to establish between them a contemporaneous agreement as to the mode and manner of the payment of the bill or note, which, if executed, will be in satisfaction and payment, yet the offer by the maker of such an agreement, when it is made in the form of an offer to prove such an agreement, must be full and specific; and it should so state the facts that it will not be doubtful what is intended to be proved, and the object and purpose for which the proof is intended, so that, if objection be made, the court may ascertain if the evidence proposed be material and relevant, and act understandingly in relation to its admission.

(Syllabus by the Court.)

Error to circuit court, Camden county; before Justice Garrison.

Action by Richard Griffith against Melbourne F. Middleton on a note. There was judgment for plaintiff, and defendant brings error. Affirmed.

J. J. Crandall and T. J. Middleton, for plaintiff in error. C. V. D. Joline, for defendant in error.

LIPPINCOTT, J. This is an action on a promissory note given by the defendant below, who is here the plaintiff in error, to the plaintiff below, the defendant in error in this court, for the sum of $375, dated April 22, 1889, payable in three months from the date. The note was first indorsed by Richard Griffith, the plaintiff; then by "The Provident Life and Trust Co. of Philadelphia, May 9, 1889"; then "For collection; remittance to Central National Bank, Philadelphia, Pa. Theo. Kitchen, Cashier." At the time of trial the last two indorsements were erased. The plea was general issue, and a specification of defenses under the general issue was demanded and served. In 1889 the defendant secured a policy of life insurance in the Provident Life & Trust Company of Philadelphia on his own life, for $10,000. The yearly premium was $522. A note was given for this premium, and, when it became due, part was paid, and a new note given. When this second note became due, another part was paid, and the note in suit was given. This last note was for $375, payable to Griffith, who appears to have been the agent through whom the insurance had been obtained. The other notes had also been given to him. The policy of insurance is still in the possession of the defendant, and retained by him. On the trial below, a verdict was directed in favor of the plaintiff, against the defendant, for the sum of $485; being the amount of the note, with interest thereon from the maturity thereof. At the trial the note was proved and offered in evidence, with the two last indorsements erased. The name of the plaintiff as first indorser was not erased. The defendant objected to the admission of the note with the name of the plaintiff indorsed thereon, and now claims in his first assignment of error, that it should not have been admitted in evidence, for the reason that the plaintiff, by legal import, was not the owner of the note, and had no right of action thereon.

It will be noticed that the indorsements subsequent to that of the payee had been erased. The promissory note was produced by the plaintiff, and he, during the progress of the cause, testified that he was the owner of the note. Now, it may be observed that to the formal admission of this paper in evidence there could be no objection. The contention made by this assignment of error is that there could be no recovery because the indorsement of the plaintiff was not erased from the note, because the indorsement in law imported a contract which conclusively demonstrated that the note was owned by some one else, who had the right of action on the note. This contention does not appear to be founded upon either reason or authority. There is no reason why evidence is not admissible to show that one who has a promissory note in his possession, and produces it, is the holder of it, and to trace his title to it. Such evidence is held to be competent by numerous adjudicated cases, and it is not evidence which varies the contract implied in the law between the indorser and indorsee. 2 Daniel, Neg. Inst. (4th Ed.) §§ 1181a, 1198. The indorsement of a promissory note by the payee is an order upon the maker of the note to pay the indorsee (2 Burrows, 676; Garretsie v. Van Ness, 2 N. J. Law 25); and

Digitized by Google

the indorser becomes liable upon the custom merchant or commercial law, and not upon any implied covenant or promise contained in the indorsement, distinct from that raised by such custom. The right of the indorsee to recur back to the payee or other indorser in case of failure of the maker to pay on demand and notice is purely of mercantile origin. Id. A promissory note only takes effect from delivery. Powell v. Waters, 8 Cow. 670. So a note may be indorsed by the payee; yet, if not delivered to some one as indorsee or holder, the title remains in the payee, who still is its holder, and no contract whatever from such indorsement is created or implied, unless there be a delivery of the note. State v. High Bridge M. E. Church Ass'n, 44 N. J. Law, 148; Denton v. Peters, L. R. 5 Q. B. 475; Muller v. Pondir, 55 N. Y. 325. If the note is still in the payee's possession, his blank indorsement is no evidence of a transfer by him. William v. Smith, 21 Mo. 419; Beeson v. Lippman, 52 Ala. 276; Best v. Bank, 76 Ill. 608. And, if it has been transferred by him by blank indorsement, upon regaining possession in a bona fide manner of the note he may strike out all subsequent indorsements and his own also, and sue upon it. The payee's possession of a bill or note is prima facie evidence of title in him, whether his own indorsement be erased or not. He need not show, in order to maintain his action, any retransfer of the instrument to himself, and he can at the trial strike out his own or any subsequent blank indorsements. He can strike out his own indorsement at the trial, or at bar, on a motion for a new trial. The general rule of law is—and I think without an exceptional ruling to the contrary, so far as I can discover—that the holder of a bill or note is prima facie its owner, and that a delivery of a note is necessary to its transfer either by indorsement or otherwise, and that the fact that his blank indorsement is thereon, standing alone, is no evidence that he has transferred the note, or that he is not the owner of it, or that any one else is the owner of it. This rule is entirely applicable to all blank indorsements or indorsements for collection,—the only character of indorsements which were upon the note in question. 2 Rand. Com. Paper, § 717, and cases cited; 2 Daniel, Neg. Inst. §§ 1181a, 1198, 1200, and cases cited. The holder's own blank indorsement, left uncanceled on the note, will not in general prevent his recovery, but from his possession it will be presumed that the paper was not delivered under the indorsement, or that, if it was so delivered, it was afterward taken up by him. 3 Rand. Com. Paper, §§ 1645, 1646, and cases cited; Locke v. Silk Co., 37 Mich. 479; Reading v. Beardsley, 41 Mich. 123, 1 N. W. 965.

The practice in this state, universally established, has been for the holder, being either payee or other indorser, to strike out all subsequent blank indorsements or indorsements for collection, and then sue upon the note. I do not think the practice has been universal to strike out his own indorsement. I think it has generally been done, but in many cases, if not quite generally, not until the time of trial. There is no reason manifest why his own blank indorsement should be stricken out. Every subsequent indorsement being stricken out, and the note being in his possession and produced at the trial, it would seem as if no reason could exist for the mere mechanical act of striking out his own name; and of course, the note having matured, there could exist no holder after that who, in the face of the judgment thereon, could maintain a recovery upon the note. There is no reason for a contrary rule, and I think it is established by authority that the fact that the blank indorsement of a holder of a promissory note still remains thereon does not impair his title to it, or defeat his action to recover the amount due. 2 Rand. Com. Paper, § 717; 3 Rand. Com. Paper, §§ 1645, 1646; 1 Daniel, Neg. Inst. § 694; 2 Daniel, Neg. Inst. § 1196; Abbott v. Joy, 47 Me. 177; Dollfus v. Frosch, 1 Denio, 367; Chaffee v. Taylor, 3 Allen, 598; Royce v. Nye, 52 Vt. 375; Evans v. Gordon, 8 Port. (Ala.) 142; Humphreyville v. Culver, 73 Ill. 485; Black v. Strickland, 3 Ont. 217; Callow v. Lawrence, 3 Maule & S. 95; Dugan v. U. S., 3 Wheat, 172; 2 Am. & Eng. Enc. Law, p. 383.

There is an entire want of reference to authorities upon this assignment of error in the briefs of counsel, but the case of Bright v. Hand, 16 N. J. Law, 273, has suggested itself as indicating that an indorser, as payee, could not maintain an action, unless the note had been reassigned to him. The case as an authority is entirely unavailable. It can be concluded from the case that the note was, at the time the suit was brought, in the hands of a third party. The case is very meagerly reported as to facts, and cannot in any sense be applicable to establish a principle so much at variance with the nature and qualities of commercial paper, transferable by indorsement, delivery by the holder, or by delivery only, as where the paper is taken up by the payee or some prior indorser of some subsequent holder. In the case of Dugan v. U. S., 3 Wheat. 172, it was held that "if a person who indorses a bill to another, whether for value, or for the purpose of collection, comes again to the possession thereof, he is to be regarded, unless the contrary appears in evidence, as the bona fide holder and owner of such bill, and is entitled to recover thereon, notwithstanding there may be on it one or more indorsements in full, without producing any receipt or indorsement back to him from either such indorsees, whose names he may strike from the bill, or not, as he thinks proper." The first assignment of error is therefore not sustained.

Digitized by Google

The second and only other assignment of error is that the trial judge refused to admit the evidence of a certain agreement between the maker and payee of the note. This alleged agreement was in the shape of an offer of evidence, and overruled by the trial justice. The note in question was given for a premium on a policy of life insurance upon the life of the maker of the note. The policy was delivered by the payee to the maker of the note, and had ever since been retained by him, and not delivered or surrendered up to the company or to the payee of the note. This fully appeared in the evidence of the plaintiff. The offer on the part of the defendant was made to show "that it was agreed between the defendant, the maker of the note, and the plaintiff, as payee, at the time of the making of the note, that the defendant, the insured, should have the option, to be exercised at any time during his life or the continuance of the policy, of paying a reduced rate of insurance, called a 'carrying rate,' by surrendering the policy to the payee of the note; and that upon the defendant exercising such option, which he did under the agreement, there would, upon an accounting rendered of payments already made, remain nothing due on said note, inasmuch as more money has been paid by the defendant to the plaintiff personally than would meet the conditions of $175 per year, which was then agreed to be the carrying rate aforesaid." Parol testimony is admissible to establish between the parties a contemporaneous agreement as to the mode of payment, which has been executed in satisfaction of a promissory note. Such an executed agreement then becomes payment of the note; and such an agreement does not alter or vary the contract.

The general rule applicable to promissory notes is that evidence is not admissible to vary the contract between the parties, and this is true whether the evidence be of a contemporaneous agreement or of any other character. The only rule under which the evidence of a contemporaneous agreement is admissible is that it must be such an agreement that, when executed, it works a performance or satisfaction of the contract, and extinguishes its obligation. There is no fraud charged, and parol evidence was not admissible tending to vary the import of this note. It cannot be converted by parol evidence from an absolute into a conditional contract. Meyer v. Beardsley, 30 N. J. Law, 239; Chaddock v. Vanness, 35 N. J. Law, 517; Wright v. Remington, 41 N. J. Law, 48. Evidence of a parol contemporaneous agreement that the note should not be paid, in whole or in part, is not admissible. Remington v. Wright (Ct. Err. & App.) 43 N. J. Law, 451; Johnson v. Ramsey, Id. 279; Anthony v. Fritts, 45 N. J. Law, 1; Hendrickson v. Hutchinson, 29 N. J. Law, 180; Whart. Ev. § 1058; Byles, Bills, par. 500; Stiles v. Vanderwater, 48 N. J. Law, 67, 4 Atl. 658; Buchanon v. Adams, 49 N. J. Law, 636, 10 Atl. 662. These cases all illustrate this rule of law, and therefore a contemporaneous agreement which varies or alters the terms and import of a promissory note, by adjudication in this court, is inadmissible, and cannot defeat a recovery. But evidence is admissible to show a want or failure of consideration, illegality of the transaction on which the note is based, or fraud and mistake. It was also held in Chaddock v. Vanness, in this court, that parol evidence of a contemporaneous agreement between the parties as to the mode of payment, which has been executed in satisfaction of the debt, is admissible in an action by the payee against the maker. In Buchanon v. Adams, 49 N. J. Law, 636, 10 Atl. 662, in this court, the testimony objected to was to the effect that, contemporaneously with the giving of the note, it was agreed with the defendant that lumber would be taken in payment of it, and that the note would not be negotiated. This testimony, supplemented by proof that such agreement was executed, on the part of the defendant, by the delivery of lumber to pay the note, was admitted for the purpose of showing that the lumber was in fact received by the payee, the plaintiff, in payment of the note, and not for the purpose of varying the terms of the written contract to pay. The principle upon which such evidence is admissible in an action by the payee is that it goes to establish the fact of payment or satisfaction. Oliver v. Phelps, 21 N. J. Law, 597–603.

If this offer of evidence in this case was to establish a contemporaneous agreement as to its mode or manner of payment between the plaintiff and defendant, and which had been executed in satisfaction of the note or the debt secured thereby, then it was admissible to defeat the action; but, in order to be admissible, the offer must tend to show this result. The offer must be adjudged by its terms, and it is clear that the agreement, if one was made at the time, had never been executed. The agreement remained of an executory character at the time the action was commenced. The policy of life insurance had not been surrendered to the payee. All of the terms of the agreement remained unexecuted. No attempt or offer was made to show that the note was without consideration, or that its consideration had failed. The offer was to show satisfaction by a contemporaneous agreement, and in no sense did the offer include such a result. The note had remained in the hands of the payee or his indorsees, and the policy of life insurance was retained by the maker. The position of the parties remained precisely as at the execution of the instrument, and the offer of evidence to defeat the action was not of any fact tending to show any want or failure of consideration of the note sued on, nor any illegality of the transaction upon which the note was founded, nor of fraud or mistake in its inception. The of-

Digitized by Google

fer was intended to show an executed agreement which worked a satisfaction or payment of the note, but the offer was entirely devoid of any fact tending to establish that result. The terms of the agreement were not set out in the offer with any degree of certainty whatever. In the offer the term "carrying rate" is used, but there was no offer to show the facts upon which the court could determine the meaning of the term. The note had admittedly been given for the premium to be paid on a policy of life insurance, which, according to the terms of the agreement, so far as they were revealed in the offer, was to have been surrendered to the plaintiff; but the offer itself and the evidence in the case show that it had not been surrendered to the plaintiff, nor had the note been demanded as satisfied. The policy was still retained by the defendant, and no attempt had been made to surrender it to the plaintiff, in satisfaction and payment of the note, or for any other purpose. The note itself was founded upon a good consideration, and the contemporaneous agreement must have been of such a character as satisfied the obligation of the note, and that in order to work the payment or satisfaction, and defeat recovery thereof, it must have been executed. A mere agreement that a note founded on a good and valuable consideration shall never be enforced, or that it shall not stand for what it imports on its face, can have no valid effect whatever against the enforcement of the obligation of the note. The agreement set forth in the offer is not of the character of contemporaneous agreements which will work a satisfaction of a note when executed. It is an agreement in relation to the future conduct of the parties, to which they may or may not conform; and whether it shall be performed or not depended upon whether both parties could agree. It was a contract of an executory character, and it never merged into an executed one; and whether or not it was ever to be an executed agreement depended entirely upon the future conduct of the parties. As the offer stands, it is just what the trial court denominated it,—an attempt to vary and alter the terms and import of the promissory note upon which the suit was brought. An offer of evidence tending to defeat recovery should be of facts clear and distinct in their character, and not of doubtful or uncertain import. For instance, an offer to give the acts and declarations of an assignor in evidence against his assignee should be so framed as to show that they were made before the transfer. If the offer leaves it in doubt whether the declarations were made before or after the transfer, it must be excluded. Abb. Tr. Ev. "Civil Actions," p. 13; Vrooman v. King, 36 N. Y. 477.

The offer of the agreement was intended to show satisfaction of the note. That was the only purpose, in law, it could have. Now, the offer of evidence frequently occurs in the progress of a cause, and with a statement for the purpose for which it is offered, and it is always subject to an objection for irrelevancy or immateriality. This method has the sanction of usage, and may be now regarded as a well-regulated formula for obtaining a hearing upon the subject-matter of the offer and the purpose for which the evidence is offered. Van Buren v. Wells, 19 Wend. 204. The trial court is bound to ascertain, as certainly as possible, if objection be made, that the evidence offered is material and relevant before it is received, and counsel must not leave it in an indefinite or doubtful shape, but are bound to inform the court of the facts expected to be proved, and how they are relevant, so that the court may act understandingly in relation to the admission of the evidence. 3 Wait, Law & Prac. (5th Ed.) 474. And the offer must be so full and specific that its exclusion would be erroneous in any point of view; and, whenever its competency or materiality depends upon the facts, they must be stated, and the offers must also be made to prove them, or it is not error to sustain the objection. It rests with the party making the offer to so state the facts that there shall be no doubt what is intended to be proved; for, if the party so chooses, he need not make any offer of evidence at all, but rely upon the evidence to be obtained from the witnesses as called. Carnes v. Platt, 36 N. Y. Super. Ct. 361; Keller v. Railroad Co., 2 Abb. Dec. 480; McGrath v. Bell, 33 N. Y. Super. Ct. 195; 2 Rumsey, Prac. 297; Bayliss v. Cockcroft, 81 N. Y. 363. The offer of the evidence in this case did not conform to established principles of law as to relevancy and purpose, and therefore no error is found in its exclusion by the trial justice. The judgment will be affirmed, with costs.

MAYOR, ETC., OF CITY OF NEWARK et al. v. BONNEL et al.

(Court of Errors and Appeals of New Jersey. March 4, 1895.)

PAVING CONTRACT—SELECTION OF MATERIAL.

Where the proper municipal board advertises in good faith for proposals for paving streets, and specifies the employment of the material deemed by it to be for the best interest of the municipality, the city is not debarred by any rule of law from contracting for what it wants merely because the desired material is the subject of private ownership or the product of exclusive manufacture. Krueger, J., dissenting.

(Syllabus by the Court.)

Error to supreme court.

Action by Mary A. Bonnel and others against the mayor and common council of the city of Newark and others. Plaintiffs had judgment, and defendants bring error. Reversed.

S. Depue, for plaintiff in error city of Newark. J. Coult, for defendant in error Barber Asphalt Company.

GARRISON, J. On the 6th day of August, 1892, the board of street and water

Digitized by Google

commissioners of the city of Newark advertised for sealed proposals for the paving of certain streets. The specification of the material to be furnished therefor in each instance called for the employment of genuine "Trinidad Lake" asphaltum. The board in inviting these bids expressly reserved "the right to accept or reject any or all proposals for the above work, as they might deem for the interest of the city." Proposals were received from two bidders, the Barber Asphalt Paving Company and the New Jersey Asphalt Company, the bid of the latter being the lower. After an investigation that occupied more than six months, the board determined that it was not for the best interest of the city to accept the proposal of the New Jersey Asphalt Company. The contracts with the Barber Asphalt Paving Company (now the subject of controversy) were thereupon awarded and executed. The examination of the board, which was directed almost wholly to the bona fides of the two competitors in regard to the employment of the material specified, is detailed in 500 printed pages of testimony, with respect to which it is sufficient to say that it fails to suggest a doubt as to the honest exercise by the board of the discretion they had reserved to themselves.

The only question of law raised by the reasons on file is that the material called "Trinidad Lake" asphaltum is a proprietary article, and a monopoly, in which there can be no competition. In point of fact, the latter statement is not sustained by the proofs. Upon the facts proved, the legal proposition is that a municipality may not contract for the material it deems most suitable for its purposes if it be potential on the subject of exclusive ownership or control, for that is what the contention comes to. Such a proposition cannot be said to be sustained by any necessary, or even by any legitimate, implication to be drawn from the legislative prescription that "all contracts shall be awarded to the lowest bidder," especially when modified by the proviso, "unless it shall apear that the interests of the city or of the property owners will not be advanced thereby." The correct rule, as I conceive it, is stated by Corley, C. J., in Hobart v. Detroit, 17 Mich. 246, in these words: "The fact that an article is patented does not necessarily prevent any person but the patentee from contracting to supply it;" the obvious reasoning being that others may contract to do so, taking the risk of obtaining the material or the patentee's license to use it. The primary objects of care in the legislative provision for competition are the public and private interests committed to municipal agencies, not the convenience of contractors or the protection of their profits. Upon this point the case In re Dugro, 50 N. Y. 513, appears to me to be a satisfactory authority. The case of State v. City of Elizabeth, 35 N. J. Law, 357, is not in point, and does not decide the proposition stated in its syllabus. All that is decided in that case is that the petition of property owners did not represent one-half of the running feet along the line of the proposed improvement. The views expressed by Mr. Justice Scudder upon the legal doctrine were not regarded by him as dispositive of the case, which turned, as he deemed, and rightly so, upon the application to the facts of a pertinent supplement directly in point. Moreover, that case concerned, not the employment of a proprietary material, but the exclusive local right to put down a patented pavement, which raises a somewhat different question, with respect to which no opinion is now expressed. There is in the present case nothing to show that the proposals were not invited in good faith, nor that the specification of material was not in point of fact for the best interest of the city. In such a state of affairs the city is not legally debarred from contracting for what it wants merely because the desired material is the subject of private ownership or the product of exclusive manufacture.

The judgment of the supreme court should be reversed.

KRUEGER, J., dissenting.

MAYOR, ETC., OF CITY OF NEWARK et al. v. CAUFIELD.

SAME v. SPAETH.

(Court of Errors and Appeals of New Jersey. March 4, 1895.)

Error to supreme court.

Separate actions by Charles Caufield and Alfred Spaeth against the city of Newark and others. From a judgment for plaintiff in each case, defendants prosecute separate writs of error. Reversed.

Sherrerd Depue, for city of Newark. James M. Trimble, for Caufield.

PER CURIAM. The writs of error in these two cases present the same question as the Bonnel Case, 31 Atl. 408, and the judgment in that case applies to them.

LUDLOW et al. v. STRONG et al.

(Court of Chancery of New Jersey. March 18, 1895.)

TRUSTS—CONTRACT—ENFORCEMENT.

1. A stakeholder or custodian of a fund, who makes a contract with a claimant to the fund for a payment to him of a portion thereof, in consideration of retaining the balance for himself, cannot in a suit on the contract, and in the absence of express provisions therein, require the complainant to bring in other claimants to fund, or require an adjudication upon the rights of these claimants or other possible claimants to the fund, as precedent to a right of recovery under the contract.

2. The contract in this case *held* not to contain such provisions for adjudicating upon the rights of other claimants to the fund.

3. The stakeholder cannot impose additional terms or conditions by his agreement with another claimant to the fund, made subsequent to the

Digitized by Google

contract, and without the consent of the claimant with whom he has contracted.
(Syllabus by the Court.)

Bill by George C. Ludlow, receiver, and others, against Woodbridge Strong and others, for specific performance. Heard on bill, answer to defendants Strong, replication, and decree pro confesso against defendant Skirm, receiver.

John S. Voorhees, for complainants. Alan H. Strong, for defendants Strong & Sons.

EMERY, V. C. The bill in this case is filed to compel the performance of an agreement in writing made by Strong & Sons, three of the defendants, with the People's National Bank of New Brunswick, one of the complainants, dated May 27, 1890, and relating to the assignment of a judgment owned by the bank to Strong & Sons, for certain uses and purposes, specified in the agreement. The general purpose of the agreement was the application of a sum of money ($526.38) in Strong & Sons' hands to the payment of the judgment held by the bank; and, to carry out this purpose, the agreement provided, among other things, that the bank should assign the judgment to Strong & Sons, whereupon the latter were to apply the moneys on account of the judgment, and then at once commence supplementary proceedings on the judgment to make the application "legal and safe"; and, when this was done, the agreement provided that Strong & Sons would reassign the judgment to the bank, and pay them 60 per cent. of the moneys, retaining 40 per cent. for their compensation. The bank now files this bill to obtain the payment of the money and the reassigment of the judgment, joining with it, as complainant, the receiver who was appointed under the supplementary proceedings on the judgment taken on the application of Strong & Sons, who are still the holders of the legal title to the judgment. Strong & Sons had received this money on April 15, 1890, as the attorneys of one Travers and his judgment creditor; and, as to the claims of these persons to the money, the agreement expressly provided that, in order to carry out the agreement between the bank and Strong & Sons, "it will be proper to secure an abandonment of said claim of John Travers and his judgment creditor." This abandonment was procured, all parties being satisfied that Travers and his creditor had no right to the money. The money had been received by Strong & Sons from one Daly, as the judgment debtor primarily liable to John Taylor (the bank's debtor), upon judgments which Taylor had obtained in 1880 against Daly, as primarily liable, and Travers, as secondarily liable. Travers, supposing that these judgments had been paid by him, through sales of his property on execution, employed Strong & Sons to collect the amount from Daly by proceedings under the practice act (section 36), for obtaining the benefit of the judgments as against Daly. Daly, the person primarily liable to Taylor, who did not deny his liability on the judgments, paid the amount of the judgments to Strong & Sons, as attorneys of Travers and his assignee, and the proceedings on behalf of Travers were not prosecuted. While still holding the money in their hands, Strong & Sons ascertained that Travers was mistaken in supposing that the judgments had been paid by the sale of his lands. Taylor, the judgment creditor of Daly and Travers, had become embarrassed since the recovery of his judgments against Daly, and the fund in Strong & Sons' hands was liable to be made the subject of claims by Taylor's judgment creditors. So far as appears, no claims had actually been made by any persons to the fund up to the date of the agreement in suit. In this posture of affairs, and on August 28, 1890, Strong & Sons made with the bank this agreement now in question. This agreement recited that Strong & Sons had in hand $526.48, as proceeds of two judgments recovered many years previous by Taylor against Travers and Daly, and that it was collected by them for Travers, on his claim that he, as secondarily liable, was entitled under the statute to collect this money from Daly, who was primarily liable, and that Travers was mistaken, so that this money would appear to belong to Taylor, and to be liable to be taken by his creditors. The agreement then provided that the bank should assign their judgment against Taylor to Strong & Sons, and thereupon Strong & Sons should apply said moneys on account of the judgment; "that supplementary proceedings be then at once commenced against John Taylor by the counsel of the bank, to make said proceedings legal and safe"; and that, when this is done, "said Strong & Sons will reassign said judgment to the bank, and pay said bank sixty per cent. of said moneys, retaining forty per cent. for their compensation, the judgment being paid to the extent of the whole amount realized against Taylor." It was then stated in the agreement "that, to accomplish this, it will be proper to secure an abandonment of said claim of said John Travers and his judgment creditor." No specific mention of Daly, who paid the money to Strong, or of Taylor's creditors, or any other claimants than Travers and his creditors to the fund, is made in the agreement, but, in reference to other claims, a provision is next added in the agreement "that, if at any time said money shall be required by any party having a superior right thereto, said bank will return so much thereof as it shall have received to said Strong & Sons, with legal interest thereon from the time said bank shall receive said money." And the agreement concludes with the provision "that, in case said proceedings to secure said moneys in

Digitized by Google

the hands of said Strong & Sons shall be unsuccessful, said Strong & Sons will at once reassign said judgment to said bank.

The assignment of the judgment by the bank to Strong & Sons was executed and delivered simultaneously with the agreement, and Strong & Sons, by the agreement itself, acknowledged the receipt of the assignment of the judgment for the uses and purposes mentioned in the agreement. About the same time, Travers and his assignee, Ellen Mitchell, by writing dated May 27, 1890 (one day previous to the date of the agreement), formally renounced their right to the money in Strong & Sons' hands, and consented that they might appropriate it as they deemed might be legal and proper. Immediately after, and on August 29, 1890, the defendants Strong & Sons, as the assignees and judgment creditors of John Taylor under the bank's judgment, presented a petition under the supplementary proceedings act (John S. Voorhees, Esq., the counsel of the bank, being named as attorney), and procured an order of that date for discovery, etc., and an injunction order restraining Daly from paying the judgments against him to Taylor or any other person, and also restraining the petitioners (Strong & Sons) from paying the money in their hands to Daly. On this petition, and after the examination of witnesses, an order was made by Chief Justice Beasley on May 17, 1892, appointing the complainant George C. Ludlow the receiver of the property and things in action of the defendants John Taylor and William Brandt, belonging to or held in trust for them or either of them, on the 6th day of October, 1888, being the date of the issuing of the execution in the cause. The complainants, claiming that by this appointment of the receiver all the conditions which Strong & Sons were entitled to require under the contract had been fulfilled, demanded of Strong & Sons the payment of the amount due to them under the contract. Strong & Sons demanded of the bank indemnity against the claim of one Skirm, who had in 1888 been also appointed a receiver of Taylor, upon proceedings taken by creditors of Taylor on other judgments (one prior and one subsequent to the bank's judgment), and who had in October, 1890, notified Strong & Sons that he claimed the money in their hands as such receiver. There is no evidence that, at the time of the making of this agreement, either Strong & Sons or the bank knew of Skirm's appointment as receiver; and, upon receiving this notice, Strong & Sons informed the bank thereof. The bank was willing to give this indemnity against Skirm's claim on receiving the money; but, on all the parties (including the receiver) meeting to adjust the matter, a further demand was made by Strong & Sons, as a condition precedent to their payment of the money to the receiver, that the receiver should agree to cancel the judgment obtained against Daly and Travers. The receiver declined to accept the money on this condition, and Strong & Sons then refused to pay over any of the money in their hands, either to the receiver or complainant, and still hold the money. They based this refusal upon an agreement which they had made with Daly, subsequent to the making of the contract with the bank, by which, as they claim, they agreed with Daly that the judgment should be canceled, and received Daly's consent to the use of the money on that express condition. This agreement of Daly's, which is attached to the bill, is not dated; but it is proved to have been made subsequent to the agreement with the bank, and the bank does not appear to have had any notice of it before its execution. This agreement, signed by Daly, recites the collection of the money by Strong & Sons from Daly, and the circumstances of the mistake of Travers, and then further proceeds: "Whereas, it was and is my wish and intention that said moneys be appropriated to the payment of said judgments [against Daly and Travers], to whomsoever the same may be lawfully owing or payable: Now, therefore, I do hereby request the said W. Strong & Sons to pay over the said money to the said John Taylor, or to apply the same as his moneys to their judgment against said Taylor, if they shall lawfully be entitled so to do, in the same manner as though said payment had been originally made for the benefit of said John Taylor; the said John Taylor having consented that the money so placed in the hands of W. Strong & Sons shall be applied towards the payment of the said judgment, and provided the said judgments against John Travers and me shall be canceled of record." Daly does not appear to have made any demand upon Strong & Sons to cancel their judgment, or for a return of the money to him by reason of the failure to cancel it. The complainants, the bank, and the receiver, having brought suit upon the contract, made Skirm, as receiver, a party defendant, and took a decree pro confesso against him, but did not make Daly a defendant, nor the parties whom Skirm represented.

The defendants, by answer and at the hearing, claim that in this suit on this contract the court should adjudicate upon the respective claims of Skirm, receiver, and of Daly, to the money; that no decree should be given in the absence of Daly (the objection of his nonjoinder being expressly raised in the answer); and that they are entitled fairly to hold the money as against the complainants until the adjudication of a competent court, made in a suit wherein all parties interested in the application of said money are made parties, that a payment of the moneys to the complainant would be a legal and safe payment. An objection was also raised to the jurisdiction of this court, on the ground that, if the suit is to be rested solely on the contract, it is an action for

Digitized by Google

the payment of money, which should be prosecuted at law.

Upon the facts above stated, established by the admissions in the pleadings and the proofs, I reach the following conclusions:

1. This court has jurisdiction. Part of the relief asked is the reassignment of the judgment, and the rights of all the parties under the contract could not be justly or equitably settled except in an action to which the parties to the contract, as well as the receiver, are parties. As to the judgment, the agreement and the assignment of the judgment constituted the defendants Strong & Sons trustees of the judgment, for the purposes and on the terms specified in the agreement, which trust is enforceable in equity.

2. The rights of the bank and Strong & Sons to the money in the hands of the latter must be settled upon the basis of the contract between them, and according to its terms. So far as it relates to the appropriation of the money in Strong & Sons' hands to the complainants' judgment, and the claims of any parties thereto, the legal aspect of the contract is substantially that of an agreement between a stakeholder or custodian of the fund, on one side, and a claimant to the fund, on the other, for a division of the fund between them on certain terms, mutually agreed on. There was nothing unlawful in the making of such contract under the circumstances here proved; but, by making such contract, Strong & Sons deprived themselves of the status of an independent stakeholder, who would have a right to have all conflicting claims to the money settled in an interpleader suit; and, on the other hand, the bank, by this contract, gave up its right to claim all of the money in Strong & Sons' hands. Strong & Sons must therefore rely solely on the contract for their protection against other claims to the money. Their agreement with one claimant for an interest in the fund deprived them of any right to compel any other claimants to interplead, nor have they now, as against the complainants, the right to insist that, in this suit, they shall practically have such interpleader and adjudication for their protection under the contract. Travers having relinquished his claim, as provided by the contract, no other claimant was a necessary party to this suit on the contract. Skirm, however, having been made party defendant without objection, and decree pro confesso having gone against him, complainants and defendants are entitled to whatever benefit this decree in this suit may give them.

3. The defendants were not entitled to require from the receiver, as a condition precedent to the payment of the money, an agreement on his part that he would cancel the judgment against Daly, for the following reasons:

(1) The cancellation of the judgment by the receiver personally was a matter which, if he chose, he could submit to the adjudication of the court which appointed him, and to whose orders he is made subject by the statute. Revision, p. 394, § 26. Strong & Sons, if bound to pay the receiver at all, were bound to pay him without conditions; and the agreement in this suit, the assignment of the judgment under it, and their supplementary proceedings estop them from setting up, as against the receiver or the bank, that they were not bound to pay, or that the money was not held by them in trust for Taylor, and payable by them as such.

(2) Strong & Sons had no right, without the bank's consent, to enter into a contract with Daly which would or might compel the bank to litigate Daly's claim to the money in a suit under the contract against Strong & Sons; nor was it the intention of this contract that, as to any other claimants to the fund than Travers and his creditor, Strong & Sons should have any adjudication of their rights in an action on the contract. The express provision in the contract for repayment of the money in case it should afterwards be required of the Strongs by any person having a superior right thereto covered both Skirm's and Daly's claims, if either made any. It was the only provision of the contract covering that subject, and its express provisions on this subject could not afterwards be extended without the consent of both parties.

The contention of defendants that the provision of the contract that "supplementary proceedings be taken to make said proceedings legal and safe" meant that the money should not be paid over unless the proceedings were "legal and safe," and that, therefore, in order to recover, the bank must, in a suit on the contract, bring in everybody who has made or may make a claim to the money, and that they are not entitled to any money until such adjudication that the payment to the complainant is legal and safe, seems to me to subvert the general intention of the contract by a phrase in it which was a mere statement of the parties as to their object in taking the supplementary proceedings, and their opinion of its effect. This phrase has a full and complete effect by such interpretation of its meaning, and, thus construed, allows the contract to stand.

Equally without foundation is the claim that the supplementary proceedings have not been "successful" in securing the money in Strong & Sons' hands under the last clause of the contract. The money was secured by these proceedings to the extent the parties intended them to be used for that purpose, and they did not intend by the use of these words to make the bank's right of recovery under the contract depend on the decision of a court as to the success of the proceedings in establishing the right of Strong & Sons to the money against other claimants.

4. The defendants, under the terms of the contract, are liable to pay to the complain-

Digitized by Google

ant bank 60 per cent. of the moneys in their hands, and to reassign the judgment to the bank.

5. The payment to the bank must be made through the receiver, who is entitled to receive from Strong & Sons the whole amount in their hands, with interest from the date of the order for injunction on Strong & Sons' application in the supplementary proceedings. As against Strong & Sons, the receiver is entitled to interest from this date, and Taylor is entitled to the credit of this amount on the judgment of the bank. After settling his account with the court of his appointment, and deducting his fees, he will pay to Strong & Sons 40 per cent. of the principal sum received by him from them, with interest received by him on the whole principal sum to June 2, 1892, the date when Strong & Sons refused to pay unless the judgment was canceled. Up to that time Strong & Sons were entitled to act on the belief that the matter would be adjusted on the basis of the payment of the original amount in their hands, and, as between them and the bank, should not be charged with interest before that date. The balance the receiver will pay to the bank. The costs of the complainant must be paid by Strong & Sons.

WATKINS v. RIST.

(Supreme Court of Vermont. Windsor. March 5, 1895.)

TRESPASSING CATTLE—BROKEN FENCE.

Recovery for repeated entries made by defendant's cattle through an unrepaired break in plaintiff's fence should be limited to such entries as occur before plaintiff has had a reasonable time to repair such break.

Exceptions from Windsor county court; Thompson, Judge.

Action by F. W. Watkins against Wallace S. Rist. Judgment for the plaintiff, and defendant excepts. Reversed.

Gilbert A. Davis, for plaintiff. W. W. Stickney and J. G. Sargent, for defendant.

MUNSON, J. The plaintiff's lawful fence was broken down by the defendant's unruly cow; and the defendant's cattle came upon the plaintiff's land through the break at the time it was made, and continued to do so for some time thereafter. The court instructed the jury that the defendant was liable for every entry made by his cattle upon the plaintiff's land through this opening. This was error. The plaintiff's recovery should have been limited to such entries as occurred before he had had what was, in the circumstances, a reasonable time to repair the fence. The defendant was liable in damages for the injury done to the fence. The duty of repairing it rested upon the plaintiff. Judgment reversed, and cause remanded.

BALDWIN v. TOWN OF WORCESTER.

(Supreme Court of Vermont. Chittenden. Feb. 5, 1895.)

SUPPORT OF PAUPER—LIABILITY OF TOWN.

One supporting a pauper, under an express contract with the overseer of the poor of a certain town, removed the pauper, against the will of the overseer, to another town, and continued such support after the termination of the contract. *Held*, that there was no implied contract to pay for support furnished after the termination of the express contract.

Exceptions from Chittenden county; Thompson, Judge.

Action by L. B. Baldwin, administrator, against the town of Worcester, to recover for the support of a pauper under an express and a subsequent implied contract. From a judgment against plaintiff as to the implied contract, he excepts. Affirmed.

D. J. Foster, for plaintiff. S. C. Shurtleff, for defendant.

START, J. While the plaintiff's intestate resided in the defendant town, he made a contract with the defendant's overseer of the poor, by which he was to support Daniel Durfey, an alleged pauper, for five dollars per week, until a suit then pending between the defendant town and East Montpelier should be determined. While this contract was in force, the plaintiff's intestate moved to South Burlington, and, against the objection of the defendant's overseer of the poor, took the pauper with him. The contract terminated June 1, 1889. The plaintiff's intestate continued to support the pauper until July 30, 1890. The plaintiff seeks to recover for the support furnished after the termination of the contract. Under these circumstances, a promise to pay for the support furnished cannot be implied. The plaintiff's intestate voluntarily, and against the objection of the defendant, removed the pauper from the defendant town to South Burlington, and there continued to support him after the express contract had terminated by its own limitation, without offering to return him to the defendant, and without any agreement or understanding in respect to his support. The plaintiff's intestate was bound to know when his contract terminated; and, if he desired to be relieved from the burden of the pauper's support after the contract was ended, he should have returned him to the defendant town, or taken measures to charge the defendant or some other town with his support. Under the statute relating to the support of paupers, he could not assume that the defendant would pay for the pauper's support until it removed him or made some provision for his support. He was not misled, deceived, or in any way induced by any act of the defendant to do what he did. He made the contract for the support of the pauper while he and the pauper resided in the defendant town; and he removed the pauper to South Burlington, and there supported him, knowing that the defendant was insist-

Digitized by Google

ing that it was not liable for support furnished after the pauper was so removed. Under these circumstances, the defendant was under no duty to take the pauper away. The defendant had not been instrumental in his removal to South Burlington. The plaintiff's intestate removed him for his own advantage and convenience, against the protest of the defendant; and it was not its duty to go to South Burlington, or to follow the plaintiff's intestate wherever he saw fit to go, and relieve him from the support of the pauper. No such duty was cast upon it by the terms of the contract, and no such duty can be inferred from the nature of the contract or the situation of the parties and pauper at the time the contract was terminated. This holding is not inconsistent with the holding of the court in Durfey v. Town of Worcester, 63 Vt. 418, 22 Atl. 609, in respect to the defendant's liability upon the express contract. The question of implied contract was not involved in that case. The action was upon the express contract. While the contract was in force and the pauper in the defendant town, the defendant undertook to terminate the contract by giving notice that it would not be further holden for his support. This it could not do without taking him away, and providing other support. At the time the alleged cause of action accrued in this case, there was no contract to terminate. It had terminated by its own limitation, and the situation of the pauper was such that no action on the part of the defendant was necessary. When the contract terminated by its own limitation, the pauper had been so far removed from the defendant town by the plaintiff's intestate that the defendant was under no legal duty to the plaintiff's intestate, and no recovery can be had for support thereafter furnished. Judgment affirmed.

SHELDON et al. v. TOWN OF STOCKBRIDGE et al.

(Supreme Court of Vermont. Windsor. Feb. 4, 1895.)

CHARITIES—BEQUEST TO TOWN—VALIDITY.

1. A bequest of a sum of money to a town, to use the income in improving a certain cemetery, is not void because of a condition that the town shall keep the amount intact for all future time, under R. L. § 3192, empowering towns to raise money to keep burial grounds in repair, and giving the selectmen authority to make all necessary regulations therefor. Munson, J., dissenting.

2. A bequest of a stated sum of money to a town for the support of the common schools, and directing that the income shall be annually divided among the school districts in proportion to the number of scholars attending school, is not prevented from taking effect by the fact that the town, which was at the date of the will divided into several districts, is afterwards consolidated into one entire district.

3. A bequest to a town for the relief of the poor of said town is not void for uncertainty.

Appeal in chancery, Windsor county; Thompson, Chancellor.

Bill by N. L. Sheldon and others against the town of Stockbridge and others for the construction of a will. From a decree that the defendant town was entitled to the bequest given it under the will, the heirs of the testator except. Affirmed.

Those portions of the will material to the questions considered are as follows: "I give the town of Stockbridge, in Vermont, one thousand dollars, to be invested in good real-estate security. One-half of the interest of said thousand dollars shall be expended yearly on my lot in the cemetery at Stockbridge Common, in cultivating flowers, improving and beautifying said lot; and the other half of the interest of said thousand dollars shall be expended yearly in fencing, improving, and beautifying said cemetery; and this gift shall be known as the 'Albert Whitcomb Cemetery Fund.' In accepting this gift of a thousand dollars, the town of Stockbridge shall agree to keep good this amount through all coming time." "I order the foregoing bequests to be paid as soon as convenient after my decease, or according to the specification of each gift; and the remainder of my estate, both real and personal, shall be kept during the life of my sister Mrs. Nancy B. W. Houghton, and then disposed of in the following manner: I give the town of Stockbridge, Vt., to be invested in safe securities, twenty thousand dollars. The income only shall be divided among the school districts of said town. Each district shall receive an amount in proportion to the number of scholars attending school. No fractional district shall receive the benefit of this bequest. This gift shall be known as the 'Albert Whitcomb School Fund.' In case the town of Stockbridge does not accept the conditions herein named, or violates said conditions, the twenty thousand dollars shall be given to the three grandchildren of my brother, the late Elias K. Whitcomb, to be divided equally among them when each is thirty years old. I give to school district No. 3, located in Bethel village and its suburbs, thirty thousand dollars; the principal to be safely invested, and the income only to be used each year for the current expenses of the school. This gift shall be known as the 'Albert Whitcomb School Fund,' and the legal name of the school shall be 'The Whitcomb High School.' In case this gift is not accepted, or its conditions shall be violated, it shall be given to and divided equally among the three grandchildren of my brother, the late Elias K. Whitcomb, when each is thirty years old. The remainder of my estate I give to the town of Stockbridge, in Vermont; the principal to be safely invested, and the income only to be used, for the relief of the poor in said town. This gift shall be known as the 'Albert Whitcomb Poor Fund.' If my estate shall not be sufficient to pay the several bequests herein named, the last shall be void. If what remains is not enough, then next to the last shall be void,

Digitized by Google

and so on in this order until the property shall equal the bequests."

J. J. Wilson, for orators. Samuel E. Pingree, for defendants Whitcomb. W. E. Johnson, for defendant town of Stockbridge. Fred Arnold, for defendant school dist. No. 3.

TAFT, J. There are six points made in the brief in behalf of the defendants Whitcomb.

1. That the cemetery bequest is void for the reason that it is subjected to a condition precedent which cannot be performed. The testator gives the town $1,000, directing that the interest be expended annually,—one-half in cultivating flowers on his burial lot in the cemetery at Stockbridge Common, improving and beautifying it, the other half in fencing, improving, and beautifying the cemetery. The condition annexed to the bequest reads, "In accepting this gift of a thousand dollars, the town of Stockbridge shall agree to keep good this amount, through all coming time." It is argued that the town has no power to bind itself by an agreement to keep the fund intact; that the statute does not empower it to enter into such an obligation. It is true, the town possesses limited powers only, such as are given it by statute, and those necessarily implied, in order to carry out its express powers. It can raise money to carry out the powers expressly given it, and for expenses incident to such purposes. It can always vote to raise money to pay expenses incurred in discharging duties imposed upon it by law. Under R. L. § 3192, towns have power to raise money to buy and keep burial gounds in repair, and to fence them, and the selectmen may make all necessary regulations for the purpose of keeping them in proper order. These duties, in respect to cemeteries, may be executed at the expense of the town, and for that purpose towns may vote to raise money. It is for such purposes that the testator requires the interest of the $1,000 to be expended annually. A cemetery may be kept in repair and in proper order by cultivating flowers, improving and beautifying lots and the cemetery, and fencing the cemetery. A town having power to raise money for the purposes specified in the gift, we hold that it may accept a gift, the interest of which is required to be expended for that purpose, even if the gift is coupled with the condition to keep the principal sum intact or good through all coming time. We think the vote of the town accepting the bequest binds it to the performance of the condition. It cannot accept the gift except upon the terms upon which it is given.

2. The second point is raised upon the bequest of $20,000 to the town of Stockbridge for the support of the common schools. The testator directs that the income of the fund shall be annually divided among the school districts of said town; each district to receive an amount in proportion to the number of scholars attending school; no fractional district to receive the benefit of the bequest. At the time of the execution of the will, and at the death of the testator, the law in relation to school districts in the town was R. L. § 499, reading as follows: "When the inhabitants of a town can not be conveniently accommodated in one district, such town shall, at a meeting warned for the purpose, divide the town into several districts and determine their limits." At that time nearly every town in this state had what is called the "School-District System," and was divided into several districts, generally from 2 to 20, each district being a corporation by itself. How many school districts there were in the town of Stockbridge is not alleged in the bill, unless argumentatively, in the averment that No. 20, Acts 1892, was passed, in effect consolidating all school districts in the town of Stockbridge into one school district. By section 1, Id., each town was constituted a single district, for school purposes, and the division of towns into school districts, theretofore existing, was abrogated, except for the settlement of their pecuniary affairs; but school districts organized under special acts of the legislature were not affected by the act unless they voted to become a part of the town system. The defendants Whitcomb contend that, the then school districts having been consolidated, there was no one to take under the will, and that the distribution of the income of the fund cannot be made in consonance with the requirements of the will, and therefore the bequest is void, as it is coupled with a condition impossible of performance. The gift is not made, in terms, to the school districts. The testator says: "I give the town of Stockbridge, Vt., to be invested in safe securities, twenty thousand dollars. The income only shall be divided among the school districts of said town. Each district shall receive an amount in proportion to the number of scholars attending school. No fractional district shall receive the benefit of this bequest. This gift shall be known as the 'Albert Whitcomb School Fund.'" It is not stated in the will for what purpose the income is to be used, but it is evident that the testator intended its use for the support of the schools, as that is the only purpose for which school districts are organized; and it is also evident from the fact that the income is to be divided in proportion to the number of scholars attending school. As early as 1787 it was enacted that towns might divide themselves into school districts, and from that day to this it is matter of common knowledge that the school districts have been constantly changed in respect to their territory. A part of one district has been annexed to another; districts have been consolidated, and others divided; and it was a very common thing to see, in the warnings of the annual town meetings, an

Digitized by Google

article, "to see if the town will make any changes in the school districts." We think that any one, in the execution of a bequest like the one under consideration, must have had in mind the constant changes so taking place. The purposes and object of the gift can be accomplished, irrespective of the exact lines of division between the districts; and we see no reason whatever in thinking that the testator had in mind that the bequest would fail if any changes were made in the school districts' lines, nor that he intended it. The town now constitutes a single district, and it is provided in the act that schools shall be held at such places and at such times as, in the judgment of the board of directors, will best subserve the interests of education, and give all the scholars of the town as nearly equal advantages as may be practicable. To make the matter as even as practicable, the school board is authorized to use not exceeding one-fourth of the school money for the purpose of conveying scholars to and from the schools. The object, therefore, of the bequest, is as fully and completely attained when the town constitutes one school district as though there were many, and the beneficiaries are the same, and take in the same manner. If there had been 20 districts when the legacy vested, and the town subsequently made 10 in place of them, or had increased the number, would such diminution or increase have forfeited the legacy? We think not. The legacy was given to the town of Stockbridge for the purposes of common-school education; the income to be divided among the districts in proportion to the scholars. If there is but one district, then it is to be paid to that. In case the act of 1892 had not been passed, would any one claim that in case an alteration had been made in the boundaries of each school district, by placing one or more families belonging in one district in an adjoining one, the school-district corporation became thereby so changed as to forfeit the bequest? Such construction would be erroneous. The town has complied with the conditions of the bequest by voting to accept it. But such would be the result in case the principle contended for is adopted.

3. The third point is material only in case the gift to the town of Stockbridge for the common schools is held null. It is for that reason not considered.

4. It is claimed that the legacy constituting the town of Stockbridge the residuary legatee of the testator's estate is void for uncertainty. Were this a new question in this state, it might merit fuller examination than we are inclined to give it; but, in view of the adjudications by this court, we do not think this question an open one. The cases in which it has been under consideration are Burr's Ex'rs v. Smith, 7 Vt. 241; Button v. Society, 28 Vt. 336; McAllister v. McAllister, 46 Vt. 272; and Clement v. Hyde, 50 Vt. 716. The bequest is for the "relief of the poor of said town." In the McAllister Case, supra, the income of the gift was for the benefit of the "freedmen of the nation," and in Clement v. Hyde, supra, it was to be expended in the education of the scholars of poor people in the county of Orange. These two bequests were held not void for uncertainty. Following this line of construction, we must hold the one under consideration valid. It is only necessary to refer to these cases to see that the gift is not void for uncertainty.

5. We think the legacy to the town of Stockbridge for its common schools vested at the death of the testator; but, in the view we take of the character of the bequest, it is immaterial whether it vested then, or at the death of Mrs. Houghton.

6. No question is made in regard to the legacy given school district No. 3, in Bethel, as that district was not abolished by the act of 1892, having been organized under a special act of the legislature. It is stated in the brief that in case the legacy does not vest until the death of Mrs. Houghton, and school district No. 3, in Bethel, becomes extinct, the legacy fails or lapses; but we do not consider this question, as there is no occasion at this time to do so. The district is still an existing corporation. What question may arise upon its dissolution we are not required, and it is not proper for us, to pass upon.

The above disposes of all the questions suggested. Decree affirmed and cause remanded.

MUNSON, J., dissents on the first point.

START, J., did not sit, having been of counsel for one of the parties in interest.

HULL et al. v. WILLIAM DEERING & CO.

(Court of Appeals of Maryland. Feb. 27, 1895.)

FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—RIGHTS OF FIRM CREDITOR.

1. A trust deed executed by an insolvent to his wife, in consideration of one dollar and of lands belonging to her separate estate which she had previously conveyed to him, but which are grossly inadequate as a consideration, will be set aside, except to the extent of the value of such separate lands of the wife.

2. A firm creditor cannot set aside, as fraudulent, a voluntary conveyance by one of the partners of his individual lands to his wife, unless there are no firm assets, or an insufficiency thereof, and no individual creditors, or his individual property is more than sufficient to pay them in full, unless the firm creditor is also an individual creditor.

Appeal from circuit court, Washington county.

Suit by William Deering & Co. against Otho Hull and wife to set aside a trust deed from the said Hull to his wife as fraudulent as against plaintiffs, creditors of the said Hull. From a decree in favor of plaintiffs, defendants appeal. Affirmed.

Digitized by Google

Argued before ROBINSON, C. J., and BRISCOE, BRYAN, ROBERTS, PAGE, FOWLER, and McSHERRY, JJ.

Alex. R. Hagner, for appellants. J. Clarence Lane, for appellees.

McSHERRY, J. The decree appealed from in this case vacated and set aside, as fraudulent, a deed of trust executed by Otho Hull to William Eubank, and dated on the 23d day of September, 1890. The deed, in which Hull is named the party of the first part, Eubank the party of the second part, and Lou E. Hull, the wife of Otho Hull, the party of the third part, conveys certain real estate lying in Washington county, Md., to the party of the second part in trust "to secure to said Lou E. Hull the payment of the sum of eight thousand dollars, evidenced by a bond of said Otho Hull of even date with" the deed, "and payable on demand." The consideration set forth in this deed is —First, natural love and affection; second, the fact that the wife had joined with him in conveying to William T. Fitzpatrick a tract of land, containing 60 acres, lying in Appomattox county, Va., which was her separate estate, and which Fitzpatrick conveyed immediately afterwards to Hull; and, thirdly, the sum of one dollar. The bill of complaint assailing this conveyance was filed February 9, 1891. Among other things, it alleges that Hull and his brother, D. Frank Hull, were in 1888 and 1889 engaged in business in Hagerstown, as partners under the firm name of D. F. & Otho Hull; that they became indebted to the appellees in a considerable amount, and that, in addition to this indebtedness, Otho Hull also individually owed the plaintiffs several hundred dollars. Upon both of these claims foreign attachments were issued against Otho Hull before the bill was filed, and in both proceedings judgments appear to have been subsequently confessed by the defendant. The bill averred that the deed of trust was fraudulent, and that it had been made with intent to hinder, delay, and defraud the appellees and other creditors of Otho Hull, many of whom, who held liens on the same property conveyed by the deed, were joined as codefendants. The answer of Hull and wife denied the material allegations of the bill, and insisted that if there was anything due to the appellees it was due by the firm of D. F. & Otho Hull, and that there were sufficient assets belonging to that firm with which to pay its indebtedness.

There is little or no difficulty about the law of this case. A voluntary conveyance made by a husband directly to his wife, or to a trustee for her benefit, in prejudice of the rights of the grantor's subsisting creditors, is, under article 45, § 1, of the Code, invalid. Such a conveyance is in prejudice of the rights of creditors when it strips the grantor of property which would otherwise have been available for the payment of his debts, and leaves him in possession of no other property which could be discovered or reached. A debtor has no right, by a conveyance of this character, to impede, hinder, or delay his creditors in recovering payment of their claims; and it matters not, so far as respects its validity, how much intangible, hidden, or concealed property may remain, if, by a voluntary conveyance to his wife, or to another for her benefit, he renders it impossible, or even more difficult, for his creditors to enforce payment of the sums that are due to them. So far, then, as the consideration of natural love and affection and the nominal consideration of one dollar are concerned, the deed would be invalid as against creditors subsisting at its date, and whom it hinders and delays; and, if nothing else remained to support it, it would of necessity fall when assailed by any one entitled to question it. There remains the other consideration stated in the deed, viz. the conveyance by the wife of her separate estate situated in the state of Virginia. It is claimed by the appellant Otho Hull that this property was very valuable, in consequence of large deposits of minerals and clay; and in his testimony he estimated it to be worth as much as $10,000. But he is supported in this by no other witness. On the contrary, the overwhelming weight of the evidence clearly and conclusively demonstrates that this Appomattox county land is of trifling value; that it contained no mineral deposits; and that it was worth only from $2.50 to $8 per acre. Estimating it at even the highest of the figures named, its utmost value would not exceed $180. A consideration amounting to no more than that sum would be wholly inadequate to support the deed of trust against the grantor's attacking creditors. The value of Hull's interest in the property conveyed by the deed of trust has been ascertained by a sale of that property and the payment of the liens upon it. The amount remaining, which has been treated as standing in the place of the property, is largely in excess of the sum of $180. Upon the hypothesis that Otho Hull was indebted, when he executed the deed of trust, in an amount larger than the value of his available and tangible assets, the deed supported by the insufficient considerations alluded to cannot prevail against the grantor's creditors, except to the extent to be presently stated. And this brings us to an examination of Hull's financial condition at the date of the execution of the deed.

While he has testified that he then possessed both real and personal property situated in the state of Virginia, and had on deposit to his credit in a Lynchburgh bank some $1,500, the certificates furnished by the clerk of Bedford county, Va., and found in the record, show that by far the most valuable part of the real estate the title to which appeared by the deed he exhibited to

Digitized by Google

stand in his own name he had conveyed to his wife long prior to his examination as a witness. He suppressed all reference to this latter conveyance, of the existence of which he was, of course, fully aware. The value of the residue of his real estate was insignificant, and his personal property also situated in Virginia, even at its assessed valuation, was not sufficient to pay his indebtedness. The money to his credit in bank during the month of August, 1890, does not appear, and was not shown to have been there when the deed of trust was made in September, nor has he given any account as to the disposition he made of it, if he has ever parted with it at all. The deed of trust substantially and practically stripped him of all the real property which he owned in Maryland, and his personal property situated in Washington county was seized and sold under executions issued on judgments recovered against him. In the face of all the facts to which we have alluded, it is idle to say he was not insolvent when he executed the deed of trust, or to insist that the conveyance whose good faith is now impeached in these proceedings did not hinder, or was not made with an intent to hinder, delay, and defraud, his creditors. It attempted, and was obviously designed, to put beyond the reach of his creditors the great bulk, if not the whole, of his Maryland real estate which was available at the date of its execution for the payment of his debts; and it attempted to do this by a conveyance, part of whose expressed consideration made that conveyance, as to that part, purely voluntary, and the residue of whose consideration has been conclusively shown to be grossly inadequate. It was therefore clearly the duty of the circuit court to declare the deed invalid, except in so far as it might be allowed to stand as a security to the wife to the extent of the value of her separate estate conveyed through Fitzpatrick to the husband, as heretofore stated. That the deed should be allowed to stand as security for the value of the wife's separate estate acquired by the husband as a part of the consideration for the deed of trust is fully warranted by the authorities. Hinkle v. Wilson, 53 Md. 293; Williams v. Manuf'g Co., 3 Md. Ch. 454.

What we have said thus far is based on the assumption that the appellees were entitled to file and prosecute the pending proceedings. But it has been insisted in the argument that the decree was erroneous because the debt due by Otho Hull to the appellees was not due by him personally, but by the firm of which he was a member, and that until the social assets have been first exhausted no part of his individual property can be taken to pay the debts due by the copartnership. It is absolutely undoubtedly true, in a contest between creditors of a partnership and creditors of the members of that partnership, that the former must primarily look for payment to the partne assets, and the latter to the individu sets of the members of the firm. Log no reason can be assigned why the same trine should not equally apply in fav the debtor when his individual propert been seized by a creditor of a firm of he is a member, and it is neither averre shown that there are not social asset the partnership be possessed of suff means to fully pay and satisfy all its then no voluntary deed made by a ber of that firm conveying his indiv property can be fraudulent as to the creditor, or can hinder or delay him, be in the case supposed the creditor would no claim whatever upon the individual erty for payment. If he has been n injured, delayed, nor hindered by such veyance, because of there being suff social assets to pay his claim, he mar ly has no standing in a court of equi question or assail it. But, beyond th has no right to resort to the individual erty until the firm's assets have bee hausted and the individual debts have paid. Hence, until he shows that h the right to resort to the individual pro for the payment of the debt due by the no disposition of that individual pro can, in the nature of the thing, be pr cial or injurious to him. Unless he s that he has a right to avail of it for the ment of his debt, he cannot be heard to tion the use its owner may see fit to ma it. It results thence that to enable h secure payment out of the individual erty he must aver and show that he a position to enforce that payment, other words, that there are no firm a or an insufficiency of firm assets, and there are no individual creditors, or the individual property is more than cient to pay them in full. Until he this he is obviously in no position to im a conveyance of individual property; he is in no position to impeach it be he has no claim upon or right to look t property for payment. McCoy v. W 51 Ala. 466; 2 Lindl. Partn. p. *706. the case at bar cannot be controlle these principles, because the appellee not only creditors of the firm of & Otho Hull, but of Otho Hull ind ally, against whom they hold a judg for the amount of the latter claim their capacity as separate creditors of Hull they have the undoubted right sail the conveyance in question. The tribution of the fund is quite another tion, but that is not now before us. have not deemed it necessary to discus question of Otho Hull's separate inde ness to the appellees. The proof in th ord, including his confession of judg upon the claim which the appellees ass against him individually, is quite suff to set that controversy at rest. As we

Digitized by Google

found no error in the decree appealed from it will be affirmed, with costs. Decree affirmed, with costs above and below.

ACTON v. STATE.

(Court of Appeals of Maryland. March 1, 1895.)

COUNTIES—JURISDICTION—INFORMATION—ALLEGATION AS TO VENUE.

1. The jurisdiction of the circuit court of Anne Arundel county extends over all that space which lies between the limits of Anne Arundel county as described in Act 1726, c. 1, and the channel of Patapsco river, under Act 1704, c. 92.

2. In the margin of an information the county and the state were named, and in the body of the information the place was described as a building erected in the water of the Patapsco river, "and distant less than one hundred yards of the land shore of the First precinct of the Fifth election district of the county aforesaid." *Held*, that the venue was sufficiently laid, as the court will take judicial notice that the river was in the county named.

Appeal and error to circuit court, Anne Arundel county.

Criminal information by the state of Maryland against Samuel G. Acton on a charge of selling intoxicating liquor on Sunday. From a judgment in behalf of the state, the traverser appeals and brings error. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Robert Moss and James M. Munroe, for appellant. Atty. Gen. Poe and Ed. C. Gantt, for appellee.

PAGE, J. The information of the state's attorney for Anne Arundel county upon which this case was prosecuted is as follows: "State of Maryland, Anne Arundel County, to wit: The State of Maryland vs. Samuel G. Acton, charged," etc. "In the Circuit Court for Anne Arundel County. Criminal Information. The above-entitled case having," etc., "and Edward C. Gantt, the said state's attorney for said county, having investigated," etc., "now comes into said court, and for and in behalf of the state of Maryland, upon his official oath, gives the said court here to understand and be informed that Samuel G. Acton, late of the county aforesaid, on the 10th day of June, in the year of our Lord eighteen hundred and ninety-four, the same day and year aforesaid being the Sabbath day, commonly called 'Sunday,' at a building erected in the waters of a navigable river, to wit, the Patapsco river, at a place in said river situate below the head of said river, and below the southernmost great branch of said river, and on the south side of the channel of said river, and distant less than one hundred yards of the land shore of the First precinct of the Fifth election district of the county aforesaid, said building erected as aforesaid being contiguous to the land of the said First precinct of the Fifth election district of the county aforesaid, unlawfully," etc. The defendant pleaded want of jurisdiction, because the place alleged as that where the alleged offense was committed was not within the limits of Anne Arundel county. To this plea the state interposed a demurrer, which was sustained, and judgment thereon rendered. According to well-settled principles, a demurrer brings under review by the court all the pleadings in the case; and, this being so, the sufficiency of the information is before us in the same manner and to the same extent as if the demurrer had been interposed by the traverser. The questions presented, therefore, are: First, has the circuit court for Anne Arundel jurisdiction over that part of the Patapsco river which is described in the information? and, second, if it be determined that it has, are the allegations in the information as to the venue sufficient in law?

1. By the act of 1698 (chapter 13), Baltimore county embraced a portion of what is now Anne Arundel county. By the act of 1726 (chapter 1) it was enacted that "from and after the last day of May, 1727, the land lying on the south side of Patapsco river, and contained within the bounds following, viz.: From the mouth of said Patapsco river with the said river to the head thereof, and from thence bounding on the south side of the main falls, being the southernmost great branch of said river, and running as the said branch runs to the first main fork of the said falls, then bounding on the south side of the said southernmost fork, till," etc.,—"shall be and forever hereafter deemed as part of Anne Arundel county." In the case of Raab v. State, 7 Md. 497, Judge Tuck, delivering the opinion of the court, said: "It is manifest that the river, after this act, remained, as it had been for many years, within the limits of Baltimore county, and that the jurisdiction of these counties adjoined on its southern shore, unless affected by the act of 1704, c. 92 [now codified as section 135 of article 75 of the Code], which provides that every county lying on any navigable river in this province shall extend its jurisdiction from the shore to the channel of such river that divides the counties, and be divided from the other county by the channel of the said river; and under this act, if applicable, the river, as far as the channel, remained in Baltimore county, and subject to the jurisdiction of its courts." So that, under this decision, it is clear that, if the act of 1704 (chapter 92) is applicable, the jurisdiction of Anne Arundel county must extend to the channel of the river, and will include all that space which lies between the limits of Anne Arundel county as described in the act of 1727 and the channel. And we are of the opinion that such is the proper application of that act. We adopt, on this point, the views so well expressed by Judge Brewer in his opinion on deciding in the lower court in Raab v. State, supra, as found

Digitized by Google

on page 486 of the printed report. That learned judge, in dealing with the contention that the act of 1704 applied only to the counties mentioned in the act, said: "I do not think it is so confined. A part of the state only was, at that time, laid off into counties. It must have been then contemplated to lay off other counties. The bounds between Cecil and Kent and the upper bounds of Cecil were not accurately defined, nor the bounds of Talbot on every side, nor were the upper bounds of Baltimore and Prince George's. Some of the other counties thereafter to be laid off might be bounded by navigable rivers; and the object of the act of 1704, although it refers only to the counties already laid off, seems to be to establish a rule applicable to all similar cases. The language of the law in the enacting part of the clause is very general,—'that every county lying on any navigable river.' The legislature is establishing a rule applicable to a particular class of cases, and why should not the rule apply to all subsequent additions of that class? This act has been codified as section 135 of article 75, and differs from the act as originally passed only in the respect that it is not made to apply 'where a dividing line has been fixed in such river by law.'" No such line has been fixed with respect to Anne Arundel. By the adoption of the Code, this section became the law of the state, and is now applicable, whatever may originally have been the design of those who enacted it, to every county lying on navigable rivers in the state, except "where a dividing line has been fixed in such river by law."

2. The rule in setting out the venue is well stated in 1 Chit. Cr. Law, 194, as follows: "In the body of the indictment, also, the facts should in general be stated to have arisen in the county in which the indictment is preferred, so that it may appear that the offense was within the jurisdiction of the court; and therefore, if a parish, village, or other place where the offense, or part of it, occurred, be stated, without naming the county in the margin, or expressly referring to it by the words 'the county aforesaid,' the indictment will be defective." See, also, 1 Whart. Cr. Law, § 223 et seq.; 1 Bish. Cr. Proc. § 101 et seq., and authorities there cited. In the margin of the information are named the county and state, and in the body the place is described,—"at a building erected in the water of a navigable river, at a place in said river situate below the head of said river, and below the southernmost great branch of said river, and on the south side of the channel of said river, and distant less than one hundred yards of the land shore of the First precinct of the Fifth election district of the county aforesaid." The court will take judicial notice of the civil divisions of the state created by statute (People v. Breese, 7 Cow. 430); and therefore, inasmuch as the bounds of Anne Arundel are fixed by statute, and the jurisdiction of the county is fixed to the center of the chann the act of 1704, and, in addition theret county is expressly named in the marg would seem the venue is sufficiently What we have said has no reference t 286th section of article 27 of the Whatever may be the proper constru of that act, we are of opinion that b ordinary rules of criminal pleading th formation must be sustained. Findin error in the ruling of the court below judgment will be affirmed. Judgmen firmed.

ACTON v. STATE.

(Court of Appeals of Maryland. Marc 1895.)

Error to circuit court, Anne Arundel cou Samuel G. Acton was convicted for selli toxicating liquors, and brings error. W error quashed.

Argued before ROBINSON, C. J., and AN, BRISCOE, McSHERRY, FOW ROBERTS, PAGE, and BOYD, JJ.

Robert Moss and James M. Munroe, f pellant. Atty. Gen. Poe and Ed. C. Gan appellee.

PAGE, J. For the reasons assigned preceding case (31 Atl. 419), the writ of er this proceeding will be quashed. Writ of quashed.

MAYOR, ETC., OF BALTIMORE v. P IDENT, ETC., OF BALTIMORE & TURNPIKE CO. et al.

(Court of Appeals of Maryland. Feb. 1895.)

TURNPIKES IN CITIES — SURRENDER OF RO ACCEPTANCE—LIABILITIES—ACTION BY CITY SOLICITOR.

1. Under Act 1825, c. 105 (Pub. Loc. for Baltimore City, art. 4, § 818), providing turnpike companies owning roads running the city of Baltimore may "cede" to the such parts of the roads as are within the limits, and the same, when "ceded," sha come a public street, the road, when cede comes a public street, without any accep by the city.

2. Such act authorizes companies not to cede that part of their road within the limits at the time of the passage of the ac also any portion taken into the city by the sequent extension of its limits.

3. Such act does not authorize the c nies to cede such portion of their roads i bered with a franchise assigned by them third person to operate a street-railway th

4. Though a grant by the legislature turnpike company of authority to grade its is a continuing right which cannot be imp yet the company takes it subject to the power; and when it grades the portion road within a city so as to make it necessa lower the grade of intersecting streets it ble to the city for the expense thereby inc

5. In the absence of proof to the con it will be presumed that a bill filed by the solicitor in the name of the city was filed its authority.

Appeal from circuit court of Baltimore

Action by the mayor and city counc Baltimore against the president, mana

Digitized by Google

and company of the Baltimore & Yorktown Turnpike Company and another. There was a judgment for defendants, and plaintiff appeals. Reversed in part.

Argued before ROBINSON, C. J., and McSHERRY, FOWLER, BRYAN, ROBERTS, PAGE, and BOYD, JJ.

Wm. S. Bryan, Jr., for appellant. John K. Cowen and E. J. D. Cross, for appellees.

ROBINSON, C. J. The Baltimore & Yorktown Turnpike Company was incorporated by the act of 1804 (chapter 51) to build and maintain a turnpike road from the city of Baltimore to the Pennsylvania line. By the act of 1860 (chapter 259) the company was authorized and empowered to build a passenger railway on its roadbed from Baltimore to Towsontown. Having built and operated the street railway for a number of years, the company, under power conferred by the act of 1872 (chapter 337), sold and conveyed to the Baltimore Union Passenger Railway Company the franchises, rights, and privileges of the street railway conferred upon it by the act of 1860. Having thus disposed of the street railway, the turnpike company, by its deed dated 19th October, 1893, conveyed to the mayor and city council of Baltimore that part of its road lying within the city limits as extended under the act of 1888, subject, however, to the grant made to the Baltimore Union Passenger Railway Company of the franchises, rights, and privileges of the street railway, and subject also to the rights of the City & Suburban Railway Company, its successor. The right thus to surrender this portion of its road is claimed by the turnpike company under the act of 1825 (chapter 105), codified as section 818, art. 4, of Public Local Laws for Baltimore City, which provides: "The president, directors and companies of the different turnpike companies owning roads running into the city of Baltimore, may cede to said city such parts of said roads as lie within the corporate limits of said city —and the same when ceded shall be in all respects subject to the same regulations as unpaved public streets." This deed, however, the city authorities refuse to accept, and they insist that the word "cede," as used in the act, is synonymous with, and to be interpreted in the same sense as, the word "grant;" and, being a grant, the deed is inoperative until it has been accepted. And we have been referred to quite a number of dictionaries as to the meaning of a word in no sense a technical word, but one in every-day use, and about which there ought not to be any difficulty as to its natural import and meaning. Like many other words, its precise meaning and signification depend somewhat upon the subject-matter in connection with which it is used. In some instances, it may, it is true, be used in the sense of "grant," but ordinarily it means to "yield," "surrender," "give up." But this, however, is not merely a dictionary question. We are dealing with an act of the legislature, conferring upon a turnpike company the power to cede to the city that part of its road lying within the corporate limits, and which, when ceded, the act declares shall be a public street. There can be no difficulty, it seems to us, as to its meaning, thus used. The turnpike company, having accepted its charter, and having built its road, could not, at its own pleasure, "cede" or "surrender" any portion of its road, unless by power conferred by the legislature; nor could the city, however desirable it might be, acquire any part of turnpike road within its corporate limits except by purchase or by condemnation; and, this being so, the object, and sole object, of the act was to confer this power upon the turnpike company, should it deem it advisable to surrender any part of its road to the city. It was never supposed for a moment that there would or could be any objection on the part of the city authorities to a surrender of the road thus made without compensation, by which a toll road within the city limits was thereby made a free highway; and hence the act declares that the portion of the turnpike thus ceded shall thereupon become a public street. All the act requires or means is that the turnpike company shall cede to the city the portion of its road lying within the corporate limits, and, when ceded, the road, by operation of the act itself, becomes a public street, and this, too, without any act of acceptance on the part of the city authorities by ordinance, resolution, or otherwise. But then, again, it is said the power to cede is limited to that part of the road lying within the city limits at the time the act was passed, and the turnpike company has no power, therefore, to cede that part of its road lying within the city limits as extended by the act of 1888. The act does not so say in terms. On the contrary, the power is conferred in general terms, and it would, it seems, be a narrow construction of a power mainly conferred in the interests of the city itself. We cannot agree with the counsel for the appellant that the legislature could not have foreseen that in 60 or 70 years the limits of the city would be extended two miles, at least, beyond the old city limits. We see no good reason for imputing such a want of foresight to the general assembly. Baltimore was at that time a growing and prosperous city, and to any one of ordinary judgment it must have been apparent, we think, that an extension of its limits at some time in the future would be absolutely necessary to its proper growth and development. Whether one mile or two miles or even further, no one could tell; but any extension of its limits would necessarily include portions of some, if not all, of the several turnpikes then leading in every direction from the city. And as it would be to the interests of the city that these several turnpike roads should be converted into free highways, this power was not restricted to the portions of the roads within the city lim-

Digitized by Google

its at the time the act was passed, but was conferred in general terms, thereby enabling them to cede not only such portions, but also such parts of their roads as might be within the city limits should the limits be thereafter extended.

We come, then, to the last objection, and one which, it seems to us, is fatal to the deed in question, and that is, the deed is made subject to the grant of the turnpike company to the Baltimore Union Passenger Railway Company of the franchises, rights, and privileges of the street railway, with the right on the part of the latter company to use, manage, and enjoy such franchises in perpetuity, and subject also to all the rights of the City & Suburban Railway Company, its successor. The act of 1825 does not make it obligatory on the turnpike company to cede any portion of its road to the city, but, if it proposes to exercise the power thereby conferred, it must make the cession without the reservation of any rights, either in its own behalf, or of its assignees. It has no right to surrender a part of its road burdened with easements which it claims the right to create in perpetuity. The act contemplated, and by every fair rule of construction means, that the turnpike shall be ceded unincumbered; and, when so ceded, the act declares that it shall thereupon become subject to all the regulations applicable to unpaved public streets. How far, and to what extent, this deed, made subject to the grant of the turnpike company to the Baltimore Union Passenger Railway Company, would affect the control of the city authorities over the portion of the road thus ceded, it may not be easy to determine. It is sufficient to say that if it would not in any manner interfere with their control over it as a public street, then it was altogether unnecessary to make the deed subject to this reservation; while, on the other hand, if it would interfere with such control, then the turnpike company had no right to surrender the road on such terms. And it is no answer to say the street railway was built and its franchises were sold under power conferred by the legislature. This may be true, but when these franchises and powers were granted the turnpike belonged to the company, and the portion of its road on which the street railway was built was at that time beyond the corporate limits, and in no manner subject to the control of the city; and while the extension of the city limits can in no manner affect the franchises and privileges granted to the turnpike company in connection with the street railway, at the same time, if it proposes to cede to the city part of the turnpike now within the corporate limits, the cession must be made without reservation as to easements created by it without the assent or concurrence of the city authorities. And this brings us to the only remaining question, and that is whether the turnpike company has the right to grade its road within city limits as extended by the act of 1888. As a general rule, the m and city council have the exclusive co of the highways and streets within the porate limits. But the turnpike com was chartered by the act of 1804, and t is no reservation in the charter itself, n any general law, nor in the constitution in force, reserving the right to amend o ter the charter thus granted. It bec therefore, a contract between the state the corporators, within the protection o constitution of the United States, which bids any state from passing laws impa the obligation of contracts. Among the ers granted to the company was the to grade its road, and this right, we said, is a continuing right, to be exer from time to time, as the necessities o company or the public convenience ma quire. Peddicord's Case, 34 Md. 463. ing, then, a chartered right, the extensio the city limits so as to include part of turnpike, could not interfere with or prive the company of the lawful exercis this right. Neither the city authorities the legislature itself could deprive it of right. At the same time, the exercise of right is subject to the paramount gov mental power known as the "police pow inherent in every well-organized gov ment, and to be exercised when the sa and welfare of the community requir It is a power which the legislature can ther alienate nor surrender, and every tered privilege is granted on the implied dition that it is to be exercised subjec this power. As was said by Mr. Chief tice Fuller: "It is likewise established the inhibitions of the constitution of United States upon the impairment of obligations of contracts, or the deprivat of property without due process of law of the equal protection of the laws of states, are not violated by the legiti exercise of legislative power in securing public safety, health, or morals. The ernmental power of self-protection cannot contracted away, nor can the exercise rights granted, nor the use of property withdrawn from the implied liability to ernmental regulation in particulars essen to the preservation of the community injury. Railroad Co. v. Town of Bri 151 U. S. 567, 14 Sup. Ct. 437." Now, proof shows that in grading its road w the city limits the turnpike bed has lowered from three to four feet below surface of certain public streets which i sect the road. The public is entitled to use of these streets for all the purposes which they were opened and dedicated. is entitled to the use of them in goin and from the turnpike road, and the pany has no right to so grade its road endanger the safety of persons thus fully entitled to the use of the public str The grading has been done, and all the now asks is to be reimbursed or com

Digitized by Google

sated for expenses necessarily to be incurred in making the grade of the intersecting streets conform to the grade of the turnpike. And this, we all agree, the city authorities have the right to demand.

In the brief of the appellees the point is made that this bill has been filed without the lawful authority of the mayor and city council. It is filed by the city solicitor in the name of the mayor and city council; and, in the absence of proof to the contrary, we must presume that it was filed by their authority. As to the City & Suburban Railway Company, we agree with the court below that the bill ought to be dismissed as to that company. Decree affirmed in part and reversed in part, and cause remanded.

MAYOR, ETC., OF CITY OF BALTIMORE v. SMITH & SCHWARZ BRICK CO.

(Court of Appeals of Maryland. Feb. 28, 1895.)

OPENING PUBLIC STREET—ASSESSMENT—EVIDENCE OF VALUE—BENEFITS.

1. In opening a public street under Code Pub. Local Laws, art. 4, § 806, a jury need not review the action of the commissioners in fixing damages, on an appeal from the assessment of benefits.

2. In ascertaining the amount of benefits in opening a public street, testimony as to the cost of filling in lots which would front on the proposed street to the level of the established grade of the street was relevant.

3. Evidence to prove the market value of property assessed for benefits should be directed to the market value in the present condition of the property, and then to any increased value by opening the street; and the opinions of witnesses having knowledge of the subject and acquainted with the land are admissible to prove such value.

4. The prices realized at sales of the land in question and of similar land in the vicinity, made within a reasonable time theretofore, being voluntary and not forced sales, are admissible to show present value.

5. The burden of proof rests upon the city to show the increase in market value of lots as the result of opening a street.

6. The court cannot permit the book of the proceedings for the opening of a street to be taken by the jury to their room on the motion of the city.

Appeal from Baltimore city court.

Proceedings by the mayor and city council of Baltimore against the Smith & Schwarz Brick Company, of Baltimore city, in the matter of opening a public street, and assessing benefits. From an award of the commissioners, defendant appealed to the Baltimore city court, and, from a judgment of that court assessing the benefits to defendant at $7,478, plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS, and BOYD, JJ.

Wm. S. Bryan, Jr., and Thos. G. Hayes, for appellant. Ber. Carter and Geo. R. Willis, for appellee.

BOYD, J. In this case we are called upon to review the rulings of the Baltimore city court at the trial of an appeal by the Smith & Schwarz Brick Company from an award of the commissioners for opening streets in the city of Baltimore, assessing benefits to said company in the matter of opening Madison street from Patterson Park avenue to Grove alley, in said city. There are nine bills of exceptions in the record, which we will consider in their order. The first presents one of the most important questions to be determined by us. The mayor and city council of Baltimore moved the court to direct the clerk to swear the jury to inquire both as to the benefits and damages awarded to the company. The court overruled the motion, and instructed the clerk to swear the jury as to benefits only, which was accordingly done. The city contends that, notwithstanding the company only entered an appeal from the assessment of benefits, the whole action of the commissioners ought to have been reviewed, and the jury required to inquire into the assessment of damages as well as benefits. That proposition is disputed by the company, which contends that the court was right in limiting the inquiry of the jury to the benefits assessed to it, that alone being the subject and cause of the appeal. It is necessary for us to examine the statutes and ordinances under which these proceedings were conducted. By section 806 of article 4 of the Code of Public Local Laws, it is enacted that: "The mayor and city council of Baltimore shall have full power to provide for laying out, opening * * * any street * * *; to provide for ascertaining whether any, and what amount in value, of damage will be caused thereby, and what amount of benefit will thereby accrue to the owner or possessor of any ground or improvements within or adjacent to said city, for which such owner or possessor ought to be compensated, or ought to pay a compensation, and to provide for assessing and levying, either generally on the whole assessable property of said city, or specially on the property of persons benefited, the whole or any part of the amount of damages and expenses which they shall ascertain will be incurred in locating, opening * * * any street * * * in said city; to provide for granting appeals to the Baltimore city court, from the decisions of any commissioners, or other persons appointed in virtue of any ordinance to ascertain the damage which will be caused or the benefit which will accrue * * * and for securing to every such owner and possessor the right * * * to have decided by a jury trial whether any damage has been caused or any benefit has accrued to them, and to what amount," etc. The ordinance of the city passed in pursuance of that statute provides for the appointment of three commissioners for opening streets. They are required to ascertain whether any, and what amount of, damages the owners of the property will sustain by the opening of the street, for which they ought to be compen-

Digitized by Google

sated. Having ascertained the whole amount of damage for which compensation ought to be awarded, and the probable expenses in the proceeding, they are then required to assess all the ground and improvements within and adjacent to the city, the owners of which they decide and deem to be directly benefited by the opening of the street. If the direct benefits assessed do not equal the damages awarded and expenses incurred, the difference is to be paid by the city, and provided for by a general levy. An opportunity is then given to interested persons to appear before the commissioners, who can review their own proceedings; and, when they make their final awards of damages and benefits, they file them with the register of the city, who gives notice through the newspapers of the right of parties affected by such awards to appeal to the Baltimore city court. Section 10 of article 48 of the Baltimore City Code provides for an appeal by "any person or persons or corporations who may be dissatisfied with the assessment of damages or benefits," etc., by petition in writing to the Baltimore city court. That court is then required to fix a day to hear any such appeal, and to direct the clerk to issue a subpoena duces tecum to the register of the city, requiring him to deliver to the court the record of proceedings of the commissioners, and all maps, plats, documents, and papers connected with such record, and the court is given "full power to hear and fully examine the subject, and decide on the said appeal." Provision is made for trial by jury of any question of fact, and, if necessary, for them to view any property in the city, or adjacent thereto, to ascertain and decide on the amount of damages or benefits, under the direction of the court. The court is also vested with the power to amend and supply defects and omissions in the record of the proceedings of the commissioners, and to increase or reduce the amount of damages and benefits assessed. It is contended by the attorneys for the city that this section of the ordinance brings the whole case before the court, and therefore it was proper to direct the jury to review the action of the commissioners in assessing the damages as well as the benefits. But we do not find anything in that section, or the other provisions of the law, to sustain that contention. The commissioners for opening the streets, in assessing damages, are required to value the property to be taken for the bed of the street as if no street was to be opened, and, in estimating the value of the property to be condemned, are not to consider the fact that a street is to be opened. Moale v. Mayor, etc., 5 Md. 324. They are required to fix the compensation to be paid to the owners for the ground or improvements to be taken from them, without regard to the use to be made of them. They then ascertain the aggregate of such damages or compensation, and, having added the estimated expenses of the proceed they are prepared to furnish the city the cost of opening the street. That pa their work is completed subject, of co to their right of revision, appeal, etc., as vided by the ordinance. The next step en is to determine where the money come from. They then decide whether is any ground or improvements in or adja to the city, the owners of which will b rectly benefited by the opening of the st Such as they find will be so benefited, assess, to the extent of such direct ben and, if the aggregate of the benefits s sessed is not sufficient to pay for the ing of the street, the balance is made u the city, by a general levy. In other w they take such property as is needed fo bed of the street, and allow the respe owners compensation for it, according then market value. They then direct A., B., and C., as owners of ground o provements somewhere in or adjacent t city, will be directly benefited after the s is opened, determine how much, and s sess them. If there is a shortage in the efit column, the account is balanced by city. It matters not whether A.'s prop thus to be benefited, is adjoining to or a of the property taken for the bed of street, or whether it is on another squa the street to be opened, or in some othe cality. If it will be directly benefited, assessed accordingly, and called upon to tribute to the payment of said street, t extent he is so benefited. It seems that the two transactions of fixing dam or compensation and of assessing ben are separate and distinct. If, therefor is satisfied with the damages allowed but is dissatisfied with the assessmen benefits (to use the language of the nance), why should his appeal from the ter necessarily carry with it the consi tion of the former? By limiting his ap to the one, as was done in this case, he fies the city he is satisfied with the Both have been made by the city, thr its officers, and if it is not satisfied wit ther it can now appeal, notwithstandin assessment was made by those of its ow lection. There is therefore no reason the jury should review the action of the missioners in fixing damages on an ap from the assessment of benefits, and w not think a proper construction of the nance would have justified the cour granting the city's motion. There is ing in the fact that the whole record o proceedings of the commissioners mus brought before the court, to sustain city's contention. It might disclose such fects and omissions as the court could am or supply, which should be corrected; a would be very difficult, if not impossibl properly review the action of the com sioners in either fixing damages or asse benefits, without having the whole re

Digitized by Google

before the court. If an appeal is taken by a person whose property is assessed for benefits, but has no claim for damages, none of his property being taken, the whole record and all proceedings are brought before the court. If some other company had owned the ground included in the bed of the proposed street, the court could not have permitted the jury, on the appeal of the brick company, to increase or reduce the amount of damages allowed the other company, except by consent of the parties; and we see no reason why the jury should be permitted to increase or reduce the damages allowed the brick company, when it has only taken an appeal from the benefits assessed against its property. The jury is authorized by the ordinance to ascertain and decide on the amount of damages or benefits, clearly meaning that it can ascertain the amount of the one before it by appeal, but not of both, unless an appeal has been taken from both. The court therefore committed no error in overruling this motion of the city.

The second and third bills of exceptions can be considered together. The evidence shows that a number of the lots of the company which will front on the proposed street, and have been assessed for benefits, were below the established grade of the street. The company offered to prove the amount of filling necessary to bring them to that grade, to fit them for use for building purposes. The city objected, but the court overruled the objection, and permitted the company to prove the estimated amount of filling necessary in each of the lots. In such cases, jurors are entitled to have before them any facts that will aid them in reaching proper conclusions. The opening of the street having been determined to be a direct benefit to these lots, the next inquiry was, how much will they be benefited? Different modes may be adopted for determining that question. A lot which would be left eight feet below the grade of the street after it is opened would not be benefited as much as it would be if on the level of the proposed street. Hence, in ascertaining the amount of benefits, testimony tending to show the cost of filling the lots to the level of the established grade will be relevant. The jury was authorized by the ordinance to view the premises, and did so in this case. When they went upon the property, the ground to be included upon the bed of the street might appear to be level, or nearly so, with that adjoining it on either side; and hence, in assessing benefits, they might have been misled, unless they were informed how much filling would be required to bring the adjoining property to the level of the established grade, and what the cost would be. If a lot was worth $1,000 before the opening of the street, and would be worth $2,000 after it was opened, without any work being done on it, the benefit to it would manifestly be $1,000; but if it would cost $500 to bring it to the grade of the street, so as to give it the value of $2,000, it is equally clear it would really only be benefited $500. Some of the witnesses testified that the proper way of determining how much the lots would be benefited is to ascertain the market value of the ground fronting on the line of the street in its present condition, before the street is condemned, to which add the cost of placing the lots and the street in such condition as that the lots could be disposed of with a front on Madison street, graded, curbed, and paved, and determine what the market value of the lots would then be. Then subtract from that the cost of grading the lots, and of grading, paving, and curbing the street, added to the present market value of the lots, and the difference would closely approximate the benefit to be derived from the opening of the street. If that be correct,—which was for the jury to determine,—they were entitled to be informed on all these subjects. The court could not say, as a matter of law, that the jury could not consider that method of reaching a conclusion, in the face of the testimony of experienced and competent men that it was the correct method. It may be much more difficult to fix a value on lots fronting on ungraded and unpaved streets than it is to determine the value of those on a graded and paved street; and inasmuch as city lots are not generally disposed of for building purposes until the streets on which they front are graded and paved, it would reflect some light on the question at issue, by giving the jury some information on these subjects. The city had the privilege of having the jury instructed as to what they should be guided by in making up their verdict, and we do not see how it could have been injured by the rulings of the court on this question.

The fourth and fifth bills of exceptions relate to the mode of proving the market value of the property assessed for benefits. It is denied by the city that prices received at particular sales for lots of ground in the neighborhood of land being valued by the jury are admissible in evidence. In a case of this kind the evidence should be directed (a) to the proof of the market value in the present condition of the property; and then (b) to how much will the present market value be increased by opening the street. The difficulty generally presented is how to determine the market value. The authorities on this subject are by no means uniform. It is generally conceded that the opinions of witnesses having sufficient knowledge on the subject, and acquainted with the land in question, are admissible to prove such value, and that the question as to whether a witness is qualified to give an opinion must be left, in a large measure, to the discretion and judgment of the trial court, but of course that discretion is not without limit. If such a witness be produced, the

Digitized by Google

weight of his testimony must depend largely upon the reasons he assigns for his opinion. If he be unable to give some intelligent reasons for his opinion as to value, a jury will not likely be much influenced by it. If he knows of recent sales of similar properties unaffected by a condition of affairs peculiar to them, the prices realized at such sales would almost necessarily influence his judgment; and, if called upon to give his reasons for naming the value of property fixed by him, the first one likely to be assigned by him is that such other properties brought certain prices. We all know from observation, if not from experience, that if inquiry is made as to the value of a lot on a certain street in a city or town, where other sales have been recently made, it is generally answered by naming the prices realized at such sales. If 12 jurors are taken upon land, to ascertain its value, with which they are unacquainted, the first question that is suggested to them is, "What does land in this neighborhood sell for?" As was said, in Moale v. Mayor, etc., 5 Md. 324, "With a view to get at this [the value of the lot], the neighboring and contiguous lots may be looked to, but they do not furnish an unerring standard to measure the value of the lot condemned." The property sold may, owing to peculiar circumstances, have brought more or less than the real market value; but those circumstances can be explained, and if it is similar in character, location, etc., and the sale was of a sufficiently recent date, and was not made under unusual conditions, the price realized would help a jury to reach a just and proper conclusion. They are not required to adopt a price fixed by other sales, but they consider it in connection with their own view of the land and the other evidence in the case. We think, therefore, that the prices realized at sales of the land in question, and of similar land in its vicinity, made within a reasonable period of time theretofore, being voluntary and not forced sales, are admissible in evidence either on direct or cross-examination of witnesses conversant with the facts. This view is sustained by Moale's Case, supra; Pierce, R. R. 224; Lewis, Em. Dom. § 443, etc.; Wyman's Case, 13 Metc. (Mass.) 316; Paine v. Boston, 4 Allen, 168; Sawyer v. Boston, 144 Mass. 470, 11 N. E. 711; Culbertson & B. Packing & Provision Co. v. City of Chicago, 111 Ill. 651; Town of Cherokee v. Land Co., 52 Iowa, 279, 3 N. W. 42; March v. Railroad Co., 19 N. H. 372; Washburn v. Railroad Co., 59 Wis. 364, 18 N. W. 328; Rand. Em. Dom. § 236; and other authorities that might be cited. As the evidence objected to was admissible, under the principles above announced, there was no error in the court's rulings in the fourth and fifth exceptions.

Our views expressed on the second and third bills of exceptions avoid the necessity of discussing the sixth.

In regard to the testimony of Patrick dington, presented by the seventh exc there may be some question whether court ought to have permitted him to in chief as to what rate he did the g on the Union Railroad. He may have special arrangements with the compan it did not necessarily follow that, b he did the work at a certain price, it fair or the usual price for grading. his answer corresponded with the pric tablished by all the witnesses who te on that subject, the appellant could no been injured by that portion of his evi

The company offered two prayers were granted; and the city, three, th and second of which were granted, a third rejected. The first prayer of th pany and the third of the city prese same question raised by the first bill ceptions, and require no further con The second of the company instruct jury that the burden of proof rests up mayor and city council of Baltimore to to the satisfaction of the jury the ext the increase of the market value lots of said property owner binding on son street, as the result of the openi said street. We think this prayer was jectionable. The burden was on th to establish the benefits this propert to be charged with. It certainly cou be said that the burden was cast on th pany to prove that it was not benefi much as the city claimed it was. Th no presumption of law in these case the assessment of the commissioners rect, but, under the very terms of th nance, the jury is "to ascertain and on the amount of damages or benefits in this case, as we have already de was confined to the amount of benefits authority has been cited, and we think can be found, to require the court to the book of the proceedings for the op of Madison street to be taken by th to their room on the motion of the city refusal of the court to do this is the s of the ninth and last exception.

We have thus considered all the bills ceptions in the record. Some points were argued we might have discussed at length, but we have given them all ful consideration, and are of the opinio the rulings of the court below must be ed. Rulings affirmed, with costs to t pellee.

MASON v. WHEELER et al.

(Supreme Court of Rhode Island. Marc 1895.)

TESTAMENTARY POWERS.

Where the will of the donee of a does not refer to the power, nor specifie the property controlled by it, but merely all her estate, real and personal, it being that the realty subject to the power was

Digitized by Google

in the donee's father, who survived her, and that she had personal, but no real, property, such devise was not an execution of the power.

Bill by Matilda Mason against Laura Wheeler and others. Decree for complainant.

Joseph C. Ely and Herbert Almy, for complainant and respondent National Bank of Commerce. Bassett & Mitchell, for respondent Wheeler.

MATTESON, C. J. This is a bill for discovery and an account. The case is as follows: Adaline M. Wheeler, of Cranston, died March 12, 1882, leaving a last will and testament, duly admitted to probate, in which she devised unto her husband, Jonathan M. Wheeler, subject to his tenancy by the curtesy, all her estate, in trust to pay the income to her daughter, Emma Louise, wife of Charles Blake, for her sole and separate use during the term of her natural life. On the decease of Mrs. Blake, the testatrix directed that all of the trust estate and fund then remaining should be conveyed and paid over to such persons and for such use as Mrs. Blake should by her last will and testament direct and appoint; but, if she should die leaving no last will and testament directing the disposition of said estate, it should descend to and be distributed among those who would be entitled to it according to the statute of descent and distribution at that time in force in this state, as if she, the testatrix, had then died intestate. Mrs. Blake died May 26, 1890, leaving a last will and testament dated August 6, 1884, duly admitted to probate, in which, after providing for the payment of debts, funeral charges, and expenses of settling her estate, giving a pecuniary legacy and disposing of certain articles of personal property, she gave, devised, and bequeathed the residue of her estate in the following terms, namely: "I give, devise, and bequeath to my father, Jonathan M. Wheeler, all the rest and residue of my estate, real and personal, of every name and nature, and wheresoever situated or being, to him, said Jonathan M. Wheeler, his heirs and assigns, forever, should he survive me." The question arising on these facts is whether or not the devise in the will of Mrs. Blake to her father, Jonathan M. Wheeler, was an execution of the power of appointment conferred on Mrs. Blake in the will of her mother, Mrs. Wheeler. The rule in relation to the execution of powers, as stated by Mr. Justice Story in Blagge v. Miles, 1 Story, 446, Fed. Cas. No. 1,479, which may be regarded as a leading case in this country on the subject, is that if the donee of the power intends to execute, and the mode be in other respects unexceptionable, the intention, however manifested, whether directly or indirectly, positively or by implication, will make the execution valid and operative; but the intention must be so apparent and clear that the instrument is not fairly susceptible of any other interpretation. If, considering all the circumstances, the intention be doubtful, the doubt will prevent the instrument from being deemed an execution of the power. It is not necessary, however, that the intention to execute should appear by express terms or recitals in the instrument. It is sufficient if it appears by words, acts, or deeds demonstrating the intention. In the case referred to, three classes of cases are enumerated which have been held to be sufficient demonstrations of an intended execution of a power: (1) Where there has been some reference in the will or other instrument to the power; (2) a reference to the property which is the subject on which the power is to be executed; (3) where the provision in the will or other instrument executed by the donee of the power would otherwise be ineffectual or a mere nullity,—in other words, would have no operation except as an execution of the power. And see Cotting v. De Sartiges, 17 R. I. 668, 24 Atl. 530; Lee v. Simpson, 134 U. S. 572, 10 Sup. Ct. 631; Patterson v. Wilson, 64 Md. 193, 1 Atl. 68; Funk v. Eggleston, 92 Ill. 515; Bilderback v. Boyce, 14 S. C. 528.

The devise to Mrs. Blake is in terms a general residuary disposition of all her estate, real and personal. It does not recite nor refer to the power in the will of Mrs. Wheeler, nor does it mention nor refer specifically to the property of Mrs. Wheeler, the subject on which the power was to be exercised. In order, therefore, to operate as an execution of the power, it must appear that Mrs. Blake intended by this devise and bequest, notwithstanding these omissions, to convey, not merely her own property, but that which was her mother's as well; and the intention must be so apparent and clear that the devise and bequest will not fairly be susceptible of any other interpretation. Such intention might be inferred, as we have seen, if the clause would be ineffectual for any purpose except as an execution of the power. It was conceded at the hearing that Mrs. Blake had no real estate of her own on which the devise could operate, and it was contended for the respondent Mrs. Laura Wheeler that the use of the word "real" in the devise was sufficient evidence of an intention to execute the power. We do not deem the use of the word "real" so conclusive that it cannot fairly be said that the intention to execute the power is not doubtful, and, if not, it cannot be held that the power was executed. As suggested by the complainant, the clause is a residuary clause, purporting on the face of it to devise only the estate of Mrs. Blake, and the word "real" may well have been intended merely to guard against a possible intestacy, and therefore there is no necessary presumption from the use of the word that Mrs. Blake had in mind the real estate of her mother, and intended to pass the title to it by the exercise of the power. Moreover, it is suggested, as an additional reason for not mak-

Digitized by Google

ing such a presumption, that, under the will of Mrs. Wheeler, Mrs. Blake's receipt of the income of the real estate was subject to the tenancy by the curtesy of her father, and that, as her father survived her, she never was in fact entitled to receive, and did not receive, the income of the real estate at all, and consequently would not naturally regard or speak of that real estate as her own. To this may be added the fact that her father was, by the terms of her mother's will, entitled to the income of the real estate during his life. There was less reason on that account for the exercise of the power for his benefit. It was further contended at the hearing that Mrs. Blake did not have any personal estate on which the clause could operate, and therefore an intent to exercise the power ought to be inferred, since the devise and bequest would otherwise be a nullity; but, assuming that the testimony admitted de bene was competent, it did not show that she was not possessed of personal estate. On the contrary, it did show that she was possessed of valuable jewels, silverware, bric-a-brac, a piano, money on deposit, and other property on which the clause could operate. We are of the opinion that the residuary clause in the will of Mrs. Blake did not execute the power of appointment conferred on her by the will of Mrs. Wheeler, and that the complainant is entitled to the relief sought by the bill.

COOMBS et al. v. PATTERSON.

(Supreme Court of Rhode Island. March 19, 1895.)

PAROL EVIDENCE—DESCRIPTION IN MORTGAGE.

1. Where a mortgage describes the property mortgaged as "every article and thing in stock or in process of manufacture" in a shop, parol evidence that this description was intended to include the machinery, fixtures, and books of account used in the business is not admissible.

2. Where a mortgage describes the property mortgaged as "every article and thing in stock or in process of manufacture" in a shop, parol evidence is admissible to show what the stock contained, and to identify it, and to show that it was on the premises when the mortgage was given.

Action by Coombs & Atkinson against Joseph E. Patterson. There was a decision for defendant, and plaintiffs petition for a new trial. Granted.

Jacob W. Mathewson, for plaintiffs. Cooke & Angell and Joseph Osfield, for defendant.

TILLINGHAST, J. This is replevin to obtain possession of certain personal property which the plaintiffs claim to own. The facts are these: In April, 1893, and for some time prior thereto, the plaintiff Coombs and the defendant were in copartnership at Lincoln, R. I., under the firm name of Coombs & Patterson, in the manufacture of jewelry. On the 13th of April, 1893, the defendant sold all his right, title, and interest in and to the partnership property and business, the being one undivided half part thereof, t plaintiff Atkinson, who thereupon, by a ment with Coombs, became a partner him in said business. Atkinson agre pay Patterson $912.20 for his interest in partnership property, and in pursuance of gave him a note for this amount, pa in 00 days, secured by a mortgage, by Atkinson individually, on "every a and thing in stock or in process of mar ture in the jewelry establishment situa Lincoln, at the corner of Clay and Main streets." Shortly after the ma of said note, the same remaining unpaid Patterson took possession of the said and all the property then found there cluding all the machinery, stock, and fi and book accounts of the firm, claimin right so to do by virtue of said mor and advertised all the right, title, and est of said Atkinson therein for sale, as gagee thereof, whereupon the plaintiffs out the writ in this case, and repos themselves thereby of said property. uncontradicted proof shows that none stock, whether manufactured, unmanuf ed, or in process of manufacture, whic in said shop when said mortgage was was there when the defendant took p sion as aforesaid, but that the same h been disposed of in the regular course o ness of the firm within 60 days after th ing of said mortgage. The case was tr the court in the common pleas division trial being waived, and a decision re in favor of the defendant. At said tri court permitted the defendant, again plaintiffs' objection, to offer testimon it was the intention of said Atkinson clude in his said mortgage to Patters the property, including machinery, fi and goods and chattels which were co to him, said Atkinson, by the defe which said machinery, fixtures, good chattels were described in a bill of sale by said Patterson to said Atkinson 13th day of April, 1893, and described in as follows, viz.: "All my interest jewelry establishment situated in L at the corner of Clay and North Main s and in every article and thing in stock process of manufacture in said shop." description in said mortgage, however, thus: "The following articles of pe property, now in my possession, and n the jewelry establishment situate in L at the corner of Clay and North Main s Meaning to convey every article and th stock or in process of manufacture i shop." The plaintiffs now petition for trial on the grounds: (1) That the cou ed in admitting parol evidence to va terms of the mortgage given by said son to Patterson; (2) that the court er deciding that the defendant was entit the possession of the property replevi der a mortgage given by one of the pa

Digitized by Google

on partnership property to secure his individual debt; (3) that the court erred in deciding that the defendant was entitled to the possession of the property replevied in said case, by virtue of said mortgage, because none of the property replevied was covered by said mortgage, or described therein; (4) that the court erred in deciding said case for the defendant, because said decision was against the evidence and the weight thereof; (5) that the court erred in deciding that the defendant was entitled to the possession of said property under said mortgage given by Atkinson to secure his individual debt on the partnership property as against the copartnership.

We think the first and third points, which may properly be considered together, taken by the plaintiffs' counsel, should be sustained; for while it is true that parol evidence may be admitted to identify property which is included in the descriptive words of a mortgage, yet property not answering the description therein cannot be shown to be covered thereby, as this would be to extend the scope of the instrument, and thereby vary the terms thereof. And it is a familiar rule of law that a written instrument cannot be varied by parol evidence. The instrument must speak for itself, unless there be a latent ambiguity, which may be explained by such evidence. Sweet v. Stevens, 7 R. I. 379; Hutton v. Arnett, 51 Ill. 198; Pingrey, Chat. Mortg. § 148. The description used in the mortgage in the present case is not ambiguous as to the class of goods mentioned, but only as to the identification thereof. It covers everything in stock or in process of manufacture in the shop. And while it was clearly competent for either party to show by parol evidence of what that stock consisted, to identify it, and show that it was on the premises when the mortgage was given, yet it was not competent to allow proof to be offered that it was the intention of the mortgagor to include another class of property therein, viz. the machinery and fixtures used in the manufacture of said stock, as this was not simply to explain the uncertain description of the property covered by the mortgage, but to vary the mortgage by including property not covered thereby; for it cannot be said that machinery and fixtures in a jewelry establishment, and much less books of account used in connection therewith, can be embraced in the phrase, "all articles and things in stock or in process of manufacture." It is true that Atkinson admits in his testimony that he intended to give Patterson a mortgage on all of the property that he purchased of him; and while it is probable that there was such a mistake in the drawing of the mortgage as would warrant a court of equity in reforming the same, yet, as it now stands, it is clearly insufficient to cover the property replevied. As it is clear, then, that none of the property replevied was covered by said mortgage, it becomes unnecessary to consider the other grounds urged by the plaintiffs in support of their petition for a new trial. Petition granted.

ADDEMAN et al. v. RICE et al.

(Supreme Court of Rhode Island. March 20, 1895.)

WILLS—CONSTRUCTION.

Where, by a codicil, testator recites the gift in the will of an undivided half of his residuary estate to his widow, and declares that she shall instead have an undivided third thereof free and clear from all debts, legacies, expenses of administration, and other charges, she is entitled to one undivided third of testator's personal estate after delivery of specific legacies, the expenses and pecuniary legacies to be paid out of the residue after delivery of the specific legacies and the payment to the widow of her undivided third.

Bill by Joshua M. Addeman and others, executors, against Rebecca R. Rice and others, for the construction of a will.

Edwards & Angell, for complainants. John F. Lonsdale, J. S. G. Cobb, Joseph C. Ely, Herbert Almy, and Cooke & Angell, for respondents.

MATTESON, C. J. The purpose of the first clause of the first codicil was to reduce the share of the estate given to his wife by the testator in his will. He recites in it the gift in the fifth clause of the will of an undivided half of his residuary estate to her in the will in lieu of dower; that, since the making of the will, he had conveyed to her his homestead estate; his intention not to give to her too large a share of his estate; and thereupon declares his will to be that she shall have an undivided third of his residuary estate. Then, as if thinking the reduction to one-third too large a reduction, adds that it is to be "free and clear from the payment of all debts, legacies, expenses of administration, and other charges." This language is explicit. The intention is too plain to be overborne by any argument of a contrary intention derived from the use of the word "residuary." Of course, a residue is necessarily what is left after something has been taken out, and, as used in a will, is ordinarily what remains after the payment of debts, funeral charges, expenses of administration, and legacies; but it is competent for the testator to exonerate a particular portion of his estate from the payment of these, or any of them, and to charge them on other portions of his estate, so that the question in such cases resolves itself into one of the testator's intention. In the present case the intention of the testator is sufficiently plain, so that, if it were necessary, we should feel warranted in rejecting the word "residuary," as having been inaptly or inadvertently used, perhaps because the estate given to Mrs. Rice in the will had been described as an undivided half of the rest and residue of the tes-

Digitized by Google

tator's estate: for not only is the interest which she is to take by the codicil to be free and clear from all debts, legacies, funeral expenses, expenses of administration, and other charges, but the gift of the remaining two-thirds of the testator's estate to his son and daughter is made expressly "after payment of debts, legacies, funeral expenses, and expenses of administration therefrom." But it is not necessary to reject the word "residuary." Effect may be given to it by holding that the specific legacies given in the will are to be first taken out of the estate, and that the residue thus created is the residuary estate of which an undivided third is given to his widow. The testator, in exonerating the share given to her from the burdens specified, had in contemplation merely what would have to be paid out for these purposes, and therefore meant to include in the word "legacies" pecuniary legacies only, and not specific legacies, and accordingly described the estate which remained outside of the specific legacies as residuary estate.

We are of the opinion, therefore, and instruct the complainants: (1) That Mrs. Rice is entitled to one undivided third of the testator's entire personal estate, after delivery of the specific legacies; (2) that the testator's debts, funeral expenses, expenses of administration, and pecuniary legacies are to be paid out of the residuum after delivery of the specific legacies and the payment to Mrs. Rice of her undivided third of the estate, as stated; (3) that the respondents George A. Rice and Lucy M. Hayward are entitled, in equal shares, to what shall remain after the delivery and payments mentioned in the two preceding clauses have been made; (4) that the complainants shall apply and distribute the fund in their hands to the payments and in the order specified, except that, if the sums which would otherwise be paid to George A. Rice and Lucy M. Hayward shall be insufficient for the payment of the testator's debts, funeral expenses, and expenses of administration, these sums shall be first applied to such payment, and sufficient money shall be taken from the share of Mrs. Rice to make up any deficiency.

MATHEWSON v. HAWKINS, Town Treasurer.

(Supreme Court of Rhode Island. March 11, 1895.)

LIABILITY OF TOWN—CONTRACT FOR BRIDGE.

A contract for the construction of a bridge entered into by the bridge surveyor of a town without the town council ever having by vote defined his duties or powers or ratified the contract, and without any appropriation ever having been made for the bridge, is not binding upon the town, under Pub. St. c. 65, §§ 3–10, 33, which define and limit the powers and duties of surveyors of highways.

Action by Fred L. Mathewson against Philip G. Hawkins, town treasurer, to recover money due on a contract for the construction of a bridge in the town of Burrill There was a verdict for plaintiff, and fendant petitions for a new trial. Gra

James Harris, for plaintiff. Stone & joy, for defendant.

TILLINGHAST, J. This is an actio assumpsit based on the following contra writing, viz.: "This agreement, made an tered into this 20th day of September, 1890, between Fred L. Mathewson, of town of Burrillville, in the county of P dence and state of Rhode Island, and W. Wood, bridge surveyor of the tow Burrillville, county and state aforesaid, nesseth: That the said Mathewson agre furnish and lay the stone for three pier the Harrisville bridge, so called, near mill of Wm. Tinkham, in Harrisville cording to plans and specifications h annexed, and to have said piers comp within a reasonable time after the ren of old bridge. It is further agreed tha said Otis W. Wood, as bridge surveyo the town of Burrillville, will pay to the Fred L. Mathewson the sum of three dred dollars on the completion of said [Sgd.] Otis W. Wood, Surveyor of Br for the Town of Burrillville. [Sgd.] L. Mathewson. Specifications for Pier Harrisville Bridge. Piers to be bui granite rubble, well laid, to be 22 ft. lo ft. thick on bottom, and 2 ft. on top; 10 feet high, or enough to bring new b to the same level as old one, with sui cut water on the upper end of each said Mathewson to have the privilege o ing all stone that are suitable, that are in the river and old pier." At the tri the case in the common pleas division plaintiff offered evidence to the effect in the year 1890 the defendant town of rillville, in town meeting, elected one W. Wood surveyor of bridges; that it been the custom of said town for some previous to annually elect or appoint an officer or agent; that the bridges o town of certain dimensions had been ke repair by him; that he had from tin time contracted debts for material and in connection with the repair of said bri which debts had been paid, by order o town council, out of the town treasury; he informally conferred with the town cil of said town while in session abou condition of the bridge in question, s ing them a piece of the planking th which was defective, and that, after ta the matter over with him and others were present, they took no action thereon simply told him to go ahead and fix it, w upon he entered into the contract afore and that in pursuance thereof the tiff commenced to carry it out by cu some stone for the piers mentioned in specifications thereof; that shortly wards the plaintiff was requested by Wood to cease work until the follo

Digitized by Google

spring, in connection with the carrying out of his contract, which request was complied with; and that before anything further was done by the plaintiff the town decided to build a new iron bridge to take the place of the old one. The proof also shows that said Otis W. Wood was removed from his office or position of surveyor of bridges by the town council on January 29, 1891, and that another man was appointed to succeed him; and the proof does not show that either the town or the town council ever ratified the acts of said Wood in the making of said contract. It does not show that either the town or the town council ever passed any vote prescribing or defining the duties or powers of the surveyor of bridges. The proof further shows that no appropriation was ever made either by the town or the town council for the building or repairing of the bridge in question, and that neither the town nor the town council had any knowledge of the making of said contract with the plaintiff until some time after the making thereof. Said contract, together with the evidence offered in relation thereto, shows that it was not a contract to repair the bridge in question, but to construct a new bridge in place thereof. In this state of the proof, the defendant's counsel requested the court to charge the jury, among other things, "that, under his office as bridge surveyor, Otis W. Wood had no authority to enter into the contract in suit so as to bind the town in its corporate capacity." This request was refused, and the presiding justice charged the jury as follows: "The main question in the case, gentlemen, is a question of law, which is not for you to determine; that is to say, whether or not the person who made this contract was authorized by the town to make a contract of this character; and upon this point, the evidence being uncontradicted, it is for the court to tell you that, in the condition of affairs shown by the uncontradicted evidence, the person who signed this contract in behalf of the town had legal authority to do so." To this charge the defendant duly excepted. We think said request should have been granted, and that the charge as given was error. Otis W. Wood, at the most, was merely the agent of the town, under the direction of the town council, for the purpose of keeping certain bridges in repair; he practically occupying the position of surveyor of highways for said town, so far as keeping said bridges in repair was concerned, although there is no such officer as bridge surveyor known to our statutes. It was the duty of the town, under Pub. St. R. I. c. 65, § 1, to keep its highways and bridges in repair at the proper charge and expense of said town, under the care and direction of the surveyor of highways; and, even assuming that said Wood had all the powers of a surveyor of highways in the premises, yet he had no authority to bind the town by any contract that he should make, unless expressly authorized so to do. It will be seen by an examination of Pub. St. R. I. c. 65, §§ 3–10, 33, that the powers and duties of towns, and of surveyors of highways therein, relating to the repair of highways, are very clearly defined, and limited; and it follows that, in the absence of express authority from the town or town council, a surveyor of highways can only do those things which the statute authorizes him to do; and, indeed, it may be doubted whether the town council even can authorize him to incur a liability on the part of the town for the doing of any work on the highways, except in certain cases of emergency, unless an appropriation for the doing thereof shall have been first made by the town therefor. See Pub. St. R. I. c. 65, § 10. But, however this may be, he certainly has no authority by virtue of his office to incur any such liability as that now in question. The taxpaying voters of the several towns have the right to determine how much shall be expended on the highways and bridges within the respective limits thereof, and when and at what cost new bridges shall be constructed and erected. See Pub. St. R. I. c. 34, § 5, concerning the power of towns to make appropriations for building, repairing, and amending of bridges. In the case at bar the only authority, if such it may be called, which said Wood had to construct the bridge in question, was by virtue of an informal talk with members of the town council while in session; and it does not appear from this, even, that the council contemplated the erection of a new bridge, but rather the repairing of the old one. But, even assuming that they did, and that they had passed a formal vote to that effect, it would not have authorized him to make the contract in question and bind the town thereby. See State v. White, 16 R. I. 591, 18 Atl. 179, 1038. Surveyors of highways being statutory officers, appointed by the town, "to perform a public service in which the town has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community, such officer cannot be regarded as an agent for whose acts or contracts the town can be held liable." Hafford v. New Bedford, 16 Gray, 297; Walcot v. Swampscott, 1 Allen, 101; City of Detroit v. Blackeby, 21 Mich. 84; Aldrich v. Tripp, 11 R. I. 141; Smart v. Town of Johnston, 17 R. I. 778, 24 Atl. 830; Dodge v. Granger, 17 R. I. 664, 24 Atl. 100; Dill. Mun. Corp. (4th Ed.) § 974. See, also, sections 4 and 5 as to power of officers or agents to bind the town by contract. Speaking in a case against a municipal corporation (Clark v. City of Des Moines, 19 Iowa, 199), Dillon, J., said: "The general principle of law is well known and definitely settled that the agents, officers, or even the

Digitized by Google

city council of a municipal corporation, cannot bind the corporation when they transcend their lawful and legitimate powers. This doctrine rests upon this reasonable ground: The body corporate is constituted of all of the inhabitants within the corporate limits. The inhabitants are the corporators. The officers of the corporation, including the legislative or governing body, are merely the public agents of the corporators. Their duties and their powers are prescribed by statute. Every one, therefore, may know the nature of these duties and the extent of these powers. These considerations, as well as the dangerous nature of the opposite doctrine, demonstrate the reasonableness and necessity of the rule that the corporation is bound only when its agents, by whom, from the very necessities of its being it must act, if it acts at all, keep within the limits of their authority." See, also, Farnsworth v. Pawtucket, 13 R. I. 88; Meechem, Pub. Off. §§ 829, 830, 834. To hold that the contract in question is binding on the defendant town would be equivalent to holding that any surveyor of highways, or person occupying a similar position, has the power to construct and erect therein such bridges and at such cost as he alone shall see fit, and that the town must pay the bills. But we think it is clear that no such power exists. The defendant's petition for a new trial is granted.

NIANTIC MILLS CO. v. RIVERSIDE & OSWEGO MILLS et al.

(Supreme Court of Rhode Island. March 21, 1895.)

INSOLVENCY—ENFORCEMENT OF CLAIM—WAIVER—ESTOPPEL.

1. Under Pub. Laws 1887, c. 631, as amended by Pub. Laws 1889, c. 820, providing that, when the assignee of an insolvent debtor disallows a claim, the claimant shall "bring suit" to test the validity thereof, the validity of a disallowed claim must be tested in equity, and not by an action at law.

2. Where the validity of a disallowed claim against an insolvent's estate was sought to be established by an action at law, the fact that for four years during which the action was in court the assignee did not object to its form does not constitute a waiver of the irregularity.

3. A party to an agreed statement of facts is not estopped by statements in the preliminary recital.

Action by the Niantic Mills Company against the Riverside & Oswego Mills and others. There was a decision for plaintiff, and defendants petition for a new trial. Granted.

John D. Thurston, Hartley F. Atwood, Hyde, Dickinson & Howe, and Hahn & Cushing, for plaintiff. Robert W. Burbank, John C. Coombs, C. H. Hanson, and Stephen A. Foster, for defendants.

STINESS, J. The first group of exceptions, relating to the form of action, raises the question whether an action at law can be br against an assignee for the benefit of cre to test the validity of a claim which h disallowed. Pub. Laws 1887, c. 63 amended by Pub. Laws 1889, c. 820, pr that a person having a claim against solvent debtor shall present it to the ass and, if he disallows it, the claimant within 60 days from notice, bring suit t the validity of the claim, or be barred any participation in the assigned esta is urged by the defendants, in suppo their exceptions, that the remedy thus is in equity, and not at law, and that n dict or judgment can be rendered again assignees, because they have made no ise. The purpose of the statute is plai is to aid assignees, by enabling them duce to a certainty the claims for whic may be liable, and by compelling proof of a doubtful claim. Before the ute, an assignee could have been ser hindered in the execution of his trust had no means of determining the valid a claim, and he could not compel a cla to establish it. He had, therefore, eit distribute to one who might not be e or to refuse to do so at his peril. Bu court had given relief in equity, to a li extent, in cases like this, e. g. upon a b the assignee for instructions (Allen v. ner, 7 R. I. 22), and upon a bill by cre to establish a lien on funds in the han the assignee (Smith v. Millett, 12 R. Then came the statute to require that s steps be taken to establish disputed c The assignee is to give notice that he lows a claim, and within 60 days the ant is to bring suit against the assig test the validity of his claim. Here w met with the question, what sort of does this mean? The respondents urg it must mean a suit in equity, because t the usual and technical designation of ceeding in equity, as "action" is at While this is the common use of the we do not think the words "suit" and tion" are used with such exactness in st as to warrant the conclusion that the only to be taken in this limited sense deed, they are often used in applicati both classes of cases, and we so find th our statutes. Pub. St. c. 204, § 1; Id. § 33. We have already held that unde statute it is proper to bring a suit in e because it seeks to enforce a trust, whic primary object of equity jurisdiction. born v. Colwell, 17 R. I. 196, 21 Atl Peabody v. Tenney, Index OO, 5, 30 At We did not say—for we did not need to that an action at law could not be br In Stone v. Corcoran, 17 R. I. 759, 2 781, the provision that no action sha brought against an executor or adminis within one year after his appointmen held to mean an action at law, because, ly, it could not have been intended to immunity for a year from injunction or

Digitized by Google

edings in equity. These decisions were ased upon an inherent meaning of the s used in the statutes, but because of ropriety of the remedy in one case and vident purpose of the statute in the oth- The question before us must be solved e same way. The word "suit" is the general term, and is broad enough to either form of proceeding; but not so rovisions of the statute. There is no pro- for a merely declaratory judgment for mount due, or judgment against assets y. At law, it must be a personal judg- against the assignee, for which he must ersonally liable, or else the court must legislate into the statute something by cation which is not there, or vary the ion form of judgment so as to make it nt only to a declaratory decree in equi- Under a judgment at law, execution l run against the assignee individually, the court should change it to run st the trust estate, if this could be done, t could then be levied upon the estate s full amount and in advance of a divi- In short, if the statute contemplated tion at law, since it could not mean to the assignee personally liable, the court depart from its form of judgment and tion, and work out a method of pro- e against him as trustee, which, if it be done, would be utterly foreign to stablished practice at law, and would, all, amount only to a decree in equity force the trust. We cannot think that roceeding at law was contemplated. The inery of the law court is not adapted to esult to be reached, and none is pro- On the other hand, the procedure in is exactly fitted to such a case,—it had so used before; the subject-matter is a recognized branch of equity juris- n. And so we think the suit in equity have been the one intended by the e. It is claimed, however, that the de- nts are estopped from objecting to the of action because they have neither ed nor objected to it for the four years g which the case has been in court, and se it is said in the agreed statement of that suit was duly brought in accord- with the statute on the disallowed claim. is no estoppel by the agreement. The ment is contained in a preliminary re- and not in the facts agreed. It was ev- y not intended to be an admission of alidity of the suit, for this was the first ion at the trial, upon the reading of the d statement of facts. Where there has long delay in objecting to an irregular- nd the case is in such condition that the can proceed with it properly, the irreg- y will be deemed to have been waived, he case will go on. But that rule can- e applied to this case, for here the whole le is in going on. We do not see how to and hence we are constrained to hold he first two requests of the defendants should have been allowed. As this disposes of the case, it is not necessary to discuss the other questions raised. New trial granted.

DUFFY v. WEBSTER.

(Supreme Court of Rhode Island. March 26, 1895.)

NEW TRIAL—PLACE OF FILING.

Under Judiciary Act, c. 31, § 6, a petition for a new trial, on the ground that one of the jurors was an interested party, should be filed in the common pleas division of the court.

Action by Charles G. Duffy against George E. Webster, clerk, to require the defendant to receive and file plaintiff's petition for a new trial. Decree for plaintiff.

Bassett & Mitchell, for complainant. G. E. Webster, in pro. per.

MATTESON, C. J. The judiciary act (chapter 31, § 6) provides that a party entitled to file a petition for a new trial under the preceding section of the chapter, to obtain it, shall take certain steps in the common pleas division where the case was tried, one of which, specified in the third clause of section 6, is the filing of a petition for a new trial, setting forth specifically the grounds of such new trial. The question for decision in the present proceeding is whether such petition should be filed in the common pleas division or in the appellate division, by which it is to be decided. Inasmuch as the section directs that the steps necessary for obtaining a new trial shall be taken in the common pleas division, and the filing of a petition is enumerated among the steps to be taken, we are of the opinion that the petition is to be filed in that division. It would seem to be a somewhat incongruous proceeding for a petition filed in the common pleas division to be addressed to the appellate division, and equally incongruous for a petition addressed to the common pleas division to be considered and decided by the appellate division. To obviate this apparent incongruity, the petition, instead of being formally addressed to either division, may be headed as one to be filed in the common pleas division, and, after stating the title of the case and its number, may proceed to pray for a new trial, substantially as in the following form, viz.: "Supreme Court, Common Pleas Division. Session, 189–. Sc. A. B. v. C. D. Decn. No. ——. And now, after verdict (or decision, as the case may be), comes A. B., the plaintiff (or C. D., the defendant), and prays that a new trial be granted him, and, as grounds therefor, alleges: (Here insert the specific grounds, numbering them 1, 2, 3, etc.)." When the petition has been filed in the common pleas division, the other steps required by clauses 1 and 2 of section 6 having been duly taken, the fourth clause of that section directs the

Digitized by Google

clerk of that division to certify all the papers in the case, which includes the petition, to the appellate division for consideration and decision, as provided in section 11 of the chapter.

The suit in which the petitioner desires to file his petition for a new trial was a case in which he was plaintiff, and the city treasurer of Providence defendant. The ground of the petition was that one of the jurors was a taxpayer of Providence, and therefore disqualified to sit as a juror in the case, because interested in the result. The respondent suggests that for such a ground the petitioner should have proceeded under section 2 of said chapter, instead of section 6. Doubtless, the petitioner might have proceeded under section 2, and would have been compelled to do so had he not discovered the disqualification of the juror in season to have taken the necessary steps to entitle him to proceed under section 6; but, having seasonably proceeded under the latter section, he was entitled to file his petition, for section 5 provides that if a case has been tried by a jury, and the plaintiff deems himself entitled to a new trial, for reasons for which a new trial is usually granted at common law, he shall be entitled to have his petition for a new trial heard before and decided by the appellate division on complying with the course of procedure set forth in section 6. The disqualification of a juror by reason of interest is a good ground for new trial at common law. We are of the opinion that the respondent should have received and filed the petition for a new trial.

COLLINS v. LAVELLE.

(Supreme Court of Rhode Island. March 26, 1895.)

DAMAGES—BREACH OF CONTRACT.

1. In an action for breach of contract to sell a store which plaintiff had entered under the contract, evidence as to the profits plaintiff realized from week to week during the time he carried on the business was admissible to show the value of the business lost by the breach.

2. In an action for breach of contract to sell a store which plaintiff had entered under the agreement, where the average profits of the business while plaintiff was in possession were $20 per week, and plaintiff had paid $405 of the price, $600 damages are not excessive.

Action by David Collins against James Lavelle for breach of contract. Judgment for plaintiff, and defendant petitions for a new trial. Denied.

Tanner & Gannon and John E. Conley, for plaintiff. J. J. Hahn and Page & Owen, for defendant.

TILLINGHAST, J. An examination of the evidence in this case fails to satisfy us that the verdict of the jury is not sustained thereby. Indeed, there is but very little conflict therein as to the terms of the co upon which the action is based, or as subsequent conduct of the parties th der. We do not think the rulings com ed of were erroneous. It was clearly c tent for the plaintiff to offer evidence the profits he had realized from we week during the time he had carried business at the store which he had chased, by bargain, of which busines store the defendant, by violating his tract, had deprived him, for the purp showing the amount of damages whi had sustained. The evidence was adm not to show purely future, and hence jectural or speculative, profits, but to the actual value of the business lost b plaintiff by reason of the breach of th tract of sale by the defendant. And well settled that in assessing the da caused by the interruption or destruct an established business, proof showin amount of such business, and the prof alized therefrom prior to the interr or stoppage thereof, is admissible; f said by the court in Society v. Harwoo Ind. 442, 26 N. E. 182, cited by defen counsel: "This affords some reasonable to reckon from, as, in case of an estab business, it is reasonable to presume if pursued in the same manner, it wil tinue to yield a like profit." See, also, mons v. Brown, 5 R. I. 299; Goel Hough, 26 Minn. 252, 2 N. W. 847; man v. Kirby, 49 Ill. 211; Sedg. Dam brary Ed.) 161; Suth. Dam. §§ 52, 5 and cases cited; City of Terre Hau Hudnut, 112 Ind. 552–559, 13 N. E. Griffin v. Colver, 16 N. Y. 489; Manv Telegraph Co., 37 Iowa, 214; Fox v. ing, 7 Cush. 516. The cases relied on fendant's counsel in support of his obj to the admission of said evidence, Braunsdorf v. Fellner, 76 Wis. 1, 45 97; Taylor Manuf'g Co. v. Hatcher Ma Co., 39 Fed. 440; Howard v. Manufac Co., 139 U. S. 199, 11 Sup. Ct. 500; Ra Co. v. Hutchins, 31 Neb. 572, 48 N. W. are cases which hold, in accordance wi almost uniform adjudications upon th ject, that evidence of purely prospect speculative profits cannot, as a genera be offered for the purpose of proving ages, and particularly that such dama would have been realized by the pl from the independent and collateral takings, although entered into in conseq and on the faith of the principal contra too uncertain and remote to be take consideration as part of the damages sioned by the breach of the particula tract in suit. But they all recogniz right of the plaintiff, in cases where hi ness has been interfered with or destroy a breach of contract on the part of t fendant, or by the wrongful act of t fendant, to show the extent of said bus and the profits arising therefrom for

Digitized by Google

ble period next preceding the time of breach or wrongful act. Thus, in How- . Manufacturing Co., Mr. Justice Lamar, elivering the opinion of the court, said: grounds upon which the general rule of ding profits in estimating damages rests (1) That in the greater number of cases expected profits are too dependent upon erous uncertain and changing contingen- to constitute a definite and trustworthy ure of actual damage; (2) because such of profits is ordinarily remote, and not, matter of course, the direct and imme- result of the nonfulfillment of the con- ; (3) and because most frequently the gement to pay such loss of profits, in of default in the performance, is not a of the contract itself, nor can it be im- from its nature and terms. * * * t is equally well settled that the profits h would have been realized had the con- been performed, and which have been nted by its breach, are included in the ges to be recovered in every case where profits are not open to the objection of rtainty or of remoteness, or where, from xpress or implied terms of the contract , or the special circumstances under h it was made, it may be reasonably med that they were within the intent mutual understanding of both parties at ime it was entered into." In the case r it is clear that quite a large part of the ges sustained by the plaintiff consisted e destruction of his business, and the equent loss thereby of his income from profits thereof, and hence were such as fairly and reasonably be considered as rally arising from the said breach of the dant's contract; and, unless he is al- d to recover therefor, he will be denied full and fair compensation to which the entitles him. For the law says that one who breaks a contract shall pay the natural consequences arising from reach thereof, which must include gains nted as well as losses sustained, pro- d they are reasonably certain, and such ight naturally be expected to follow the ch. The evidence offered by the defend- as to his prior experience with the plain- n another and entirely distinct business ure was properly ruled out, as it mani- y could have no bearing on the questions sue in this case. The defendant makes point that the damages awarded by the ($600) are excessive. We are not satis- hat this is so. The proof shows that the s receipts of the store were from $7 to per day when plaintiff purchased it as said, and that the same had increased r his management to $75 to $120 a week n he left it; the average profits for the e time being at least $20 a week. There idence, also, that the plaintiff had paid on account of the agreed price of the and business, including the license, h sum the defendant refused to repay n he turned the plaintiff out of said store; and we cannot say that $600 is an excessive amount for the breach of a contract which resulted in the total destruction of a business that yielded this income, together with the loss of said sum of $405, advanced as aforesaid. Petition for new trial denied, and case remitted to the common pleas division, with direction to enter judgment on the verdict.

MUNICIPAL COURT OF CITY OF PROVIDENCE v. McELROY et al.

(Supreme Court of Rhode Island. March 26, 1895.)

RULING ON DEMURRER—PLEADING OVER.

Upon the overruling of a demurrer to the declaration, the defendant may plead over.

Action by the municipal court of city of Providence against Catherine A. McElroy and others upon an administratrix's bond. Judgment for plaintiff, and defendants petition for a new trial. Granted.

For opinion overruling demurrer, see 30 Atl. 796.

Irving Champlin, Harry C. Curtis, and John T. Blodgett, for plaintiff. Hugh J. Carroll, for defendants.

PER CURIAM. We are of the opinion that a new trial should be granted, in order to permit the defendants to file their plea that the estate of the deceased had been declared insolvent, and the proceedings thereon. The defendants styled their plea a "second demurrer" instead of a "plea," though it was in fact a plea. The circumstance that the plea was styled a "second demurrer" apparently misled the common pleas division. If it had been a second demurrer, the action of the court in declining to permit it to be filed would have been correct; but, as it was a plea, the defendants should have been permitted to file it. Their demurrer having been overruled, they were entitled, under our practice, to plead over.

MURPHY v. EDDY.

(Supreme Court of Rhode Island. March 26, 1895.)

CHATTEL MORTGAGE—REDEMPTION BY MORTGAGOR'S EXECUTOR.

1. Pub. St. c. 176, § 11, giving a chattel mortgagor 60 days, merely, after a condition of the mortgage has been broken, within which to redeem, the administrator of a deceased mortgagor, appointed after the breach of a condition, cannot redeem after 60 days subsequent to his appointment.

2. A bill for an account by an administrator of a deceased mortgagor against the mortgagee, alleging merely the existence of complicated accounts between deceased and respondent, is insufficient.

Bill by Thomas F. Murphy, administrator, against Jesse P. Eddy. Demurrer sustained.

Digitized by Google

Dennis J. Holland and John M. Brennan, for complainant. S. S. Lapham, for respondent.

MATTESON, C. J. We do not think that the bill can be maintained either for an account of the mortgaged estate, or for an accounting generally. It was filed January 7, 1895. It shows that the mortgagor, Wilson, died January 8, 1891; that subsequently, in 1891, the respondent, as mortgagee, took possession of the mortgaged property, and held it for several years; that the complainant was appointed administrator of the estate of the deceased May 16, 1893, and qualified himself as such. Pub. St. R. I. c. 176, § 11, provides that "whenever the condition of any mortgage of personal property has been broken the mortgagor or any person lawfully claiming or holding under him may redeem the same at any time within sixty days thereafter, unless the property shall in the meantime have been sold in pursuance of the contract between the parties." Assuming that the 60 days allowed by the statute for redemption at law would not run so long as there was no administrator on the estate of the deceased, they did begin to run immediately on the appointment and qualification of the complainant. No equity is set forth in the bill which would permit a redemption at a later day. In the absence of such equity, the mortgage must be regarded as having been foreclosed, and the right of redemption barred, at the end of the 60 days next subsequent to the appointment and qualification of the complainant as administrator. It follows that the respondent thereupon became the absolute owner of the property which had been conveyed in the mortgage, and therefore no longer liable to account for it, even though, as alleged, it was more valuable than the amount due on the mortgage.

The bill prays for no discovery, but merely avers, in general terms, the existence of intricate and complicated accounts between the deceased and the respondent. Such an averment is not sufficient to support a bill for an account. McCulla v. Beadleston, 17 R. I. 20, 26, 20 Atl. 11. Demurrer sustained.

BURRILL et al. v. GARST.

(Supreme Court of Rhode Island. March 21, 1895.)

SPECIFIC PERFORMANCE—PARTIES.

In an action to compel conveyance to complainants of certain property, one who has disposed of the legal title to all his interest in the property, and against whom no relief is demanded, should not be made a party to the action.

Bill by Alice E. Burrill, by her next friend, and another, against Sebastian Garst. Demurrer to bill. Overruled.

Mowry & Scott, for complainants. S. S. Lapham and Bassett & Mitchell, for respondent.

MATTESON, C. J. The general r
equity as to parties is that all perso
terested in the subject-matter of the s
in the object to be attained by it ou
be made parties either as complainar
respondents. Story, Eq. Pl. §§ 72, 13
De Wolf v. De Wolf, 4 R. I. 450, 454;
v. Seton, 1 Pet. 299, 306; Van Keu
McLaughlin, 21 N. J. Eq. 163, 165. I
ley v. Inglee, 2 Paige, 278, the rule is
as follows: "Persons are necessary p
when no decree can be made respecti
subject-matter of litigation until they a
fore the court, either as complainar
defendants; or where the defendan
ready before the court have such an in
in having them made parties as to aut
them to object to proceeding without
parties. There is also another class of
where persons who are not absolutely
sary as parties may be made defenda
the election of the complainant." In
v. Watts, 6 Wheat. 559, the rule is
negatively: "No one need be made a
complainant in whom there exists no
est, and no one a party defendant
whom nothing is demanded." The pu
of the rule is to promote the convenie
ministration of justice, and to prev
multiplicity of suits. It rests to a cons
ble degree in the discretion of the cour
should be restricted to defendants who
terests are involved in the issue, and
be affected by the decree. Bank v.
1 Pet. 306. We see no reason for req
the Rhode Island Hospital Trust Cor
to be made a respondent. According
allegations of the bill, it has no inter
the property to which the suit relates
ing conveyed the interest which it toc
der the will of Elethear Burrill to t
spondent. The bill does not seek t
aside the deed from it to the respondent
avers that it passed to the respondent
ing but a naked legal title to the pro
of which the complainants seek a co
ance to themselves. It contains no s
tion against the Rhode Island Ho
Trust Company which could be mad
basis of any relief against it, and no
against it is demanded. By the alleg
of the bill, it also appears that the
Island Hospital Trust Company sold
the right, title, and interest of Elethear
rill in the land at her decease, and th
respondent prior to the sale had expre
tice of the equitable ownership of the
plainants. If there are equities existi
favor of the respondent against the
Island Hospital Trust Company, as ass
by counsel in argument, though none
stated, they do not appear in the bill
do not, so far as appears, affect the
plainants; and, if not, they ought not
involved in litigation over matters whi
not concern them, and which can be
appropriately considered in another su
tween the parties directly interested
in. Demurrer overruled.

Digitized by Google

YOR AND CITY COUNCIL OF BALTIMORE et al. *v.* KEELEY INSTITUTE OF MARYLAND.

ourt of Appeals of Maryland. March 27, 1895.)

STITUTIONAL LAW — ACTION FOR TREATMENT AND CURE OF HABITUAL DRUNKARDS—STATUTE—DEFECTIVE TITLE.

1. The provisions of Act 1894, c. 274, relat- to the treatment of habitual drunkards, that may be sent, at the expense of the city of timore, to a state institution for treatment, n ex parte proceeding similar to that provided in case of insane paupers, is not unconstitu- al on the ground that the legislature has no er to compel the city, without its consent, to its citizens for the treatment of habitual kards.

2. The treatment and cure of habitual drunk- constitute but one subject in Act 1894, c. the title to which states that it is "An act rovide for the treatment and cure of habitu- runkards"; and the act is not unconstitu- al as containing two subjects in its title, reas the body of the act mentions only the atment" and not the "cure" of drunkards.

ppeal from superior court of Baltimore .

etition by the Keeley Institute of Mary- d against the mayor and city council of timore and others to compel defendants ay the amount of a judgment due under ree of the circuit court. From a pro na order of the superior court for the is- nce of the writ, defendants appeal. Af- ed.

rgued before ROBINSON, C. J., and YAN, BRISCOE, McSHERRY, FOWLER, BERTS, and BOYD, JJ.

homas G. Hayes, for appellants. Fred. Story, for appellee.

OBERTS, J. The appeal in this case is en from a pro forma order of the superior rt of Baltimore city, on a case stated for opinion and order of that court, in a ceeding instituted by the appellee to ob- the writ of mandamus to compel the ap- ant to pay to the appellee, under a de- e of the circuit court of Baltimore city, sum of $100 for the treatment of John P. an, an habitual drunkard residing in said ; the sole object of this appeal being btain from this court a determination of validity vel non of the act of the general embly of Maryland (chapter 247), passed uary session, 1894, entitled "An act to vide for the treatment and cure of habitu- runkards." The act, by its first section, vides that any inhabitant of this state is of kin to or a friend of an habitual nkard, as defined in the fifth section of act, may apply by petition to the circuit rt of the county or the circuit court of timore city, where such drunkard resides, leave to send such drunkard, at the ex- se of the county or city, as the case may to an institution located in Maryland for medical treatment of drunkenness, as court may designate. The first section further provides that the petition shall be verified by the applicant, and contain the name, age, and condition of the habitual drunkard, and show that neither he nor his petitioning kin is financially able to incur the expense of his cure; and, further, that said petition shall contain the written agreement of said drunkard to take such treatment, and obey the rules of the institution to which he may be sent. The second section provides that the court shall be satisfied of the truth of the facts stated in the petition before sending the drunkard to an institution, and that the charge for the treatment shall in no case exceed the sum of $100; and it then further provides that the court shall thereupon order the expense of such treatment to be paid out of the treasury of the county or the city of Baltimore, as the case may be, in the same manner as other claims for the administration of justice are paid. The third section has no direct bearing on this subject in controversy here. The fourth section provides that the officers of the institution to which a drunkard is sent shall become sworn officers, without compensation, of the court sending the drunkard for treatment. The fifth section defines a drunkard to be "any person who has acquired the habit of using spirituous, malt or fermented liquors, cocaine or other narcotics to such a degree as to deprive him or her of reasonable self-control." This statement gives substantially all the material facts necessary for the purposes of this controversy.

It is contended that the act is in conflict with the constitution of this state, for that the legislature has no power to compel the city of Baltimore, without its consent, to tax its citizens for the treatment of habitual drunkards at an inebriate asylum. By the provisions of section 47, art. 16, of the Code, whenever, by petition under oath, any person shall be alleged to be a drunkard, incapable of taking care of himself or herself, or his or her property, any circuit court of this state, and also the circuit court of Baltimore city, shall have the power, in its discretion, on such preliminary examination or inquiry as it may think proper to make ex parte, to issue a warrant to the sheriff of the county or city to arrest and bring the person so charged before such court. Then follows the summons of a jury in like manner with the established practice in cases of lunatic paupers, under article 59 of Code. Under either article of the Code, the proceeding is ex parte, and the questions to be passed upon are submitted to the finding of a jury, instead of the court. These two provisions of the Code have been in force in this state for many years, and have been, especially with respect to lunatic paupers, of well-recognized service. The law now under consideration, in so far as it relates to the liberty of the drunkard, does not require the intervention of a jury, for the reason that he voluntarily and in advance agrees in writing that

Digitized by Google

the court may send him to any institution in the state for the medical treatment of drunkenness. We are very clear that the law does not in the remotest possible sense curtail any right of the drunkard. Do the provisions of the law requiring the city to pay for the medical treatment of the drunkard improperly or injuriously affect any right of the city of Baltimore, any more than the tax which is imposed for the maintenance of courts, civil and criminal, is found to be, as all other taxes are, an exaction for the benefit of the public good? We fail to recognize the force of this objection, especially in its application to the lunatic paupers of the state. The principle invoked has just the same force in its application to the condition of an habitual drunkard as to a lunatic pauper. The law is general in its application, and is intended alike for city and county. The ninth section of article 11 of the constitution declares that it "shall not be so construed, or taken as to make the political corporation of Baltimore, independent of or free from the control which the general assembly of Maryland has over all such corporations in the state." This court, in Regents' Case, 9 Gill & J. 397, says: "A public corporation is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government,—an instrument of the government, subject to the control of the legislature, and its members officers of the government for the administration or discharge of public duties, as in cases of cities, towns," etc. And, again, in the same case (fol. 401), it says: "Public corporations are to be governed according to the laws of the land, and the government has the sole right, as trustee of the public interest, to inspect, regulate, control, and direct the corporation, its funds and franchises." While it is not claimed that the legislature has absolute and unlimited control over the appellant, there can be no doubt as to the power of the legislature to require the payment by the city of a sum requisite to defray the expense of maintenance and medical treatment of habitual drunkards residing within the corporate limits, and committed under the provisions of the law now under consideration. If the legislature has authority—which we do not question—to treat habitual drunkards as a class of citizens who are entitled to be restrained or medically cared for by placing them in institutions for treatment, it would naturally follow that, in so far as the law applies to the citizens of Baltimore, the expense of the treatment of its habitual drunkards ought reasonably to be borne by it. It was held, as already stated, in Regents' Case, supra, that the government "has the sole right, as trustee of the public interest, to inspect, regulate, control, and direct the corporation, its funds and franchises." It is one of the gravest conditions of the century in which we live, and of which legisla have been compelled to make observa that the victims of the excessive use o coholic stimulants, narcotics, etc., grown to be legion, not of healthy, ro manhood, but of broken, debauched, and crepit men, against whom and for whom a class, public sentiment has a right to peal to the legislature for protection. Bacon has said "that all the crimes on e do not destroy so many of the human nor alienate so much property, as drun ness." Mr. Justice Harlan, delivering opinion of court in Mugler v. State, 123 623, 8 Sup. Ct. 273, says: "There is no tification for holding that the state, u the guise merely of police regulations, is aiming to deprive the citizen of his co tutional rights; for we cannot shut ou view the fact, within the knowledge of that the public health, the public morals, the public safety may be endangered by use of intoxicating drinks; nor the fact tablished by statistics accessible to e one, that the idleness, disorder, pauper and crime existing in the country are some degree at least, traceable to this e Mr. Tiedeman, in his work on the Limitat of Police Power, says: "It is the polic some states, notably New York, to estab asylums for the inebriates, where habi drunkards are received and subjected course of medical treatment which is ca lated to effect a cure of the disease of dr ing, as it is claimed to be. A large par human suffering is the almost direct re of drunkenness, and it is certainly to interest of society to reduce this evil as m as possible. The establishment and m tenance of inebriate asylums can there be lawfully undertaken by the state." think the legislature was possessed of an power to deal with the subject-matter of law; and that in what they did they in respect violated any provision of the con tution of the state or of the United State

There is nothing in the contention that title to the act violates section 29, art. 3 the constitution, which provides that e law enacted by the general assembly s embrace but one subject, which shall be scribed in its title. The title provides the treatment and cure of habitual dru ards, and it is claimed that this cont more than one subject, and that in the pr sions of the act nothing is said about "cu but reference alone is made to the "tr ment," of habitual drunkards. But we th the legislature must have been influen by the conviction that the cure would some instances, at least, follow the treatm and that cure and treatment constitute one subject. We entertain the same view

In respect to the writ of mandamus, think it properly issued, as the remedy ap priate under the circumstances. It foll that the order must be affirmed. Order firmed, with costs.

Digitized by Google

NFELTER v. MAYOR, ETC., OF BAL-TIMORE.

t of Appeals of Maryland. Feb. 28, 1895.)

IAL NOTICE—ACTION AGAINST CITY—SELEC-OF COURTHOUSE SITE—DELAY IN CONDEMN-G LAND—DAMAGE TO PROPERTY OWNER.

. The court will not take judicial notice of ntents of city ordinances.

. Defendant city passed certain ordinances ling an appropriation for a courthouse, des-ng a site, which included plaintiff's proper-d appointing a committee to purchase the rty, and empowering the committee, if it l fail to agree with the owners of any por-f the property required, to begin condem-proceedings. *Held*, that the passage of ordinances without any execution of them, as plaintiff was concerned, gave him no of action for delay or failure on the part endant in completing the purchase or con-ation of plaintiff's property.

eal from Baltimore city court.

ion by John J. Shanfelter, trading as ffy and Co., against the mayor and city il of Baltimore, for damages for delay npleting purchase and condemnation of rty of plaintiff designated by ordinance condemned for the erection of a new house. From a judgment for defendant, tiff appeals. Affirmed.

ued before ROBINSON, C. J., and AN, McSHERRY, FOWLER, BRIS-PAGE, ROBERTS, and BOYD, JJ.

. Pinkney Whyte and Jos. Whyte, for lant. Wm. S. Bryan, Jr., for appellee.

YD, J. This appeal is from a judgment e Baltimore city court sustaining a de-r of the appellee, the defendant below, declaration. The appellant, who was aintiff below, alleges that he is the les-for a long term of years" of a property n as the "Imperial Hotel," on the square ded by Calvert, St. Paul, Fayette, and gton streets, in the city of Baltimore, square had been selected by the city rities, under certain ordinances passed rsuance of an act of the general assem-f Maryland, for the erection of a new house, and that, although all interests, t the plaintiff's, in said square, had obtained for the purposes mentioned act of assembly and in the ordinance, building committee of the new court-" neglected, delayed, and failed to com-the purchase or condemnation of his in-in said property from the 1st day of 1893, to the time of the institution of uit, although repeatedly requested and ed so to do. He avers that he has been y damaged, injured, obstructed, and diced in his business as hotel keeper, ason of the delay, in the use and enjoy-of his property. The claim intended to esented by the declaration is the right over damages for what is alleged to be reasonable delay in acquiring plaintiff's rty after the passage of the ordinances ing as a site for the new courthouse uare which includes the said hotel prop-erty, notwithstanding the requests and warnings of the plaintiff. It is contended, however, on the part of the city that the declaration is technically defective in not setting out at least the legal import of the ordinances upon which appellant bases his right to recover. They are only referred to by number and dates, and not even the substance of them is given. The court cannot take judicial notice of their contents, and hence it is not informed by the declaration what duties are imposed or powers conferred by them. Without the provisions of the ordinances on which the plaintiff relies being before the court, it is impossible for it to determine whether they impose such duties on the defendant, or render it liable for failure to perform them. We do not think, therefore, that the references to said ordinances are sufficient to comply with the well-established rules of pleading adopted in this state. But, as we would have the power to remand the case so that the declaration could be amended to meet our view as to mere matter of form, which we need not state more fully, we will determine the main question intended to be presented, as it has been fully argued, and the ordinances have been, for the purpose of the argument, treated as if before us. The appellee, having been authorized by an act of assembly, passed Ordinance No. 100, approved October 7, 1892, by which the commissioners of finance were authorized and directed to issue bonds of the city to the amount of $6,000,000 from time to time, as the same might be required, for the purposes therein mentioned. $1,750,000, or so much thereof as might be required, of the proceeds of the sales of said bonds, were directed to be used for the purchase of ground, erecting thereon and properly furnishing a new courthouse and record office. By Ordinance No. 81, approved April 20, 1893, the square above mentioned was selected as the site, and the mayor, comptroller, and register were directed to acquire title to a portion of the property included within the bounds of the square, on which John F. Carter held an option for the sum of $132,500 to be paid out of the $1,750,000. Ordinance No. 83, approved April 20, 1893, authorized the building committee of the new courthouse (to be thereafter appointed), in case it could not agree with the owner or owners of any lot or portion of this square, or any interest therein, or if the owners were under age, etc., to condemn the same, and then minutely prescribed the course of proceeding in the event of condemnation. The second section of that ordinance limited the total amount to be expended by the building committee to $1,617,500, to be paid out of the sum appropriated for the new courthouse, and directed the commissioners of finance to sell from time to time, as the same were needed, as many of said bonds as should be required to supply the said sum. Ordinance No. 108, approved May 1, 1893, named the building committee of the

Digitized by Google

new courthouse, and authorized them to advertise in Baltimore and other cities, inviting the submission of drawings, plans, and specifications. Ordinance No. 187, approved May 25, 1893, further defined the duties and powers of the building committee. It authorized them to employ a competent architect, gave them power to provide for the erection of the new courthouse upon the site already selected, when it shall have been acquired, and to do all acts and make all contracts essential in their judgment to the best and most successful accomplishment and carrying out of the design of building the new courthouse, provided that the full amount expended for all purposes should not exceed $1,617,500, which sum, it will be observed, is the difference between the total amount appropriated and the amount paid for the property held under the John F. Carter option. The above are all the ordinances referred to in the declaration and cited in argument, and hence we need not refer to any others. It is apparent from an examination of them that it was contemplated to erect a large and expensive building. Considerable time was necessarily required to perfect the plans for the building, and the only money at the command of the building committee must be raised by the commissioners of finance from sales of the bonds authorized for the purpose. The members of the committee were only named in the ordinance approved the 1st day of May, 1893. The delay complained of by the plaintiff was from that date until a day not later than the 7th day of April, 1894, at which time the declaration was filed, although the record does not disclose whether the suit was instituted then or prior to that time. If the passage of the ordinance selecting the site appointing the committee, etc., gave the plaintiff a cause of action, as contended by him, unless executed without any unreasonable delay, it would seem to be a rather severe construction of what is to be deemed unreasonable to require the committee, at the peril of rendering the city liable for damages, to acquire all the property necessary, and perform all the other labor incident, to the early part of their work within 11 months from their appointment. But we cannot assent to the doctrine sought to be established by the plaintiff, that the mere passage of these ordinances, without any execution of them, so far as the plaintiff is concerned, gives him a right of action. It may be true that the selection, as a site for the new courthouse, of the square which includes the property in which the plaintiff has an interest, may make his tenure uncertain, and may possibly affect his business to some extent, but, if that be conceded, we do not think it follows that under the circumstances of this case the city is liable to him merely because it has not proceeded to acquire his interest. The determination on the part of the city authorities to adopt that particular site is not a taking of the plaintiff's property, nor is it ev declaration of their intention to take invitum, as long as he holds it. The ing committee has no authority, under ordinances, to condemn it without first ing a proper effort to agree with him. It be that his term will expire before the erty is needed, or negotiations for a chase, if fairly conducted on both sides, result in an agreement, and save the ne ty of condemnation. However this ma passing the ordinances cited cannot pr ly be deemed a beginning of condemn proceedings, and no such proceedings c instituted until some attempt to agr made. That is a condition precedent t exercise of the right of eminent domai the building committee, as Ordinance N only gives them the power to conden case they cannot agree with the owner cepting those laboring under some disal nonresidents, and unknown heirs. We it clear, therefore, that it cannot proper said that these ordinances were the mencement of condemnation proceedings they only vest the power to condemn i building committee, and prescribe their of procedure. As well might it be said a charter of a railroad company autho it to construct a road between two points, and vesting it with the power of nent domain, is to be treated as a comm ment of such proceedings because it au izes the company to adopt them.

It is claimed, however, on the part o appellant that the case of Mayor, etc Baltimore v. Black, 56 Md. 333, which been previously in this court as report 50 Md. 235, established the doctrine tended for by him. It may be true tha language of the learned judge who de ed the opinion of the court both in 50 235, and 56 Md. 333, may give some gr for that contention if the facts of the be not borne in mind. But the stateme facts in the opinion reported in 50 Md. s that an ordinance had been passed or 10th day of June, 1871, to condemn open Pressman street from Gilmor to roe street, and on the 12th day of the month the commissioners for opening st gave notice as required by the City (1869) of their intention to meet on July and proceed to execute the ordinance. Blacks owned land lying between Gilmor Monroe streets, which would be divide Pressman street, and claimed compens for the whole of two lots of ground, a of which was required for the bed of street. They then surrendered the two to the city, and the street commissi sold the parts thereof not included in bed of the proposed street, under the p sions of the City Code. No further a was taken in the premises until the 20th of May, 1875, when the ordinance of 10, 1871, was repealed, and the proposed provement abandoned. It was very pro

Digitized by Google

nder those circumstances, that an ac-
ould lie for damages caused by the
onable and unauthorized delay, pro-
some steps had been taken to put the
default, such as remonstrances, com-
or applications by the owners to the
thorities to proceed with the work
eal the ordinance. In point of fact
ceedings had not only been commen-
t nothing remained to be done but to
e damages or abandon the work. Al-
it is held that the city can abandon
mprovements, even after the assess-
f damages, yet, if an owner of proper-
been injured by an unauthorized de-
d the city has been made aware that
ot satisfied to let his title to the prop-
main in that unsettled condition, he
without remedy. So, although it is
that opinion that when an ordinance
ndemning and opening a street has
assed, and remains unexecuted, or but
y carried into effect, the property
cannot maintain an action for such
negligence on the part of the city un-
has done something to put it in de-
t is apparent that it was not intended
that, if he did take such action, and
dinance remained wholly unexecuted
he particular property in controversy,
ssarily followed that an action would
ut the ordinances now being consid-
ffer materially from the one before
rt in the Black Case. In the latter
provided that before the mayor and
uncil should pass any ordinance for
ning of a street they should give 60
otice of the application for the pass-
such ordinance in two daily newspa-
ublished in the city of Baltimore.
when the ordinance was passed, the
ommissioners (who were annually ap-
, as other city officers) were required
30 days' notice of the object of the
ce under which they proposed to act,
the day, hour, and place of the first
to execute the same. The commis-
were then required to meet at the
d place named, and proceed to award
es, assess benefits, etc. They were
ted with the power to negotiate with
ners, and, in case of failure to agree,
o proceed to condemn, but they at
xed the damages, subject, of course,
in rights of appeal, etc. In this case
ilding committee had not even been
ed when the site was determined up-
, as already stated, their duty rela-
the acquisition of the property was
hase it, if they could, at such price
deemed just, and the appropriation
permit of, and, in the event of a fail-
reach an agreement, they could then
to condemn. They are vested with
liscretion, which the nature of their
required. We have thus devoted con-
le space to the consideration of
Case, as the counsel for the appel-
lant earnestly and forcibly contended that it sustained the position taken by him. But if we gave the fullest and broadest meaning to the language there used, without applying and limiting it to the facts of that case, which we must do, we would still be met with the marked difference between an ordinance for opening a street under the provisions of the city code of 1869 and the ordinances now before us, as above indicated. Without prolonging this opinion by discussing Graff's Case, 10 Md. 544, and Norris' Case, 44 Md. 607, we need only say that the property involved in them had been actually condemned, and they do not in any wise conflict with the views herein expressed by us. On the contrary, they and Musgrave's Case, 48 Md. 272, sustain the conclusion reached by us. In Leisse v. Railroad Co., 2 Mo. App. 110, so much relied on by the appellant, the company had filed its petition, and had commenced condemnation proceedings. The facts of the hypothetical case therein stated by the learned judge who delivered that very able opinion, which is quoted in the brief of the appellant, would amount to bad faith on the part of the condemning company. We do not mean to say that an owner of property cannot, under any circumstances, have relief, unless the company or municipality has actually commenced condemnation proceedings. It may be possible that a case might occur which would show such a deliberate effort and determination to depreciate the value of property for the purpose of subsequently acquiring it by condemnation at a reduced and insufficient price as to render the company or municipality liable on the ground of fraud. If such case is ever presented, it will be time enough to determine how far relief can be given; but in this case it is not alleged or intimated that the members of the building committee were not acting in perfectly good faith. We have found no authority which sustains the right of the property owner to recover damages under such circumstances as those before us. The appellant has not been disturbed in his possession, and, if the prospective use of the property for a new courthouse has affected him injuriously, it is only of that character of loss that any one having an interest in property may sustain by reason of the provisions of law which require all persons to hold their property subject to be taken for public purposes, or by those authorized to exercise the right of eminent domain for what are deemed to be at least quasi public purposes, upon the payment or tender of just compensation. If no ordinance selecting a site had been passed, but the defendant had simply been authorized to erect a new courthouse, and the city authorities and the prevailing sentiment of the community favored the use of this square for the purpose by reason of its central locality, and the fact that the city already owned a considerable part of it, the plaintiff might suffer the

Digitized by Google

same character of loss he now complains of, yet it would hardly be contended that the city would in such case be liable to him, however much he may have urged and insisted upon the authorities taking definite and final action. It would be in that as it is in this case, damnum absque injuria. It follows from what we have said that the judgment must be affirmed. Judgment affirmed, with costs to the appellee.

WEST BOUNDARY REAL-ESTATE CO. OF BALTIMORE CITY v. BAYLESS et al.

(Court of Appeals of Maryland. Feb. 28, 1895.)

SALE OF LAND—MERGER BY DEED.

The provisions of a contract for the sale of land are, as a general rule, merged in the deed subsequently made in full execution of the contract of sale.

Appeal from circuit court of Baltimore city.

Bill by the West Boundary Real-Estate Company of Baltimore city against William H. Bayless and another. From a decree for defendants, plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and PAGE, ROBERTS, BOYD, McSHERRY, and FOWLER, JJ.

Wm. H. Buckler, for appellant. E. G. Baetjer and W. H. Bayless, for appellees.

FOWLER, J. We announced at the conclusion of the opening argument of the appellant's counsel in this case that it was our opinion that the order sustaining the demurrer to the plaintiff's bill should be affirmed, and some of the grounds on which that opinion was based were then briefly expressed by the Chief Justice. Counsel for appellant at once filed a motion for reargument, which is based upon the case of Busey v. McCurley, 61 Md. 436, which was not cited either in the briefs or oral argument; and he contends that by the decision in the case cited it has been, in effect, adjudicated: First, that a contract to erect a dwelling of a given cost is sufficiently definite to support a bill for specific performance; second, that, if the defendant had parted with the title to the land upon which the dwelling is to be erected, the court will grant compensation to the plaintiff in lieu of specific performance. A careful examination of that case will show, however, that it does not support the contention of the appellant. The contract sought to be specifically enforced in the case now before us is to erect on a certain lot a dwelling house costing not less than $4,000. In the case relied on, the bill was filed to enforce a stipulation in an antenuptial contract by which James McCurley, the testator of the appellants in that case, agreed that his wife, if she should survive him, should receive at his death from his estate "one dwelling house, to be vested in her absolutely in lieu of dower," and in consideration therefor she resigned her dower and distributive s in his estate. It appears that the hus left an estate valued at about $100,000, by his will he disposed of the whole e and bequeathed a small leasehold dwe house, worth $2,000, to his wife, in charge of his agreement with her. Sh nounced this bequest, and claimed a ce dwelling on West Baltimore street, w she alleged was built for her and wa signed to come to her in the event of her viving her husband. This dwelling h however, had been devised to one of the tator's daughters by a former wife. case stated in the bill, therefore, was si this: that the husband had agreed to provision for a dwelling house for his by will; that he had built and design particular house on Baltimore street, in timore city, for her; and that he had not failed to devise to her the house design but that the bequest he made to her simply illusory, and was made with a st design of depriving her of what was r intended originally she should have. It shown by the proof that the husband d fact select the particular house menti in the bill as the one intended for his and that it was worth about $6,000. der these circumstances the court "There certainly ought to be a remedy the grievance suffered by the widow i case stated in the bill be clearly made And notwithstanding the fact that the d ing house she was to have had been cl designated, as shown by the proof, it held that specific performance of the tract would be attended with no little culty, and that, as there had been no cial objection taken to the jurisdictio the court to grant relief by way of com sation, that was perhaps the most just equitable mode of administering relief u the peculiar circumstances of the case. English cases cited in Busey v. McCu supra, cannot, we think, be fairly relie to support the contention of the appe in this case. They and many others do support the general proposition, annou in 61 Md. 446, "that a court of equity ha risdiction, upon application for specific formance, to decree the assignment of s ticular house or the erection or purcha a house to gratify the requirements of tract sought to be specifically perfor The court, however, are careful to this general statement of the rule, and ceed to say: "But in all such cases the a ment must be sufficiently definite to the court in the direction to be given specific performance, or, at any rate, th may be made certain and definite upon p inquiry." And it must be remembered in the case relied on, the court had the not only of a house of the value of $ but it had the additional fact that the house designated by the husband hi was a certain house on Baltimore stre

Digitized by Google

ore city. What was indefinite and un- in the contract was made definite rtain by proper inquiry; that is to the evidence in the cause. But, as e in hand now stands, we have noth- the general and indefinite language contract; nor has it been suggested ere is any proper inquiry we could re- to make that contract so definite and that it may be specifically executed ourt of equity. Although in Busey's upra, relief was granted by way of sation, because of the peculiar cir- nces of that case, and also because ial objection was taken to the juris- of the court so to do, yet, at the me, the rule was clearly laid down e power to grant compensatory relief be exercised in all cases for specific ance. "That power, as a general rule, nly as ancillary or incidental to the o grant other relief." Under Act of ent 21 & 22 Vict. c. 27, § 2 (Lord Act), it is provided that in all cases h a court of chancery in England has ction * * * for specific perform- shall be lawful for the same court, ll think fit, to award damages to the jured, either in addition to or in sub- n for * * * such specific perform- nd such damages shall be assessed in anner as the court shall direct." Our owever, is, as laid down in Busey's 1 Md. 448, that in cases of specific ance it is only under special circum- and upon peculiar equities,—as, for e, in cases of fraud, or where the as disabled himself by matters ex post rom a specific performance, or where s no adequate remedy at law,—that rt award pecuniary compensation in other relief.

ference to the earnest and able argu- oral and written, submitted on the the appellant, we have thus consid- me of the questions presented, other e one we shall now proceed to dis- iefly, and which, in our opinion, is ve of the whole matter. Subsequent correspondence between the plaintiff said defendant Bayless, which con- the contract here sought to be en- a deed for the lot in question was d by the former to the latter, and the n is whether the previous parol con- or is not merged in the subsequent The general proposition is well set- at parol evidence cannot be "used t law or in equity for the purpose radicting, adding to, subtracting from, ng the terms of a deed, or controlling l operation and effect, except where npeached for fraud, or where it is to be reformed upon the allegation of accident, or mistake." Bladen v. 30 Md. 581. It is true there is an- xception; as, for instance, where it appears that it was the intention the deed was only a part execution of the contract. Newbold v. Peabody Heights Co., 70 Md. 499, 17 Atl. 372, where it was expressly stipulated in the agreement that the restrictions and reservations contained in the contract should be complied with and carried out as if embodied in the deed. In Bryant v. Wilson, 71 Md. 440, 18 Atl. 916, the general doctrine is thus announced: "The prima facie presumption of law arising from the acceptance of a deed is that it is an execution of the whole contract; and the rights and remedies of the parties in relation to such contract are to be determined by such deed, and the original agreement becomes null and void." The case of Linthicum v. Thomas, 59 Md. 574, cited by the appellant, has, we think, no application here. That was an appeal from a decree setting aside a deed and contract for exchange of property on the ground of fraud.

Is the case before us an exception to the general rule, and can the contract and the deed stand together? It appears that on the 16th June, 1893, the president of the appellant wrote to the defendant Bayless that he had been instructed by his company "to accept the proposition of Bayless for the sale of the lot in question." Then followed a stipulation in regard to the opening of a street and the putting of improvements nearer than 30 feet from the westernmost or rear boundary of the lot, and the letter continues: "In other respects the lot is sold to you upon the ordinary terms and under ordinary restrictions which are contained in the printed deed of which I inclose you a copy. You are to pay for the property as follows: $1,200 cash. You are to deliver up to the company 80 shares of its capital stock. You agree to erect a dwelling upon the lot costing not less than $5,000, and have it ready for occupancy within one year from 1 July, 1893." On the next day, Mr. Bayless replied as follows: "Your letter of the 16 inst., received, and contents noted. I accept your proposition as to sale of lot, except that the dwelling is to cost not less than $4,000, instead of $5,000." This was the end of the correspondence, and it may be doubted whether there was ever a completed contract formed. But, assuming that it was a completed and valid contract, what was the effect upon it of the subsequent deed, which was executed on the 3d July, 1893, by the plaintiff to the defendant Bayless, conveying the same lot described in the contract? The consideration set forth in the deed is $5,200, and it also provided that the grantee, his heirs and assigns, should not within 10 years from the date of said deed erect on said lot any dwelling house costing less than $3,000, and within the same time he should not build any improvements nearer than 30 feet to the front building line. It is impossible, we think, looking at these two instruments, to suppose they were intended to stand together. The consideration in the

Digitized by Google

contract is $1,200 cash, and 80 shares of the capital stock of the appellant corporation; while the consideration in the deed is $5,200. The contract provides that no improvements shall within 10 years be erected nearer than 30 feet to the rear building line. The deed provides that none within the same time shall be erected nearer than 30 feet to the front building line; and, finally, the deed provides that the grantee, etc., shall not within 10 years erect on said lot a dwelling costing less than $3,000; while the agreement declares that he shall before the 1st of July, 1894, erect on said lot a dwelling costing not less than $4,000. It would seem, therefore, that the contract, as understood and alleged by the appellant, is entirely inconsistent with the deed in several important particulars. We find nothing which clearly shows that the deed was only a part execution of the contract, but, on the contrary, it appears very clear that it was the intention of the parties, so far as we can ascertain that intention from the alleged contract and the deed, that the latter was to take the place of all antecedent negotiations; and it follows that, even if a valid contract had been made, it became, after the execution of the deed, void and of no further effect. As was said by the late Judge Miller in delivering the opinion of this court in Bladen v. Wells, supra: "If a party, after conveying by deed, * * * can set up an antecedent or accompanying parol contract contradicting the deed, * * * there would be very little room for the operation of the rule, and very little security or safety in such instruments or in titles held under them."

Decree affirmed.

RIEMAN v. BALTIMORE BELT R. CO. et al.

(Court of Appeals of Maryland. March 26, 1895.)

DESCRIPTION IN DEED—BOUNDARY BY STREET—CONVEYANCE TO CENTER LINE.

The description in a deed was as follows: "Beginning * * * at the southeast corner or intersection of H and G streets, and running thence easterly, bounding on G street, 25 feet; then southerly, parallel with H street, 80 feet, to an alley; then westerly, bounding on said alley, to H street, 25 feet; and thence northerly, bounding on H. street, to the place of beginning." *Held*, that "the southeast corner" of H and G streets was the point of intersection of the east side of H street and the south side of G street, and no part of the roadbed of H street passed by the deed.

Appeal from Baltimore city court.

Action by Joseph H. Rieman against the Baltimore Belt Railroad Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, BRISCOE, PAGE, ROBERTS, and FOWLER, JJ.

A. W. Machen and Geo. R. Willis, pellant. John K. Cowen, T. W. Blal and Geo. Blakistone, for appellees.

FOWLER, J. This is an action of ment. The plaintiff owns a lot on the east corner of Howard and German in the city of Baltimore, fronting 25 the south side of German street, w even depth of 80 feet. The defendan duly authorized by the legislature a mayor, etc., of Baltimore, to construc nel under the bed of Howard stree as constructed in front of the plainti the tunnel in no way obstructs traf lowest point being 60, and its highest or top, 15, feet below the surface street. It also appears that at this the tunnel occupies a strip of land and 7 inches wide east of the center Howard street. The plaintiff claim under a proper construction of his d owns to the center line of Howard and, if he be correct in this content must recover, it being conceded th tunnel at this point extends more t feet east of the line which the p claims as the western boundary of And the sole question, therefore, is w the plaintiff's lot extends to the ce Howard street, or only to the eas thereof; and the solution of this q depends upon the proper construct one deed, namely, that from Deboral man to the corporation for the re widows, etc., of the clergy, etc., date uary 24, 1839, and recorded among th records of Baltimore county (now c Liber TK, No. 289, folio 480. The d tion, which is the only part of the d are now concerned with, is as follows ginning * * * at the southeast co intersection of Howard and German and running thence easterly, bound German street, twenty-five feet; then erly, parallel with Howard street, feet, to a nine-foot alley; then we bounding on said alley, to Howard twenty-five feet; and thence nor bounding on Howard street, to the p beginning." The plaintiff offered a n of prayers, all based upon his const of the foregoing description, that his tended to the middle of the street, b learned judge below instructed the ju he was not entitled to recover, and, t dict and judgment being against him, appealed.

The case was elaborately argued, our opinion, the question presented ha settled by decisions of this court in substantially similar to this. In th place, we will examine the language deed. The beginning point of the l veyed is the southeast corner or in tion of Howard and German street this point of intersection must be point where the east side of Howard

Digitized by Google

he south side of German street inter-
or these lines, and no other, can form
outheast corner of Howard and Ger-
streets." The beginning point being
learly placed on the east side of How-
reet, the lines of the lot, according to
eed, are as follows: Easterly bound-
German street; then, by two courses,
ward street; and thence, bounding on
rd street, to the place of beginning,—
place of beginning, we have seen, is
east side of said last-named street.
think it is evident there was no inten-
anifested by the grantor in the deed
consideration to convey any portion of
l of Howard street; for it must be con-
that the beginning point is on the east
f Howard street, and it is also clear
he end of the fourth and last line of the
t the same point; and, this being so, it
reasonable to suppose that it was the
on of the grantor that the third line
run beyond the east side of Howard
to the center line thereof, and thence to
ace of beginning. The result of this
be to convey a triangular lot or strip
l in the bed of Howard street, bound-
ither on Howard street nor on the cen-
e thereof, which would certainly not be
ent with the description found in the
In the case of Sibley v. Holden, 10
249, in considering a case very similar
one now before us, the supreme court
ssachusetts uses this language: "The
on is whether, when the description re-
to the road again, it shall be taken to
the side or the center of the road. If
ued to be the center, then the remaining
ould be neither by the side of the road
e center, but by a diagonal line from a
in the center to a point in the side.
would not only be obscure and inconsist-
ith any supposed intention of the par-
ut repugnant to the last clause in the
otion, which is, 'by the said road to the
of beginning.'" And, continuing, the
says: "As one point in this line is fixed
description to the side of the road, we
tisfied that, by a just and necessary con-
on, the other point must be taken to be
same side of the road, and therefore
ll of the road is not included." It was
ded that the case just cited has been
ated, even in Massachusetts, and the
f Dean v. Lowell, 135 Mass. 55, was re-
to sustain this position. But, in Dean
vell, Sibley v. Holden is not referred to
way, and while the decision in the
case is based upon the fact that, as one
f the disputed line was indisputably
on the side of the road, the other point
be there also, the conditions were en-
different in the former case. In Dean
vell, the court use this language: "The
the road is not mentioned in the deed;"
gain: "Neither the end nor any other
ular part of the wall is mentioned." It
ntended that, as the line in dispute ran
by the said road to a stone fence, the line must run on the side, and not in the center, of the road, because it was shown by the evidence that the stone fence terminated at the side of the road. But it was held that as neither the side of the road, nor any particular part of the stone wall, was mentioned in the description, the general rule should prevail, and the deed was held to convey to the center line of the road. But, if one end of the disputed line had been fixed on the side of the road, it might have been well inferred in Dean v. Lowell, as was done in Sibley v. Holden, and the cases in this state which will be presently noticed, that the bed of the road was not included nor intended to be; and thus, if the description in the two deeds had been similar, the conclusions reached in the two Massachusetts cases above referred to would have been the same, and, as we think, in accord with our own decisions. The general doctrine that a call to bound on a public highway, without more, will be presumed to be a grant to the center of it, if the grantor owns the fee of the bed thereof, is well established in this state, but it is also quite as familiar to us that this presumption is not conclusive. Hunt v. Brown, 75 Md. 483, 23 Atl. 1029; Sadtler's Case, 63 Md. 533; Gould's Case, 67 Md. 60, 8 Atl. 754; and Gump v. Sibley (decided at January term, 1894, and not yet officially reported) 28 Atl. 977.

It would unnecessarily prolong this opinion to examine in detail the cases just cited, in order to show that, by the rules of construction announced in all of them, the description in this case must be held not to include the eastern half of Howard street, in front of the appellant's lot. In Gould's Case, supra, it was said that the points of beginning and ending of lines, those points being designated corners of streets, as in the case before us, "fix the beginning and ending of the lines with as much certainty and positiveness as if stones had been called for in the deed." In the description we are now considering, the point of the beginning and ending is the southeast corner of Howard and German streets. This point, as we have seen, is the beginning of the first and the end of the fourth line, which latter "bounds on Howard street." In the absence of any clear intimation in the deed to the contrary, we must assume that both ends of the line are either on the center or side line. Here we have one end of the disputed line on the side line of Howard street, and the other end will therefore be on the same side of the street, and the line itself will run thereon. As was said in Sibley v. Holden, supra, when "one point in the line is fixed by the description to the side of the road, we are satisfied that, by a just and necessary construction, the other point must be taken to be at the same side of the road." In Sadtler's Case the parties themselves placed the boundary stones on the sides of the road, and the calls were for these boundaries. But whether fixed by the parties themselves or not makes no difference

Digitized by Google

(Hunt v. Brown), for the question is, in every case, what is the true construction of the deed? In Sadtler's Case we held that, as the boundary stones were on the side of the road, and the lines ended at them, the lines could not be extended to the middle of the road. It is true we have no stone boundary in this case, but we have what in Gould's Case was held to fix the lines with as much certainty, namely, a designated corner of two streets, which is necessarily on the sides of both streets. We cannot agree with the suggestion, upon any reasonable construction, that the corner of two streets can be found in the middle thereof, namely, at the point where the center lines of the two streets intersect. Where one end of a line is fixed on the side of a highway, no rule of construction known to us will justify the location of the other end of that line in the center of it. Such a location should be made only when required by express words to that effect. By Act 1892, c. 684, it is provided, in accordance with our suggestion made in Hunt v. Brown, supra, that title passes to the center of the street or highway in all cases of devise, gift, grant, or conveyance of land bounding on any street or highway, or when any street or highway shall be one or more of the lines thereof, unless title to such street or highway is reserved in express terms. This act, having been passed subsequent to the date of the deed here in question, is not applicable to this case. Agreeing with the learned judge below, the judgment will be affirmed. Judgment affirmed, with costs to the appellant.

PEARSON et al. v. WARTMAN et al.

(Court of Appeals of Maryland. Feb. 28, 1895.)

CONSTRUCTION OF WILL—CHARGE ON REAL ESTATE.

Where testator bequeaths to his wife a stated sum and all of his property for life, and gives certain pecuniary legacies to various persons, and devises all the remainder to persons named in specified shares, such legacies, on the death of the wife, are not a charge on the real estate, the personalty being insufficient for their payment.

Appeal from circuit court of Baltimore city.

Bill by Mary L. Pearson and others against Charles A. Wartman and others to have legacies charged upon testator's real estate. From a decree sustaining demurrers, and dismissing the bill, plaintiffs appeal. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BRISCOE, ROBERTS, PAGE, and BOYD, JJ.

A. S. Niles and Oscar Wolff, for appellants. C. Marshall, Thos. Hughes, C. J. Bonaparte, Randolph Barton, Skipwith Wilmer, S. D. Schnucker, and G. Whitelock, for appellees.

ROBINSON, C. J. The question i
case is whether certain legacies in t
of Charles Hoffman are charged up
real estate. The testator gave to hi
$2,000 absolutely, and then he gave
all his real and personal estate for lif
after her death, he gave pecuniary le
to some 20 odd persons, amounting
aggregate to $45,000. The rest and r
of his estate he disposed of in the foll
language: "I give, devise, and bequea
remaining portion of my estate, first,
fred Bennett two shares; to Mary Jan
of the town of York, Pa., one sha
Maria, wife of Dr. Dan'l P. Hoffma
share; to Charles A. Wartman, one
to Mrs. Eliza Rhodes, my niece, one
to my sister Louisa C. Jones, one sh
the shares to be alike and of equal v
The wife survived the testator abo
years, and upon her death the perso
tate which had been given to her f
proved to be insufficient for the paym
full of the legacies. This will having
executed prior to the act of 1894, c. 4
question is not affected by that act,
provides: "In all wills hereafter ex
the real estate of every testator not sp
ally devised shall be chargeable wit
payment of pecuniary legacies, wherev
personal estate after the payment of
shall prove to be insufficient, unless th
trary intention shall clearly appear."
If the question arising upon this wil
one of first impression, and we had t
strue it by the language in the will
and without reference to the constr
which has been put by this court upon
lar language in other wills, there wou
we must admit, much force in the ing
argument of the counsel for the appe
for where a testator gives certain pecu
legacies, and then gives the remainin
tion of his estate, "or the rest and resi
his estate," it may be fairly argued th
meant the remaining portion of his
after the payment of the legacies; and
the decisions in Bench v. Biles, 4 Mad
and Greville v. Browne, 7 H. L. Cas
this may be considered the establishe
in England. But in this state, begi
with Stevens v. Gregg, 10 Gill & J. 14
cided more than 50 years ago, and af
in Power v. Jenkins, 13 Md. 458, and
firmed in the recent case of White v.
man, 66 Md. 89, 5 Atl. 865, it has bee
sidered as settled law that where a
tor gives legacies, and then gives "t
mainder of his estate, real and persona
"the balance of his estate," or "the rest
due, and remainder of my estate," thes
other like terms are not in themselves
cient to show an intention on the part
testator to charge the real estate wit
payment of legacies. These cases al
ceed upon the principle that the perso
tate is the primary fund for the pa
of legacies, and, even where the real

Digitized by Google

pressly charged with the payment of es, no resort can be had to the real unless the personal estate is insuffi- or unless the testator has by the terms will exonerated the personal estate the payment of the legacies. And, being the case, legacies are never char- pon the real estate unless the testa- declares in express terms, or such in- n can be fairly and reasonably infer- om the terms and disposition of the The mere fact that the testator gives cy to one person, and then gives the id residue of his estate to another, the ary clause in itself is not sufficient to an intention to charge the legacy upon eal estate. In Lupton v. Lupton, 2 Ch. 628, where the residuary clause n these terms: "I give, devise, and be- n all the rest, residue, and remainder real and personal estate, not herein already devised and bequeathed,"— ellor Kent says: "This clause does not r to me to afford evidence of an inten- o charge the land with these pecuniary es. If that residuary clause created n charge, the charge would have exist- almost every case, for it is the usual , and a kind of formula in wills." his language of Chancellor Kent was l with approval in the early case of as v. Gregg, and in White v. Kauff- the latest case in which this question een considered.

he will before us the residuary clause e remaining portion of my estate"; in as v. Gregg the language was, "the nder of his estate, real and personal"; n Power v. Jenkins, "the balance of my ." All these expressions mean the thing, and, if so, these cases must be ered conclusive of the question, unless tention to charge the real estate can be ed from the general disposition of the and it was argued that the fact that estator had given to his wife the en- state for life was in itself sufficient of an intention to make all his prop- real and personal, one fund, out of the pecuniary legacies were to be and Ogle v. Tayloe, 49 Md. 158, was re- n in support of this view. In that case egacy was held charged on the real , but it was so held under a will widely ent from the one now before us. There estator gave his entire personal prop- o his wife for life, but to have the en- ontrol over it, and to do with it as she think best. Then he gave to his wife fe his real estate, being about 1,400 of land, and upon her death he gave al estate to his two sons, Richard and e, to be equally divided between them. hen he gave to his daughter a legacy 000, to be paid to her by her brothers their coming into the possession of the rty on the death of their mother. The hat the legacy was made payable by the brothers upon their coming into possession of the property, together with the further fact that the widow, the life tenant, had the right to dispose of the personal property in any manner she might think fit, were facts from which it might be fairly and reasonably inferred that the testator meant that the legacy to his daughter, being the only provision he had made for her, should be charged on the real estate devised to her brothers. "To confine the payment of the legacy to the personalty," say the court, "would have made it dependent on the use and consumption of the widow, who had an absolute right of disposal by the terms of the will." Nor do we see how it can be said that there has been such a blending of real and personal property as to constitute one fund, out of which the testator meant that the pecuniary legacies should be paid. He gives, it is true, his entire real and personal estate to his wife for life, and he empowers his executors to sell the whole or part of a tract of land on the York road, containing 41 acres, the proceeds to be invested for the same uses and purposes as above expressed; that is, if they deemed it best to sell this tract, or any part of it, the proceeds were to be invested, and the interest thereon to be paid to his wife during her life; and then, upon her death, he gives to one person certain ground rents, partly in fee and partly leasehold, and $3,000 in money; and then to another person a ground rent, partly in fee and partly leasehold, and $5,000; and then to another person $2,500; and so on, down to the residuary clause, by which he gives the remaining portion of his estate to the persons therein named. The "remaining portion," as construed in the cases to which we have referred, means the remaining portion of his personal estate, if there should be any left after the payment of the legacies, and the remaining part of the real estate not previously disposed of. In no sense, however, does he treat his entire estate, real and personal, as a blended estate, constituting one fund, out of which the legacies were to be paid. So construing this will, according to the well-settled law in this state, we find nothing, either in the terms of the will, or the general disposition of the property, from which it can be fairly inferred that the testator meant to charge the pecuniary legacies upon his real estate. Decree affirmed.

COX v. BRYAN, Registration Officer, et al. (Court of Appeals of Maryland. Feb. 28, 1895.)

TIME OF TAKING APPEAL—JURISDICTION—CONSENT.

Under Laws 1890, c. 573, § 21, providing for appeal to the district court from the action of a registration officer if taken within one week from the last sitting of such officer, an appeal taken after the time named, the petition, by order of court and agreement of counsel, being filed nunc pro tunc to bring it within the time

Digitized by Google

fixed by the statute, is not within the jurisdiction of the court.

Appeal from circuit court, Charles county.

Appeal by Francis M. Cox from the action of Alex. M. Bryan, officer of registration of the Seventh election district of Charles county, and others. Dismissed.

Argued before ROBINSON, C., J., and BRYAN, McSHERRY, FOWLER, ROBERTS, and PAGE, JJ.

Francis M. Cox, in pro. per. J. F. Mathews and Adrian Posey, for appellees.

PAGE, J. The appeal to the court below was not filed within one week from the last day of the sitting of the registration officer. His last sitting in 1894 was on the 15th day of October, and the petition was not filed until the 26th of October. By section 21 of chapter 573 of the act of 1890 it is provided that the person aggrieved "shall have the right to appeal forthwith from such decision or action to the judges or judge of the circuit court * * * by petition verified by his oath or affirmation, within one week after the final day of the October sitting for revision." It appears that the state's attorney agreed that no advantage should be taken of the delay, and the petition might be filed nunc pro tunc, and that thereupon the judge, on the 27th of October, ordered that the petition be filed as of 22d of October, 1894, in accordance with the agreement. But neither the agreement of counsel nor the order of the court can confer jurisdiction, in a case where the law does not authorize the court to take cognizance of the matter. This is a proceeding under a statute, and to give the court jurisdiction the requirements of the act must be strictly complied with. Shelby v. Bacon, 10 How. 56; Ticer v. Thomas, 74 Md. 345, 22 Atl. 402. The case was therefore not properly before the circuit court, and its rulings consequently cannot be reviewed by this court. The appeal will therefore be dismissed. Appeal dismissed.

BLACKFORD, Register of Voters, v. ROBINSON.

(Court of Appeals of Maryland. Feb. 27, 1895.)

ELECTIONS—REGISTRATION OF VOTERS.

One who makes personal application therefor to the officer of registration is entitled to be registered as a voter on the day appointed for the revision of the registry list, under Act 1890, c. 573, § 14, providing that the officers of registration, "when sitting at any time thus provided for the registration of voters or for the revision of their registries of voters, shall register all persons making personal application" to be registered.

Appeal from circuit court, Washington county.

Appeal by William H. Robinson from a decision of Thomas R. Blackford, officer of registration, refusing to register the petitioner as a voter on the day fixed by law for the revision of the registry list. an order overruling the officer's decisio ordering that the petitioner's name be on the registration books, said Blackfo peals. Affirmed.

Argued before ROBINSON, C. J. BRYAN, McSHERRY, FOWLER, BRI ROBERTS, and PAGE, JJ.

C. A. Little, for appellant. N. S. and C. D. Wagaman, for appellee.

ROBINSON, C. J. The question i appeal is a plain and simple one. Th istration officers for the several counti required to sit three successive days i tember of each year, beginning on the Monday of said month, and four succ days in October of each year, beginn the first Monday of October, for the re tion of voters. Act 1890, c. 573, § 9. further provides that they shall also the Monday next succeeding the second day in October, for revision and for t instatement of persons whose names have been stricken off. And section 1 ther provides that the officers of regist when sitting at any time thus provid the registration of voters, or for the re of their registers of voters, shall regis persons making personal application t officers of registration to be registe voters, etc. And the question is w the officers of registration for the co are authorized to register voters wh make personal application to be regi on the day set apart by the law for t vision of the registry list,—that is, Monday next succeeding the second M in October. This question is answe the plain language of the fourteenth s which provides, as we have seen, tha officers, when sitting at any time pre by the act, either for the registration ers or the revision of their registries register all persons making personal cation to be registered. The appelle ing made personal application to the of registration on the day he was sitti the purpose of the revision of the r list, he was entitled to be registered er. And this being so the ruling of th will be affirmed. Ruling affirmed.

AMSDEN v. ATWOOD.

(Supreme Court of Vermont. Windsor. 16, 1895.)

TENANT FROM YEAR TO YEAR—REN

A tenant whose lease expired No 1, 1891, held over until December 26, 189 out objection from the landlord, who co to render monthly bills throughout the and to accept payment of rent quarterly that the tenant was entitled to complete t upon which he entered November 1, 1892

Exceptions from Windsor county Thompson, Judge.

Digitized by Google

tion by Rollin Amsden against John P. ood. Judgment for plaintiff, and defend- excepts. Reversed.

e plaintiff sought to recover for certain les furnished by him to the defendant t which no question was made. He also ned to recover for rent of power and use ill under the contract of lease set forth he opinion of the court from October 1, to the date of the writ in this suit, h was December 27, 1892. The court di- d a verdict for the plaintiff in the sum 257.94, and gave judgment thereon, to h the defendant excepted. In this nt the court included rent of power for nonth of November and two-thirds of the h of December, 1892, and use of the mill November 1 to December 19, 1892. Aft- ecember 19th the plaintiff refused to saw ogs of the defendant, and on December gave the notice mentioned in the opin- of the court. The defendant did no in the premises after December 19th. defendant offered to show under his plea ffset that he had contracted for large tities of logs to be manufactured under lease, and that by the action of the plain- he was deprived of the profit he would thereby made. The court held that up- he evidence the defendant was not enti- to go to the jury upon his plea in offset, hich defendant excepted.

bert A. Davis and W. B. C. Stickney, for tiff. J. J. Wilson and J. C. Enright, for ndant.

LER, J. It appeared on the trial that laintiff was the owner of a water power, a sawmill and machinery situated there- n Windsor, and that on August 19, 1885, n indenture, he leased a portion of the to one Loring Atwood for the term of years from October 1, 1885, at an annual of $400, in quarterly payments of $100 on ist of January, April, July, and Octo- It was stipulated in the lease that the tiff should build a dryhouse on the prem- and that the lessee should pay him as therefor 8 per cent. interest on its cost. as further stipulated that the plaintiff ld saw the lessee's logs for his business— manufacture of chair stock—at a price after to be agreed upon and indorsed on lease. It was afterwards agreed that price should be 60 cents an hour, but it not indorsed. The lessee entered into se and occupation of the premises, and nued therein until April 1, 1890, when, his consent, a new contract was execut- the plaintiff and the defendant, as fol- "That whereas, said John Atwood has the place of Loring Atwood in a con- or indenture dated the 19th day of Au- 1885, executed by and between Loring od and the said Amsden; and whereas, in modifications and extentions of said act or indenture have been mutually agreed upon by and between said Amsden and said John Atwood which it is deemed desirable to put in writing: Therefore, be it known that the said Amsden, for a valuable consideration, doth hereby extend the lease set forth in said contract or indenture of August 19 for the term of one year from the first day of November, 1890, with a further extension of a term not exceeding five years from the first day of November, A. D. 1891, at the option of said John Atwood, provided he shall give to said Amsden notice in writing at least three months prior to November 1st, 1891, of the number of years for which he shall elect to hold and enjoy such extended term. And the said John Atwood, in consideration of the foregoing, doth hereby covenant and agree to and with the said Rollin Amsden that he will pay in equal quarterly installments of $109.44 on the first days of January, April, July, and October for such extended terms, as the rent thereof, except so far as said rent may be reduced under the provisions of said indenture of August 19, 1885, and that he will in all respects fulfill all the contracts and agreements of the said Loring Atwood therein contained. It is further mutually agreed and covenanted that if the said John Atwood does not have logs so as to run his chair works from the first day of April to the first day of November, A. D. 1890, then the rent is to be reduced one-half for such time only between said dates as said shortage of stock may exist." It is clear that the original lease, with all its covenants, was extended by this contract, excepting so far as the covenants were thereby changed. The only changes made were a slight reduction in the quarterly rent, and a further agreement that the rent should be reduced one-half for such time between April 1 and November 1, 1890, as the defendant was short of logs for his chair works. The new contract definitely extended the lease to November 1, 1891, with an option in the defendant to have it extended a further term, not exceeding five years from that date, by giving the plaintiff three months' previous notice thereof. As the defendant failed to exercise his option, the lease terminated by its own limitation on that date, and the defendant remained in possession without right.

The relation of landlord and tenant can exist only by virtue of a contract, express or implied. It may be created by implication of law as well as by express contract. Here the express contract had terminated, and the question is whether the defendant remained as a tenant by implication of law, and, if so, what was the nature of his tenancy. It is clear that after the extended lease terminated the plaintiff might have evicted the defendant. He allowed him to remain without objection until November 1, 1892, and thence until December 26th of that year, when he gave him a written notice that he regarded him as a tenant by sufferance; that the rent would be increased

Digitized by Google

to $600 after January 1, 1893; that the charge for sawing logs would be increased; and that, as a condition of the defendant's continuing as his tenant, he should not employ men who were personally offensive to the plaintiff. In Blumenberg v. Myres, 32 Cal. 93, it was decided that a tenancy by implicatcn arose, subject to the covenants and conditions of the original lease, where the tenant held over, and the landlord received rent after the expiration of the term. This was on the ground that the receipt of the rent was an acknowledgment of a subsisting tenancy. Numerous cases are cited in the valuable notes to this case in 91 Am. Dec. 560, to the effect that a tenant whose term has expired, and who, instead of quitting the premises, as he ought to do, remains in possession, holding over, is a wrongdoer, and the landlord may treat him either as a trespasser or as a tenant for another year upon the same terms, at his option (Den v. Adams, 12 N. J. Law, 99; Rowan v. Lytle, 11 Wend. 619; Adams v. Decker, 11 N. J. Law, 84); that this is so though the tenant has no intention of holding over for a year, or of paying the same rent (Hemphill v. Flynn, 2 Pa. St. 144; Bacon v. Brown, 9 Conn. 334), even where, before the expiration of his term, he notifies the landlord that he does not intend to keep the premises another year, but nevertheless remains in possession; that his remaining fixes him as a tenant for another year, if the landlord chooses to treat him as such. Wood, Landl. & Ten. § 484, says: "By holding over after the expiration of the term, the lessee becomes a tenant at sufferance. He does not thereby necessarily become a tenant from year to year, though such a holding, accompanied with payment of rent, or other recognition by the lessor of a tenancy, may ripen into an estate of that description; the tenant, in the absence of evidence to the contrary, being bound by the terms of the expired lease, so far as they are applicable to such an estate, without any new bargain to that effect between him and the lessor." In section 13 of the same work the author says: "By the common law, if a tenant who has occupied and paid rent annually, holds into a new year, it is evidence of a new demise for a year, or rather from year to year, according to the circumstances, or of a tenancy at will, if the circumstances are such as to rebut a renewal of a former tenancy;" and cites Jackson v. Salmon, 4 Wend. 327; Bradley v. Covel, 4 Cow. 349; and Digby v. Atkinson, 4 Camp. 278. In that section it is said that the landlord may treat the tenant holding over as a trespasser or as a tenant holding over on the terms of the original lease. In such case the lease is not the contract under which the tenant holds, but is evidence of the contract. The tenant holds upon the terms of the expired lease, unless notified of new terms before the lease expired. In 4 Kent, Comm. 112, it is laid down that: "If the tenant holds over by consent given, either expressl constructively, after the determination lease for years, it is held to be evidence new contract, without any definite pe and is construed to be a tenancy from to year. The moment the tenant is suff by the landlord to enter on the possessio a new year, there is a tacit renovation of contract for another year, subject to same right of distress." This is recogn as a correct statement of the law in Si v. Allen, 43 Vt. 172. In that case it held that an estate at will was conver into a tenancy from year to year by the ment of rent; not by the length of that the tenant held and paid rent, bu the fact that he entered and held und stipulation to pay annual rent, and paid cordingly. Hall v. Wadsworth, 28 Vt. Barlow v. Wainwright, 22 Vt. 88. In dette v. Pierce, 50 Vt. 212, the buil leased for a stable was enlarged by the ant, and without right used by him and family as a tenement. Held that such was in violation of and put an end to the tract, if the plaintiff had so elected; that the defendant's continued occupancy a succession of years, and his paymen annual rent, converted the tenancy, how it should be designated in its inception, a tenancy from year to year. Amsde Blaisdell, 60 Vt. 386, 15 Atl. 332, is no variance with this doctrine. On the trary, it is there recognized that, in orde convert a tenancy at will into one from to year, an occupation for a second must at least be entered upon. See Sted v. McIntosh, 42 Am. Dec. 122, and n Vrooman v. McKaig, 59 Am. Dec. 85.

It would be a fair test of the soundnes this doctrine to inquire whether the te having held over one full year after the mination of his written lease and ent upon a second year, could then quit premises at pleasure, without further lia ty to pay rent. That he could not is se in Barlow v. Wainwright. See notes to case in 52 Am. Dec. 79. In Haynes v. rich, 133 N. Y. 287, 31 N. E. 94, it was cided that from the fact of the tenant's ing over after the expiration of his term law implied an agreement to hold for a upon the terms of the prior lease; that option to so regard it was with the land and not with the tenant, and that the l held over at his peril. In that case the ant informed his landlord that he did wish to renew his lease, and that he int ed to surrender possession at its termina but he was prevented from so doing two days by his inability to procure tr to move his goods and by the illness boarder. It was held that these facts not prevent such holding over from opera as a renewal of the lease for another ye the landlord elected so to treat it. In note to that case in 28 Am. St. Rep. 63 is said to be the general rule that, if a

Digitized by Google

or one or more years holds over at the
ation of his term, the landlord may
him as a trespasser, or as a tenant
nother year upon the terms of the prior
as far as applicable. Cases from New
Rhode Island, Indiana, and Minnesota
ted in support of this doctrine. There-
unless the defendant surrendered his
to the premises, and in legal effect ad-
d his liability for their use to Decem-
3, 1892, it must be held that, when the
iff brought the suit, his claim for rent
ny part of the quarter commencing
nber 1, 1892, had not matured, and that
was error in including in the judgment
tems for "use of mill" and "rent and
" which became chargeable after that

ppeared that in September, 1891, the
iff requested the defendant to exercise
ption, and that the latter declined to
the lease extended beyond November 1,
for the reason that it was uncertain
er he could obtain logs for his busi-
the next winter. But after that date
tayed right along," as the plaintiff testi-
with no new agreement as to his occu-
, and paid his rent as he had done
the written contract. After that year
completed, he continued his occupancy,
was in possession of the premises on
nber 27th, when the plaintiff's writ was
d. The defendant claimed that there
a conversation in August, 1892, about
maining till the next spring, but that it
ot amount to an agreement. The plain-
enied having such conversation. We
t think that the defendant's deciding to
e the premises, and his act of taking
and removing his machinery, after the
iff's notice to him of December 26th,
be construed as conferring upon the
iff a right of action for rent not then
There was no surrender of the tenan-
the defendant, nor acceptance thereof
e plaintiff. The plaintiff did not re-
te the relation of landlord and tenant.
endered monthly statements of rent to
efendant through the entire year 1892,
had previously done, and thus recog-
him as his tenant, though in his no-
f December 26th he called him a tenant
fferance. If, at the expiration of the
ded lease, the plaintiff had done no act
nizing a continued tenancy, the defend-
ould have been within the definition of
who come in by right and hold over
ut right. He would have remained
y by the plaintiff's laches as his tenant
fferance. The plaintiff elected to rec-
e him as a tenant for another full
by taking his rent, and allowing him,
ut objection, to enter upon a second
This, we think, made the defendant
nt from year to year. He at least had
nt to complete the year upon which he
hus entered. Judgment reversed, and
remanded.

MONTGOMERY v. BEECHER et al.

(Court of Chancery of New Jersey. March 19, 1895.)

ABSOLUTE DEED AS MORTGAGE—EVIDENCE.

In an action to set aside a deed by a corporation, it appeared that the corporation was in need of money; that its manager executed a note payable to the corporation, and due in 90 days, which was discounted by defendant at a large discount. When the note became due it was not paid, and the deed in question was then made to defendant, the manager at the time agreeing to procure defendant a purchaser for the lots therein conveyed. *Held*, that the transaction was a loan, and the deed merely executed as security.

Suit by John A. Montgomery, receiver, against Herbert W. Beecher and others, to declare certain conveyances void. Judgment for complainant.

Peter Backes, for complainant. Wm. M. Lanning and G. D. W. Vroom, for defendants.

BIRD, V. C. The bill in this case is filed by the receiver of the Barnegat Park Company, alleging in effect that certain conveyances either never had any actual existence as conveyances, or that they were fraudulent, and consequently should be declared void, and that the title which they purport to convey should be decreed to be in the said company. It is admitted by the complainant that certain instruments, which upon their face purport to convey the lands in question, had an existence, but it is alleged that such honest use was not made of them as to effectually pass title. It appears that the Barnegat Park Company was formed on the 7th day of August, 1889. In the fall of that year, according to the testimony of Edward S. Farrow, the principal manager, it became financially embarrassed, although it declared a dividend of 2 per cent. upon its capital stock of $200,000. In order to relieve itself of its embarrassment, he says, he advertised for persons to become interested. The result of this advertising was communication from a man by the name of Forney, and through him negotiations were carried on which resulted in the sale of the premises in question,—one parcel to said Forney, and another parcel to a man by the name of Corbin. All of the negotiations were carried on through Forney, Corbin never having been seen by Farrow. As I understand him, Forney was once at Barnegat Park, but his exact location prior to the time of these negotiations he was not certain of, and since then he has only heard of either Forney or Corbin as being in Chicago and Seattle. Farrow says that on the 2d of December, 1889, two notes were made by him to the Barnegat Park Company, and indorsed by the Barnegat Park Company,—one for $1,500 and the other for $1,250,—each made payable in three months, of one of which the following is a copy: "Barnegat Park, N. J., Dec. 2nd, 1889. Three months

Digitized by Google

after date, for value received, I promise to pay to the order of the Barnegat Park Company fifteen hundred dollars, at the Commercial National Bank of New York, with interest from date at the rate of ——%. $1,500.00. Due ——. Edward S. Farrow, U. S. Army." And it is indorsed as follows: "The Barnegat Park Company, M. W. Conkling, President. Henry C. Corbin." I think that Farrow's testimony shows that at this time a deed was made and executed in the name of the company as grantor, and in the name of Corbin as grantee, which was afterwards destroyed. "Q. What became of that deed? A. Destroyed when the other was made. Q. To whom was that or those deeds made that you say were destroyed? A. One to Forney and one to Corbin. Q. Why did you think it necessary to make a new deed, as you previously explained these matured about the time of the maturity of the notes? Tell me what deed was destroyed. Specify the land. A. On the 38 lots in the boulevard of Barnegat Park. Q. Anywhere they might be available without designating that? A. Without designating that 38 lots." When this note matured, he says that the amount due thereupon was paid by Corbin, less 15 per cent. of its face value, and that then the deed in question was delivered and executed to him. A note in all respects the same was indorsed by the said Edward L. Forney, and when it became due, Farrow says, he paid the amount due thereon, less 15 per cent. of its face value, and that a few days thereafter the deed in question was made and delivered to him. At this time one Marcus W. Conkling was the president of the association. Farrow swears that he prepared these deeds himself for Corbin and Forney, and presented them to Conkling for his signature, and that Conkling then, as president, executed the deeds. Farrow says also that this transaction was submitted to the board of directors, and the plain inference is, from his testimony, that Conkling was present. Conkling denies these statements in every particular. He swears that the first intimation that he ever had of this transaction was in the winter of 1891 and 1892,—several weeks, at least, after the appointment of the receiver. He says that during that winter season he and Farrow were stopping at the hotel called "The Pines." While there they occupied the same room, in which was an office desk, to which each had access. He swears that in that desk he discovered what purported to be deeds of conveyance by the company to Corbin and to Forney, and what purported to be two other deeds from Corbin and Forney, as grantors, with the names of the grantees in blank. These conveyances purport to convey the lands which are now claimed by the complainant in this suit. Conkling says that he made a note of the transaction because it particularly arrested his attention at that time.

The difference in the statements of principal witnesses is important, althou my view of the case, not conclusive. Co was president of the company, and F was secretary and treasurer. Farrow upon the ground all the time, and had t tire control and management of the pany. Conkling's explanation of the ence of these deeds which purport to c the title to Corbin and Forney is as fo He says that he was in New York on ness, and that at the request of Farr executed a number of deeds in blank, der that Farrow might not be delay securing purchasers when they were to take title, and that he delivered thes veyances, so executed, to Farrow. T will be perceived, is in direct conflict the statements of Farrow that he pre these conveyances, and then submitted to the board and to Conkling, and that ling then executed them. It is not a thing for me to come to the conclusion in a matter of so little interest as thi turns out to be to Conkling, he would erately commit perjury, especially there are so many opportunities to c dict him, and so many witnesses to the fact. He appeared upon the w stand, and I saw nothing to awake picion that he was deliberately falsi I am inclined to take his statement a I cannot comprehend that a man business capacity and experience could forgotten a transaction of this cha At the time of these negotiations wit bin and Forney, the company had only two conveyances, the consideration of was $4,800, which, or the principal p which, was secured by mortgages. T tal cash realized at this time was only $400. The whole number of lots con to Corbin and Forney was 72. To say under such circumstances—that is, i very infancy of the enterprise, when i just struggling for breath—a transacti this nature should be brought befor board of directors, of which Conklin president, and that he then, or at any time, should be called upon to execut deliver conveyances, and in so short become so utterly oblivious to the fact speak about it as he did under oa quite incredible. The point of confli tween Farrow and Conkling does not e beyond this. In other words, Farrow's ments may be true, as to other branch the case, without necessarily leadin mind to the conclusion that Conkling's ments with respect to the execution a livery of these conveyances is false. all the circumstances connected wit case—that is, the way in which these were manipulated, taking both the ments of Farrow and Conkling, and th in which the grantees, Corbin and F were introduced into the negotiations finally dismissed and lost sight of, and

Digitized by Google

and the introduction of Beecher at the nce and under the guidance of Farrow considered, the impression has been strongly fixed upon my mind that Corand Forney were men of straw, and as instruments by Farrow. When askhat the consideration for the Corbin was, Farrow says: "He paid the y over to me. The amount of the note he discounted was $1,500, and he re- about 15% bonus." He produced the dated December 2, 1889. The conveyis dated March 5, 1890. When asked xplain, he says: "The note matured months after date. That brings it to 2d, and three days of grace would it March 5th, 1890; and that day the was paid, and the conveyance was to Mr. Forney in consideration of the y. The company at that time was of funds, and it could not take care e note." He says the company was of money, and was getting it wherever uld, and that, when this note was , Forney paid the cash, less 15 per and the amount paid was placed to redit of the Barnegat Park Company, e books of Farrow & Conkling. The y is not traced further. And he says paid Forney by conveying to him 38 named in the bill of complaint on the ay of March, when the note matured. ays the Corbin transaction was the in all respects, but that the deed to was executed on the 15th of March, There is nothing to show that the egat Park Company kept any books of nt of its own. From the testimony nference is that the books of Farrow nkling were the only account books exhibit any of the money transactions e concern. Nothing has been present- the way of accounts, to show that the deration spoken of ever passed to the any.

, to proceed, what comes after is both teresting and as enigmatical as what gone before. Farrow says that he ised Forney and Corbin to find a pur- r for them. With this, all interest upeir part seems to have ceased. Farays that he negotiated the transaction Beecher, and that Beecher was to give n and Forney $3,000 for the lots named e bill, and that he delivered the deeds for to Beecher. It would be supposed, w having undertaken this, that he l be able to account, as was his duty, an agent, for the entire consideration; e can only account for $700, which was by check on the 4th day of May, 1892. was more than seven months after the ntment of the receiver, and a year and months after the date of the deed to er. He was asked if he knew perly about the payment of the $3,000 by er: "A. Yes, sir; I received the final ent from Mr. Beecher. He gave me a check, I think, for half, and then the balance in two payments,—six months or a year, I think; the last check being in full, dated May 4, 1892." He is then asked by his counsel if he has any knowledge of the payment of the other $2,300, and he answered, "No, sir; I have not." On cross-examination he was asked: "What did he pay? A. He paid them some cash at the time, and, as far as I know, gave them some notes for the balance. Q. How much of that cash did he give Mr. Forney? A. I can't tell you." Nor was there any proof from any source whatever that this amount of the alleged consideration was ever paid.

There has been an answer put in in the name of all the defendants,—Farrow, Beecher, Forney, and Corbin,—but the latter three have been in no other sense represented, neither of them having been sworn or examined. Nor has any reason been shown why they have not been. True, a party claiming an interest in an estate may establish it without subjecting himself to an examination; but it may well be conceived that circumstances may be presented of such a character as to awaken the gravest suspicion of the honesty of a transaction, when the best testimony is not produced. I cannot but infer that Forney and Corbin had no personal interest in this suit at its commencement, or at the present time, and that consequently, if they ever had the interest which is claimed for them, they would have been quite disinterested witnesses, and their testimony would have been of the utmost service to the court. But the interest of Mr. Beecher in the cause, if what is claimed in his behalf be meritorious, is so great as, in my mind, to excite more than surprise that his testimony has not been presented. This is especially so when it is considered that he has joined, or been made to join, in the answer with the other defendants. Why his testimony should not be produced has not been explained. His interest in these lots has been directly challenged and denied. Indeed, he is charged with assisting in an effort to perpetrate a fraud upon the Barnegat Park Company. Farrow, the man with whom it is said he carried on these transactions, acknowledges himself unable to give the details of the transaction for said lots. Without dwelling upon this, I cannot but infer that Mr. Beecher abandons the defense, or finds himself wholly unable to sustain it. In the answer, fraud is denied, so far as Beecher is concerned, and the only allegation in support of his claim to the title is that he paid a good and valuable consideration for the premises. I cannot but conclude that these deeds were never beyond the control of Farrow. He was asked who put those deeds upon record. He answered: "I do not know. I might have sent them up for record. Q. When were they recorded? A. When it was learned, I believe, that the transaction was at-

Digitized by Google

tacked,—some time in 1892, I believe." Notwithstanding the above, he says that Corbin and Forney had possession of their deeds, but this in no wise limits the conviction that he had the control of them at will. And this seems to be equally true of the deeds purporting to convey the title to Beecher.

In the above statements and expressions or conclusions, I have been controlled by the views outlined in the bill of complaint. But there is another view to be taken of the case, when the testimony is carefully considered, which, to my mind, is more satisfactory, and quite in harmony with the condition in which the Barnegat Park Company found itself, and also with the testimony in the cause. This transaction should be regarded as nothing more nor less than a loan of money upon the part of Forney and Corbin, and an execution of these instruments, and a delivery to them or for them, as security for such loan. It is perfectly evident that they did not purchase, and that it never was their intention to purchase. It is equally evident that the company did not negotiate with them for a sale, but for a loan. Had the transaction been one of bargain and sale, it would have been complete in the first instance. On the 2d day of December, 1889, when the notes were delivered, the exact consideration for the properties would have been agreed upon. The conveyance of title would have been accepted, and that would have been the end of it. Had it been such sale, there would have been no discount or percentage of large amount. There would have been no promise upon the part of Farrow to procure some one else to relieve Forney and Corbin. A simple statement of facts, and a review of what is above stated, must lead every person at all acquainted with legal methods to the conclusion that to denominate the transaction as an absolute conveyance is a gross misnomer. The testimony of Farrow establishes this view of the case beyond controversy. I therefore conclude that these conveyances were offered as a pledge, that the interests of the pledgees have been satisfied, and that Beecher holds the title for the Barnegat Park Company. He will be required to execute a conveyance to the complainant, as receiver, or to such other person as may hereafter be named by the court, to be held in trust by him for the creditors of said company.

STATE (SCHEFBAUER et al., Prosecutors) v. BOARD OF TOWNSHIP COMMITTEE OF KEARNEY TP. et al.

(Supreme Court of New Jersey. Feb. 28, 1895.)

MUNICIPAL CORPORATIONS — STREET LIGHTING — POWER OF TOWN BOARD—CONTRACTS.

1. The act of the legislature entitled "An act authorizing the lighting of public streets and places, in the cities, towns, townships, bor and villages of the state, and to erect and tain the proper appliances," approved Ma 1894 (P. L. 1894, p. 477), confers upon the ship committees of the respective townshi this state general power over the matters o lighting of streets and public places in said ships, and under this act the township con tees are authorized to enter into contrac light the streets with gas, electric lights, or erwise, for a term not exceeding five years, a cause the annual expense thereof to be raise taxation, the same as the expense for the v ing and repairing of roads and streets is ra

2. This act of May 22, 1894, is applicab the township of Kearney, in the county of son, which was created and incorporated b act entitled "An act to set off from the t ship of Harrison in the county of Hudson, a township to be called the township of Kear approved March 14, 1867 (P. L. 1867, p. and upon which, under the corporate name title of "The Board of Township Committe the Township of Kearney," additional po were conferred by virtue of the provisions o act entitled "An act for the improvement o township of Kearney in the county of Hu and to increase the powers of the township mittee in said township," approved April 6, (P. L. 1871, p. 1371); and under these laws the act of May 22, 1894, the board of the t ship committee of the township of Kearn the municipal authority authorized to act i matter of lighting the streets and public p of that township with gas, electric lights, or erwise.

3. In the exercise of the power of ligh the streets of the township under these l the board of township committee is not boun award a contract, where the street lightin done by contract, to the lowest bidder for work, but they are bound to exercise the p in a bona fide manner, and with reasonable cretion and judgment for the benefit of the t ship, basing such reasonable discretion up rational basis of fact in its support. When determination of the board is upheld by rational basis of fact, the court will not de disputed facts, or weigh evidence, in order t view the action of the board in awarding tracts of the class in question.

(Syllabus by the Court.)

Certiorari in the name of the state at suit of Rupert Schefbauer and Jesse Ca against the board of township committe the township of Kearney, in Hudson cou and George F. Woolston, to review a cont for lighting streets. Contract affirmed.

Argued November term, 1894, before D ON, MAGIE, and LIPPINCOTT, JJ.

Edward Kenny, for prosecutors. Jo Parker, Jr., for defendant.

LIPPINCOTT, J. This writ brings up review the proceedings and resolut passed by the board of township commi of the township of Kearney, in the count Hudson, on the 14th day of August, 1 whereby a contract was awarded to George F. Woolston for lighting the str of said township of Kearney for a tern five years with electric arc lights. The p ecutors, one of whom is an unsuccessful der for the contract, and the other a paying citizen of the township, contest validity and legality of the award of contract to Woolston, and the prin grounds upon which they assail the pr

Digitized by Google

rs are that the board of township com-
ee of this township is not authorized at
contract in the matter of the lighting
e streets of the township, or, if so au-
zed, then they have no power to make
contract for such a length of time as
years. The board of township commit-
on the 12th day of June, 1894, by resolu-
directed the clerk to advertise for a
act for street electric lighting for a
of five years, and bids were then re-
d from three bidders, including bids by
fbauer and Woolston. These bids were
ed on July 10, 1894, and referred to the
ing committee of the board. On August
894, the committee on lighting reported,
mmending the award of the contract to
ston, and on August 28, 1894, by resolu-
the board so awarded the contract. The
ecutors, before the contract was execut-
ned out this writ of certiorari to review
proceedings, and the award of the con-

e question of the extent of the power of
ships generally over this matter, and the
er of the board in this township, must
st discussed and determined. The town-
of Kearney was incorporated by an act
e legislature entitled "An act to set off
the township of Harrison, in the county
udson, a new township to be called the
ship of Kearney," approved March 14,
(P. L. 1867, p. 253). This act, by its ex-
provisions, conferred upon the inhab-
s all the rights, powers, privileges, and
ntages to which the inhabitants of the
townships in the state were entitled or
ect by the laws of this state. By the
ral law entitled "An act incorporating
nhabitants of townships, designating their
rs, and regulating their meetings" (Re-
n, p. 1191), approved April 14, 1846 (Nix-
ig. p. 872), it was provided that the in-
ants of each of the several townships
is state were constituted a body politic
corporate in law, as theretofore consti-
and established, by the name of "the
bitants of the township of * * * in
county of * * *." By the eleventh
on of this act the persons qualified to
at town meetings were empowered at
annual meeting, or at any other meet-
luly held for the purpose, to vote, grant,
raise such sum or sums of money for the
tenance and support of the poor, the
ling and repairing of pounds, the open-
making, working, and repairing of roads
keeping them in order, and prosecuting
efending the common rights of such
ship, and for other necessary char-
and legal objects and purposes thereof,
re or shall be, by law, expressly vested
he inhabitants of the several townships
is state, by this or some other act of the
lature. By the twelfth section of this
he township committees were authorized
perintend the expenditure of any mon-
aised by tax for the use of the township.

It will be observed that the power to repair roads and keep them in order was one of the principal objects of the incorporation of townships, and it would seem quite conclusive that the power to light the roads, wherever in the township it became necessary for public safety or convenience, could be exercised, whenever the voters of the township, through the forms of law, chose to grant and raise money for that purpose, to be expended under the superintendence of the township committee; and that the township committees were the municipal authorities authorized to act in such matters after such grant of money had been made for the purpose. The power to repair and keep in order roads would certainly, by necessary implication, confer the power to light a road, or portion of it, when necessary; and it is a power which has been exercised by township committees, to a certain extent, ever since the creation of such political subdivisions as townships. It would be a necessary charge, and it would constitute a legal object for the good of the public, within the power of these political organizations. The only restrictions upon the part of the township committee in an expenditure for this purpose would be that it must be preceded by a resolution or order by the voters of the township of a tax for that purpose, which resolution or order could also, by its terms, provide the time and mode in which the township committee should exercise its power. Without the order for the tax, the committee would be invested with no power whatever over this or any other class of township expenditure; but when the tax is ordered raised for this purpose, and no other agents of the township appointed by the town meeting or town electors, the power to make expenditures for this purpose fell upon the township committee. The township committees are the agents of the township, so far as their acts within the provisions of the law are concerned. Demarest v. Inhabitants of New Barbadoes, 40 N. J. Law, 604. Under the eleventh section of the general township act it is concluded that whenever it became necessary for public safety or convenience to light any road, street, or part or parts thereof in a township, it was within the power of the voters to grant and raise by tax a sum of money sufficient for that purpose, as one of the legal objects of incorporation, to be expended under the superintendence of the township committee, who were the legal body authorized to act in the matter. I think the power falls within the reasonable interpretation of the general township law, and within the principles established by the few cases in this state in which the powers of incorporated townships, and their township committees have been discussed. The power of lighting roads within the townships is not conferred upon any other corporate body exercising municipal authority within the township, and by a fair, reasonable, and necessary implication it

Digitized by Google

arises out of the very nature of the objects and purposes of the township governments as provided by the general laws. The power must be exercised by the municipal authority with reasonable discretion, within the narrow bounds of the legislative grants of authority to townships. I do not think it can be denied that municipal authority, having exclusive power of repair and keeping in safe condition the streets or roads, also has the power, by necessary implication, for the public convenience and safety, to light such streets or roads. 2 Dill. Mun. Corp. (4th Ed.) p. 822, § 691 (546) and cases cited in note. The township powers to be exercised, like those of any other public municipal corporation, are those granted in express words; those necessarily or fairly implied in, or incident to, the powers expressly granted; and those essential to the declared objects and purposes of the corporation. 1 Dill. Mun. Corp. (4th Ed.) § 89, and cases cited. For powers of townships and township committees: Bradley v. Town of Hammonton, 38 N. J. Law, 430; Waterworks v. Smith, 47 N. J. Law, 473, 1 Atl. 459. The township committee, when indictable for not keeping highways in good order and repair, can file a bill in their own name to restrain shutting up such highways or rendering them impassable. Inhabitants of Greenwich v. Easton & A. R. Co., 24 N. J. Eq. 217, 25 N. J. Eq. 565. The appropriation or grant of money by the voters must, of course, precede, or be in advance of, the obligation or the expenditure, unless otherwise provided by law. Wayne Tp. v. Cahill, 49 N. J. Law, 150, 6 Atl. 621; 26 Am. & Eng. Enc. Law, p. 98, tit. "Towns and Townships"; Rulon v. Inhabitants of Woolwich, 55 N. J. Law, 489, 27 Atl. 906. The power of the township committee to act would depend upon whether the voters of the township had voted any sum or sums of money as an annual expenditure for such object or purpose. When this condition was complied with or otherwise provided for, then the township committee was the municipal body authorized to act in the matter of the superintendence of the expenditure called for. By the provisions of "An act for the improvement of the township of Kearney, in the county of Hudson, and to increase the powers of the township committee in said township," approved April 6, 1871 (P. L. 1871, p. 1371), other and greater powers, rights, and privileges were conferred upon the township committee than were conferred upon township committees in and by virtue of the provisions of the general law incorporating townships, to which reference has been made. The corporate name of the township by this act was designated as "The Board of Township Committee of the Township of Kearney." The powers conferred were as ample as those conferred upon an ordinary city government. By this statute the township, as a body politic, was possessed of all the powers conferred by the general laws governing townships, and not in conflict with the creased powers under the act of 1871, such increased powers as were conferred that act. Under this act of 1871 it was vided that "the board of township commi of the township of Kearney" should have the powers of a municipal corporation ne sary for carrying out the objects and poses of the act. It could have a com seal, alterable at pleasure, and by its tit could sue and be sued in any of the co of this state; and by this title it was emp ered to make contracts, agreements, regulations, and pass, alter, and repeal dinances for the purpose of carrying out objects and intentions of this act. By eleventh section of this act the board township committee was vested with po to pass, enforce, alter, and repeal ordina to take effect in said township of Kear to lay out, open, widen, vacate, alter, gr fill up, refill, establish, alter, and regu the grade and grading of all streets, aven and roads, side and cross walks; to ascer and establish the boundaries of all str and public roads in the township, and authenticate all said improvements by m or otherwise; to pave, macadamize, gr curb, and gutter the streets, avenues, roads; to construct and build sewers, dra and culverts, and other necessary pass for water; to lay sidewalks of stone or er materials, and to lay out cross walk stone; to set and reset the curbs and gut in the streets and roads, or any part th of. The power was also conferred on board to lay and regulate or prohibit the ing of, water or gas pipes in or under streets or roads or any part thereof; to clare what shall be considered nuisances prevent and remove all obstructions and sances in and upon any street, road, plac places in said township; and to secur every respect to the public, and to the joining owners, the safe and convenient of all streets, sidewalks, and public pla for the purpose for which they were or m be laid or dedicated in said township. rious other and extensive powers were gr ed to the board of township committee this act of 1871, as fully and as ample those which are generally provided for ordinary city municipal government; from time to time since 1871 up to the p ent time additional powers have been, both special and general laws, extended this governing board of this township meet the needs and exigencies of the rap increasing population thereof.

One of the first objections made to awarding of this contract for electric lighting is—and the insistment is strenuo made—that there is not vested in the bo of township committee of the township Kearney any right by virtue of any islative authority to act at all in the m ter of the lighting of streets in such to ship. I think, by the references alre

Digitized by Google

e, and a review of the powers and privs conferred upon the incorporated townss under the general law by the title he inhabitants thereof, and upon the ship committees thereof, it is clearly onstrated that whenever and wherever e necessary for the public good, and ic needs require the lighting of the ts and roads, the power can be exer- under these general laws, and that the ship committee is the municipal author- ith power to act in the premises. But, if this contention be not good, still it fficult to perceive how the power can enied to this board under the provisions ie act of 1871. Under this act of 1871 e power is given to lay out and improve ts, to regulate the use of the same, re- e obstructions therefrom, lay out side- s thereon, and to do and perform every r act in relation to such public streets h a municipal corporation like that of y would or could be authorized to do r any charter of incorporation. It is there is no express power granted to board to light the streets, but the power y out streets, to make them accessible e public, and to adjoining property own- and to render them safe and convenient ublic use and public travel, and to lay pipes in the street, certainly carries it as a necessary incident the power, never it is deemed necessary for the pub- ood, to light them. This board is not entitled to exercise the powers which xpressly granted to it, but also such as necessarily incident thereto in order to exercise the powers expressly granted. hose to become incorporated under the e of "The Board of Township Committee he Township of Kearney," but it is no a municipal corporation than if it had incorporated under the name of "The of Kearney." All this depends upon the tered powers and privileges which it is led freely to exercise for the public good, n the execution of these powers it is en- to appropriate and raise money by tax- without any other limit than the pub- necessity. It may, therefore, be con- d that there was vested in the board of ship committee of the township of ney power to light the streets within the ship limits, and to provide ordinary, nsible, and ample appliances for such ing. And there can be no dispute in this er but that the board here referred to the board, and the only board, author- to act in such matters from time to by ordinance, resolution, contract, or ement, in accordance with the provi- of the township charter. By an act of legislature entitled "An act authorizing ighting of public streets and places, in cities, towns, townships, boroughs and ges of the state," passed June 1, 1886 L. 1886, p. 389), the common council, ship committee, or other municipal authorities of any city, town, township, borough, or village in this state were authorized, from time to time, by ordinance or resolution, to order and cause any public street or streets, place or places, or any part or parts thereof in any city, town, township, borough, or village to be lighted with gas or otherwise, with full power to make or enter into contract or contracts with any other party or parties in relation to the matter, and to appropriate money by taxation to bear the expense of such lighting. It is hardly necessary to say anything in relation to this act, except to refer to the fact that it applies to all cities, towns, townships, boroughs, and villages, and confers the power upon the different municipal authorities in each of these subdivisions to act in such matter; and to add that in townships the power is conferred upon township committees by contract or otherwise to light the streets with gas or otherwise. This act necessarily limits the exercise of this power within the annual appropriation for such expenditure, and gives no power to contract for more than a period of one year; but the appropriation for such purpose need not precede the contract for such lighting. By a supplement to the general act of incorporation of townships, approved April 14, 1846, which supplement was approved May 17, 1894 (P. L. 1894, p. 434), the township committee or board of commissioners within any township of this state, having authority to procure and supply lights for lighting the public streets, were empowered to make a contract with any person or corporation for the supplying of such lights, for a year or term of years, which contract, when so made, shall be lawful and valid; and the moneys payable under said contract in each year shall be levied and raised by taxation in the annual tax levies of such year, provided that no such contract shall be made for a longer period than five years. By an act entitled "An act authorizing the lighting of public streets and places, in the cities, towns, townships, boroughs and villages of this state, and to erect and maintain the proper appliances," approved May 22, 1894 (P. L. 1894, p. 477), power was conferred upon the common council, township committee, or other municipal authorities of any city, town, township, borough, or village in this state authorized to act in such matters, by ordinance or resolution, to order and cause any public street or streets, place or places, or any part or parts thereof, to be lighted with gas, electric lights, or otherwise, and to erect and maintain for that purpose, or cause to be erected and maintained, all necessary and proper posts, poles, lanterns, and fixtures, and to make and enter into any contract or contracts with any other party or parties for any term or terms not exceeding five years, and to cause the annual expenses thereof, after being ascertained or determined by resolution or otherwise, to be

Digitized by Google

levied, assessed, and collected in the same manner as taxes for the working and repairing of roads or streets in such township are or may be levied, assessed, and collected.

All these statutes are referred to in order to show the course of legislation on this subject of lighting streets and public places in townships. Neither under the general law applicable to townships, nor under the charter of the township of Kearney, passed in the year 1871, could there exist in the board of township committee of the township of Kearney any power whatever to make any contract in relation to the lighting of the streets and public places of the township for more than a period of one year. Neither of these acts would enable the municipality to enter into any contract for the lighting of streets for a longer period than they possess the right to make an appropriation for the expenses thereof, to be included within the tax levy; and under the general law applicable to townships, and the charter of 1871, the board of township committee could not raise, grant, or appropriate any money, or include any greater sum in the tax levy, than was necessary for the municipal or township purposes for the current year; and, while the power was conferred upon them to provide the appliances for the same, and cause the streets to be lighted, yet no contracts whatever could be made for any period longer than one year. This has been the contention of the prosecutors, and it may, for the purposes of this case, be conceded. But, whether this be so or not, this power to contract for a longer period is clearly found in the acts of 1894. We have already concluded that under the general township act, or under the statute of 1871 applying especially to this township, or under the general law of 1886, the township committee, or the board of township committee of this township, was the municipal authority authorized to act in such matters as the lighting of the streets by gas or otherwise, and by the act of May 22, 1894 (P. L. 1894, p. 477), the power is extended to lighting with "gas, electric lights, or otherwise." By the true interpretation of the act of May 22, 1894, the words, "authorized to act in such matters," as used in this statute, plainly refer to such boards as are provided for in the different and differing municipal charters having such matters in charge. This statute is a general grant of power to all cities, towns, townships, boroughs, and villages to light the streets with gas, electric lights, or otherwise, but conferring the exercise upon the appropriate municipal authorities within the municipalities; as, in case of a municipality where one board is authorized to act in educational matters, and another board has power over streets and public places, and the lighting of the same, the latter would be the authority having in charge such matters, and would exercise the power conferred by the statute. Thus the board of township committee of the townshi by these statutes authority to act i matter of lighting the streets of the ship; and a mere reference to the st of May 17, 1894, and the statute of Ma 1894, disposes at once of the objection no power existed in the board to ente a contract for such lighting for the of five years. Upon this subject both statutes expressly confer this power the board of township committee, an only argument advanced against the cise of the power is that the expense be estimated and raised by taxation ally. But this is no answer to the ex terms of, and the express grant of in, the statute. The contract is fo years, and the expense of the contract be raised by taxation annually. This annual expense under the contract. is nothing incongruous or inconsiste these provisions. In fact it is a safe against extravagance. The power i given to issue bonds, and thus burde municipality, but the expense as it is red, or about to be incurred, or after incurred, is placed in the tax levy. grant to place the expense annually i tax levy was entirely within the exerc legislative power, and so was the pow create a contract extending over a of five years. These things were en matters of legislative wisdom and d tion, and, being found in the legis grant of power, can be exercised by th nicipality upon which it is conferred.

In the examination of the return t writ, it appears that the board of tow committee of the township of Kearne formed to the formal directions of the ute in their proceedings and award c contract to Woolston for the lightin streets of the township with electric The resolutions of the board to ligh streets of the township with electric were in accordance with the statute. posals were advertised for in accor with these resolutions for the lighti the streets of the township for five with electric arc lights; and in accor therewith, at the time appointed, p als and communications were received three parties, representing the differen tems of electric arc lighting. These opened in a public manner on July 10, the time appointed, and referred t lighting committee of the board. much examination of the question, an er all the parties were heard upon the ject, notably the prosecutor in this who was a bidder for the contract, o gust 14, 1894, the lighting committee r ed to the full board, recommending th contract be awarded to Woolston, a August 28, 1894, formal resolutions t effect were passed. The objection o prosecutors to the action of the tow committee in the award of the contr

Digitized by Google

t was not awarded to the lowest bid-
There can be no force in this objec-
In the exercise of the power confer-
pon them in this matter, they were
equired to award the contract to the
bidder. The authority to enter into
ontract was a general one, and not lim-
nd restrained in any manner in this
t; and, if they exercised the power
d faith, in a bona fide manner, with-
buse or corruption, then the court can-
terfere with the exercise of their judg-
in the matter. They were not to exer-
n arbitrary discretion, and over such
ercise of power the court would have
control in order to defeat fraud or in-
e. and to protect the public from the
of the power conferred, and from ex-
and imposition. But if they exer-
the power conferred upon a substan-
d rational basis of fact, in good faith,
bona fide manner, then the discretion
dgment, whichever the act may be
cannot be interfered with by the
The legislative power to make this
ct was conferred upon this body, and
pon the court. They exercised the
, and, while it may have been exer-
in a different manner, or with a differ-
iscretion, from that which the court
have exercised, that alone furnishes
ound for nullifying their action. The
to be exercised, and the restraints of
e matters of legislative jurisdiction.
buse of the power, contrary to com-
ustice, becomes cognizable in the courts
rrection. State v. Mayor, etc., of City
yonne (N. J. Sup.) 28 Atl. 382; State
ard of Chosen Freeholders, etc., 37
Law, 254. Where the power to con-
is general in a municipal corporation,
is not restricted to an award to the
bidder, the contract may be awarded
other circumstances than the mere
proposed. Shaw v. Trenton, 49 N. J.
339-341, 12 Atl. 902; State v. Trenton
25, 1895) 31 Atl. 613, and cases cited.
here be a dispute upon the facts in the
s to the question who was the lowest
. the determination of the board, made
d faith, would be upheld, if there were
acts in the matter affording a rational
for such determination; and therefore,
n the evidence there exists a dispute up-
s question, the court will not determine
ight in order to reverse the determina-
f the municipal authority having the
t-matter within their discretion. But
eful examination of this evidence does
veal that Woolston was not the lowest
, and, if that is a reason for setting
the proceedings, it ought clearly to ap-
It will be observed that the advertise-
for proposals was for bidders to esti-
separately on lights for this electric arc
g of 1,200 and 2,000 candle power, and
m 80 to 125 lights required. The bids
of the Excelsior Electric Company and the bid of Woolston were in accordance with the advertisement. The bid of the Excelsior Electric Company clearly appeared to be much higher than that of Woolston, and therefore was not considered. The bid of the prosecutor Schefbauer was clearly not in accordance with the advertisement. He bid 2½ cents per light of 2,000 candle power per hour, or $100 per year, and two cents per light of 1,200 candle power per hour, or $80 per year; and this estimate was based, as he expressly stated in the proposal, upon 4,000 hours of light per year. Woolston's bid was "for full 2,000 candle-power lights, twenty-nine and one-half cents per light per night; for full 1,200 candle-power lights, twenty-seven cents per light per night." Upon these bids of Woolston and Schefbauer there ensued an examination, and evidence of experts and others as to which would be the cheapest for the township to contract with was laid before the township committee. It has been observed that Schefbauer's bid was indefinite, and there has been an endeavor to show by calculation that his system would be cheaper for use than that of Woolston, and from that point the evidence drifted into a discussion of experts and others upon the respective merits of the different systems of electric arc lighting; the merits of the direct current and the alternating current systems, respectively, have been elaborately dwelt upon, and the differences and advantages of the one system over the other have been extended, until it is a difficult task for the ordinary mind to determine whether one single fact in relation to the merits of the different systems has been established. Upon an examination of the evidence, if I was called upon to determine the matter, I should find, as it appeared to the board of the township committee at the time of the awarding the contract, that Woolston's bid was the one in accordance with the advertisement, clear and distinct in proposal, and the lowest bid, in terms, for the supply of light required. It is clearly so, unless an abstract calculation is entered upon, based upon a proposal or bid ambiguous in its terms, and not in accordance with the advertisement. But we are not called upon here to determine accurately which was the lowest bid, and we go no further than deciding that this was a question of judgment for the township board to determine, and that they did so upon facts tending to show that their conclusion was one at which they could reasonably arrive, and one at which they arrived in good faith in a bona fide manner. The proceedings here brought up for review rested in the honest judgment and discretion of the board, based upon a rational basis of fact before them, and the questions of advantage to the municipality, and of expediency, were for them to determine. The proceedings and award of the contract will be affirmed, with costs against the prosecutors.

Digitized by Google

McGLADE v. McCORMICK.

(Court of Errors and Appeals of New Jersey. March 4, 1895.)

SALE—FALSE REPRESENTATIONS—RES JUDICATA.

1. To render a vendor liable in tort for fraudulent representations on the sale of a horse, knowledge on his part of the falsity of the representations must be proved.

2. Where a person, after being nonsuited in an action for fraudulent warranty in the sale of a horse, recovers judgment in an action for breach of contract on the same warranty, he cannot obtain a reversal of the judgment in the tort action.

Error to supreme court.

Action by Patrick McGlade against James McCormick. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Howard Carrow, for plaintiff. Fred'k A. Rex, for defendant.

BEASLEY, C. J. This writ brings up for review the proceedings at the trial resulting in a nonsuit of an action commenced in the supreme court. The record shows that the suit was in tort, and that plaintiff's damage was the result of a fraudulent warranty of soundness in the sale of a horse by the defendant to him. At the circuit, when the plaintiff had rested his case, a motion was made, in behalf of the defense, that he be called, on the ground that there was an entire failure of evidence to show a scienter in the defendant, and which was a fact essential to the cause of action as laid in that proceeding. The motion prevailing, a bill of exceptions was taken and sealed, and in this way the case is now upon the record before us for our decision.

After a careful examination of the testimony as it stood before the trial judge at the time the plaintiff rested, it is the opinion of this court that the motion to nonsuit was rightly granted. Several witnesses had testified to a contract of warranty of the soundness of the horse sold, but none had asserted that he had either said or done anything evincive of his knowledge that the stipulations or statements embodied in his agreement were untrue. Nor were there any facts in proof from which it could be rationally inferred that such guilty consciousness had existed. Any verdict resting on so flimsy a ground would have been untenable; it would have been summarily set aside on motion. The judgment of nonsuit on this account should be affirmed.

It also seems to me that there is likewise another insuperable obstacle to a successful prosecution of this writ of error. The defendant in error has interposed by way of special plea, setting up certain facts which would seem to debar the plaintiff from attempting to reverse the judgment of nonsuit above referred to. The circumstances thus pleaded are that after the entry of such judgment the plaintiff brought his action against the defendant in the supreme court, founded on the same warranty alrea ed, the only difference between the fi second suits being that the first was and the second one was in contract plea further shows that in the last there was a verdict and judgment i of the defendant. There is no repl or other denial of the facts thus p the consequence being that they ar taken as true. In my opinion, this suit, carried to a judgment, must u ably be considered a waiver of all r prosecute the anterior suit in any whatever. The existence of the c and its breach, which has been defi determined in the second action, con an indispensable part of the first, a sequently cannot be again tried. Th ment in the last procedure is a finali respect to the inability of the plai maintain a successful action on th ranty in question, and, this being production of such a result by the p must in law operate as a waiver of a to reverse my writ of error the judgm nonsuit in question, when its reversa be absolutely fruitless. Let a judgm affirmance be entered.

MEYERS v. SCHUMAN et al

(Court of Chancery of New Jersey. M 1895.)

EQUITY—DEMURRER—RESCISSION OF CO

1. A motion to strike out a bill plaint "on the ground that it shows no for the interposition of a court of equi states nothing which requires the defen answer," is, in effect, a general demur must fail if there is any ground on wh bill can be retained.

2. A bill for relief and discovery n against a general demurrer, present such as will entitle complainant to some part relief independent of the discovery.

3. A bill in equity by decedent' brought to recover the money due upon of life insurance taken out by her husb assigned to her, and for a surrender of the is not subject to general demurrer, notwit ing it admits a prior formal assignmen fendant.

Bill in equity by Christina Meyers Kate Schuman and Equitable Life As Society for the possession of a life in policy, and payment of money due t Motion by defendant Schuman to dism Denied.

Chas. A. Baake & J. J. Crandall, f plainant. C. L. Cole, for defendant man. W. T. Day, for defendant Eq Life Assurance Society.

GREEN, V. C. George Meyers, a n man, on the 30th of December, 1887, p a policy on his life in the Equitable L surance Society of the United States sum of $2,000, to be paid to his execut ministrators, or assigns at his death, sideration of his payment of an annu

Digitized by Google

of $139.64. He assigned this policy to ate Schuman, and delivered it over to the 28th day of May, A. D. 1888. On th of November, 1894, he demanded the sion of the said policy of the said Kate an, but she refused to give it to him, hereupon Meyers, in writing, assigned olicy, with all moneys to become due n, to his wife, Christina Meyers. e Meyers was married to complainant 5, 1853, and he departed this life No- r 24, 1894, at Atlantic City, in this The proper proofs of death were made assurance society, and Kate Schuman, ignee of the policy, made a demand up- said society for the amount of the pol- Like demand was made by Mrs. Mey- The latter then filed her bill in this against the society and against Kate an. This bill alleges that the policy fected by her deceased husband to aug- any rights and properties that he might to and for the benefit of his next of his death. It avers that Meyers "form- ssigned and set over the said policy Kate Schuman, and delivered said pol- her, who now has possession of said and claims the money due and pay- n said policy by virtue of such assign- and that such assignment was exe- on the 29th day of May, 1888"; also that "said Kate Schuman had no in- e interest in the life of said George s, and that said Kate Schuman was related to said George Meyers, either od or marriage; and that she was nev- any wise a creditor, partner, or in any f his household, and held no moral or relation to said deceased; and that for ason that said assignment was purely ary, and said Kate Schuman had not ghtest insurable interest in the person l George Meyers, the said assignment nd is purely fictitious and inoperative." rges that George Meyers always paid emium on the policy himself, out of his money, to the time of his death; that us to his death he made and published will and testament, and bequeathed all al, personal, and mixed property to his and appointed her sole executrix of his

It prays for answer without oath, par- ly that Kate Schuman shall set forth at right or title she holds the policy, y what right and how she has, or ever ny insurable interest in the life of the George Meyers; that she be decreed to der the policy to the complainant, and omplainant have the right to proceeds said policy, and for such other and fur- elief as shall be agreeable to equity and conscience. The Equitable Life Assur- Society of the United States asked leave a bill of interpleader, on the ground here was no dispute, on its part, as to lidity of the policy, and no claim by it he money, which it was willing to pay h person as should be legally or equi- tably entitled to receive the same; and that claim had been made upon it by both the wid- ow, Mrs. Meyers, and the assignee, Mrs. Schuman, as being so entitled. There was a suggestion from the court that it was not necessary, in view of the present practice of the court, to file a bill of interpleader, but that a more simple, expeditious, and inexpen- sive practice was indicated by Chancellor Walworth in the case of Badeau v. Rogers, 2 Paige, 209. In that case the complainant filed a bill in the nature of a bill of inter- pleader to redeem a mortgage. A bill was already pending in the court with reference to an assignment of this mortgage, and also one to foreclose the mortgage, and in this suit all of the persons interested were parties. The chancellor says, with reference to the bill of interpleader, showing that it was unneces- sary (page 211): "If the complainant had pre- sented a petition to the court in those two suits, there can be no doubt that the chancel- lor would have authorized him to pay the money into court to abide the event of the litigation between Rogers and Secord, and would have stayed all further proceedings against him." In consequence of some pro- ceedings in the suit, however, the chancellor thought he ought not to dismiss the bill. Counsel for the assurance society thereupon presented this petition as a defendant in this cause, in which it sets out that it is a mere stakeholder with reference to this fund, and asks that it may be permitted by an order of the court to pay the money due on the pol- icy of insurance into court, to abide the result of the suit; and that it may, at the proper time, receive back its policy of insurance, and be discharged from all liability in the prem- ises. Upon the filing of this petition an or- der to show cause was made requiring the complainant and the defendant Kate Schu- man to show cause why an order should not be made in the cause authorizing the society to pay the sum of $2,000, mentioned in the pleadings, into court, to abide the event of the cause, and thereupon to have the bill as to it dismissed, and further proceedings there- in against the society stayed, and the com- plainant and defendant ordered to interplead, and settle the matter in difference between them, and at the conclusion of the contro- versy to deliver up and surrender to the so- ciety the policy of insurance mentioned in its petition.

If the bill can be maintained, there is no reason why the order to show cause should not be made absolute. Notice was given by counsel for defendant Schuman, under rule 213, of a motion, to be made at the same time the order to show cause was returnable, to strike out the bill of complaint, "on the ground that it shows no ground for the inter- position of a court of equity, and states noth- ing which requires the defendant Kate Schu- man to answer." This motion takes the place of a demurrer, and admits all facts stated in the bill which are well pleaded. The bill ad-

Digitized by Google

mits an assignment of the policy, and its delivery to the defendant Schuman, but it does not aver that this was an assignment of the moneys due and to grow due thereon. Its attack on the assignment is largely based on the ground that it was voluntary, and that the assignee had no insurable interest in the life of the insured. This motion, being in effect a general demurrer, must fail, if there is any ground on which the bill can be retained. It is said in Vail's Ex'rs v. Railroad Co., 23 N. J. Eq. 466: "A demurrer will lie wherever it is clear that, taking the charges of the bill to be true, the bill would be dismissed at the hearing; but it must be founded on this: that it is an absolute, certain, and clear proposition that it would be so. Where the demurrer is general to the whole bill, and there is any part, either as to the relief or the discovery, to which the defendant ought to put in an answer, the demurrer, being entire, must be overruled." In Drummond v. Westervelt, 24 N. J. Eq. 30, it is held that a general demurrer will not be allowed to a bill if it presents a case in which the legitimate proof may be such as to call for a decree in favor of the complainant. The bill in this case is for relief and discovery. It must, as against a general demurrer, present such a case as will entitle the complainant to some part of the relief independent of the discovery. Miller v. Ford, 1 N. J. Eq. 365; Little v. Cooper, 10 N. J. Eq. 273; Metler's Adm'rs v. Metler, 18 N. J. Eq. 270, affirmed 19 N. J. Eq. 457. The suit is against an insurance society and another, to recover the money due on a policy of insurance on the life of the husband of the complainant. She claims this money, on the decease of her husband, by virtue of an assignment to her, by her husband in his lifetime, of the policy, and all moneys to grow due thereon, as well as sole legatee and executrix of her husband, the insured. She does not have, and never had, possession of the policy. She says her right to the moneys due is denied by the society because the defendant Schuman also claims to be entitled thereto. She alleges that George Meyers, the insured, did, prior to the assignment to her, formally assign and set over the policy to said Schuman, and deliver the policy to her, and that she still retains possession of it. There is no admission in the bill that Meyers did more than make a formal assignment of the policy to Schuman. A formal assignment of such an instrument does not necessarily carry a right to the money it may secure. There may be a right to the formal possession of the paper in one and a right to the money secured in another. Lord Cairns, in Rummens v. Hare, 1 Exch. Div. 169, which was an action in detinue for a policy of insurance, says (page 171): "This is an action not involving any question with regard to the money secured by the policy of insurance, but for the detention of the paper writing only;" and at page 172: "We have nothing to say as to the money which is secured by it. This is one of those cases in which the plaintiff may not be able cover the document which is the evide the debt, while the person who holds th dence may not be able to recover the itself." The legitimate evidence in thi may show that this assignment was n solute, that it was only for safe-keeping a condition since executed, or as collate an undertaking since discharged; eith of which facts would fall within the gation that it was only formal. It is the assignment is principally attacked ground that Schuman had no insurable est in the life of Meyers, but by the d allegation that the assignment to Sch was only formal the pleader has broug possible legal effect of the assignment the four corners of the case. The assig questioned is in the possession of the d ant Schuman. Complainant has never and has no notice of its contents. If merely formal, and the reason for its ment has ceased, complainant may be tled to the aid of this court, by its d to secure the money due on the policy. motion must be denied, with costs.

NATIONAL DOCKS & N. J. J. CONN ING RY. CO. v. PENNSYLVA- NIA R. CO. et al.

(Supreme Court of New Jersey. Oct. 25,

CONDEMNATION PROCEEDINGS — TAKING OF ROAD PROPERTY—VALUE FOR PROSPECTIVE —EVIDENCE—MEASURE OF DAMAGES.

1. In a proceeding to condemn a ri cross defendant's tracks below the grade of, evidence that, after the constructi the crossing, defendant, if it wished to more tracks on the part of its right of w yet utilized, would have to build abutmen bridges which would not be necessary were for the crossing, was admissible. Lipp J., dissenting.

2. If the cost of the abutments and b or any less expensive mode of making su cant strip available after the taking, wa than the land would be worth when so r ed, plaintiff was entitled to its value wh deemed, less the cost of redeeming if the ing was not taken; but, if the cost of ut the strip after the taking would not exc value when made available, the measure o ages was the difference between the cost o mode of redeeming it as must be resorted t the taking and the cost of redeeming it the taking, if the former would exceed t ter. Lippincott, J., dissenting.

Error to circuit court, Hudson count fore Justice Lippincott.

Proceeding by the National Docks & Jersey Junction Connecting Railway pany against the Pennsylvania Ra Company and another to condemn c property for railway uses. Judgmen plaintiff, and defendants bring error. versed.

Argued before BEASLEY, C. J., and GIE, LIPPINCOTT, and VAN SYCKE

J. D. Bedle and James B. Vredenb for plaintiffs in error. J. R. Emery an lins & Corbin, for defendant in error.

Digitized by Google

N SYCKEL, J. On the trial below the
iffs in error offered evidence to show
ost of building abutments and bridges
sary to make the green strip available
dditional tracks or other uses. This
ace was excluded, and an exception
upon which error is assigned.

m the evidence and exhibit in the
the jury had a right to find that this
of land could not be made available for
cial use by the Pennsylvania Company
ut filling it up to the grade of existing
. Before the crossing by the National
, earth filling only was necessary. After
rossing is taken, it will be necessary
nstruct abutments and bridges to re-
he earth filling, which would other-
fall upon the tracks to be constructed
e National Docks, and obstruct their
In the judgment of this court, the evi-
offered and overruled was competent,
ecessary to enable the jury to estimate
amages sustained by the Pennsylvania
any by the crossing of that strip by the
nal Docks road. It was a question of
for the jury to settle, what the value
t strip was to the Pennsylvania Com-
for any purpose to which it might law-
and reasonably appropriate it. If the
hould find that the cost of constructing
ents and bridges, or the cost of any
xpensive mode which might be devised
der to utilize the said strip after the
, was in excess of the value of the
after such redemption, then the jury
l say that any such mode of attempting
leem and appropriate the said strip is
sonable, and should not be resorted to.
onsequence of such a finding would be
he said strip of land would be rendered
ratively valueless when the crossing
pleted, because it would cost more to
it available to the Pennsylvania Com-
than it is worth. In that case the
ylvania Company would be entitled to
alue of the strip when redeemed, less
st of redeeming it if the crossing was
ken. But if the cost of abutments and
es, or some other effective but less ex-
ve mode of utilizing the strip after the
, did not exceed the value of the strip
it is redeemed, then the Pennsylvania
any would be entitled to the difference
en the cost of such mode of redeeming
must be resorted to after the taking
he cost of redeeming it before the tak-
f the former exceeds the latter. The
expensive mode of effecting the redemp-
must be taken into account. In this
the evidence offered was competent,
should have been received, and submit-
the jury, with proper instructions. If
rip, provided no crossing was taken by
ational Docks road, would be more val-
without filling up (taking into account
st of filling), then the question would
hat the value is, and whether by the
that value was impaired, and to what
extent. In such case the cost of filling and of abutments and bridges would not enter into the computation. All these are questions of fact to be submitted to the jury. The rejection of the evidence offered was erroneous, and the judgment below should therefore be reversed.

(Jan. 22, 1895.)

LIPPINCOTT, J. (dissenting). I am constrained to dissent from my brethren constituting the majority of the court, in the conclusion that the judgment in the Hudson county circuit court should be reversed. The exceptions under review were taken on the trial of an appeal in a condemnation proceeding brought by the defendant in error (a railroad company) to acquire a route across the route and lands of the plaintiffs in error (other railroad companies), the crossing being made under the grade of the existing tracks of the older company. A great number of exceptions were taken to the manner of framing the issue for the trial of the controversy, on the appeal from the award of the commissioners, to the amendments thereto, and during the trial of the same. The only exceptions to rulings deemed worthy of discussion and determination are those set forth in the eighth and ninth assignments of error. To properly understand these rulings, the evidence in the case, and the purpose of the offer of the testimony excluded, must be carefully considered. For convenience, the railway company prosecuting the condemnation, which is the defendant in error, may be designated as the "Connecting Company," and the two railroad companies, owning as lessor and lessee, who are plaintiffs in error, may be designated as the "Pennsylvania Railroad Company."

A part of the property taken was a crossing under grade of a number of yard tracks, and also under the tracks of the Pennsylvania Company, on one of its filed routes in Jersey City, called the "Main Passenger Route." It was contended on the trial, by the Connecting Company, that the authorized width of this route was only 66 feet, but it was determined by the trial court that the width was 100 feet (P. L. 1830, p. 86; P. L. 1868, p. 1030; P. L. 1872, p. 567), and that at the point of crossing the Pennsylvania Company held the width of 100 feet, besides other lands on either side. At the point of crossing there are three tracks on this located width. The two northerly ones are used as the tracks of the main passenger line of the Pennsylvania Company, and the southerly track of the three is used in connection with the large adjoining parcel of land owned by the said company, as a part of their passenger car yard. The two main passenger tracks are located, one on each side of the center line of the located route; and all of the three tracks cross over the route of the Connecting Company, on an iron-girder bridge, resting on stone abutments 30 feet apart, constructed by the

Digitized by Google

Pennsylvania Company in the year 1887. The trial court allowed the owning company to prove the cost of these abutments and bridge, and the cost of these permanent maintenances, and directed the jury to include their value in the award of damages. Another offer was made by the Pennsylvania Company. The proof was: That on their route, at the place of crossing, there was room for more tracks on both sides of these tracks then there constructed, and that two more tracks could be laid on the route, north of those already constructed upon it. In order to construct these two tracks to the north, and on the same level, it would only be necessary for the Pennsylvania Company, under present conditions, to make an embankment across the route of the Connecting Company. That the taking of the undergrade crossing by that company would change existing conditions so that it would be necessary for the Pennsylvania Company, if they should ever build such tracks at the same location and elevation, to build bridges to carry these two additional over the route of the Connecting Company. Upon these facts, substantially, the Pennsylvania Company, at the trial, contended that they were entitled to recover, as part of their damages, the cost—to be now estimated—of the erection of such bridge and abutments for two tracks which they lawfully could, and possibly might, place at that location, less the cost of raising the embankment there, which would be an expense necessary under existing conditions. The offer was stated in these terms by counsel of plaintiffs in error: "I offer to prove the cost of construction of such additional abutments as would be necessary to accommodate two additional passenger tracks to the north of the present tracks." This was followed by an offer to prove the cost of filling the same space so as to support such two tracks, as follows: "The offer is made upon the idea that the only way of ascertaining what the damage is, and what the value of the land is, is by ascertaining the difference between what it would cost to build the bridge there, and what it would cost to fill it up; the idea being that, if that other road was not underneath us, we would fill it up, instead of building a bridge there." These offers were distinctly presented as the measure of damages, and not to show the capabilities of the property. The argument of counsel at the trial, as it appears in the record, demonstrates this. It is clearly stated to be that: "If they [the Connecting Company] did not build their road, we could get all the rails which the law allows us to put on that highway without building any abutments, and therefore the damage we suffer is the difference between what it would cost to put the rails there without building an abutment and what it would cost to put them there when we have to build an abutment." The trial court so understood it, for in ruling upon this offer of the cost of the abutment the said, "It is offered here as an eleme damage to be included in the verdict jury"; and it was not then, nor at any afterwards, questioned that such wa purpose of the offer upon which the was called to rule. The testimony as estimated cost of these abutments wa jected. The trial court said, substan that there was no duty on the part Pennsylvania Company to construct two additional tracks; that it could contended that such use of the land more than a future possible use; th from the facts in evidence, one might j fairly conclude, with as strong a proba that these lands would not be used f two additional tracks, but for other ra uses, which might very materially c the character and cost of constructio evident necessity existed for two more at that point; and that the necessity never arise. It is, then, evident that t fer was made on the trial as a definite ure of damages, and that it was ruled in that aspect, and rejected as not c tent for that purpose, and it cannot b sented on error as competent for othe poses not stated to the court at the ti trial. In the case of Railroad Co. v. D 37 N. J. Law, 528, in the court of error appeals, Mr. Justice Van Syckel, deliv the opinion of the court, said: "It is the settled rule that a party shall not be in an appellate court upon a point not or a matter not raised and considered, court below. The point specifically was properly decided, and the court c say that, if the evidence had been offer any legal purpose, it would have be jected. The result is in harmony with cases which have been adjudged in court and in the supreme court"; many cases.

The rejection of these estimates has assigned for error, and a majority c court hold that the estimates should been admitted, and, that the rejection error. I cannot agree with that view. far possible future uses of land taken be considered in condemnation cases matter which must, to a very great e be left to the discretion of the trial j for the manifest reason that the numb such possible uses is endless. The possible use to which the land might b voted, and the cost of preparing it for use, was not the issue which was fr for the trial of the controversy. Mr tice Depue, in the case of Schenck v. G 38 N. J. Law, 471, in the court of error appeals, said: "The cardinal rule in trial of causes is that the evidence sh confined to the issues made by the pa An adherence to this rule is of great tical importance in trials by jury. most every case of controverted fac infinite variety of extraneous circums

Digitized by Google

be suggested, which may bear remote-
pon the issues involved, or upon the
bility of witnesses. The admission of
proof of such circumstances must be left
he discretion of the judge; otherwise,
ury might be confused by the multitude
llateral issues, tending to a miscarriage
he cause, and the trial expanded to an
asonable extent." See, also, Providence
. R. Co. v. City of Worcester, 155 Mass.
1, 29 N. E. 56. While it may be said
the trial court is bound to admit evi-
e showing or tending to show the avail-
ty of the property for valuable uses, it
ilte another thing to admit evidence as
he cost of some particular erection said
e necessary to adapt the land to such
The cost of restoration for an exist-
use stands upon an entirely different
ciple from the cost of creating a future
The cost of restoring an existing use
nd damaged by the taking may be prov-
n certain cases. Where it is apparent
the cost of restoring the existing use
be less than the damages otherwise
ained, such cost should be provable, on
principle that a party should not recover
dable damages. If a part of a house
aken, the damages might be the full
e of the building, if not restored, but
such restoration the damage might be
l. In such case the cost of restoration
ld be the fair measure of damages.
rwick aptly illustrates this doctrine as
ws: "If all the windows of a house
ld be broken, the measure of damages
ld be the cost of putting in new win-
s, not the loss resulting from leaving
permanently without windows." Sedg.
. § 1199. The cost of restoring an ex-
g use may also be proved where it ap-
s that the restoration is necessary to
exercise of a public franchise which the
emning party has no lawful right to
roy. It is on this ground that, in a
oad, or a street crossing of railroad
ks, the cost of adjusting the existing
ks to a change of grade made necessary
he crossing supplies the rule of dam-
. In the case of Massachusetts Cent.
. v. Boston, C. & F. R. R., 121 Mass.
Mr. Justice Gray said that "damages
l be allowed for changes in the surface
lutely required by law, or in fact neces-
to be made by the corporation injured,
der to accommodate its own land to the
conditions." But here no present pub-
uty to lay more tracks is shown, and no
evidence appears that they now are,
er will be, necessary for the exercise of
franchise. The fact that the land taken
rt of a railroad route does not, it seems
e, entitle the owner to more than just
pensation, measured by the usual stand-
The restrictions on the condemnation
railroad route are imposed solely for
benefit of the public. The private right
he railroad company has no sanctity,
and the company "occupies no higher ground than a common landowner." Morris & E. R. Co. v. Central R. Co., 31 N. J. Law, 205, 214; Pennsylvania S. V. R. Co. v. Philadelphia & R. R. Co., 160 Pa. St. 294, 28 Atl. 784. Land not necessary for the franchise may be taken, even though it be acquired by condemnation, or is part of the filed route. Cincinnati, S. & C. R. Co. v. Village of Belle Center, 48 Ohio St. 273–295, 27 N. E. 464; Railroad Co. v. Drummond, 46 N. J. Law, 644; Mobile & G. R. Co. v. Alabama Midland Ry. Co., 87 Ala. 520, 523, 6 South. 407. As matter of fact, it was not shown that the laying of the two tracks was contemplated or necessary. On the contrary, from the evidence, it could not be contemplated, except as a future possibility. It clearly appeared in the evidence that if the two proposed tracks should be laid they could be extended only about 50 feet east of the crossing of the road of the Connecting Company, where the lands of another railway company, not concerned in the litigation, would be encountered. Their right of way, beyond a width of from 50 to 60 feet, ended abruptly at this point; and the two proposed tracks would end abruptly at this point, for beyond it clearly appeared that the Pennsylvania Company had acquired no title. Presumably, the full width might be acquired at some future time by condemnation or purchase, but the fact is the Pennsylvania Company has not yet acquired it, and that indicates at once that the construction of two more tracks north of those now in use is but a remote possibility. That the laying of these two tracks is a remote possibility is also apparent from the consideration of other facts in the case. About a quarter of a mile east of the crossing, this route, which has an authorized width of 100 feet, ends; and the passenger line is limited to the width of four tracks, and is an elevated iron structure within the line of a public street called "Railroad Avenue," in the city of Jersey City. Two of these four tracks are necessary to transfer passenger cars between the car yard and the terminal station on the Hudson river. The other two are passenger main-line tracks, being the continuation of those crossing the abutments already erected. A similar restriction also on the present use exists about a quarter of a mile to the west of these abutments. There the passenger route, with two tracks, joins the freight route, also with two tracks, and these four tracks enter the deep cut in the solid rock only wide enough for that number. It is apparent that, if the two proposed tracks were constructed under present conditions, they could be no more than sidings, and could not be used as main-line tracks, unless substituted for those now in use for that purpose, and that the construction of these two new tracks is not necessary for the exercise of the franchise of the owning company.

Digitized by Google

It is difficult to perceive, under the facts, how the estimate of cost could have been admitted, even if it had not been offered as a fixed item of damages. As a defined and certain item, reduced to dollars and cents, to be included, as such, by the jury, in the damages, it would seem to be radically objectionable, and yet it was offered as such an item. It was proposed that the owning company should now be paid the large cost of these proposed abutments, not because necessary or needed now, or likely to be built soon, but because possibly or probably they might be necessary at some future time; but no period was attempted to be fixed in the evidence within which that time would arrive, and without that element it would have been impossible for the jury to estimate what sum should be allowed, which, if invested, would realize the cost of the abutments when needed. The jury could not fix the time within which the erection would be necessary, nor could they determine the character of the structure which should be made the basis of the cost of future use. The offer called for additional abutments north of those under the present tracks, and if the owning company could select this plan as the mode of future use, on which to base an estimate of damages, then they could select any other plan, and prove its cost. It is at their discretion to erect a building there, or locate their tracks at an increased elevation, or to construct a bridge with a span of 60 feet, instead of 30 feet, or to construct an arch over the tracks of the connecting company, or to adopt any other plan of crossing, however costly it may be, and include the cost, as a fixed item of damage, in the verdict. Thus, so far as the offer ruled upon in the trial court is concerned, the matter might rest here, as being properly rejected, but it is difficult to understand how the offer could have been made so as to be admissible for any other purpose than that stated. The evidence rejected was, I think, not only incompetent for the purpose for which it was offered, but for any other purpose in the cause.

If such estimates can be admitted, it would follow that not only in every case where the tracks of one railroad company cross under grade the tracks of another, but in every case where a highway crosses a railroad under grade, the cost may be proved, and must be considered, in fixing damages of constructing abutments and bridges, for as many tracks as the older route will contain, though in fact but one or two tracks may have been constructed, and no more may ever be required. No distinction can, in this regard, be made between highway and railroad crossings. In the case of Morris & E. R. Co. v. Central R. Co., 31 N. J. Law, 214, the chief justice said: "The inconvenience to the company from the intersection of their road by the track of another company, and by the use of such track, may be greater than that occasioned the individual by the interse of his farm or private road; but it is s jury of the same general character, the ages in both cases being equally asce able." It appears to me that a fatal tion to such proof, whether offered as a ure of damage, or as an aid to the jury timating damages, is that the amount p can bear no definite relation to the da sustained. It might be much less or more. It does not meet the objection t that the jury should allow the increase of adapting to the future use only wh their judgment, the improvement is more than its cost. Such a rule would a most capricious measure of damage. pose we apply it to this case, and asc the conclusion to which it will lead. proposed abutments and bridges would $20,000, then the jury should value the in its imaginary improved state, and mine whether the land thus improved be worth that sum, or more, to the older pany, and, if so, award the $20,000. plan proposed should be one of a bridge, with a span of 50 feet, involvi expense of $30,000, then, if the jury s deem the investment likely to prove able, they should award $30,000. If the should be to construct a permanent arch, costing $40,000, then, if the jury favorably of the investment, they award $40,000. Many plans of futur might be presented, every one of might be a reasonable and profitable the land, but it would not follow that t creased cost of the construction on such resulting from the taking, should be ass Other land not taken may be applied to uses, or other equally profitable uses land, which would not be impaired by the taking, might exist. I think the in hand illustrates this position. Unde evidence, as I understand it, the abut now standing are shown to have been ed some years ago by the owning con for the express purpose of connectin freight tracks of the Pennsylvania Co with the tracks of the National Docks way Company, or some other compan tracks crossing the passenger yard tracks of the former under grade. Th terprise was not completed, and the Co ing Company was organized, and took abutments as a part of their route. O completion of their railroad the land in tion will be available to make this co tion formerly projected at the grade new railroad. Revision, p. 932, § 111. use would not be impaired by the takin would be by the extension of the abutm The court could not, in view of this us which the land in the past had been a ly prepared, and which is not impaire the taking, assume that some other us volving a large expense, would at som be profitable, and would be the less pensive mode of redemption, and, on

Digitized by Google

ons, admit estimates of the probable eof. The mode of estimating dam- osed by the owning company disre- consideration that the owning com- ght provide itself with many new another part of its route or lands ncurring the expense of abutments The Connecting Company, under its plan prescribed by the order of the urt, must, at its own expense, pro- unnel and abutments on its route under the car yard and route of ng company for a length of 524 feet, ch the Pennsylvania Company may ely with their tracks. The space proposed tunnel, if occupied to its pacity, could be crossed with about . There are now in use, across it, tracks.

are some other suggestions which ny mind in relation to the want of sity of the use of the location of the ompany. If two more tracks were or convenient, a very slight ex- n of this evidence shows that they located on the southerly portion of te or land across the tunnel, where of their construction would in no enhanced by the construction of the . Such location might require some ment of yard tracks, but there is acred about any particular arrange- tracks, as has been decided in a een these parties. The older com- t yield to reasonable changes in the use both in its yard and on its ational Docks & N. J. J. C. Ry. ited Companies, 53 N. J. Law, 217, tl. 570. Also, see Pittsburgh Junc- o. v. Allegheny Val. R. Co., 146 Pa. 308, 23 Atl. 313. It seems to me ourt could not submit to a jury evi- tablishing a rule of damage com- ly by entirely ignoring all these tions. It is not just compensation damages to sections of property consideration of the whole tract ill not be in fact sustained. Cham- outh Chester Borough, 140 Pa. St. 21 Atl. 409.

ated in the memorandum of the de- the court in this case that the least mode of effecting the redemption roperty is the one which must be o account. By this, I take it, is e improvement of the land for some use, and the expense will depend e selected, and the mode of improve- pted for that use. The court can- ne what that use or mode of use The court must rule on the offers ce when they are presented, and the no inspiration to determine wheth- e proposed, and the plan presented to create that use, will be the least ; but the court must, in order to e evidence of costs, assume, when r offers to prove the cost of making any improvement on the land, that this is the least expensive, and also that the property will be required for that use. I do not think that any one will contend that the power of the court ever could be extended so far without grave abuse. Assuming its admission, the jury would not be able to determine whether the improvement in the future would be worth the cost. The jury cannot say what the abutment would cost at some future period of time. Neither the court nor the jury could determine this, and it cannot be of value in the proper determination of the amount of damage to know what some particular structure, if built upon a certain site, would cost now; and it is beyond question that the court and jury are to determine judicially what is now the present value of the land, and the present damages sustained by the taking. Transportation Co. v. Suydam, 17 N. J. Law, 25, 45, 47. See Santa Ana v. Harlin, 99 Cal. 538, 544, 34 Pac. 224. In condemnation cases, the parties whose property is taken, in order to swell damages, often enlarge upon those particular uses to which their land might in the future be devoted, and with which the taking will most seriously interfere, and ignore other uses, equally valuable, which are not impaired by the taking; and, while these efforts on the part of the owner are entirely proper, it is the duty of the court to confine the testimony to the facts which show the availability of the property for future uses, and to exclude the evidence as to conjectural or speculative uses. It is improper to permit estimates to be presented showing what some proposed construction on the land would cost under present conditions, and what a like construction would cost under changed conditions, resulting from the taking, for the reason that compensation is to be given for what is known to be the present injury, and not for damages which may or may not be sustained in the future. Chambers v. South Chester Borough, 140 Pa. St. 510, 522, 21 Atl. 409. This doctrine appears to have been stated or approved in the case of Massachusetts Cent. R. R. v. Boston, C. & F. R. R., 121 Mass. 124, where Gray, C. J., said that the company had the like right with individual owners to damages, "taking into consideration any fences or structures upon the land, or changes in the surface, absolutely required by law, or in fact necessary to be made by the corporation injured, in order to accommodate its own land to the new condition." This doctrine appears to have been approved in Railroad Co. v. Bayonne, 51 N. J. Law, 428, 431, 17 Atl. 971; Flint & P. M. R. Co. v. Detroit & B. C. R. Co., 64 Mich. 350, 368, 31 N. W. 281; Chicago & A. R. Co. v. Joliet, L. & A. R. Co., 105 Ill. 388, 402, 407; by Justice Depue in Re Morris & E. R. Co., 9 N. J. Law J. 75, 78. I think the evidence was properly rejected by the trial court, and that the judgment below should be affirmed.

Digitized by Google

PENNSYLVANIA R. CO. v. MONTGOMERY COUNTY PASS. RY. CO.

(Supreme Court of Pennsylvania. March 25, 1895.)

STREET RAILWAYS — CONSTRUCTION ON COUNTRY ROADS—CONSENT OF TOWNSHIP AUTHORITIES—RIGHT OF ABUTTING OWNERS—INJUNCTION.

1. Independent of the express provisions of the street-railway act of 1889, and those of prior date, the failure to confer on the companies organized thereunder the power of eminent domain is sufficient to justify the conclusion that the connection of cities by railways built along country roads by such companies was not contemplated, as a street railway is an additional servitude in the case of a township road, though not in the case of a city or borough street; and, while cities and boroughs have full power to authorize use of their streets by a street railway, the consent of township authorities to such use of its roads is binding on the public, but not on abutting property and its owners.

2. The consent of the "local authorities," required by Act 1889, before a street railway can be constructed within a city, borough, or township, must, in the case of a township, be given by the supervisors when together, and acting in their official character.

3. The township books, in the custody of the town clerk, are the records of the township, and should afford evidence of the action taken by the supervisors in all matters of public importance, such as consenting to the construction of a street railway.

4. Where street railways have been constructed and operated over country roads without legal consent of the township officers or abutting owners, but at the same time without opposition, and under a mutual mistake as to the rights of parties, the operation of such railways may not be stopped, but the only remedy of abutting owners is by action at law for damages.

5. Construction of a street railway along a country road will be enjoined till damages have been paid or secured to the satisfaction of an abutting owner, if he brings suit in proper time.

6. Under Act 1889, requiring the application for incorporation of a street-railway company to set out its route, and providing that no railway shall be constructed by such a company within a city, borough, or township without the consent of the local authorities, construction of a line cannot be commenced till the consent has been obtained of the local authorities of all the cities, boroughs, or townships through which its route passes.

Appeal from court of common pleas, Montgomery county; H. K. Weand, P. J.

Suit by the Pennsylvania Railroad Company against the Montgomery County Passenger Railway Company to enjoin the construction by defendant of its electric street railway on the public road known as the "Schuylkill River Road," in Upper Merion township, plaintiff being the owner of land in said township over which said Schuylkill River Road runs. Decree for defendant. Plaintiff appeals. Reversed.

Charles H. Stinson, C. Henry Stinson, and William F. Solly, for appellant. Jas. B. Holland, N. H. Larzelere, and John G. Johnson, for appellee.

WILLIAMS, J. Our system of street passenger railways had its origin in the days of special legislation. Each company then had its own act of incorporation, in which its route was described and its powe fined. These companies were confin the cities and large towns of the stat their cars were moved by horse powe were a substitute for the omnibus, an er vehicles devoted to the carriage o sengers, which had been previously in mon use. After the adoption of the constitution the practice of separate lation for each company became impra ble, and in 1878 a general law was providing for the organization of railway companies for the purpose of structing, maintaining and operati street railway for public use in the c ance of passengers." No power of em domain was conferred on these comp but the several provisions of the act that such railways were to be const upon the streets, conforming to the of the streets, and subject to the regu of the municipal authorities. The 1876 gave to street-railway compani cities of the first class, the right to other than animal power" in the mov of their cars. The act of May, 1878 ferred the like right upon street ra companies in cities of the second and classes. The general law further pr that any company organized under it visions should maintain an office fo transaction of its business "in the where its railway was located. All provisions show that the street rai contemplated by the general act of were intended for the accommodati the crowded streets of cities, and f other purpose. The present general la lating to these corporations was pass 1889. It was intended to bring togeth valuable provisions of several acts sembly into one comprehensive statut to make some changes that experienc shown to be desirable. It authorize incorporation of five or more perso the purpose of "constructing, maint and operating a street railway on any or highway upon which no track is l authorized to be laid" under existing ters, with the privilege of occupying street" by any power other than by motive. It required the route to be s in the application for incorporation the streets and highways upon whi was to be built, and showing "the circ the route, the amount of the capital of the company," and other particula required all companies incorporated its provisions to maintain an office the railroad was located. Section 1 vided that "no street passenger ra shall be constructed by any company porated under this act within the lim any city, borough or townships witho consent of the local authorities thereo shall any street passenger railway be porated hereunder which shall not h continuous route from the beginning

Digitized by Google

orming a complete circuit with its ack, excepting the five hundred feet sed under section fourteen hereof."

these provisions, we think it is ap- that the attempt now being made to these city conveniences into long f transportation, connecting widely- ed cities and towns by electric rail- raversing country roads, was not an- d or provided for by the legislature. ilure to confer upon these companies wer of eminent domain would, if it lone, be sufficient to justify this con- . The land taken for streets in cities roughs is in the exclusive possession municipality, which may use the foot- well as the cartway for any urban de without further compensation to owners. Provost v. Water Co., 162 275, 29 Atl. 914; City of Reading v. 153 Pa. St. 360, 26 Atl. 62; McDevitt Co., 160 Pa. St. 367, 28 Atl. 948. Nor e construction of a street passenger upon the surface of the street im- ny additional servitude upon the y fronting on the street so occupied. v. Traction Co., 147 Pa. St. 579, 884. But the easement acquired by olic by proceedings under the road an easement for passage only. The is entitled to the possession of his r all other purposes. We held, there- Sterling's Appeal, 111 Pa. St. 35, 2 5, that the occupancy of a country a pipe line imposed an additional le upon the farm owner, while in Mc- v. Gas Co., supra, we held that a e laid within the limits of the street ority of the city did not impose any al servitude on the lot owner. The for the distinction is fully stated in nion in the latter case. The same ion exists, and for the same reasons, urban and suburban property, as to t of corporations to occupy a high- r a street passenger railway. This, be seen by the cases cited above, rban servitude, to which suburban y has not been subjected by law, up time. The consent of township au- s justifies an entry upon the public far as the public is concerned; but ervisors of the townships have no to bind private property, or subject servitude, for the benefit of any per- corporation other than the township public it represents. The carriage engers through the township, on their from one city or borough to an- by rail, is in no sense a township ; and whether these passengers heir journey in cars drawn by a loco- over a steam railroad, or in those d by electricity over tracks laid he highways, is immaterial both to rs and to landowners along the raveled, except as the adoption of the other of these modes of trans- portation may affect the township roads, or the private property of citizens. When the supervisors give their consent to the occupation of the township roads by a street railway, they speak as the representatives of those who build and those who use the roads, but not as the representatives of the private property over which the roads pass. The street-railway companies cannot reach the property owners either through "the local authorities," or by the right of eminent domain, as the law now stands; and it is not easy to see how such a company can protect itself in the use of country roads except by contract with every owner of property along the roads they wish to occupy. The trouble is that the supposed needs of the country have outgrown its legislation, and an effort is now being made to adapt street railways to purposes for which they were never intended, and for which the existing legislation relating to them was not framed.

Cities and boroughs possess the necessary power over their streets to enable them to authorize their use by a street railway. Townships do not possess municipal powers, and, under existing laws, their control over the public roads is limited. But in this connection another interesting question suggests itself. How is the assent of "the local authorities" to be obtained in any given case, and what is the proper evidence that it has been given? The township books, in the custody of the town clerk, are the records of the township, and should afford evidence of the action taken by the supervisors in all matters of public importance. A paper in the pocket of a contractor or of some officer of a corporation is not the proper evidence of action by the township or the school district. The action needed is not that of the individuals who compose the board, but of the official body. Thus it was held that a contract signed by the members of the school board separately did not bind the district. The best evidence of their official action was their minutes kept by the secretary. Wachob v. School Dist., 8 Phila. 568. For the same reason a contract signed by the president and secretary was held to be invalid. It had not been acted upon by the board when in session. School Dist. v. Padden, 89 Pa. St. 395. One supervisor may bind the township by an act that is ministerial in its character. Dull v. Ridgway, 9 Pa. St. 272; Pottsville Borough v. Norwegian Tp., 14 Pa. St. 543. Not so, however, when the act is one that requires deliberation and the exercise of judgment. Cooper v. Lampeter Tp., 8 Watts, 125; Union Tp. v. Gibboney, 94 Pa. St. 534; Somerset Tp. v. Parson, 105 Pa. St. 360. In such cases the supervisors must be together, and their action must be taken in their official character, and should appear upon the township book kept by the town clerk. If not so taken, it does not bind the township, and has no validity whatever. The supervisors

Digitized by Google

should consider and deliberate upon any application made to them for leave to occupy any of the township roads with a street railway. If they decide to grant the application upon certain terms and conditions, as to the manner and extent of the occupancy permitted and the extent of repairs to be required, these terms should appear in the record of the meeting, as well as the consent; and a contract that does not rest on such official action, properly taken by the proper officers, is utterly worthless. But we know, as matter of current history, that street railways have been projected, and actually constructed, and are now in operation, over country roads, where no legal consent has been obtained, and where no attention has been paid to the rights of property holders. Such railways cannot now be torn up or enjoined either by the township officers, or at the instance of landowners along their routes. Where such enterprises have been allowed to proceed, and the expenditure of large sums of money has been permitted, it would be inequitable to correct at this time what was a mutual mistake, under the influence of which these enterprises have been pushed to completion; but it would seem desirable that such charters should not be granted in future until the legislature has made such provision for the assessment of damages to property as shall protect the owners from the additional servitude which the construction of electric railways does certainly impose upon all adjoining owners outside of municipal boundaries. At present an action at law is the only remedy within the reach of an injured person who has suffered a railway to be built across his land without objection; but equity will interpose to protect him, if he comes in proper time, by enjoining the construction until his damages have been paid or secured to his satisfaction.

The only remaining question raised in this case is over the right of a street railway to build any part of its line before it has the right to complete it. A steam railroad may enter upon any part of its line, and commence building, subject only to its duty to complete the line in accordance with its charter. The reason of this is that it is clothed with the power of eminent domain, and may enter and appropriate land regardless of the will of the owner. A street-railway company, as we have seen, does not possess the power of eminent domain. It cannot build under its charter alone. It must have the consent of the proper municipal or local authorities, or it cannot move. If the proposed line passes through a city, borough, or township intermediate the termini, and that city, borough, or township refuses its permission, the power to build the road described in the application and charter cannot be exercised. It must be possible for the company to complete its line before it has a right, as against any city, borough, or township into which its line extends, to begin work. It is not possible for such company to complete its
without the consent of the local autho
of the districts through which it pa
and, where this is refused in one or mo
the municipal or quasi municipal divi
through which its line runs, the buildi
its proposed road under its charter is a
possibility. Let us suppose, for purpos
illustration, a charter to authorize the
struction of a street railway from A., thr
certain roads in B., C., and D., to the ci
E., and that consent has been obtained
the local authorities of A., of C., and
but refused by the local authorities of B
D. The proposed line is thereby cut up
three wholly unconnected pieces. It is
clear that, under a charter authorizing
building of a line of road from A. to E
company could not lawfully build three
tinct local roads, viz. one in A., anoth
C., and the third in E. The consent give
A. to the construction of the line of
authorized by the charter would not
the local authorities from objecting to
construction of a local road within
own limits. When confronted with its
consent, A. could well reply, "The ro
which consent was given is not the road
are now building, for the building of
road has become impossible by the acti
the authorities of B. and D."

The learned judge of the court below
in the conclusion of his opinion, "Con
tions of this character are multiplying r
ly, and we may assume they are dema
by the public." This is a strong reaso
meeting the questions involved in this
squarely, that the legislation needed to
tect property owners against this cla
corporations may be had at the same
that the powers necessary to convert
was intended as an urban convenience
a general mode of transportation are co
ered and conferred by the lawmakers
this case the defendant's line of so-c
street railway extends through two boro
two townships, and over one county b
over the Schuylkill river. The line and
cuit of its road over the several high
to be occupied are fully set forth in its
ter. The consent of the local authoriti
West Conshohocken borough and of
Marsh township were refused. That o
per Merion township was given. That
borough of Conshohocken was given, an
since been withdrawn. Under such ci
stances the building of the line of stree
way described in and authorized by the
ter is impossible, and the company ha
right to proceed. The conclusions o
learned master were correctly drawn
the decree recommended by him should
been made. The decree appealed fr
now reversed, and the record remitted,
direction to the court below to make th
cree recommended by the master, awa
the injunction prayed for. The costs o
appeal to be paid by the appellee.

Digitized by Google

GH COAL & NAV. CO. v. INTER-COUNTY ST. RY. CO.

ne Court of Pennsylvania. March 25, 1895.)

RAILWAY—WHO MAY OBJECT TO—CONSENT OF TOWNSHIP—BRIBERY—EFFECT OF INJUNCTION.

. corporation which has contracted un- June 12, 1893, to make and repair all ic roads in a township, may maintain a enjoin the construction of a street rail- reon, as something which may increase len of repair, or add to the difficulty of supervision.

The consent of the supervisor of a town- the occupancy of its roads by a street in consideration of the railway com- roviding him employment, confers no n the company, being obtained by brib-

. charter of a street railway authorized ding of its line through several town- der the act of 1889, making the consent cal authorities a condition precedent. It the consent of one of the townships, of the others. *Held*, that an injunction ng the building of its line in the town- ich had given its consent was not a re- he charter, but simply required the com- keep within the limits of its charter, and e road connecting the several townships.

l from court of common pleas, ill county.

by the Lehigh Coal & Navigation Com- gainst the Inter-County Street-Rail- ompany to enjoin defendant from g its line on the public roads in Rahn ip. A preliminary injunction was ed, and plaintiff appeals. Reversed.

M. Roads, Fergus G. Farquhar, and . Ryon, for appellant. James Ryon, Barringer, and J. O. Ulrich, for appel-

LIAMS, J. Most of the questions d in this appeal have been con- and determined in Pennsylvania R. Montgomery Co. Pass. Ry. Co. (just) 31 Atl. 468. Some questions pecu- this case remain to be considered, these alone we now direct our atten- The first of these relates to the status corporation plaintiff. The contract n the plaintiff and the township of by which the plaintiff undertook the and repair of all the public roads in nship, was made under the authority act of 12th June, 1893, the constitu- y of which has been affirmed by this This contract transfers the burden ing and repairing all the public roads township from the township and its to the company, and it invests the y with the right to object to the in- ion or maintenance of any obstruc- the public travel thereon which may e the burden of repair, or add to the y of suitable supervision. The plain- s stand, therefore, in a position to- the township of Rahn and towards veling public which enables it to be upon the questions raised in this case, in substantially the same way as the township itself would be entitled if it was plaintiff in the bill now before us.

The second question is over the validity of the consent given on behalf of the township by Coll, in consideration of the agreement of the defendant to provide employment for him during the balance of his natural life, and for his son, also, at an agreed price per day. This agreement was not between the township and the railway company, but between Coll, as an individual, and the company, by which the company undertook to pay the individual for his action as an officer. The plain import of the agreement was this: If the supervisor of Rahn township would give consent, on behalf of the township, to the occupancy of its public roads by the defendant's street railway, then the company would pay the man who held the office the price he demanded for his official action. The privilege bargained for came from the township. The price of the privilege went to the man who held the office that enabled him to control the privilege. We have no inclination to enter upon an argument for the purpose of proving what is perfectly obvious on a simple statement of the facts, viz. that this was a very plain case of bribing a public officer. A consent so obtained, if otherwise valid, could confer no rights on those who bought it. The contract which was given for it was as utterly worthless as the consent. Neither the buyer nor the seller took anything by their bargain, nor did the township, against which both seller and buyer were contriving, lose anything by the transaction. Its consent has not been given, and cannot be obtained, in the way in which the paper, called a "consent" in this case, was secured.

The last question peculiar to this case is whether the granting of an injunction "would work a practical repeal of the defendant's charter." We do not see how it could work any such result. The charter authorized the building of a line of street railway through several townships and boroughs. The general law, however, made the consent of the local authorities a condition precedent to the right to construct the line or circuit of railway. Before the company can rightfully insist on its right to build under its charter, it must secure the consent, not of one of the boroughs or townships, but of all of them. Without such consent it cannot build the line authorized by the charter, and it has no right to build any other. If a line of street railway is projected to connect three adjacent districts,—A., B., and C.,—and a charter obtained, describing the circuit to be built, the first thing to be done under the charter is to secure the requisite consent in each of the districts. The borough B. is applied to, and it gives consent to the construction of the proposed circuit, but A. and C. refuse. What, then, is the situation? The consent of B. relates to the line of street

Digitized by Google

railway authorized by the charter. That cannot now be built. The consent is therefore inoperative. If, then, the company undertakes to build a local road in B. without a new charter and a new consent, the municipality may well object that its consent is being used for a purpose not contemplated when it was granted, and within neither its letter or its spirit. If the company persists, notwithstanding, in its effort to build and operate a railway within the limits of B. only, and the court, on application of the municipal authorities, should restrain such construction by injunction, this would not work a practical repeal of the charter of the company, but restrain its action so as to keep it within the limits authorized by the charter. The trouble such companies encounter grows out of the circumstance that they consult their chartered rights less than their pecuniary interests. For these reasons, as well as for those stated in Pennsylvania R. Co. v. Montgomery Co. Pass. Ry. Co., referred to above, the decree appealed from is now reversed. The record is remitted to the court below, not for further hearing, but with the direction that the injunction be restored, and made perpetual.

RAHN TOWNSHIP v. TAMAQUA & L. ST. RY. CO.

(Supreme Court of Pennsylvania. March 25, 1895.)

STREET RAILWAYS—CONSTRUCTION — CONSENT OF LOCAL AUTHORITIES—LOCATION.

1. A street railway company has no right to enter on the highways of a township which has given its consent to its construction till consent to the construction of the line has been obtained from all the townships and boroughs through which its route lies, as shown by its application for incorporation and its charter.

2. While a street railway may diverge from a street for a short distance, where it is necessary to avoid discomfort or danger to the traveling public, it cannot, to reduce time and distance for passengers traveling from city to city, locate its route across country.

Appeal from court of common pleas, Schuylkill county.

Suit by the township of Rahn against the Tamaqua & Lansford Street-Railway Company to enjoin the construction of defendant's line. Decree for plaintiff. Defendant appeals. Affirmed.

Geo. M. Roads, Fergus G. Farquhar, and Jno. W. Ryon, for appellant. James Ryon, L. W. Barringer, and J. O. Ulrich, for appellee.

WILLIAMS, J. The questions raised by this appeal have just been decided. The invalidity of the alleged consent signed by Morris Coll, supervisor, was decided in a case in which the present defendant was plaintiff, and the Inter-County Street-Railway Company defendant. 31 Atl. 473. The necessity resting upon the company to put itself in position to build its railway the circuit described in its applicatio charter before it can insist on occupyi highways of any one of the cities, bor or townships through which its circuit es was distinctly held in Pennsylva Co. v. Montgomery Co. Pass. Ry. C Atl. 468. The importance of that hold made perfectly apparent by the fa this case. The defendant had not ob the consent of the borough in whi road began, nor of that in which it nor of all the districts intermediate. construction of its circuit was absolute possible while this state of things and it had no right, as against a tow or borough that had given a valid c to the building of a railway described charter, to enter upon its highways u was in a position to do that which its ter required. This was the law prior act of 1889, under which the defendan incorporated. Com. v. Erie & N. E. 27 Pa. St. 339. If that was doubtful, made the law, as to all street railwa the provisions of that act. The learned suggests a question of grave importanc does not seem to be raised by the ments. He says: "It does not appear denied that the defendants have locate railway only in part upon the street o way and the balance over the lands vate persons who have given their c How far this is lawful, under their c it is not necessary here to decide." mode of location shows how determi the attempt to use our street-railway lation for a purpose never contempla the lawmakers. Street railways are ways on and along the streets of a town. They must conform to the gra the streets they occupy. They may d for a short distance, where the confor of the surface or the position of s make it necessary in order to avoid d fort or danger to the traveling public that a street railway may, like a steam way, locate its route, not for the accom tion of local travel along the highway to reduce time and distance for pass traveling from city to city or town to across the country, is a proposition not entertained. It involves a perversion character and object of street railways. is obiter dictum, but the subject is s mately related to the questions under sion in these cases, and is of such tance both to the railroads and the of the state, that the writer feels ju in calling the attention of the other d ments of the government to it in this ner. Applications for charters should we have no doubt they are, carefully ined; but attention has not heretofore called to this subject, and its importan therefore not been recognized. If it sirable to introduce a new kind of ra transportation for long distances, it

Digitized by Google

ided for by suitable legislation, so parties to be affected may be able stand their rights, and adjust them- the situation in which such legisla- place them. Whether such a new s needed, and, if needed, under what egulations it shall be introduced, are ve questions. The exposition of such we have relating to the construc- intenance, and operation of street is all that concerns the courts. The s affirmed. The appellants to pay s of this appeal.

/

QUA & L. ST. RY. CO. v. INTER-COUNTY ST. RY. CO.

e Court of Pennsylvania. March 25, 1895.)

CTION OF STREET RAILWAY—CONSENT OF L OFFICER—INJUNCTION—REVERSAL.

he consent of a township supervisor to ruction of a street railway on its roads s official act, and therefore of no avail, e action was not taken at a meeting of rvisors, but the time, place, and occa- e of the appointment of the company, ts benefit, and it was not entered in the the township, in the possession of the rk, but the supervisor, while frightened, a paper, under his official title, purport- ve consent.

Where, in a suit between two street-rail- panies, both of which had charters to the same township highway, and each claimed that it had, and the other had lid consent of the township to the con- of its line, defendant was enjoined, e will not be reversed, though plaintiff uch valid consent; defendant having no to occupy the highway, because it like- no valid consent.

l from court of common pleas, ill county.

y the Tamaqua & Lansford Street- Company against the Inter-County ailway Company to enjoin the con- n of its electric railway line over a in Rahn township; each having a which, on its face, authorized them its line on such highway, and each the exclusive right thereto. There ecree against defendant, from which ls. Affirmed.

Ryon, L. W. Barringer, and J. O. for appellant. Geo. M. Roads, Fer- Farquhar, and John W. Ryon, for ap-

IAMS, J. The question raised by , second, third, and fourth assign- f error has just been decided in Le- al & Nav. Co. v. Inter-County St. Ry. Atl. 471. It is not necessary to repeat there said. We have no doubt that sent obtained from Coll was invalid reason stated by the learned judge of rt below, and for the further reason n Pennsylvania R. Co. v. Montgom- Pass. Ry. Co. (also decided at the term) 31 Atl. 468. It was the action of an individual upon a consideration moving to him as an individual, and not the action of an officer, appearing upon the records of the township where the evidence of official action should appear.

The fifth assignment is sustained. When a corporation comes into a court of equity claiming rights against the public under an agreement purporting to be executed by township officers, the agreement should be conscionable, and it should have been obtained by fair and conscionable methods. The learned judge found the evidence relating to the execution of the consent by Coll to the Tamaqua & Lansford Company to be directly conflicting, and he adopted the rule of law, saying, "We have no other guide than the seeming preponderance" of the testimony; and, testing the validity of the alleged consent of the local authorities of Rahn township by what seemed to him to be the preponderance of a mass of contradictory testimony, he sustained the validity of the consent. We find no fault with the view of the learned judge as to the existence of a "seeming preponderance," but we cannot agree that the chancellor was bound by it. On the contrary, we hold that the alleged consent was ineffective for two reasons: First, it was extorted from the individual who held the office of supervisor by methods that a court of equity cannot approve, and it ought not, in fairness towards the citizens and taxpayers of the township, to be held binding upon them for this reason, if for no other. But, second, another and a sufficient reason is found in the fact that the giving of the alleged consent was not an official act. The time, the place, the occasion, were of the appointment of the company, and for their benefit. The action was not taken at a meeting of the supervisors, regular or special. It was not entered upon the books of the township in the possession of the town clerk. No record of any sort was made of what was done, because no official action was taken. A frightened man executed a paper, adding his official title to his name, but this did not make it the official action of the supervisors. This was a subject for deliberation, a subject of importance, not to the man, but to the township whose officer he was; and the action should have been taken upon an intelligent consideration of the interests of the township, and regularly entered on the proper township book. The evidence of such an official act should not rest upon a piece of paper in the pocket of a private individual, who may not be a citizen of the township, or within reach of its taxpayers. But this conclusion does not require us to reverse the decree. The defendant is absolutely without authority to occupy the township roads, and the injunction was properly ordered. The plaintiff held a charter which the commonwealth had not disturbed, and which conferred a right, prima facie, to secure consent and proceed with the

Digitized by Google

building of its roads, if the township and the property holders were willing. This consent it claimed to have. It had a right to be heard, therefore, upon the validity of the consent of the township set up by the defendant in opposition to that held by itself. Both grants could not stand. Each contended that the grant to the other was bad. Both were right. The fact that neither company has a valid consent from the township to occupy the public roads, under the papers now before us, is no reason why the injunction ordered in this case should not stand. The decree is affirmed. The costs to be paid by the appellant.

BERKS COUNTY v. READING CITY PASS. RY. CO. et al.

(Supreme Court of Pennsylvania. March 25, 1895.)

STREET RAILWAYS — REINCORPORATION OF COMPANIES—CONSTRUCTION ON COUNTY BRIDGES —PERMISSION—INJUNCTION.

1. Act 1889, § 20, declaring that street-railway companies incorporated under Acts 1878 and 1879 (both of which were unconstitutional), and any such company "heretofore existing under color of any charter or letters patent * * *, upon accepting the provisions of this act * * *, shall thereupon become and be a body corporate hereunder, and shall * * * have * * * all the privileges, franchises and powers conferred by this act upon corporations to be created under this act," allows companies lawfully organized under special acts to be incorporated thereunder, as, with the exception of the street-railway companies organized under Acts 1878 and 1879, they were the only ones "heretofore existing"; and the words "under color of" do not, in this connection, mean that the charters or letters patent are defective, but are used as equivalent to "under authority of."

2. A bridge owned by a county is part of a highway, within the provision of Act 1889, authorizing street-railway companies to extend their lines.

3. A bridge owned by a county cannot be occupied by a street-railway company without the consent of the county commissioners; and, while their consent cannot be arbitrarily withheld, they may refuse to allow it to be used till made strong enough for the additional burden, and may require the company, as a condition of its occupancy of the bridge, to pay the cost of the necessary work and of repairs.

4. Where county commissioners, after giving a contract to a street-railway company for occupancy of a county bridge, but before anything had been done under it, refused to abide by it, or permit the occupancy of the bridge, and the company had notice of this, but nevertheless seized the bridge, and commenced to lay its track, it will be enjoined; the contract being one which equity would not enforce, for the reason that the bridge was not strong enough to bear the additional burden without some changes or repairs, for which there was no provision.

Appeal from court of common pleas, Berks county; G. A. Endlich, Judge.

Suit by the county of Berks against the Reading City Passenger Railway Company and the Reading Traction Company to enjoin defendants from proceeding with the construction of a street-railway track over a bridge belonging to plaintiff, and compelling them to remove such part of the track as they had already put thereon Decr plaintiff. Defendants appeal. Affirme

C. H. Schaeffer and Richmond L. Jon appellants. W. Oscar Miller, Co. Sol. vey F. Heinly, and William J. Rour appellee.

WILLIAMS, J. We are satisfied w decree appealed from in this case, but not satisfied with all the reasons given by the learned judge of the court The findings of fact show that the R City Passenger Railway Company and th Street Passenger Railway Company w corporated in 1873, by a special act of ass for each, in which the route to be occupi plainly and specifically described. Eac pany entered upon the route assigned 1893 the Penn Street Company was i in the Reading City Company, so that t ter became the owner and operator o routes. But the Harrisburg bridge ov Schuylkill river at Reading was not in in the route of either company, and the charters of 1873 the Reading City pany had no means of extending its li on and over the bridge. In December it accepted the provisions of the act o and a new charter was issued to it section 20 of that act. The first imp question is therefore over the effect action. The learned judge held it to idle ceremony, which gave to the co none of the powers conferred upon com incorporated under the provisions of th and for the reason that, as the compan lawfully organized under a valid act sembly, it was not within the letter spirit of the provisions contained in sa tion. It is clear that the act of 1889 tended to provide a new and comple tem for the organization and governm street-railway companies in this state. its approval by the governor, it becam only general law in force upon the subj that all companies thereafter organized have exact uniformity of powers, priv and duties. At the end of this comp sive system, we find the provision now interpreted. It declares that all com theretofore incorporated under the act (which had been held to be unconstitu and under the act of 1879 (which was s to the same objection), and "any stree senger railway company heretofore ex under color of any charter or letters pa the commonwealth, upon accepting th visions of this act in writing under th of the corporation, filed in the office secretary of the commonwealth, shall upon become and be a body corporate under, and shall be entitled to and hav session of, all the privileges, franchis powers conferred by this act upon c tions to be created under this act and the governor shall forthwith caus letters patent under this act to issue t corporation under the same name as th

Digitized by Google

in the charter under which it was incorporated." We are of opinion provision was intended to afford— way for companies organized under were invalid to secure a lawful cor- aracter; and, next, to open the way anies legally organized under special ssembly to lay off their special be- and put on the uniform dress which of the statute had so carefully pro- the class of corporations to which nged.

rds "under color of," in the sentence s, "any street passenger railway com- etofore existing under color of any r letters patent," were not happily They often mean what the learned d them to mean in this case, that rity "under color" of which a thing s assumed or defective. But their like that of all words not purely must depend on the connection in ey stand, and the fixed character of s to which they relate. In this pro- e companies organized under defect- had already been provided for. ere no "heretofore existing" com- t, to be taken into account, except had been organized under charters special acts of assembly, like those ich the Reading City Company was me acting. These charters and let- t were valid, but they left the com- ding them to stand outside the class y the act of 1889, and outside the of general laws to be thereafter pplicable to the class. The legisla- t was to reduce so far as possible er of outstanding special charters, the entire street passenger railway as rapidly as possible, under the em of management and control. To it was necessary to provide a way ng street-railway companies to sur- eir special charters and secure new ing on the new general law. The nder color of" must, in the connec- hich they stand in the twentieth sec- e act of 1889, be read as equivalent ords "under authority of." This is to give effect to the legislative in- to open the way for any and all s existing under charters or letters ued previously to the passage of the ne in under its provisions, and avail s of its benefits. The Reading City Company, by its surrender of its r and acceptance of the act of 1889, in the language of this section, the l powers of "a body corporate here- nd became entitled to "all the priv- anchises and powers conferred by pon corporations to be created under and all the properties, rights and belonging to such corporation there- quired by gift, grant, conveyance, ordinance, assignment or other- n other words, it ceased to stand alone upon its special act of assembly, and passed, with all its belongings, under the general law.

Let us now, conceding the right of this company to extend its lines within the meaning of the act of 1889, inquire into its right to occupy the Harrisburg bridge. This bridge belongs to the county of Berks, and is under the control of the county commissioners. It cannot be occupied without their consent, but that consent cannot be arbitrarily withheld. It is, in an important sense, a part of the highway; and its ownership by the county cannot be made use of to block the course of improvements, or to extort unreasonable concessions. The county is liable to the public for its safe condition, and the commissioners have a right to consider its strength, and to refuse to permit its use in a manner that would jeopardize the traveling public using it in the ordinary manner. But, if it can be made safe for use both by the public and the street-railway company, the duty of the commissioners is to consider what is necessary for that purpose, and in what way it can best be accomplished. The cost of the work found to be necessary, as well as the cost of repairs, they may require the company to pay or secure as a condition of its occupancy of the bridge. In this case the company applied to the county commissioners, and in December, 1893, obtained a contract from them for the occupancy of the Harrisburg bridge with their railway. We have examined this contract. It may be that it is somewhat improvident, but we are clear that it is not so grossly so as to justify the court in pronouncing it absolutely void for that reason. The county commissioners, however, for some reason, refused to be bound by it, and of this the railway company had actual notice. Nothing had been done under it by the company up to the time that its officers were made fully aware of the refusal of the commissioners to abide by it, or to permit them to occupy the bridge. Under such circumstances, if they regarded the contract as binding upon the county, the courts were open to them, and it was their duty to settle the extent of their rights in an orderly manner. It seems doubtful, upon the evidence now before us relating to the strength of the bridge, and its inability to stand the increased burden to be put upon it, whether a court of equity would have enforced this contract without imposing additional terms. The company probably entertained the same view of the situation. It accordingly decided to shove by the courts, seize the bridge, and attempt to defend under its contract. This it did in the nighttime, and with a strong hand. This is a method of asserting property rights that courts do not favor. It is a race against the law which it is rarely, if ever, worth the while to run, and which, if won, cannot often yield the winner any substantial advantage. This court has frequently condemned this

Digitized by Google

disorderly and dangerous practice. One of its most recent utterances can be found in Easton, S. E. & W. E. P. Ry. Co. v. City of Easton, 133 Pa. St. 505, 19 Atl. 486. The injunction was properly issued in this case, because the seizure of the bridge was without the consent of the county commissioners, and after notice that their consent had been withdrawn, and because, upon the evidence before us, we cannot enforce the contract under which the company seeks to justify its entry upon the bridge. The strength of the structure does not seem to be sufficient to bear the additional burden, without some changes or repairs. The decree is affirmed. The costs of the appeal to be paid by the appellant.

THOMAS v. INTER-COUNTY ST. RY. CO.

(Supreme Court of Pennsylvania. March 25, 1895.)

STREET RAILWAYS—CONSTRUCTION WITHOUT PERMISSION—RIGHT OF ABUTTING OWNER.

An abutting owner on a borough street on which a street-railway company is constructing its electric line without any valid permission of the local authorities may enjoin the construction as a nuisance.

Appeal from court of common pleas, Carbon county; Allen Craig, Judge.

Suit by William D. Thomas against the Inter-County Street-Railway Company to enjoin defendant's construction of its line. Decree for plaintiff. Defendant appeals. Affirmed.

James Ryon, L. W. Barringer, J. O. Ulrich, and A. H. O'Brien, for appellant. Loose & Craig, Fergus G. Farquhar, and John W. Ryon, for appellee.

WILLIAMS, J. The first question presented by the assignments of error in this case relates to the validity of an ordinance of the borough of Lansford giving consent to the occupancy of the borough streets by the defendant's street railway. This question has been settled during the present term by the Lehigh Coal & Nav. Co. v. Inter-County St. Ry. Co., 31 Atl. 471, the appellant in this case. In that case the consent of the supervisors of Rahn township to the occupancy of its public roads had been obtained by means of a contract similar to that made use of to induce the action of the councilmen of the borough of Lansford in this case. We there held that it is, in effect, bribery to secure the action of a public official by the promise of a reward to be made to him as an individual, and that a court of equity cannot recognize as valid any official action induced by such rewards, or the promise thereof. The action obtained in that case and in this was upon a subject of importance to the citizen and taxpayers of the district. It required deliberation and the exercise of judgment, in view of all the circumstances. The constituents of the supervisors and the councilmen had the
have the question considered on it
and determine on the best judgmer
officers authorized by law to speak
What has happened is that the offic
been induced to make terms for th
as individuals, and to barter the
of their constituents for considerat
sonal to themselves. We follow
laid down in the Navigation Co
Case, with no doubt of its wisdo
justice, and overrule the second a
assignments of error.

The remaining assignments relat
standing in court of the plaintiff.
leged that he is merely an abutting
er on a street on which the defenda
deavoring to construct a street railw
that he has no such interest in the
as entitles him to be heard. But v
He sees men at work in the street c
his property fronts, and in which he
interest which a lot owner has in t
way into which his premises oper
are digging it up, and laying pieces
ber and iron or steel along and
He goes to them to inquire what i
and what right they have there;
finds, as was the case here, that th
no right whatever, and that they a
fore committing a nuisance upon t
way in which he is interested. H
right to prosecute in the quarter ses
to seek to stop their operations by
tion. If they are not trespassers, b
under a valid charter and munici
sent, then he is in no position to c
unless some special damage is susta
him; or if, without a valid chart
nevertheless have municipal cons
same thing is true. But the proposi
tained in the headnotes to Larimer
Ry. Case, 137 Pa. 533, 20 Atl. 570,
er than the point decided. In that
street-railway company, with no m
consent, and consequently with n
whatever in the streets, sought to
another company from constructing
railway on certain streets in the
Pittsburgh, notwithstanding the fa
the latter company had municipal
to the occupancy of the particular
What was decided was that a com
which municipal consent had been
did not stand in a position to contest
of a company to build, to which munic
sent had been given. The refusal to
without any right in the street whate
consequently without legal standing
test the extent and character of th
to its rival. Our Brother Clark
support of his position the case of Sp
v. Railway Co., 54 Pa. St. 401. In t
a bill was filed to restrain the Uni
senger Railway Company from
street-railway cars on Sunday. T
pany was lawfully incorporated.
on the streets was not denied. It

Digitized by Google

wever, that the running of street the pursuit of a worldly employ- he Lord's day, and therefore a vio- the Sunday law. What was held an act that is simply illegal will arily be restrained, except at the of some person who can show that ured by it. If the object of the s simply to enforce a general law, e left to the remedy which the law vides for its enforcement. Lock- ailway Co., 139 Pa. 419, 21 Atl. 26, l on by the appellant, is quite as our question as the cases just re- The plaintiffs were abutting lot who had paved the street with as- t their own expense. The munici- d given consent to its use by a way company. The bill alleged treet railway would impose an ad- ervitude on their lots, and that for ery of their damages the law had provision. For this reason they al- law under which the defendant porated was unconstitutional, and any, notwithstanding its charter unicipal consent, was without cor- owers, and without right in the he injunction prayed for by the was refused in the court below, refusal was affirmed by this court. t railway was an urban servitude ity had a right to impose upon the the street. The company did not r attempt to exercise, the right of lomain, and the plaintiffs had no damages against it. They stood, in no position to raise the ques- hich they rested their right to equi- f. But the position of the parties se is quite unlike that of the par- ckhart v. Railway Co. The plain- abutting owner, but here the like- . The defendant company is in in front of the plaintiff's premises unicipal consent. It and its em- e trespassers. They are disturb- rface of the highway; committing e upon it of a permanent, and, ac- the general belief, of a dangerous An abutting owner is not de- om proceeding in such a case be- e are other lot owners on the same suffer in the same manner that he he nuisance was a stable or a dwell- was being erected in the center of street, and the borough authorities or refused to interfere with its an abutting lot owner would have e in reaching the ear of a chancel- ed, there are cases in abundance building of even a projecting win- been enjoined at the instance of lot the vicinity. So, also, with en- nts upon, and obstructions in the e unrestricted use of public alleys of all sorts. The plaintiff has what led a general interest in the streets, as a citizen, and he has a special interest in this street as an abutting owner who must use it as a means of access to his property. He has, therefore, a right to object to its obstruction by a mere wrongdoer. None of the assignments of error are sustained, and the decree is affirmed, at the costs of the appellant.

McMICHAEL et al. v. INTER-COUNTY ST. RY. CO.

(Supreme Court of Pennsylvania. March 25, 1895.)

BOROUGH—ORDINANCES—VETO—SUIT BY BURGESS TO DETERMINE VALIDITY.

1. A burgess is entitled to a reasonable time for examination of an ordinance, and, where one is placed in his hands only an hour before called meeting, his veto, returned within 24 hours thereafter, is in time, though Act 1893 requires him to return an ordinance to which he objects at the next meeting.

2. A burgess may maintain a suit to enjoin action under an ordinance which he claims to have vetoed, and which defendant claims to be valid on the ground that the veto was too late.

Appeal from court of common pleas, Carbon county; Allen Craig, P. J.

Suit by John L. McMichael, burgess of Summit Hill, and the Lehigh Coal & Navigation Company, against the Inter-County Street-Railway Company, to enjoin defendant from constructing its electric railway on the streets of the borough of Summit Hill. Decree for plaintiffs. Defendant appeals. Affirmed.

James Ryon, L. W. Barringer, J. O. Ulrich, and A. H. O'Brien, for appellant. Loose & Craig, Fergus G. Farquhar, and John W. Ryon, for appellees.

WILLIAMS, J. The assignments of error in this case present two questions not involved in any other one of the series of appeals with which this one is connected. The first of these relates to the validity of the ordinance of the borough of Summit Hill, under which the defendant claims to have secured municipal consent to the occupation of certain streets with its street railway. The evidence shows that an outline or draft of such an ordinance as was thought to be necessary had been prepared by the borough solicitor, and presented or reported to the councils at a meeting held on the 5th day of October, 1894. One or two alterations were made in it by councils, and then it was formally accepted, as appears by an entry on the minutes, made thus: "On motion, the ordinance be accepted." This was probably intended as an expression of satisfaction with the character of the work done by the solicitor in the preparation of an ordinance suitable for consideration and adoption at the proper time. Another meeting of councils was held on the 10th day of the same month, which adjourned to meet at the call of the president. Six days later a call was made by the presi-

Digitized by Google

dent, and a meeting held at the house of one of the councilmen. At this meeting the ordinance was taken up and adopted, giving to the defendant permission to enter upon and occupy certain borough streets with its street railway. When this was done, another adjournment was made to the call of the president. This call came on the following day, and at that meeting the business done was the approval of a contract and bond given by the defendant company under the provisions of the ordinance adopted the day before. The next meeting of councils was the regular monthly meeting held on the 2d day of November. The hour for this meeting was 7:30 o'clock in the evening. On the same evening, at about 6 o'clock, the ordinance, the agreement of the railway, the bond, and other accompanying papers came to the hands of the burgess, for his examination and action. His veto was not presented to councils when that body met, and at its adjournment it was alleged that the ordinance had become effective under the provisions of the act of 1893. The burgess completed his examination and sent his veto on the following day; and his veto message, with a statement of his objections to the ordinance came in this manner to the notice of councils and of the defendant. Was this veto in time, under the circumstances of this case? The burgess insisted that it was, and, as the defendant admits, protested against the validity of the ordinance, and the right of the railway to occupy the streets under it. It may well admit of doubt whether an ordinance adopted at a called meeting is within the meaning of that provision of the act of 1893 that requires the burgess to return an ordinance to which he objects at the next regular meeting of councils. It would seem that an ordinance passed at one regular meeting should be promptly placed in the hands of the burgess, who would then have until "the next regular meeting" for examination and decision. If an ordinance passed at a called meeting is to be treated in the same manner as though passed at a regular meeting, then the called meeting might be held on the same evening with the regular one, at an hour or a half hour earlier, and an ordinance upon an important subject, and of great length, be passed. It could then be placed, as this one was, in the hands of the burgess at a time to make examination impossible; and, if the object was to avoid a veto, the shorter the interval between the special and the regular sessions, and the more prompt the adjournment of the regular, the better the prospect of securing an ordinance in defiance of the burgess. This is an opening for discord and uncertainty and litigation that the law did not contemplate. The court below took the most favorable view possible of the situation, for the councils and the defendant, when it held that the burgess was at least entitled to a reasonable time for examination. That he was not allowed, by the council a reasonable time in this instance, and th veto, promptly returned within 24 hou er the papers were placed in his hand in time, were conclusions that followed ally, and we see no reason for distu them.

The second question relates to the of the burgess to raise the question validity of the ordinance. This is debatable. The statute confers on hi veto power. The councils arrange to its exercise practically impossible, a sert that they have a valid ordinance out his signature. He has a right to his prerogative, and he can do this on denying the validity of the ordinance a to be binding notwithstanding his veto. appropriate remedy for him is by b equity to restrain action under the nance alleged on the one side to be and on the other to be without legal This brings his prerogative, and the m of its exercise, before the court, and mines the duty of the councils towards The joinder of the other plaintiff ha been demurred to, and the decree may rest on the right of the burgess to be on the validity of the ordinance. The is affirmed. The costs of the appeal paid by the appellant.

RUPPEL v. ALLEGHENY VALLEY CO.

(Supreme Court of Pennsylvania. Apr 1895.)

CARRIERS OF FREIGHT — DELAY IN TRANSI TION—NEGLIGENCE—INSPECTION OF CARS— AGES—LIMITATION BY AGREEMENT—MEAS

1. Where delay in transportation of was caused by a hot box, which was disc after defendant company had taken the miles, and it then appeared that the bras journal was broken, and there was ev that it had never fitted the journal, and peared that defendant had, without any i tion, received the car from another line a journey of 1,000 miles, it was a question f jury whether, by reasonable inspection, t fect could have been detected when defe received the car.

2. Evidence that loss of a car of po was caused by a delay of three days in tra tation is not purely conjectural, when thre nesses of experience in shipping and deal potatoes testified that the condition of th the car on its arrival indicated that deca commenced within two or three days.

3. A provision in a bill of lading tha amount of any loss or damage * * * sh computed at the value of the property place and time of shipment, * * * un lower value has been agreed on," is vo against public policy, in case of loss caus negligence; the effect of the stipulation not alone the avoidance of inconvenienc uncertainty in the demand for damages, reduction in the real loss. Mitchell, J., di ing.

4. Where defendant accepted a car tatoes for transportation to a certain poi yond its line, and charged a through rate t point, the measure of damages for loss potatoes through delay caused by negligen its line is based on the market price of the

Digitized by Google

t the end of defendant's line, but at
f destination. Mitchell, J., dissent-

rom court of common pleas, Alle-
nty.

y George Ruppel against the Alle-
ley Railway Company for loss of a
toes, caused by delay in transporta-
gment for plaintiff, and defendant
Affirmed.

Scott and Geo. B. Gordon, for ap-
William Yost, for appellee.

J. Ruppel, the plaintiff, by wire,
gned to him, at Pittsburgh, from
ns, a car load of potatoes. They
ed 4th of June, and reached Pitts-
n June, 1892, being about six days
y. Before the car arrived, plaintiff
ed its transfer to defendant's road
nt to Buffalo; and when it came
rd, he, in company with two others,
the potatoes, which were packed
and pronounced them in good con-
he same day the car was trans-
defendant's road, and he, the next
ook from defendant a bill of lading
nt to Buffalo. The bill stated quan-
barrels potatoes; advance freight
17.67. It also contained this stipu-
The amount of any loss or damage
all be computed at the value of the
t the place and time of shipment un-
ill of lading, unless a lower value
agreed upon." On the evening of
(the 11th) the car was made part of
ich was started for Buffalo. About
ut of Pittsburgh, it was discovered
hot box. In consequence, it was
ed at Kittanning, 42 miles from
, for repairs. This was about mid-
aturday, the 11th. The car remain-
anning without repairs until Mon-
ng, the 13th, when it was run to
y 23 miles further towards destina-
e an examination showed the brass
al to be broken. This was replaced
30 minutes. On Monday, in the
he car was again coupled to a train
to destination, and arrived at Oil
on the next morning (Tuesday, the
ere it had to be transferred to a con-
e, the Western New York & Penn-
o reach destination. The inspectors
d refused to receive it, unless repair-
s again delayed until repaired. In
oon of the same day it was again
Buffalo, where it was delivered to
gent, Thursday morning, June 16th.
he potatoes were then found to be
nd wholly worthless, and the re-
onsiderably damaged. The plaintiff
it for damages, averring negligence
nt, in not, under the circumstances,
e car with reasonable dispatch to
. The court submitted the question
nce to the jury, who found for
nd defendant appeals. There are seven assignments of error, which, in substance, embrace three questions: (1) Was there such evidence of negligence as warranted the court in submitting that question to the jury? (2) If so, was there sufficient evidence that this negligence caused the damage complained of? (3) Was the measure of damage adopted by the court, under this contract, correct?

This written contract only expresses what the law implies on the part of the common carrier, namely, that goods which it accepts shall be transported with reasonable dispatch towards destination. Whether the contract has been kept is a question of fact. If there be contradictory evidence, or if the facts warrant opposite inferences, the case must go to the jury. Here it was undisputed that in the usual course of transportation this car ought to have reached Buffalo on Monday. Other cars which started with it on the same train did arrive at that place on Monday. This car was delivered on Thursday, three days later,—in about the same time from Pittsburgh to Buffalo as from New Orleans to Pittsburgh. It was not an unwarranted assumption on part of plaintiff that reasonable dispatch was the ordinary and usual time taken for the movement of such freight between those points. Appellant's counsel argues, in pressing his assignment, that there was not sufficient evidence of negligence. In his view there is, perhaps, no more accurate statement of what is reasonable dispatch than that of Pollock, C. B., in Briddon v. Railway Co., 28 Law J. Exch. 51: "The contract was to carry the cattle to Nottingham without delay, and in a reasonable time, under ordinary circumstances." Here, it is argued, under ordinary circumstances the car would have been delivered on Monday, but because of the happening of a circumstance which could not be provided against, for it could not be foreseen,—a hot box,—it was not delivered until Thursday. There was evidence that usually no degree of care in inspection or operation can guard against this obstruction to speedy transportation; that a car in apparently good condition as to journals and axles, and properly lubricated, will at times have a hot box. And in so far as the delay was necessary because of a hot box, which could not, with ordinary care, have been provided against, the dispatch was reasonable. But then plaintiff replies to this that appellant accepted this car at Pittsburgh, after it had made the trip from New Orleans, without inspection. The car inspector of defendant at East Brady, where it was repaired, testified that the brass of the journal was broken, and that he thought the brass, in the first place, had not fitted the journal; that it was not the proper pattern. The car repair man for defendant at Oil City, where this car had been rejected by the connecting road, testified that it had also had a broken center plate and bolt and damaged timbers. With a broken brass and the other injuries, at this distance from Pittsburgh, aft-

Digitized by Google

er a journey of more than 1,000 miles to Pittsburgh, and no proof of inspection there, the appellee argued that it was out of repair and defective before leaving Pittsburgh; that ordinary care required inspection and repair at that point, or a transfer of the potatoes to another car. It is settled that "a railroad company is bound to provide cars reasonably fit for the conveyance of the goods it undertakes to carry, and that the carrier owes the same duty of inspection of cars received from another road, and run over its own lines, as in respect to its own cars." Wood, R. R. § 430; Patt. Ry. Acc. Law, p. 238. To the same effect are all the authorities in this country and England. Whether the cause of this hot box existed, and by reasonable inspection could have been detected, in Pittsburgh, was a question for the jury, on the evidence. The court could not weigh it to determine the truth. Clear and full instructions were given on this point, and we see no error in the submission.

As to whether the delay resulted in the loss, the evidence on that point, though not clear, is not purely conjectural. No less than three witnesses of experience in shipping and dealing in potatoes testify, in substance, that the condition of these, when the car was opened at Buffalo, indicated that decay had commenced within two or three days. If the loss resulted from not being taken out of the car two or three days sooner, and these two or three days were beyond that reasonable time which, under the circumstances, the law allowed the carrier, the defendant was answerable for the loss. This question was also properly submitted to the jury on the evidence.

How is the loss to be measured? The contract stipulates that the market price of the potatoes at Pittsburgh at date of shipment is to be the measure of damages. If the loss be not attributable to the negligence of the carrier, then this condition of the contract is binding on the consignor. There is no rule of public policy which forbids it. But the verdict of the jury has determined as a fact that the loss was occasioned by the negligence of defendant. The carrier cannot by contract, in this state, limit his liability in case of negligence. The law on this subject is so clearly stated by our Brother Williams, and so amply vindicated by a citation of authorities both of this country and in England, in the late case of Willock v. Railroad Co., 166 Pa. St. 184, 30 Atl. 948, that repetition is unnecessary. And the general principle announced in that case is conceded by counsel for appellant, but it is argued that it has no application here. This stipulation, it is urged, is not to relieve the carrier from any liability for negligence, but was adopted to avoid the uncertainty which would otherwise be incident to proper proof of loss. If this were the object of the stipulation, there is no public policy which would avoid it. The trouble with this view, however, is that the condition is palpably a limitation of
duction on the loss of the shipper. T
inducement to shipment of marketabl
modities is the higher price at point
tination. This alone creates and stir
international, interstate, and domestic
Railroads and all other common
would have but lean incomes if this w
so. The plain effect of it is not alo
avoidance of inconvenience and unce
in the demand, but a restriction
amount of it,—a reduction in the re
It is therefore void. The fact that
was not on defendant's line, and t
terminus was Oil City, does not, in
this contract and the facts, fix the
price at Oil City as the measure of da
Defendant accepted the car for tran
tion safely to Buffalo, and charged a t
freight rate per 100 pounds from Pitt
to that point. It was not answerable
default or neglect beyond its own line
undertook to carry safely and with
able dispatch on its own line, and
to the connecting road on the route
tination. The verdict of the jury fin
it did not carry with reasonable dispa
its own line towards destination, an
this caused the damage sustained at
The loss there is therefore the meas
damages. Pennsylvania Railroad Co
tusville & P. Plank-Road Co., 71 Pa.
cited and relied on by appellant, is
distinguishable from this case. The c
averred there on part of the compan
to carry the lumber from sidings on
road to Corry, at the end of it, from
it was to be transported by the Oil
Railroad to Titusville,—26 miles furthe
plaintiffs did not claim there was any
ment, express or implied, to forward th
ber by delivery to a connecting roa
only that defendant was bound to trans
Corry, and further averred failure in th
ticular as the cause of the damage, an
that the measure of the damage was t
at Titusville. Having that contract in
this court said: "What, then, ought
the measure of damage on the failure
of the railroad company to transport
ry? The rule is compensation,—such
age as might reasonably have been an
ed, and within view of the parties."
case the shipment is, by the bill of
from Pittsburgh to Buffalo, on a t
rate. Oil City is not mentioned. This q
now raised does not seem to have oc
to appellant at the trial in the court
There was no evidence concerning it,
was not mentioned in the written
The only instruction asked on the s
in this particular, is in defendant's
point, thus: "The measure of dama
this case is the market value of the p
at the time and place of shipment, a
freight paid to Buffalo, less the amo
ceived for the potatoes at Buffalo." T
court affirmed, unless the loss resulte

Digitized by Google

igence of defendant, in which case falo market would determine the of damages. But even if it had sed by a prayer on part of appellant ial instructions, under this contract, nat reasonably might have been an- and within view of the parties," it ot to have been affirmed.

we have said disposes of all the as- ts of error demanding notice. The t is affirmed.

HELL, J., dissents from so much of ion as relates to the measure of dam-

---

OMMONWEALTH v. WEBER.

he Court of Pennsylvania. March 25, 1895.)

-ADMISSION OF EVIDENCE — CONDUCT OF AL—IMPANELING JURY—ARGUMENT OF COUNSEL.

he prosecuting attorney may comment ndant's failure to call as a witness his o saw him kill her father, she being a t witness for him, but incompetent for

here the prosecuting attorney offered to ndant's wife as a witness if defendant bject, but defendant objected, and the rejected, the court cannot be held to d in allowing the state to offer to call

such case there was no error in not the offer from the records.

nproper argument of the prosecuting at- the jury should be objected to by de- counsel when made; otherwise is

here 12 of the 48 jurors drawn were nother case at the time defendant's jury d, and when 11 jurors had been accept- all the rest of those present had been d or stood aside, there was no error in to wait for the return of the jurors out her case, instead of calling a juror from od aside, especially where defendant's ry challenges had not been exhausted.

here was no error in permitting defend- ore indictment found, to be brought ed into the court room, in presence of l jury.

here was no error in allowing a witness, testimony of defendant had closed, to threats of defendant against the per- illed; for, though it would have been in chief, the order of introducing testi- s in the discretion of the court.

ch testimony was also admissible at as affecting defendant's credibility, he while on the stand, denied that he made ts.

from court of oyer and terminer, unty.

n Weber was convicted of murder, eals. Affirmed.

s & Stevens, for appellant. Frank l, Dist. Atty., Charles H. Tyson, H. r, and J. H. Jacobs, for the Common-

, J. The defendant having been uilty of murder of the first degree, ing been sentenced accordingly. he his appeal. The testimony was am- ple to establish, in substance, these facts: Weber was a laborer, 26 years of age; from his birth had lived in the city of Reading; in April, 1892, had married Agnes Klemmer, a daughter of the deceased, Justus Klemmer, of Reading. Soon after marriage, they went to housekeeping, and continued to live together until some time in the early part of the year 1893, when the husband was convicted of a criminal offense, and sentenced to one year's imprisonment in the Berks county jail. This resulted in breaking up the home. One child having been born to them, the wife, with this child, went to her father's house. The father and daughter took the furniture and household goods, with some of Weber's clothing, and stored them in the house of Walter Miller, a brother-in-law of Klemmer. The child remained with the grandfather, and its mother went out to service. Matters continued in this condition until 14th May, 1894, when Weber was discharged from prison, by reason of expiration of term. He immediately sought out his wife where she was employed, and had several interviews with her, but they did not again live together. Weber thought, and probably correctly, that his wife's father was opposed to her living with him. He then determined to get possession of some of the household goods stored at Miller's, asserting that they belonged to him; had one or more notices sent to his wife by Aldermen demanding them. On the 7th of June, he bought a revolver at one hardware store, and cartridges at another; then went to his brother's house and loaded the pistol. About 6 o'clock on the evening of the 11th of June, he went to Miller's house, where the furniture was stored, and asked Mrs. Miller if his wife and her father were there yet. She said, "No." He said they were coming to divide the furniture. He waited about an hour on the steps, until they came. Some of the furniture was in the cellar, and, at the suggestion of Klemmer, the three, Weber, his wife, and Klemmer, started down the steps. Miller, just then coming in, followed with a light. When they got to the cellar, they undertook to set apart for Weber articles that belonged to him. He demanded to know where a bedroom set was, belonging to him. Klemmer replied that he had all that belonged to him, and more too. He then demanded his marriage certificate. Klemmer replied that his (Weber's) wife had that, and she had a right to it. Then Klemmer started to leave the cellar by a rear door opening out into the yard. Weber made a profane answer, drew a revolver, aimed at Klemmer, and snapped it; again pulled the trigger, this time discharging it, shooting Klemmer in the arm, shattering the bone; again shooting him when he fell or was falling; this shot in the brain, causing almost instant death. Another shot, either preceding or following these two (it is not clear which), was fired, causing a slight wound on the arm. He then

Digitized by Google

followed his wife to another part of the cellar, thrust the revolver in her bosom, snapped it, and ran out into the alley. There was evidence of threats made by him against his father-in-law, both while in prison and after he was discharged. He denied, on the witness stand, these threats, and declared that Klemmer and Miller assaulted him in the cellar; that in self-defense he drew the revolver, when Miller caught and pulled his arm, causing its discharge. His story throughout, at best, was improbable, and the jury did not believe him. It was improbable, not alone because in flat contradiction of Miller's statement, the only other competent witness of the shooting, but because its improbability was inherent in the story itself. If Miller had not testified at all, men of ordinary observation and experience would not have thought it credible. It is seldom, in the trial of felonious homicides, that the evidence of malice aforethought and the fully-formed purpose to kill is so abundant and convincing.

The learned judge of the court below, in a charge, clear, impartial, and comprehensive, as to the law applicable to every phase of the evidence, left the defendant's case to the jury. In fact, so impartial was the charge that the able counsel for defendant do not complain of it. But, on appeal, fourteen assignments of error are pressed upon us for consideration. Nine of these complain of illegal conduct or speech during the trial by counsel for the commonwealth; two of them aver fatal irregularities in impaneling the jury; one, to bringing the prisoner into court manacled, in presence of the grand jury, which was made the ground for a motion to quash the indictment; one, to alleged error in the admission of testimony of a witness; and the fourteenth, and last, that the evidence did not warrant a conviction of murder of the first degree. As to this last, we have already spoken. The evidence fully warranted the verdict. As to the others, the substance of them was considered by the court below in a very full opinion, overruling the motion for a new trial. The gravity of the consequences of this judgment to the defendant has, however, moved us to re-examine his complaints of error, to see if there be any such merit in them as calls for reversing the judgment.

The first assignment is: "The court erred in allowing counsel for commonwealth to comment on failure of defendant to call his wife as a witness." The wife saw her husband kill her father. She was incompetent as a witness for the commonwealth, because she could not be called to testify against her husband. She was, however, a competent witness in his behalf. He could have called her to the stand. If his statement was true, that he acted only in self-defense, and the pistol was discharged in a scuffle, without intent to kill, why did he not call her to corroborate him? Counsel for commonwealth argued that the fair inference was that her testimony would have contra her husband. This was not unwar comment. The force of it was for th If she had been a competent witness commonwealth, and had not been it would have been allowable for d ant's counsel to have argued that it w cause her testimony would have cont ed Miller. There is, under the circu ces, no legal presumption raised by fusal to call a competent witness. simply a fact for the consideration jury, entitled to such weight as, in v all the circumstances of the particula it ought, in their judgment, to have.

The second assignment is "that the erred in allowing commonwealth to o place the wife of defendant on the st a witness for the prosecution, and striking the offer from the record." argued that the testimony of the wi clearly inadmissible, and must have so known by counsel for commonw but, although the offer was overrule the mere fact of its having been mad highly prejudicial to the defendan was so intended to be. We know of n the court can rule on an offer without ing it. It was to call the wife if defe did not object. Defendant did objec she was rejected. There could have no other ruling except to admit her mony, and this would have been m error. The assignment, in effect, is th commonwealth called an incompeten ness, the defendant objected, and the sustained the objection; therefore the erred. The offer being overruled, th essarily made it a silent part of the and it had no effect in the trial that ing it from the record would cure.

The third, fourth, and fifth assign complain that the court erred in perm counsel for commonwealth to argue n of fact to the jury, not sustained b evidence. The remarks of counsel, a presented, were taken down by the stenographer of counsel for defendan not by the court reporter. Counsel fo monwealth deny they were made a printed. The stenographer, when exa under oath, does not testify the rep full, nor does he testify with any po ness that it is accurate; but, assumin we have before us a correct repor words should have been objected to time they were uttered. No judge expected to anticipate the line of arg counsel will adopt, and caution him s improper speech. A judge may, and does, of his own motion, stop counsel proper statements, and administer r But he may not give close attention that counsel say when addressing the nor is he required to. That is the d opposing counsel, and, if the argume objectionable, the objection should a be made to the court. Then the wor

Digitized by Google

down by the official reporter, and the subject of ruling by the court, ew here. That counsel on one side into court with their own stenog- and take down the address of the counsel, to be made the subject of and objection, not at the trial, but ds in this court, is so unfair to the low, and so obviously prejudicial to handed administration of justice, dismiss these assignments without notice.

xth assignment is that the court per- ounsel in the argument to attack the of defendant, not from the evidence, nference from the fact that he had witnesses to testify to good char- f this was done as alleged, clearly nwarranted. The previous character harged with a crime has no bearing on his guilt, unless he chooses to the subject of consideration by at- o prove a good character. If he do this, as he did not here, the com- th can offer no evidence on the sub- is entitled to the presumption of e until his guilt be proven by the wealth by evidence to sustain the r averments in the indictment to e has pleaded. He may then offer to contradict that adduced by the wealth; and to establish his inno- to raise a doubt as to his guilt, may vidence of previous good character. d then only, is the door open to the wealth to impeach his character pre- he crime charged. To permit an in- of bad character to be argued, be- has not adduced evidence of good r, is a palpable evasion of a well- nd humane rule. Prisoners are not nvicted because their past lives in- ey are capable of committing crime, use the proof shows, beyond a rea- doubt, they committed the particular arged in the indictment. Until they question of previous character, the wealth cannot, either by evidence or t. But how are improper statements wful inferences to be taken advan- n a review of the proceedings here? as we have already said in reference her assignments of error, by objec- he trial. Prompt objection then, we t, would have relieved defendant's rom the burden of pressing the as- s of error here. The court's atten- not called to the matter by protest ion. There was no erroneous ruling court. There is not, even upon the n official and trustworthy report of s. In this court an error of speech onistic counsel is complained of, and l of the judgment sought because of e commonwealth had elicited from a on the stand irrelevant or incompe- imony without objection, and there n no request by defendant to the court to withdraw it from the consideration of the jury, it would hardly have been argued, in view of the settled law, that this court should reverse the judgment. His silence in the court below would have been conclusive against his complaint here. And there is no distinction, in this respect, between improper evidence and improper argument. It is the duty of counsel to aid the court by their learning and fidelity in the administration of justice. Any other rule of duty would, probably, lead to very undesirable results, because, without it, the most effective defense astute counsel could make for criminals with a hopeless case on the evidence would be, by silence, to invite errors of omission and commission by the court and opposing counsel, with the object of securing reversals on review; and thus, by persistent, expensive, and vexatious appeals, wear out the prosecution. The attitude of defendant's counsel, as exhibited by the record, is, in substance, this: "Counsel for commonwealth erred in the matter of his address to the jury. I erred by remaining silent when I should have promptly brought his error to the notice of the court by objection. The court committed no error, but its judgment should be reversed because it did not perform my duty." There are, it is true, rare instances where judgments of the serious character of this one have been set aside because of errors or slips by prisoner's counsel, which may have brought about the adverse verdict; but there is no instance of it having been done where the trial, on the whole, was so fair as this, and where the verdict was in accord with the overwhelming weight of the evidence.

The seventh, eighth, and ninth assignments are to arguments which, though intemperate in language, cannot be said to be without foundation in the evidence.

The tenth and eleventh assignments of error relate to the impaneling of the jury. The forty-eight jurors drawn were not present in court when this jury was called. Whatever inequality, if any, is produced by the right of the commonwealth to stand aside jurors until the panel is exhausted, the right existed. All the jurors present had been called, and either sworn, challenged, or stood aside. Eleven were accepted, sworn, and in the box. The twelfth juror was called from those stood aside. The defendant's peremptory challenges were not then exhausted. He claimed the right to have called all the jurors in attendance, before any of those stood aside should be called. As twelve were out in their room deliberating on a verdict in another case, this could not be done without serious interruption of the business of the court. Under the circumstances, it was within the discretion of the court to proceed with this trial without awaiting the return of the jury then in their room. Especially was this a reasonable exercise of discretion when the defendant's peremptory challenges had not been exhausted.

Digitized by Google

The twelfth assignment of error is to permitting "the defendant, before indictment found, to be brought handcuffed into the court room, in presence of the grand jury." What reasonable precautions the officer having the prisoner in charge shall take to keep him safely in his passage from prison to the court room, during the progress of the trial, must largely depend upon the judgment of the officer. The fact that he was brought into the court room handcuffed, and the grand jury may there have seen him thus secured, does not warrant the inference, that, therefore, they were prejudiced against him in finding the bill of indictment. An athletic young man, charged with a high crime, of course would be securely kept to await trial. While not in court, he would be within prison walls. Going to and from the court room, escape would be guarded against, either by a prison van or handcuffs. The grand jury would have known this if they had not seen it.

The thirteenth assignment is to the admission of the testimony of George Snyder, a fellow prisoner, who testified to threats made by defendant against his father-in-law, while in prison. The witness was called after the testimony of defendant had closed. What he testified to would have been evidence in chief. It was material as part of the commonwealth's case. But he was also called to contradict defendant, who had been asked, when on the stand, whether he had not made the threats, in substance, testified to by Snyder. He denied he had made them. The order of introducing testimony, generally, is in the discretion of the trial judge, and we see no abuse of that discretion here. But, without this, the evidence was clearly admissible at this stage of the trial, as affecting the credibility of defendant's testimony.

After a most careful examination, we are all of the opinion that there is nothing in the record or the assignments of error which should move us to disturb the judgment. It is therefore affirmed, and it is directed that the record be remitted to the court below, that the sentence may be carried into execution according to law.

SCRANTON GAS & WATER CO. v. LACKAWANNA IRON & COAL CO.

(Supreme Court of Pennsylvania. March 25, 1895.)

CONTRACT—CONSTRUCTION — LIMITATIONS — RUNNING OF STATUTE.

1. A contract provided that plaintiff should furnish defendant with pure water for four enumerated purposes for $10,000 a year, stipulated that such undertaking should include the furnishing of water for no other purpose than those enumerated, and then provided that plaintiff would, on reasonable notice, and for another consideration, furnish defendant with "such other water as may be required" by defendant for other purposes, from certain streams. *Held*, that pure water was to be furnished for the four enumerated purposes only.

2. Where plaintiff contracted to furn ter to defendant, for certain purposes o a certain amount per year, the fact that ant, without having any right to do without the knowledge and consent of took water from the pipes for other p will not prevent the running of the against an action for the value of the taken; no deception or fraudulent pract ing been made use of to divert the atte plaintiff, or to relax its attention, and th ing been no difficulty in the way of the knowledge, the water pipes and connect ing the property of plaintiff, to which it cess at all times.

Appeal from court of common pleas awanna county.

Action by the Scranton Gas & Wat pany against the Lackawanna Iron Company for the value of water used. ment for plaintiff. Defendant appea versed.

Joseph O'Brien, M. E. Olmsted, ton Wallis, and John G. Johnson, for lant. L. Amerman, H. W. Palmer, H. Burns, for appellee.

WILLIAMS, J. Two important qu are presented on this record. The these relates to the construction of t tracts between the parties for the su water to the defendants. A contra made in 1874, and largely modifie supplemental agreement made in 1881 provided that the gas and water c should furnish the defendants wit water for the "generation of steam, hydrants, and hydraulics, and for sto dwellings" belonging to the iron a company, for the price of $10,000 per payable in monthly installments. I lated that the undertaking should clude the furnishing of water for boshes, or condensers, or for any oth pose than those named in the agreem also stipulated for free access by the of the water company to the works iron and coal company, to enable then if the arrangements for saving wat working satisfactorily, and reserv right to put meters upon the waste the pleasure of the water company, to determine with certainty the am water used under the contracts. disposed of this subject, the contra ceeded to consider another, viz. a su water for the purposes previously ex The water company undertook in th of the agreement to furnish the def upon reasonable notice, "such other as may be required by said iron a company" for tuyeres, boshes, and c ers, and for all other purposes requ the works, except for water wheels the Lackawanna river or Roaring for which it was to receive interest cost of constructing the necessary w bring the water to the defendant's mi the actual cost of operating them an ing them in repair. The water of th awanna river and that of Roaring B

Digitized by Google

the defendant's works was not pure ut was charged with acids and oth- rities from the drainage of the coal near which both streams passed, endered the water unfit for domestic and for generating steam. The judge of the court below held that ract provided for a supply of pure r the four enumerated purposes, and pply of "other water," or water not be taken from the river or the brook convenient point, for all other pur- xcept water wheels, that the busi- the defendants might require. This orrect construction of the contract. ertaking of the water company was y pure water for certain specified , and to supply for other purposes her water" as might be needed. The uch other water" are not equivalent additional water," but are put in with "pure water," which the wa- any was to supply for purposes that pure water. The right of the de- to pure water, under the terms of ract, was confined, therefore, to such as was necessary for the "genera- team, for fire hydrants and hydrau- for stores and dwellings." It had t to call upon the water company, nable notice, for a supply of river r all other purposes, but it had no demand pure water for such other , or to take it without demand from nection under its control, without be- e to pay for it, in addition to the $10,000, the price of the water to t was entitled under the contract. ntiff alleges that the defendant did e water for purposes for which it right to use it, and without the ge of the plaintiff. The defendant is, or alleges that only a small quan- used. The facts were for the jury, learned judge was right in holding defendant was liable in this action quantity of water as was improp- en from the pure-water supply.

e plaintiff's claim extended over a f 10 years, from 1881 to 1891, and gs us to the second question, which o the statute of limitations. The judge held, and so instructed the t if the defendant "took the water e pipes of the water company with- ng any right to do so, and without wledge and consent of the water , then such abstraction of the water audulent use of the water, and until ntiff discovered it they could not it; and therefore that would be an to the general rule that the action brought within six years." Now, it borne in mind that no deception or nt practice was made use of to di- attention of the water company, or its vigilance. It must also be re- d that the connection by means of which the pure water was used for unauthorized purposes was put in by the water company, and that its officers and employés had access to it at any and all times when they might choose to examine it. All that the evidence shows, or that the instruction of the learned judge assumes, is that the pure water was taken at times without any legal right to take it, and without the knowledge and consent of its owners. Reduced to its true proportions, the question is thus seen to be whether ignorance of the commission of a trespass will prevent the running of the statute against the owner of the property injured. The trespasser who enters my fields or my uncultivated lands, and takes possession, and holds them for the statutory period, acquires title to that which he has taken. He is not required to tell me of his entry, or render an account for the timber he has taken, or the profits he has made. He comes upon my land, in the language of the learned judge of the court below, "without having any right to do so, and without the knowledge and consent" of the owner; but at the end of the statutory period he ceases to be a trespasser. My remedy is gone, and my land has gone with it. While I was wholly ignorant of his entry upon my land, the statute has given it to him. The fee simple passes out of me, and rests in him, without any act of mine and without my knowledge. The cases that so hold are too numerous to justify an attempt at citation. The true reason for this rule was stated in the recent case of Lewey v. Coke Co. (not yet officially reported) 31 Atl. 261. What an owner might know if he was personally present, by himself or his employés, on the surface of his possessions, he is bound to know, unless his attention is diverted by the fraudulent artifices of the wrongdoer. Silence or concealment will not prevent the running of the statute. Sankey v. McElevey, 104 Pa. St. 265. The question in any given case is not, what did the plaintiff know of the injury done him? but, what might he have known, by the use of the means of information within his reach, with the vigilance the law requires of him? In Lewey v. Coke Co., supra, we held that the owner was not bound to take notice of a trespass committed upon the coal underlying his land, to which he had no access, and at which his presence, by reason of the position of the coal stratum, was impossible. When knowledge is impossible, because of the laws of nature, or because of the actual fraud of the wrongdoer, the statute runs from the time of discovery. But a constructive fraud is not enough. Downey v. Garard, 24 Pa. St. 52; Campbell's Adm'r v. Boggs, 48 Pa. St. 524; Hollingshead's Appeal, 103 Pa. St. 158. But in the case now under consideration the pipes and the connection through which it is alleged water was used in excess of the defendants' contract rights were put in by the water company, were its property, and were, as matter of law, under its control. There was

Digitized by Google

no difficulty in the way of fullest knowledge. The defendant used more water than it paid for, and was silent in regard to it. The plaintiff took no pains to know whether the contract was being observed by its customer, and was therefore in ignorance of the fact that too much water was used. This state of facts is the common one on which the statute is held to run in favor of a trespasser from the date of trespass, and it should have been so held in this case. The 4th, 7th, 11th, 12th, 13th, 14th, and 15th assignments of error are sustained. The judgment is reversed, and a venire facias de novo awarded.

KETCHUM et al. v. CORSE et al.

(Supreme Court of Errors of Connecticut. Sept. 1, 1894.)

CONSTRUCTION OF WILL — INVALID PROVISIONS—EFFECT ON VALID PROVISIONS—STATUTE OF PERPETUITIES.

1. Testator, after devising to his wife the whole, or so much as she might need, of the income of his estate devised in trust, directed the residue of the income to be paid during the continuance of the trust in equal shares to his seven children, and in case of the death of any child, his distributive share of such income to be paid to his "heirs and legal representatives," who were to take "by way of representation." He then provided that upon the death of the last survivor of his wife and children the residuary estate should be conveyed in equal shares to the "heirs and legal representatives" of the children, who were to take "by way of representation." *Held*, that the provision for the benefit of the "heirs or legal representatives" of the children was void as violating the statute of perpetuities.

2. In such a case the residuary estate should be distributed as that of an intestate subject to a valid trust estate during the life of the wife, due regard being had to a clause of the will providing that advancements therein stated as having been made to the children should be charged against them in the distribution.

3. In such a case, upon the death of a child before the death of the wife, leaving a wife and children, his share of the income until the death of the wife of the testator would become part of the intestate estate of deceased.

Case reserved from superior court, Fairfield county; Thayer, Judge.

Action by Franklin M. Ketchum and others, trustees, against Catherine K. Corse and others for the construction of a will. Reserved to the supreme court.

John W. Alling, for complainants, Franklin M., Edward B., and Landon Ketchum, and Willard Parker. Nathaniel R. Hart, for defendant Willard Parker, Jr. Curtis Thompson, for defendants Catherine K. Corse and Margaret Parker. J. C. Chamberlain, for defendants Edith Evans and others, minor grandchildren and great-grandchildren of the testator.

FENN, J. The material facts involved in this reservation may be stated as follows: Morris Ketchum, late of Westport, by his last will, dated August 12, 1876, among other things provided in clause 5 that the rest and residue of his property be given and devised to his executors in trust, to hold age, and invest, "and to derive a yea come from my said estate, and to hol apply the same as follows, viz.: (1) and apply from time to time, and as as necessary, so much of such yearly as may be necessary for the expenses trust, and the proper maintenance, car management of my said estate. (2) and make over to my dear wife, Mar semiannually, during the term of he ural life, the whole or so much of sa nual income, after the payment last directed, as she shall require, to and absolute use and benefit. (3) To pa make over, semiannually, the residue o annual income, if any there be, in shares, to my children, Kate Corse, Fr M. Ketchum, Charles J. Ketchum, E B. Ketchum, Landon Ketchum, Ma Parker, and Miller Ketchum, and, in the death of any of my said children, and make over, during the continua this trust, to the heirs and legal repre tives thereof, the distributive share o income to which such deceased child have been entitled hereunder, if living heirs and representatives taking by representation, and not according to number. Sixth. As soon as may be the death of the last survivor of my wife and children, I direct said trust make over and convey my residuary in equal shares to the heirs and legal sentatives of my said children, such and representatives taking by way o resentation, and not according to thei ber." In the seventh clause the te stated that he had advanced to each children sums of money, varying in am and that certain of them were devis special lands, under the will of his Margaret; that, "to the end of an equ distribution" of the residuary estate, amounts should be charged them, a "I direct my said trustees, in making distribution of my residuary estate in shares, as hereinbefore provided, to as part of such estate the total amou the advancements as above declared to reckon as part of the respective di tive shares of my estate the advance above charged to my said children tively." The next clause of the will follows: "Eighth. I hereby empowe said children to dispose by last will an tament of the distributive share of my uary estate to which his or her heirs gal representatives would otherwise b entitled hereunder, and I direct my sai tees, as far as they lawfully may, to and make over such distributive sha accordance with the will of such te provided such will shall have been larly proved, and knowledge thereof have been given said trustees, withi period of one year after the death of testator." The testator died in 1880,

Digitized by Google

iving his wife, Margaret, who died er 11, 1893. He also left surviving hildren named in the will. Of these , Charles J. and Miller have since estate, each leaving a widow and . The rest survive. Franklin M. er married. The others have mar- have issue. During the life of the the testator the trustees paid over ll the income of the estate conveyed will, and at her death the value of duary estate was, and is, substantial- ,000.

uestions propounded relate to the and effect of the third subdivision ifth article, and of the sixth article, will, and are stated in the complaint vs: "(1) Is the provision in said sub- third of said fifth article, which at, in case of the death of any of ldren, said trustees are to pay and rer, during the continuance of the the heirs and legal representatives the distributive share of said in- which said deceased child would en entitled thereunder, if living, such d representatives taking by way of tation, and not according to their valid, or is the same void as in vio- f the statute of perpetuities? (2) provision of the sixth article of the hich directs the trustees, upon the f the last survivor of the wife and of said testator, to make over and the residuary estate in equal shares eirs and legal representatives of such lid, or is the same void as in viola- the statute of perpetuities? (3) If visions of said will, either in the bdivision of the fifth article of the in the sixth article of the will, in fa- he heirs and legal representatives of d or children of the testator, are in- hat, then, is the effect of such in- upon the provisions of said third ion of the fifth article, directing the t of the semiannual income in equal o the children of the testator? (4) of the provisions of the will which signed to take effect upon the death widow of the testator valid? (5) If said provisions of said will are in- r any reason, to whom does the es- trust estate created by any of such ns go, and of right belong?"

er to answer the first and second of e questions, it is necessary to deter- at the testator intended by the expres- irs and legal representatives thereof," d to a child dying during the continu- the trust. In pursuing this inquiry, ext should be taken into consideration. eirs and legal representatives" were a "distributive share," and to take it of representation, and not according number." If we attach to the word ts ordinary meaning, including collat- is manifest that, under the repeated decisions of this court, the statute of perpetuities is violated. If we apply to it the more restricted meaning of "children," it is evident that the testator, in both the fifth and sixth clauses, has failed to make any provision whatever for such a contingency as the death of the unmarried son, Franklin M., intestate. Such an oversight cannot properly, by mere construction and inference, be attributed to the testator. Doubtless, in what the testator said as to "representation," he must have had children or descendants of a deceased child in mind. The question is whether in making use of the word "heirs," instead of "children," he intended a broader provision. But if the conclusion that he did not is adopted, then, substituting the word "children" for the word "heirs," the language accords with that of our statute of distributions, viz. "children and the legal representatives of any of them who may be dead" (Gen. St. § 630), and should receive the same construction. By "representatives," as used in this statute, and also in section 632, where it is provided that no representatives shall "be admitted among collaterals after the representatives of brothers and sisters," is intended neither heirs generally nor executors and administrators, but lineal descendants taking "by representation," per stirpes, "and not according to their number." Applying this meaning, it is evident that such representatives may, at the death of a child of the testator, be the grandchildren of such child, and the children of parents both born after the testator's death, a contingency which is not only possible, but perhaps probable, under clause 5 of the will when applied to the last but one, and under clause 6 when applied to the last survivor, of seven lives. This also would cause the provisions in question to offend our statute of perpetuities. It may be suggested that by the language used in the fifth clause, "in case of the death of any of my said children," the testator meant in case of the event of their dying within the lifetime of the testator. Such a construction would at the same time make the provision as to heirs and legal representatives valid, and deprive it of any practical operation; since no child of the testator named in the will did in fact so die. Of course, such construction could not be put upon the language used in clause 6, It is, besides, in contravention of the meaning of the eighth clause, by which it is evident the testator intended to confer upon his children the power to dispose by will of what would otherwise go to the "heirs and legal representatives"; a power which, if valid, as the testator believed it to be, could only be exercised by children living at the death of the testator, and then dying during the continuance of the trust. The first and second questions propounded must therefore be answered by saying that the provisions referred to are void as in violation of the statute of perpetuities.

We are thus brought to the remaining questions as to the effect of such invalidity upon

Digitized by Google

the other provisions of the will, and in the determination of this inquiry the general purpose and intent of the testator, if the same can be ascertained, should be regarded, and as far as possible, in conformity to legal rules and principles, effectuated. Fortunately, such general intent seems clear. So far as the residuary estate—alone under consideration—is concerned, the cardinal thought was the best, fairest, and most certain provision for the natural objects of his bounty,—his "dear wife, Margaret," and his children. For his wife he first provided, in a clause under which she could, and in fact did, receive the entire income of the residuary estate during her life. No question therefore arises concerning the disposition of any such income accruing while she lived and not required by her. For his children he next provided, by provisions which, while they extended the trust created after the death of the wife, and until that of the last survivor, gave to them the entire beneficial use and enjoyment of such property, at least to the utmost limit to which it could have been imagined that it was possible to do, consistent with the continuance and validity of the trust. In the first place, the entire residue of the annual income—meaning all not paid to the wife or expended in the expenses of the trust and the proper maintenance, care, and management of the estate—was to be paid and made over, semiannually, in equal shares, to the children. Second, in case of the death of any child, such payment of the same proportion or "distributive share" continued to "heirs and legal representatives thereof," taking "by way of representation." Third, at the death of the last survivor the trust ceased, and the trustees were to "make over and convey" the corpus in the same proportion and manner. Fourth, advancements were to be charged his children, "to the end of an equitable distribution," and the trustees, in making final distribution, were to "reckon as part of such estate" the "total amount of the advancements as above declared," and "as part of the respective distributive shares" the advancements charged to the children respectively. Fifth, the full power of disposition by will was expressly declared. In view of all these provisions, whatever may have been the purpose of the testator in providing for the continuance of the trust after the decease of his wife (which purpose it is, perhaps, not difficult to infer), it seems evident that—since, by reason of the invalidity of the provisions which we have held to violate the statute of perpetuities, no other persons than the children of the testator can take beneficially, or as purchasers, any interest in this residuary estate under the will—there can be no justification in holding that the trust continues as to any portion of such estate as long as it may do so without violating such statute; that is, until the time specified in the will: the death of the last survivor of the wife and children,—provided results would necessarily follow from such continuance, coupled with the invalidity of t
mate provisions, which the testator co
have contemplated, and which would
his general purpose of equality and "eq
distribution." Would such results
therefrom? It seems to us that they
Two of the testator's children have
died intestate. Four more will die bef
seventh or "last survivor." Since n
provision is contained in the fifth claus
what disposition shall be made of th
of income to which such children woul
been entitled, if living, during the conti
of the trust, and it cannot be claimed t
language in said clause either constitut
children a class, or vests in them seve
freehold estate per auter vie in an
part of principal or income, it must res
on the death of Miller Ketchum, the fir
of the testator to die, and who left a
and children, one-seventh of the princ
one-seventh of the continuing income f
principal—it is unnecessary to de
which it should be called, or how treat
ing the life of the trust—became, in th
that no valid disposition was made
the will, the intestate estate of the t
not of the deceased son; so that any
tion of it must be to the children ge
counting the "representatives" of s
ceased son as entitled to one share or
of such seventh. The same results fo
with the modifications and complicatio
dent to the devolution of the first shar
the death of Charles J. Ketchum, who
a wife and children. They will follow
ture, subject to a possible exercise of t
er of appointment (if the same is valid
we do not mean to intimate any opini
cerning, as it is not requisite, and the q
was not made), so long as the trust co
For these reasons, as well as others
might be stated, if essential, we thi
case falls within the principle decla
this court in Andrews v. Rice, 53 Co
5 Atl. 823, that where trusts, otherwis
are so connected with invalid provisio
they cannot be separated and carried
fect without involving consequences s
tially and materially different from w
testator intended, then they, too, mu
with the illegal distribution."

The superior court is advised: Firs
the provisions in subdivision 3 of cl
and also in the sixth clause, of the
Morris Ketchum, in reference to he
legal representatives of deceased chil
the testator, are void as in violation
statute of perpetuities. Second. Th
trust created ceased to be valid and
mined upon the death of the wife of
tator, and that the entire residuary
should be distributed as being intestat
of the said Morris Ketchum, charge
and subject to a valid trust estate du
life of his wife, which has now dete
by her death; that, in making such d
tion, the provisions of clause 7 of the

Digitized by Google

e to charges and advancements should
ded and followed. In this opinion
judges concurred.

ARROLL v. WEAVER et al.
e Court of Errors of Connecticut. Sept. 1, 1894.)

INSOLVENT'S TRUSTEE — SET-OFF — PLEA MENT—SUFFICIENCY—ACCEPTANCE OF OR- ARMLESS ERROR—APPEAL—FINDINGS OF

nder Act 1893, p. 318, § 6, providing he trial of any civil action in which an es to the supreme court of errors "all ence material to the questions of fact nade a part of the record"; and section ting either party to "appeal from any r refusal to find any fact * * * in er now by law provided,"—errors claim- conclusions of fact can be considered reference to claimed errors of law as- on the record, for the sole purpose of g the record.

hen the relation of the claimed errors nclusions of fact to the errors of law in the record is obscure, the finding will rrected.

n assignment of error in general terms be considered.

a second defense defendant pleaded exhibiting a statement of the payments d, third, he pleaded a set-off, alleging tiff was indebted to him "in the amount in * * * the second defense." t the third defense was informal and as showing a payment made by de- rather than a debt due him.

debt due from an insolvent at the com- nt of the insolvency proceedings may against his trustee as against himself.

a suit by an insolvent's trustee for a his insolvent at the commencement of vency proceedings, a reply to a plea of alleging that within 60 days of the in- of the proceedings defendant was gar- y creditors of the insolvent, whose ere subsequently allowed against the d that the payments were made after shment, was properly stricken out.

an action by a trustee for a debt due ent for building a schooner, defendant hat a certain firm furnished insolvent for the schooner, for which he drew an n defendant; that the firm recovered a thereon against defendant, which he d that by reason thereof defendant was ted to insolvent, but that insolvent was to him in a sum specified. *Held*, that er sufficiently alleged that defendant ac- d paid the order.

such case it was error, under the prac- upon motion of defendant, filed with his o compel plaintiff to make the insolvent laintiff.

ch error not appearing to be harmful, it could not avail the trustee plaintiff nd for new trial.

an action by a trustee for a debt due ent, defendant pleaded by way of set- the insolvent drew an order on him, paid. *Held*, that the error in overrul- nurrer to the answer for its failure to fendant's acceptance of the order was , where, in a statement subsequently endant alleged acceptance, and the par- at issue thereon, and the court, upon unobjected to, found for defendant.

an action by a trustee and his insol- a debt due the latter, error in overruling ent's demurrer to defendant's answer ail the trustee on an appeal by him

Appeal from superior court, Fairfield county; Shumway, Judge.

Action by George P. Carroll, trustee, against E. Harris Weaver and William E. Hunt upon contract. From a judgment for defendants, plaintiff appeals. Affirmed.

Allan W. Paige and George P. Carroll, for appellant. Charles H. Fowler, for appellees.

TORRANCE, J. On the 10th of January, 1891, one William E. Hunt agreed to build a schooner for the defendant Weaver, for which the latter agreed to pay Hunt $25,000. The vessel was completed according to the contract, and accepted by Weaver on the 22d of October, 1891. On the 19th of December of the same year the plaintiff was appointed trustee in insolvency of Hunt, and the present suit by him, as such trustee, was brought March 18, 1892. In his complaint the plaintiff alleged that defendant had paid Hunt up to October 20, 1891, on account of the contract price of said vessel, $17,725, and this suit was brought to recover the balance of said price claimed to be due and owing to Hunt at the date of the proceedings in insolvency. In substance the defense was that this claimed balance had been paid prior to the proceedings in insolvency. The matters and items of payment really in dispute between the parties were comparatively few in number, and very simple; but the pleadings subsequent to the complaint, consisting of a somewhat numerous array of answers, partial answers (so called), replies, partial replies (so called), demurrers and statements, interspersed with frequent amendments, and sundry motions with rulings and orders thereon, present these matters in a way that seems unnecessarily confused and complicated. In the court below judgment was rendered for the defendant, and the plaintiff took the present appeal for certain claimed errors of law, and also, under chapter 174 of the Public Acts of 1893,[1] for certain claimed errors committed by the court in its conclusions of fact. Under the last-named statute, the defendant, in a written request consisting of 33 paragraphs, asked the judge to incorporate in his finding certain facts claimed to be proved by the evidence in the case. Twenty-one of said paragraphs the judge found to be proven, and the remainder not proven. The evidence bearing upon the facts embodied in said written request is made part of the record.

The claimed errors in the conclusions of

[1] Pub. Acts 1893, p. 318:

"Sec. 6. Either party may * * * file written exceptions to any finding of fact by the court, and to any refusal to find a fact requested, * * * and all the evidence claimed by either party to be material to such question or questions of fact shall, so far as the court shall find the same to have been actually given in the case, be made a part of the record in the case.

"Sec. 7. Either party may appeal, from any finding or refusal to find any fact, to the supreme court of errors in the manner now by law provided."

Digitized by Google

fact, set forth in the reasons of appeal, furnish no ground for an appeal from the judgment, and can only be considered by this court so far as they relate to the claimed errors of law assigned upon the record, and for the sole purpose of completing the record so as to fully present the matters out of which it is claimed those errors of law arise. Styles v. Tyler, 64 Conn. 432, 30 Atl. 165; Bank v. Wellington, 64 Conn. 553, 30 Atl. 774. In the case at bar the relation of the claimed errors of fact to the errors of law assigned is obscure and doubtful, and we can see no reason for a correction of the finding. This disposes of all the claimed errors of fact assigned upon the record, and leaves the claimed errors of law for consideration in the light of all the facts found, including those in the finding proper, and also those found proven in the plaintiff's written request aforesaid. As these errors of law relate principally to the state of the pleadings prior to the time when the parties went to trial, and to the motions made with reference thereto, and the rulings on such motions, it may be proper here to set forth in substance the state of the pleadings at the time when the parties went to trial. The defendant's answer then consisted of three defenses, the first being, in effect, a general denial; the second was a plea of payment; and the third a claim by way of set-off. Under his defense of payment and his claim of set-off, the defendant, in November, 1893, filed an itemized statement of the payments made to Hunt, or for him at his request, on account of the contract price of said schooner, giving the date of payment, the amount so paid, the name of the payee, and for or on account of what the payment was made. For our present purpose it is enough to say that the plaintiff, in his reply, admitted certain of said items and certain of them he denied, and it was chiefly upon the issues so formed that the trial was had. The court below found all the disputed items save one in favor of the defendant, and found that at the time when the insolvency proceedings against Hunt were commenced the defendant was not indebted to him; and this conclusion is final, and must stand, unless in reaching it, or in the trial of the case, the court below committed some error of law prejudicial to the plaintiff and which entitles him to a new trial. The claimed errors assigned are 26 in number, but, as the last of them is a mere general assignment, it need not be considered; and as 9 of them, numbered from 8 to 16, inclusive, are claimed errors of fact which have already been disposed of, they may be laid out of the case. The claimed errors of law remaining will be briefly considered in the numerical order of their assignment.

In his first defense, as finally amended, the defendant admitted most of the allegations of the complaint, but denied that he owed the balance claimed. The plaintiff, apparently treating this defense as a plea of payment, demurred to it chiefly on the ground th issue of payment could only be raised affirmative defense. The court overrul demurrer, and this is the first error as This defense was not a plea of payme was it intended as such. The second d was such a plea, but the first defense, hardly a model of its kind, was, in ef general denial that anything was due think the demurrer to it was properly ruled, and, furthermore, that even if th not so, the action of the court und circumstances did the plaintiff no har

The second error assigned relates overruling of the demurrer to the thi fense. This was a plea or claim b of set-off, alleging, in substance, that time of Hunt's assignment in insolve was indebted to the defendant " amount as stated in paragraph 1 of t ond defense." This reference, in effe corporated the itemized statement filed the defense of payment, just as it stoo part of the third defense, and it showed a payment made by the defe rather than an indebtedness due to hi this respect this defense was informa defective, but the demurrer was not so if at all, to the form of it, but to it stance; on the ground that an indebt due from Hunt to the defendant at th mencement of the insolvency proce could not be set off against the claims plaintiff as trustee. That the demurr to the substance of this defense, rathe to its form, clearly appears from the of the plaintiff in support of this point. ground was not well taken, and the rer was properly overruled. As a g rule, a trustee in insolvency takes the of the insolvent subject to such burd the debtor has imposed upon it, and t equities as would have been good again debtor. Merwin v. Austin, 58 Conn. Atl. 1029. Moreover, as it does not that the court below allowed any set such, or had any occasion to do so, a case was tried on the pleadings as amended, the action of the court in o ing this demurrer cannot possibly have the plaintiff any harm.

The plaintiff next complains becau court, on defendant's motion, struck o plaintiff's "second partial reply t amended second partial defense of O 25th or 26th." In this reply it was a in substance, that within 60 days of th mencement of the insolvency proceedin money owed by the defendant to Hu the schooner had been attached in t fendant's hands by certain creditors o in three separate suits; that the clai those creditors, with costs of suit, a ing to over $500, had been subsequen lowed by the commissioners on Hun solvent estate, and the allowance ap by the court of probate; and that orders of Hunt upon the defendant,

Digitized by Google

ndant alleged he had accepted, and ums of money which the defendant e had paid for and at the request of ıd been so accepted and paid after been garnished in said suits. The the plaintiff appears to be that on tution of the proceedings in insol- e money thus attached became the of the trustee, to be turned over to tually, and that the fact that after y had been attached the defendant orders or paid out money at the f Hunt was no answer to the plain- m for the money so attached in de- hands. The reply in question ap- have been filed as a basis for mak- a claim. Upon the validity of that e express no opinion. It is suffi- say that in this suit it had properly The suit was brought to recover e which the complaint alleged was Hunt at the commencement of the y proceedings, and for nothing else. ot brought to recover for money or of Hunt attached in defendant's nd which he had wrongfully or im- disposed of. In striking out the question the court committed no er-

xt three errors assigned arise out ction of the court in the matter of hall & Co. order, and in citing in coplaintiff. It appears that New- o. had furnished materials to Hunt in the construction and equipment hooner, to the amount of $1,073.69, he 19th of October, 1891, Hunt drew order upon the defendant for said n favor of Newhall & Co. Appar- re was some dispute between the t and Newhall & Co. as to whether ndant had accepted said order, for & Co. brought a suit against the de- n the superior court for New Haven upon a claimed acceptance of said ade on October 19, 1891. In Febru- , that suit was determined in favor ll & Co., and shortly thereafter the t paid said judgment. In April, defendant filed in the case at bar dment to his answer, in which he substance the above facts, and al- t by reason thereof he was not in- Hunt at all at the commencement solvency proceedings, but that Hunt me was really and in fact indebted the sum of $1,200; and he append- amendment to his answer a writ- on, asking the court to order the to make Hunt a party to this suit. ion was allowed, and the plaintiff, his objection and protest, was or- make Hunt a coplaintiff, which or- subsequently complied with, and ame a party to the suit. The plain- rred to the said amendment to the because it did not allege that the t accepted said order in favor of Newhall & Co., because it did not appear that the present plaintiff was a party to the action therein referred to, because "said action appears to have been res inter alios acta, and because the facts there stated are insufficient in substance to constitute a defense to the whole or to any part of the complaint." The answer in question is quite susceptible of improvement in its mode of statement. It sets out evidence to a certain extent, instead of alleging facts. But, after all, we think it, in substance, alleges that the defendant on the 19th of October, 1891, accepted the order in question, and subsequently paid it in full; and the demurrer is to the substance of it, rather than to the form. We think the demurrer was properly overruled. Moreover, subsequently, in his statement filed in November, 1893, the defendant explicitly alleged that he accepted said order on the 19th of October, 1891, and the parties were at issue upon that allegation, and the court, upon evidence not objected to, has found it in favor of the defendant. The court allowed only the amount of the face of the order when accepted. If the defendant in fact accepted the order on the 19th of October, 1891, as the court below has found, he was then entitled to credit for it on the price of the schooner. It made no difference that it was not then paid, if the defendant was solvent, and his liability fixed (Merwin v. Austin, 58 Conn. 22, 18 Atl. 1029); nor that defendant supposed he had not accepted the order, nor that he paid it at the end of a lawsuit. In view of what was thus done subsequently in the case, it clearly appears that no harm was done to the plaintiff by the overruling of this demurrer, even if the court as he claims erred in so doing.

This same thing is true of the next claimed error, in striking out certain paragraphs of the reply filed by the plaintiff after the demurrer in question was overruled. In view of what subsequently was done in the case, this claimed error did the plaintiff no harm. In ordering and compelling the plaintiff to bring in Hunt as a party to the suit, we think the court committed an error. His presence or absence could not in any way affect the judgment to be rendered between the plaintiff and defendant, and in such a case the practice act does not permit him to be made a party. State v. Wright, 50 Conn. 581. It does not appear, however, by the record, that the plaintiff was harmed in any way by the fact that Hunt was made a party, or by any of the proceedings that subsequently took place in consequence of his admission as such party, and the error cannot avail him as a ground for a new trial. Burns v. Fredericks, 37 Conn. 86–92; Butler v. Barnes, 61 Conn. 399–402, 24 Atl. 328.

Hunt, after he became a party to the suit, filed a demurrer to the amended answer of the defendant filed in April, 1893, which demurrer the court overruled; and this action

Digitized by Google

of the court is assigned by the plaintiff for error. This clearly did him no harm, and, moreover, as Hunt has not appealed from the judgment rendered against him, the claimed error cannot avail the plaintiff on this appeal.

The next assignment is for the claimed error of the court in finding certain specified facts, although the same "had not been put in issue by the pleadings in the case." The ground of this assignment is not, we think, sustained by the record.

On the trial of the case the plaintiff made certain claims of law, based upon the facts as he claimed them to be, and the remaining assignments of error relate to the overruling of these claims. In regard to all of these it is sufficient to say that the court did not find the facts to be as the plaintiff claimed, and that upon the facts as found by the court these law claims were properly overruled. There is no error. The other judges concurred.

TRUMBULL v. HEWITT et ux.

(Supreme Court of Errors of Connecticut. Sept. 1, 1894.)

FRAUDULENT CONVEYANCE — WIFE AS GRANTEE — NOTICE OF FRAUD — HUSBAND AS WIFE'S AGENT.

1. A finding of fact that certain depositions, objected to as being copies, are the originals, will not be disturbed upon appeal.

2. In an action to set aside a conveyance made by an insolvent husband to his wife, the latter claiming that she had no knowledge of the insolvency, and that the property was conveyed to her in payment of an existing debt, she may properly be questioned relative to her knowledge of, and the consideration given for, previous transfers by the husband to her during the existence of such debt.

3. Where the court found that the grantee in a fraudulent conveyance had no knowledge of the fraud, the defendant was not prejudiced by the admission of evidence tending to establish such knowledge.

4. Certain evidence was held, upon defendant's objection, to be inadmissible, but was admitted by agreement of counsel, subject to the objection, in view of a contingency which might render it admissible. *Held*, that its admission was not prejudicial to defendant, no such contingency arising.

5. An insolvent husband, with intent to defraud his creditors, conveyed his land to third persons, without consideration, and then procured from them a voluntary conveyance of the same land to his wife, who, in ignorance of the fraud, accepted the deed in payment of a valid debt due her from the husband. *Held* that, since the husband acted as the wife's agent in procuring the transfer to her, though without her knowledge, she was a party to the fraud.

Appeal from superior court, Windham county; Hamersley, Judge.

Action by Jonathan Trumbull, trustee, against Gilbert L. Hewitt and wife to set aside certain alleged fraudulent conveyances of real estate. From a judgment for plaintiff, defendants appeal. Affirmed.

Charles E. Perkins and Solomon Lucas, for appellants. Jeremiah Halsey and Donald G. Perkins, for appellee.

TORRANCE, J. This is a compla
a trustee in insolvency, alleging,
stance, that the three conveyances
estate described therein, made by
fendant Gilbert L. Hewitt to the ot
fendant, his wife, are fraudulent a
as against the creditors whom the
represents, and praying that the san
for that reason, be set aside. In th
below judgment was rendered in f
the plaintiff, and from that judgm
defendants take this appeal.

The principal question presented
appeal is, in effect, whether or n
Hewitt can hold the lands so conv
her as a purchaser in good faith an
valuable consideration. Before dis
that question, however, it may be
dispose of certain matters of minor
tance assigned for error in the reason
peal. One of these is whether para
14½, 15, and 17 of the finding ough
treated as a part of the record. Th
below rendered judgment in this case
5th of August, 1893, and the notice of
was filed August 9th. On this last
day the defendants filed the follow
quest: "Request is hereby made th
time for filing the request for a findi
der the provisions of General Stat
1132, be extended ten days; that i
the 29th day of August, 1893." In pu
of the rule of court regulating the p
ings under section 1132, the reque
granted. On the 28th of August the
ants filed a written request for a
containing a draft of a proposed
Subsequently, counsel for the defe
claimed that said request and draft
posed finding were also intended a
quest to the judge to incorporate in th
ing such facts as they claimed to be
by the evidence, under the provisi
chapter 174 of the Public Acts of 189
court below did not take this view
matter, but made the finding under t
visions of section 1132 of the Genera
utes and the rules of court regulati
same. The record then proceeds as f
"But, in order that the finding may b
plete, in case the supreme court of
shall be of the opinion that the defe
have legally filed a request for the inc
tion of facts in the finding under the
1893, I include in paragraphs 14½, 1
17 all of the facts set out in the dr
finding filed by the defendants, which
proven by the evidence and not inclu
other paragraphs, although these fac
not properly, and should not, be inco
ed in the finding, unless the defe
draft for a proposed finding is held t
legal request for their incorporation
finding under the act of 1893.'" We
the court below, in holding that this
was not taken under the provisions
act of 1893, took the correct view
matter; and, consequently, that the

Digitized by Google

agraphs thus contingently made a he finding ought not to be regarded d as a part of it. We notice this owever, only as touching a matter ce, for, in the view which we take rincipal question in the case, the forth in the paragraphs in ques- me of no importance.

he trial of the case the plaintiff n evidence two depositions which duly taken at Denver, Colo., upon otice given to the defendants. To ission of these depositions the de- objected, on the ground that they the depositions of the parties, but erely copies of former depositions the deponents in another case. rt below, however, found the fact ich this objection was based to be nd that "the depositions in question depositions of the parties duly giv- e time and place certified by the te." That finding is conclusive up- appeal.

he trial below "Mrs. Hewitt testified wn behalf that, at the time of the ces to her, she had no knowledge husband was in embarrassed cir- es, and knew nothing about his busi- any intention to defraud creditors. cross-examined as to her knowledge nsfer to her of the Advertiser Build- Norwich, which had been placed in in 1888 by her husband, and which ned she had bought. Having said not negotiate for the purchase, she d if she received the deeds from the This question was objected to as t, and was admitted by the court. ndants also asked to have all cross- ion as to the Advertiser Building out. It was claimed by the plaintiff ing knowledge of facts tending to e condition of Hewitt. The court to strike out the testimony. Mrs. was also cross-examined as to the to her by her husband of some land ch, on Warren street, in 1888, which had also been the subject of a suit, purpose of showing her knowledge usband's condition, and for the pur- pose of showing that at the time not consider her husband indebted The question, 'Did you pay anything ransfer of that lot?' was objected to efendants as res adjudicata, and was by the court." We cannot see that below erred in any of these rulings. the questions in issue was whether witt in 1889 had any knowledge of and's business, and of his then em- financial condition, and of his in- o defraud his creditors. She testi- she had no such knowledge. Upon e her knowledge of his business and ancial condition in 1888 was a rele- t; and it was for the sole purpose ing her knowledge of his business and financial condition in 1888 that she was cross-examined concerning the transfer to her of the Advertiser Building. Upon this question of her knowledge of her husband's affairs in 1888, we think the cross-examination objected to was permissible. Hoxie v. Insurance Co., 32 Conn. 37. The evidence as to whether or not she paid anything for the transfer to her of the Warren street property was also admissible for the purpose for which it was offered. Mrs. Hewitt claimed that from about the year 1876 down to 1889 her husband had been continuously indebted to her in a large amount. If she had paid him in 1888 for the Warren street property, and while he was still largely indebted to her, this would tend to discredit her claim. The question objected to was clearly proper upon cross-examination. Moreover, even if the court below had erred in all of the rulings now in question, we cannot see how this harmed the defendants, or either of them, for the evidence objected to was offered for the ultimate purpose of showing actual knowledge on the part of Mrs. Hewitt of her husband's insolvency, and of his intent to defraud his creditors; but the court has found that "she had no actual knowledge of the insolvency, no conscious intent to perpetrate a fraud, and no actual knowledge of the intended fraud" of her husband.

Upon the trial below the plaintiff offered evidence of the sale of building lots from the lands described in the complaint, after the conveyance of said land to Mrs. Hewitt in 1889, and of the prices obtained for said lots, for the purpose of showing that she had in fact received from such sales more than the amount she might have given for the land. The plaintiff claimed this evidence contingently, in case "it might appear as a part of the defense that Mrs. Hewitt acted in good faith, and that there was some, although a greatly inadequate, consideration"; and claimed that in that event he would be entitled to relief in this proceeding in respect to the excess of the value of the land over the consideration paid, and that the evidence in question would be admissible. To the admission of the testimony for this purpose the defendants objected. The court said that "the evidence might be admissible if a condition arises which the plaintiff says may arise in the case, and we have got to come to a matter of accounting; but excluded the evidence for the present." Counsel thereupon agreed, in order to avoid detaining the witnesses, that their testimony might be taken out of order, subject to the defendants' objection, and this was done. Subsequently, the defendants offered evidence tending to show consideration for the conveyances to Mrs. Hewitt, and were at issue with the plaintiff as to the adequacy of that consideration; and Mr. Hewitt testified to the same sales of lots in full, and to his expenses incurred in so doing, and to the disposition which was made of the money received for

Digitized by Google

such lots. In the twelfth reason of appeal the action of the court in thus admitting the aforesaid testimony contingently is assigned for error. There are two good and sufficient answers to this claim. In the first place, error cannot properly be predicated of the action of the court in receiving the testimony contingently, under the circumstances disclosed by the record. The court had already ruled that the testimony was, when offered, inadmissible. It intimated, however, that in a certain contingency it might be admissible; thereupon the parties, to accommodate the witnesses, agree that it may come in, subject to the defendants' objection, to be used if the contingency should arise. Clearly, under these circumstances, it was not improperly received; and it is of this alone that the defendants complain. In the second place, if the evidence in question had been improperly received, it nowhere appears that the court ever came "to a matter of accounting," or considered this evidence for such purpose; and it does appear that Mr. Hewitt testified fully as to these same sales of lots, and the prices obtained therefor, his expenses in making the sales, and the disposition of the proceeds. Under these circumstances, it is clear that the admission of the testimony objected to did the defendants no harm.

We have thus disposed of all the matters of minor importance assigned for error in the reasons of appeal, concerning which any question was made and decided adversely to the defendants in the court below, and we come now to the main question in the case, which is, as before stated, whether or not Mrs. Hewitt can hold these lands conveyed to her by her husband as a purchaser in good faith and for a valuable consideration. The substance of the facts found upon this point may be stated as follows: The defendant Gilbert L. Hewitt and one Charles J. Setchel were partners in business, under the name of Hewitt & Setchel, from February, 1883, to August 29, 1890. On said day they, as copartners and as individuals, made an assignment in insolvency of all their property to the plaintiff, as trustee, and on September 2, 1890, he was duly appointed and qualified as such trustee. Prior to September 9, 1889, Gilbert L. Hewitt owned the undivided half of the three pieces of land described in the complaint, his sister being the owner of the other, subject to the unassigned dower interest of their mother, who was nearly 80 years old. On the 9th of September, 1889, Hewitt conveyed his interest in one of said three pieces to one Ford, and on the same day Ford delivered to Hewitt a quitclaim deed of the same interest made to Mrs. Hewitt, the Wife of Gilbert L. Hewitt. Both deeds were left for record by Hewitt at the same time on September 10, 1889. On November 4, 1889, Hewitt conveyed his interest in another of said pieces of land to one Hooper, who on the same day executed and delivered to Hewitt a quitclaim deed of the same interest made to Mrs. Hewitt; and both of said were left for record by Hewitt at the time on November 6, 1889. On the November, 1889, Hewitt conveyed his est in the third of said pieces of land t who on the same day executed and de to Hewitt a quitclaim deed of the sa terest made to Mrs. Hewitt; and b said deeds were left for record by He the same time on November 13, 188 these transfers no consideration passe from either of the parties, and Mrs. had no knowledge of them until after deeds had been left for record. Subs to November 13, 1889, Mr. Hewitt all the deeds to his wife, telling he were in satisfaction of his indebtedn her, and she received them in satisfac such indebtedness. She then believ husband was indebted to her in the about $2,000, with interest since 187 at this time, at her husband's reques up to him the note which he had given in 1876, which read as follows: "N Conn., Aug. 14th, 1876. For value re I promise to pay Emma L. Hewitt on sand five hundred and twenty-six and dollars ($1,526.49). Gilbert L. Hewitt "had made no demand for payment, a no knowledge of her husband's inten pay the same by conveying the land, a no knowledge of the amount of intere since 1876, and had no knowledge of th ent amount of the indebtedness, knowledge of the amount or nature land mentioned in the deeds. She m inquiry whatever as to the amount d the situation or value of the land, the for the payment in land, or as to any connected with the transaction. Her knowledge and active participation transaction consisted in accepting the in satisfaction of whatever indebt there might be." At the time of the veyances to his wife, the fair marke of Hewitt's interest in the land so co was $4,500. Hewitt was then insolve so continued till the assignment in 18 knew that said land was needed to p creditors. The debts allowed against tate of Hewitt & Setchel amounted t than $16,000, and the assets of said including all the property of Hewi Setchel, and the three pieces of lan veyed to Mrs. Hewitt, are insufficient said debts. These debts existed at th of the conveyances to Mrs. Hewitt made the conveyances to his wife purpose of placing this land, which w stantially all the property he then owi yond the reach of his creditors, and e ly of the First National Bank, and wit al intent to defraud his creditors, secure for himself the beneficial inte the property. In the execution of thi Mrs. Hewitt was his ignorant and pas strument. She had no actual knowle the insolvency, no conscious intent to

Digitized by Google

aud, and no actual knowledge of the fraud." It thus appears, to state the brief, that Hewitt, at a time when nowingly a hopeless insolvent, con- is wife substantially all the proper- n had, worth $4,500, for the express f placing it beyond the reach of his itors for his own benefit, and with tent to defraud those creditors. It found that the wife had no actual e of the insolvency, none of the in- aud, and that she received the con- in satisfaction of what she believed bt due to her from her husband.

fendants claim that Mrs. Hewitt in er, upon the facts found, must be as a purchaser in good faith and uable consideration, because she had l knowledge of the insolvency or her husband, and because, as they e gave up a valid indebtedness im as the consideration for the con- This claim impliedly concedes ss Mrs. Hewitt is both an innocent and also a purchaser for value, ot prevail in this suit; and the law so. It is not enough that she pur- e land innocently, unless she also aluable consideration for it; and it ough that she gave such considera- it, unless she also purchased inno- Where in cases like this the convey- voluntary one, it will be set aside e grantee be innocent of the fraud. k v. Kiely, 41 Conn. 611; McKenna ey, 16 R. I. 384, 17 Atl. 354; and e grantee participates in the fraud of or the conveyance will be void as reditors, even though the grantee value. Wadsworth v. Marsh, 9 5; Hawes v. Mooney, 39 Conn. 37; v. Greenwood, 23 Ark. 258; Ren- Spatz, 128 Pa. St. 524, 18 Atl. 405. ndants strenuously insist that upon with reference to the consideration ssed between Mrs. Hewitt and her for this land, as found upon the en- d as it stands, she must be regard- ving given a valuable and nearly ad- onsideration for the conveyances. In we take of the case, it is unneces- ass on the validity of this claim, and osely refrain from doing so. For ose of the argument, however, and purpose only, we concede it to be e further concede that, as a general ere a debtor's sale or transfer of is fraudulent as to creditors, the pur- or value cannot be affected by the fraud unless he knowingly partici- d assists in the fraud. Partelo v. 26 Conn. 483; Christian v. Green- Ark. 258; Hamilton v. Staples, 34 3.

ing, then, that she was a purchaser uable consideration, was she also an purchaser,—a purchaser in good ithin the meaning of the rule in- voked in her favor? We think not. The court below has, indeed, found that, in all this scheme on the part of Mr. Hewitt to defraud his creditors, his wife was his ignorant and passive instrument, possessed of no actual knowledge of his insolvency or of his intended fraud, and having no intention herself to perpetrate a fraud. The finding is sufficient to show that she is guiltless of the fraud of her husband in a moral sense; but, if he acted as her agent to a certain extent in this matter, then in a legal sense, and for civil purposes, the case is quite different. In that case, and in so far as he was her agent, or acted as her agent, his objects and purposes became hers, his knowledge hers, and to a limited extent his frauds became her frauds. Thus in Warner v. Warren, 46 N. Y. 228, the knowledge and fraudulent purpose of the husband as agent of the morally innocent wife were held to be legally her knowledge and her fraudulent purpose. In Smith v. Board, 38 Conn. 208, it is said that: "Principals are always presumed to have knowledge of all the acts done or declarations made by or to their agents, when acting in relation to the subject-matter of the agency, and within the scope of an actual or apparent authority conferred upon them." In First Nat. Bank of New Milford v. Town of New Milford, 36 Conn. 101, the knowledge of the fraud possessed by the agent of the bank was held to be the knowledge of the bank; in Willard v. Buckingham, 36 Conn. 395, the knowledge of the general agent of those having charge of the railroad was held to be their knowledge; in O'Connell v. Kilpatrick, 64 Md. 122, 21 Atl. 98, it was held that the agent's knowledge of the seller's intent to defraud creditors was the knowledge of his principal, who purchased without actual knowledge of such intent; and in Clark v. Fuller, 39 Conn. 238, the knowledge of the fraud possessed by the husband as agent of the innocent wife was held to be her knowledge of the grantor's intent to defraud his creditors. Nor does it make any difference in the application of this principle that the agent and the grantor are one and the same person. Thus in Marjoribanks v. Hovenden, 6 Ired. Eq. 238, an attorney at law, the owner of a certain interest in land, mortgaged it to secure a debt. The mortgage was not duly registered, and the attorney, some 18 months after the execution of the first mortgage, mortgaged the same property to another person, who had no knowledge of the existence of the first mortgage. The second mortgage was duly registered, but the second mortgagee had employed the mortgagor as his attorney in the transaction; and it was held that the knowledge of the attorney of the existence of the first mortgage was legally the knowledge of his principal, the second mortgagee. The court says in that case: "The question arose in Sheldon v. Cox, Amb. 624, whether there

Digitized by Google

was any distinction where the agent was also the owner of the property, and it was held there was no distinction in such a case. The question in every case is not whether the agent had any interest, but whether he had any notice of the incumbrance; and it is quite clear that, if a man employs a solicitor who is also the owner of the property, he is as much bound by the knowledge of that solicitor as if he had employed one who had no interest whatever in it." Atkins v. Delmege, 12 Ired. Eq. 1, is to the same effect. In all that Mr. Hewitt did in this matter, after he delivered the deeds of his interest in these lands to Ford and Hooper, he was acting, not as grantor, but as agent for his wife; as such he requested Ford and Hooper to convey the interest they had thus acquired in the lands to her; as such he received the deeds from them; and as such he put them upon record. It is true that the aforesaid acts were, when done, done without her knowledge or consent; but she subsequently fully ratified them by accepting and retaining the benefit of them. "An act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him. * * * In that case the principal is bound by the act, whether it be for his detriment or advantage, and whether it be in tort or contract." Wilson v. Tumman, 6 Man. & G. 236. In such cases an express ratification is not necessary. As a general rule, "if the principal receives and retains the proceeds of the agent's fraud,—the property, money, and the like obtained through an executed transaction,—or claims the benefit of, or attempts to enforce, an executory obligation thus procured, he renders himself liable for the fraudulent acts of his agent." 2 Pom. Eq. Jur. (1st Ed.) § 909; First Nat. Bank of New Milford v. Town of New Milford, supra. The agent of Mrs. Hewitt, then, at the time these conveyances were made to her, and while acting for her, had full and complete knowledge of the insolvency of Mr. Hewitt, and of his intent to defraud his creditors, and her agent actually aided and assisted Mr. Hewitt in the accomplishment of his fraudulent designs. It is only by assuming that Mrs. Hewitt was a mere automaton in respect to such designs that she can be excused morally from the guilt of participation therein. Legally, she cannot be excused. There is no error. The other judges concurred.

STATE v. STEVENS.

(Supreme Court of Errors of Connecticut. Sept. 1, 1894.)

CRIMINAL LAW—HEARSAY EVIDENCE — HARMLESS ERROR—EXAMINATION OF WITNESS.

1. In a trial for assault, a policeman testified that on going to the room occupied by complainant another officer handed him a glove. ing "[Complainant] says she found the glo the bed, and handed it to me." *Held* that, it tended to show having been proved by testimony, the admission of the declarati one officer to another was harmless error.

2. Error cannot be predicated on the cise by the court of its discretion in perm or excluding questions on cross-examinatio germane to matters touched on in the dire amination.

3. The error in permitting a question asked in an objectionable form is cured the answer thereto is proper and admissibl

4. The credit of the complaining witn a prosecution for an assault cannot be att by showing that she was "discharged" fr choir.

Appeal from superior court, New H county; Ralph Wheeler, Judge

James A. Stevens was convicted o sault with intent to murder, and ap Affirmed.

Levi N. Blydenburgh and Harry W. A for appellant. Tilton E. Doolittle, S Atty.

HAMERSLEY, J. The defendant bound over to the superior court by the court of New Haven, upon complaint o city attorney charging him with the of assault with intent to murder, and to the jury, and convicted in the sup court on that complaint. This appe from the judgment on that verdict. appeal asks a new trial for alleged e in the rulings of the superior court rel to the admission of testimony.

The person assaulted was one Grace lips, who lived, with her father and m by adoption, in a house having a base the entrance to which is in the rear entrance to the floor above being fro street; and above this floor is an att which Grace slept. The assault was at half after eight o'clock in the eve Grace then being in bed. There wa other person in the house. The ass entered at the basement door, and wen stairs to the attic, where Grace was in Immediately upon entering the attic beat her on the head, gave her two or violent blows, and with a sharp instru which the state claimed to have be razor, cut a deep gash on her face, an other on the right side of her neck, b escaping penetration of the jugular The night was dark, and Grace coul identify the assailant. She screamed, he ran out of the room, down the stairs escaped by the basement door. Grac to the window as soon as she could, op it, and screamed. Police Officer Kerr near by, heard the screams, and cam wards the house, where he saw Grace a window. He went into the house, an to the attic, lit a light, and saw Grac ting on the bedside bleeding, but sa one else in the room. He returned t street door, blew his whistle for help immediately Police Officer Hodge

Digitized by Google

t up alone to the attic, found Grace on the bed, and she then handed glove. Hodge handed this glove to who came in immediately after, saying girl says she found the glove in , and handed it to me." The glove ken by Kerr to the police office, and d on the trial and identified as the anded by Hodge to Kerr.

main error assigned relates to the these facts. Kerr was called as a and testified to the declaration of "The girl says she found the glove bed, and handed it to me." The de- objected, and the court overruled ction. The court erred in admitting laration. It was hearsay evidence, not come within any exception to e excluding such evidence. The the state that the declaration was ble as a part of the res gestae is ported by the facts. Hodge's decla- s plainly no part of the res gestae; en if the declaration of Grace could ed as a part of the transaction to ed, it should have been proved by ct testimony of Hodge, and not by rsay testimony of Kerr. But we think this error is sufficient ground w trial, in view of the circumstances case appearing in the record. The cts that the declaration of Hodge o prove were that Grace found the the bed, and handed it to Hodge. rs in the record that these facts were ently fully proved by direct testi- that Grace testified to finding the the bed; that Hodge testified that while sitting on the bed, handed the him, and that he handed it to Kerr; there was no claim by the defense glove exhibited at the trial was not found by Grace on the bed. We ee how the erroneous admission of aration of Hodge could in any way ded to the force of the testimony of Grace, and Kerr, which was proper of the subject-matter of the decla- nor can we see any way in which ission of the declaration in this case ve injuriously affected the defense. is very clear that a new trial ought be granted for the improper admis- testimony in cases where it is ap- the court that no injury to the com- and no injustice could have result- the error.

her rulings complained of relate to cise of discretion by the court in ng the examination of witnesses by and to the determination of the ity of evidence admitted and ex- The finding of facts details at con- length the facts claimed to have oved by the state and by the de- nd portions of the testimony. We fied that under the well-settled and rules of evidence there is nothing substantial in the errors alleged, and a brief statement of the objections will be sufficient to show that the court did not err in the exercise of its discretion, and that the defendant did not suffer from the admission of immaterial, or the exclusion of material, evidence.

1. The state called as a witness Henry H. Phillips, who had adopted Grace as his child, and examined him as to a conversation he had had with the defendant, in which the defendant asked his consent to marry Grace. The state claimed that the jealousy and anger of the defendant at the rejection by Grace of his addresses was the main inducement to the assault. The witness was examined on no other point. On cross-examination the defendant inquired, "You were arrested for this offense, were you not?" The question was objected to and excluded. The court did not exceed its legitimate discretion in excluding that question at that time, upon such cross-examination. Chapman v. Loomis, 36 Conn. 459. Subsequently, the same witness, Phillips, was called as a witness for the defense, and asked on direct examination, "By the way, you were arrested for this offense, were you not?" The defense claimed that immediately after the assault Grace had declared that her father cut her, but did not offer to show then or at any time that any prosecution was pending or had ever been commenced against Phillips. Upon objection, the question was excluded. The court was justified, under the circumstances of the case, in holding the question to be immaterial. The defense further examined Phillips, as its own witness, for the avowed purpose of proving that there had been a recent quarrel between Phillips and Grace, and that he had hard feelings against her. After Phillips had denied any quarrel, the defense examined him as to whether he had upbraided her for staying out nights, and, upon his denial of this, proceeded to examine him as to whether he had made any complaint at the police office about Grace; and the court, upon objection, stopped the defense in its inquiry as to complaints at the police office. The defense also asked the witness if he did not remember saying, upon the hearing at the city court, "She has not minded us very well lately," and on objection this question was excluded. The defense offered no direct testimony, except that of the witness Phillips, to show either that Phillips had any motive to assault his daughter, or that he was at the house at the time the assault occurred; and Phillips, as a witness called by the defense, in response to the inquiry of the defense, testified that from 8 o'clock until he went home and found the officers at his house he was at Leslie Freeman's coal office, at the corner of Goffe and Orchard streets, in the company of George Constant and George Besham. We think it plain that under these circumstan-

Digitized by Google

ces the court was justified in finding that the questions excluded were immaterial to any fact legitimately at issue; especially if the court believed, as may be inferred from the record, that the examination of Phillips was conducted for the real purpose of obtaining in this way some statements that might be used to discredit the witness Grace, and which were entirely inadmissible for such purpose.

2. The defendant was called as a witness in his own behalf, and asked, "Do you know if Grace Phillips was discharged from the choir?" The court excluded the question. The fact that she had left the choir was in evidence, and the question was claimed for the purpose of showing she was discharged for some improper conduct. The credit of the witness Grace could not be attacked in that way.

3. The state claimed that the assault was made with a razor; that the accused at the time of the assault owned a razor; and after the assault falsely told an officer, and also had himself testified, "that he had broken his razor two months before the assault, by dropping it, and had thrown it away, and that he had been shaved by one Anthony since." In connection with evidence tending to prove that the accused had not broken his razor, as he claimed, and had used it to shave himself down to two or three days before the assault, the state called as a witness one Samuel Sands, and asked him, "What do you remember about Stevens, if anything, using that razor, or allowing him to use it?" The question was objected to as indefinite as to time, and admitted; whereupon Sands testified that Stevens used his razor about three months before the cutting, without his permission, and when he charged him with it he admitted using it, and gave as an excuse that his razor was broken. The accused then objected to the question and answer, on the ground that the evidence was immaterial, and the court overruled the objection. The answer of Sands removed the objection as to the form of the question. Tyler v. Todd, 36 Conn. 221. And we cannot say that the court was not justified in regarding the evidence of Sands as a circumstance not wholly immaterial, in connection with the other evidence offered tending to prove that the accused falsely denied his possession of a razor, and made untrue statements in asserting the loss of his own razor, and in attempting to account for its alleged loss. There can be no question as to the materiality of such evidence.

4. The state called as a witness one George R. Burton, and claimed to be surprised by the testimony of the witness, and that the witness had told a different story, and claimed the right to cross-examine him as a hostile witness. The court was of the opinion that the witness was hostile, and unwilling to give evidence, and permitted the state to inquire of the witness as to i vious statements. The defense obje the questions because they were l and on no other ground. The court ruled the objections. This was a within the discretion of the court, an is nothing in the record to indicate th discretion was not properly used. trial is denied. The other judges con

---

SCANLON et al. v. WALSHE et.
(Court of Appeals of Maryland. Marc 1895.)

DESCENT AND DISTRIBUTION — CHILDREN DURING MARRIAGE — PRESUMPTION OF L MACY—EVIDENCE—COMPETENCY OF WIT

1. The presumption that children while their mother was living in lawfu lock with her husband are legitimate clusive, in the absence of proof of impote the husband, or evidence negativing the bility or probability of access.

2. On an issue as to the legitimac woman's children born while she was li lawful wedlock with her husband, the mony of the alleged father is inadmissib

3. The marriage of a woman with leged to be the father of children born while living in lawful wedlock with a husband is not evidence of their illegit but is admissible after proof of illegi to show paternity.

4. A husband or wife is incompet testify that children born to the wife wedlock are bastards.

5. Where a wife in divorce proceedi leged that the children whose custo sought were born to her and her husbar afterwards, in proceedings to change names, swore to a petition stating the fact, she is estopped to deny such paterni

6. One who instigated divorce proce and afterwards married the woman, an gated proceedings to change the surna children born during the former marri his own, is estopped to deny sworn stat in such proceedings as to the paternity children.

7. It is not necessary that exceptions set out all the reasons and grounds on they are based.

Appeal from circuit court of Baltimo

Petition by Carlotta Walshe agains Joseph Walshe, Catherine Scanlon, a ers for confirmation of a sale of lan for distribution of the proceeds. F pro forma order overruling exceptions auditor's account, allowing a certain other defendants, defendants Catherin lon and others appeal. Reversed.

Argued before ROBINSON, C. J., and ERTS, BRISCOE, McSHERRY, and LER, JJ.

Rich. S. Culbreth and Rich. Bernard for appellants. Henry C. Kennard, pellees.

FOWLER, J. It is fortunate that of justice are seldom called upon to c a case in which the facts are so shoc every sense of decency and morality a presented by the record now before u shall not attempt in this opinion to with any particularity the testimony

Digitized by Google

justifies this remark, for the view s been forced upon us, after careful tion, renders such an uninviting gether unnecessary.

20th March, 1891, David J. Walshe, nore city, died, leaving a will dis- his personal property and one-third eal estate, and intestate as to the of his real estate, which latter con- by far the larger and more valu- t of the property, known as the House," on the northwest corner of and St. Paul streets, in said city. as filed in the circuit court of Balti- by Carlotta Walshe, for the sale eal estate, against a number of per- uing to be heirs at law of her hus- vid J. Walshe, three of them being children, born while she was living l wedlock with a former husband, thers being sisters and the children ased sister of said Walshe. Proper ngs were had, and, by agreement of he whole property was sold for the 0,000, which sale was duly confirmed. forma order, the court below rati- or's account B, by which the sum of was allowed to three children of tiff, as their share of the proceeds From this order the sisters and the of a deceased sister of Walshe have ; and the question is, who are the aw of David J. Walshe?

are two sets of claimants: First, rs and several nephews and nieces; ndly, the plaintiff's three children, gest of whom is about 24 years of , although born while their mother ried to and living in lawful wedlock first husband, Florian V. Simmonds, m she was divorced, claim to be the of said Walshe, whom she after- arried, and his heirs at law, because nt to their birth their mother and ged father married, and he acknowl- em to be his children.

ntion whose foundations are so con- good morals, public policy, and the ions of law can be maintained only statute which not only introduces aw of inheritance," as our statute ewer v. Blougher, 14 Pet. 178, opin- hief Justice Taney), but which, to s case within its terms, must also some rules of evidence which we nclined either to weaken or destroy. ute upon which the appellees, the of Carlotta Walshe, rely to main- r contention, is section 20, art. 46, ode, which provides that, "if any ll have a child or children by any whom he shall afterwards marry, d or children, if acknowledged by shall, in virtue of such marriage owledgment, be hereby legitimated ble in law to inherit and transmit re as if born in wedlock." This vas before this court for construc- tion in the case of Hawbecker v. Hawbecker, 43 Md. 516, where a married man had by his wife four children born in lawful wedlock, and during the life of his wife he also had six children by another woman. His wife died, and he subsequently married the mother of the last-mentioned children, whom he acknowledged as his, and treated them as he did the children of his first wife. It was very earnestly contended in that case that the section above quoted should not be construed so as to include within its terms a case in which children are conceived and born when their parents are under impediment to marry. But it was held that although the legislature, no doubt, in thus mitigating the severe rule of the common law, intended to hold out to the surviving parents an inducement to marry, and thus put a stop to the further illicit intercourse between them, yet "the main purpose and intent of the enactment * * * was to remove the taint and disability of bastardy from the unoffending children, whenever their parents did marry, without regard to the deepness of the guilt on the part of the parent." And, in concluding the opinion, the language of Chief Justice Taney in the case of Brewer v. Blougher, supra, to the same effect, in relation to the same provision of law, is quoted approvingly. We said: "The legislature has not seen fit to make any exceptions to its operation. Its terms embrace every case where 'any man shall have a child or children by any woman whom he shall afterwards marry.'" Hawbecker v. Hawbecker, supra. It will be observed, however, that in the case we have last cited there was no question whatever made as to the paternity or illegitimacy of the children who were admitted to have been born out of wedlock. It was assumed that the reputed was the real father, and that the children were illegitimate; and the only question was whether the law was applicable to the admitted facts. But here we have a different condition. Indeed, this is the very opposite to Hawbecker's Case; for, while the force of the broad terms of the law is here admitted, it is contended that the foundation facts—the facts of illegitimacy and of the alleged paternity—are not established at all, because—First, the witnesses are incompetent; and, secondly, even if competent, their evidence is not of that strong, distinct, satisfactory, and conclusive character which is required to overcome the presumption expressed in the common-law rule "Haeres legitimus est quem nuptiae demonstrant," or another expression of the same rule, "Pater est quem nuptiae demonstrant." The old rule in England was, and also in this country (1 Greenl. Ev. § 28), that this presumption of legitimacy was conclusive. But it is said the courts did not long permit so violent an estoppel. 1 Bish. Mar. & Div. § 1170. This legal presumption has been characterized as the foundation of every man's birth and status, and of the

Digitized by Google

whole fabric of human society, and nowhere has its full force and extent been so fully acknowledged and so well expressed as in the case of Hargrave v. Hargrave, 9 Beav. 553, by Lord Langdale, the then master of rolls, decided in 1846. He says: "A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion; but it may be wholly removed by proper and sufficient evidence showing that the husband was (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse." "Such evidence as this," says his lordship, "puts an end to the question, and establishes the illegitimacy of the child of a married woman." And in the same case it was held that where opportunities occurred for sexual intercourse between the husband and wife, and there was no proof of his impotency, no evidence can be admitted to show that any man other than the husband may have been or probably was the father of the wife's child. It was said in Craufurd v. Blackburn, 17 Md. 56, that the declarations of the parents were not admissible to defeat the consequences of marriage, such as that the children are bastards; and Lord Mansfield said in Goodright v. Moss, Cowp. 594: "It is a rule founded in decency, morality, and policy that the father and mother shall not be permitted to say after marriage that their offspring is spurious." And, in our opinion, the testimony of the adulterer, when offered for the same purpose, should likewise be excluded; especially so in all cases in which it appears that the proof does not exclude the possibility or probability of access of the husband to the wife. In such cases, as Lord Langdale said in Hargrave v. Hargrave, supra, there being no proof of impotency, no evidence will be admitted to show illegitimacy. To this extent, at least, we think the presumption of the legitimacy of the child of a married woman should be conclusive.

The mere fact of marriage and acknowledgment should not, under the facts of this case, be received as proper evidence of illegitimacy. The fact of illegitimacy should first be proved, and then the marriage and acknowledgment may be offered to prove paternity. And so it was held in Grant v. Mitchell, 83 Me. 27, 21 Atl. 178. And in Hemmenway v. Towner, 1 Allen, 209, the declarations of the adulterer offered to show illegitimacy of the child of a married woman were excluded, the husband and wife having lived together as such until six months next before the birth of the child. It is true these two cases, last cited, were decided upon statutes not altogether like ours; but the questions decided were questions of evidence, and we think what was said in the cases on this subject is particularly applicable to this case. Now, the only testimony before us which can properly be referred to, to prove illegitimacy, is that of the plaintiff Carlotta Walshe, which, as we have seen, is inadmissible for that purpose. At the most, her testimony may be offered to show she was untrue to her husband. 2 Bish. Mar. & Div. And so, also, as to the declarations and letters of David Walshe, which appear to have been offered to prove the acknowledgment of the children. Neither will be admissible to show the husband was not the father, if he had or could have had access, as indicated in Hargrave v. Hargrave, supra; and that he could have had access, we think, is clearly shown in this case, for the separation did not occur until several years after the birth of the youngest child. But the testimony of Carlotta Walshe, as well as that of the adulterer, if he were alive, would be inadmissible to show the tardy, and equally so his declarations, because they are both estopped to swear to a state of facts in conflict and incompatible with the proceedings for divorce, and the change of name of her three youngest children. She will not be allowed now to come into court, and recklessly contradict what she alleged in the one and swore to in the other. Edes v. Garey, 46 Md. 41; Railroad Co. v. McCann, 51 Md. 351; Railroad Co. v. Ward, 13 How. 335. And it appearing that she was the instigator of both proceedings, and in a position to know the truth, the estoppel should work equally against him, his declarations and his letters.

In the supplemental brief on the part of the alleged children of Walshe, filed a few days ago, it is suggested that the objections now relied on in this court to most of the testimony are not covered by the exceptions filed by the appellants below, and Davis v. Walshe is spoken of as a witness whose testimony was objected to below only on the ground of estoppel. It should, however, be observed that he is not a witness as to declarations, verbal and written, which were offered, and the testimony of all the witnesses who testified to the former, as well as the latter, which were offered in evidence, the effect of which was offered to show recognition of the children, was excepted to on the ground of estoppel. And, while it may be true that estoppel of the divorce and other proceedings may not go to the extent urged by the appellants, yet, as we have already said, if David J. Walshe, if living, would be estopped, Carlotta Walshe is, thereby estopped from taking positions inconsistent therewith. And we think the exceptions on the ground of estoppel, filed below, fairly cover the additional grounds of estoppel urged in this court, while it is required that every exception in order to be availed of in this court, must

Digitized by Google

to writing, and filed in the court
t least before the hearing there be-
it is not necessary to set forth all
ons and grounds on which such ex-
are based.

ve think it unnecessary to prolong
cussion. It is conceded the excep-
ed below cover the testimony of
Walshe as to nonaccess, and, hav-
ained the exception based on this ob-
her testimony as to any collateral
the purpose of proving nonaccess
also be inadmissible. Wrightman,
Leg. 1441. And it must be remem-
at we have been considering what is
e rule by which to measure the
and character of evidence required
the child of a married woman to
stard, which child is born while the
is living in lawful wedlock with her
. And although, in this particular
e woman herself and her children,
ngest of whom is 24 years old, are
o establish the illegitimacy of the
, and for that purpose are asking us
oy or weaken this rule, which the
ce of many years and the wisdom
ent judges have sanctioned, we must
er that such position is seldom occu-
either the mother or her offspring.
they are more frequently interested
ding and enforcing the rule which
the rights of legitimate rather than
ts of illegitimate children. We feel
o say, however, that, if all the testi-
e have thus excluded were properly
ns, we could not, while giving full
d effect to the legal presumption of
cy, and in the absence of that strong,
satisfactory, and conclusive testi-
equired to overcome that presump-
otherwise than reverse the pro forma
ppealed from. Order reversed, and
manded; costs to be paid out of the
hand of the trustees.

UTCHINS v. PEARCE et al.

f Appeals of Maryland. Feb. 28, 1895.)

WILLS—NATURE OF ESTATE.

fter giving ground rents to his daugh-
ator, in the fourth item, gave $5,000 to
be invested and held in trust by his
provided that, if they should "die with-
," then such portion or portions should
ed between testator's surviving heirs.
dicil he annulled that part of the will
the investment of $5,000 for each of
hters, and "in lieu thereof" gave other
ents to each, "to be held in trust as di-
my foregoing will." *Held*, that the
die without issue" must be construed,
t 1862, c. 161, to mean a failure of is-
e lifetime or at the death of the person
nd that the devise of ground rents in
il must be read into the fourth item of
so that the daughters, respectively, take
able estate in fee, subject to be defeated
dying without issue living at the time of
pective deaths.

Appeal from superior court of Baltimore city.

Action by Elizabeth S. Hutchins against Jacob M. Pearce and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, PAGE, FOWLER, McSHERRY, BRISCOE, and ROBERTS, JJ.

James McColgan, for appellant. Dani. M. Thomas, H. M. Denison, and Wm. A. Fisher, for appellees.

PAGE, J. This is an action of ejectment, the determination of which depends upon the construction of the last will of John B. Pearce. Mr. Pearce died in 1874, leaving surviving him a son and two daughters. At the time of his death, his son, Jacob M. Pearce, was 40 years of age, married, and with a family of five children, ranging from 1 to 12 years in age. One of his daughters, Mary Louisa, was 36 years of age, and unmarried. The other, Sophia Augusta, who has since intermarried with the defendant John M. Denison, was 32 years of age, and also unmarried. His will is dated the 23d of February, 1872, and a codicil thereto the 18th day of July, 1874. Mary Louisa Pearce died without having ever married, leaving a last will dated the 16th of June, 1883. By his will, John B. Pearce, after providing for the payment of his debts and funeral expenses, by the second clause bequeathed to his daughter Mary Louisa certain ground rents, particularly described, of the total annual value of $1,448, subject to the trust, however, thereinafter created, and by the third paragraph, to his other daughter, Sophia, certain other ground rents, of the total annual value of $1,419.50, also subject to the same trust. The fourth paragraph is as follows: "I will and bequeath unto my daughters, Mary Louisa Pearce and Sophia Augusta Pearce, each the sum of five thousand dollars, to be invested in good securities or ground rents, and to be held in trust by my son, J. Myers Pearce, whom I hereby appoint trustee for my daughters, in all the property I have devised to them, both real and personal, the rents and incomes derived therefrom to be paid to them for their especial benefit; and, in case my daughters die without issue, then such portion or portions shall become part of my estate, and be divided between my surviving heirs." After sundry minor bequests, he then bequeaths the rest of his estate to his son. The codicil is as follows: "I annul all that part of said will in which I directed my son to invest for my two daughters five thousand dollars each; and in lieu thereof I give and bequeath to my daughter Louisa four ground rents on the west side of Oregon street, near Thompson street, in the city of Baltimore, each rent 117 dollars, payable in March and September, and six rents, of 90 dollars each, on the east side of Gilmor street, payable half yearly, on the 1st of Jan-

Digitized by Google

uary and the 1st of July. And unto my daughter Augusta I give and bequeath five ground rents on the N. W. corner of Carey and Edmonson streets, each lot 100 dollars annually, payable on the 1st of January and 1st of July, and a rent of 400 dollars on the York turnpike, fronting thereon 100 feet, running back to Barclay street 400 feet, payable quarterly, in May, August, November, and February; the same rents to be held in trust as directed in my foregoing will."

The first question that arises is upon the proper construction of the fourth paragraph of the will, and this, we are of opinion, is free from difficulty. Though the testator, in the first clause, uses no words of perpetuity, there is nothing in the will to indicate that he intended his daughters should take anything less than an absolute interest in the property. This, however, is subject to the limitation that, "in case my daughters die without issue, then such portion or portions shall become part of my estate, and be divided between my surviving heirs." The words, "die without issue," unless a contrary intention appear by the will, must be construed, since Act 1862, c. 161, to mean a want or failure of issue in the lifetime, or at the time of the death, of the person so taking. Lednum v. Cecil, 76 Md. 153, 24 Atl. 452; Mason v. Johnson, 47 Md. 355; Devecmon v. Shaw, 70 Md. 224, 16 Atl. 645; Gambrill v. Forest Grove Lodge, 66 Md. 17, 5 Atl. 548, and 10 Atl. 595. And we are of opinion that this construction effectuates the intention of the testator, as gathered from a fair examination of the whole instrument, when taken in connection with his surroundings, and the objects of his bounty. He had three children,—a son and two daughters,—and to them he bequeaths his entire estate, with unimportant exceptions. The daughters were unmarried. One of them was 32 years of age; the other, 36. He must have contemplated the possibility of one or both dying without leaving children, and, if that did so occur, it appears to have been his wish that such portions of his property as he had left them should pass to such of his own descendants as might then survive. To make this desire effectual, he created a trust, which, by the very terms he employs, was not to commence until after his own death, and could not terminate, as to each portion, until the death of each of the daughters. This general intent, plainly exhibited as it is by the structural plan of the will, as well as by fair interpretation of the terms employed by the testator, would be entirely frustrated by construing the instrument so that the limitation can take effect only upon the death of the daughters, or either of them, in the lifetime of the testator. The property, however, described in the declaration, is part of that which was devised to Mary Louisa by the codicil, and it therefore becomes necessary to determine what the nature of the interest was that passed by its provisions. The terms which the testator here employs annul all that part of said will in wh rected my son to invest for my two d five thousand dollars each; and in li of I give * * *" (by two clauses ground rents to each of the daughte at the conclusion of the second cl these words: "The same rents to in trust as directed in my foregoi The appellant, while conceding th words apply to the bequests made daughters by the codicil, insists property is not subject to the lin contained in the will. Now, it is a tled principle that "the will and co to be construed together, as one ins but if there be any conflict or rep between them the codicil * * * erate in preference to the will." Le dle, 12 Gill & J. 305; Thomas v. Lev Md. 451, 21 Atl. 367, and 25 Atl. 3. not think the codicil shows a chang intention of the testator. It annu that part of the will in which the had directed his son to invest $5,000 of his daughters, and in lieu of thi tutes certain ground rents. Other fourth paragraph of the will remai tered. The gifts to the daughters, will, were to be subject to a trust, the purpose was to more effectuall the retention of his property in his ily, and what is bestowed by the to be held in trust in the same mann the trust so created by the codicil, be difficult to assign any sufficient that can carry with it the imputati intention different from that to be from the will itself. The will and are inconsistent only in respect to scription of the property bestowe versity v. Pinckney, 55 Md. 381. Th bequeathed by the codicil are mere tutions for that which was given by and must be "taken with all its ac Earl of Shaftesbury v. Duke of ough, 7 Sim. 237. This was not the Buchanan v. Lloyd, 64 Md. 308, 1 and 6 Atl. 171. There the court said: are no materials in the codicil or in and codicil together, of which we ca cate a limitation over to the children Winder." And to so construe the would have the effect to curtail th and operation of the residuary claus will. A gift by the will is not to be c by uncertain expressions. Unive Pinckney, supra; Mann v. Fuller, In this case, to carry out the gener tion, as gathered from a full examin the entire will and the codicil, the d the ground rents in the codicil must into the fourth paragraph of the w the daughters, respectively, will tak uitable estate in fee, subject to be in the event of their dying without i ing at the time of their respective Thomas v. Levering, 73 Md. 455, 21

Digitized by Google

Atl. 3. We think there is nothing in with what we have said in Fairfax vn, 60 Md. 58; Dorsey v. Dorsey, 9 or in Hill v. Hill, 5 Gill & J. 88. ision in Fairfax v. Brown was based e intention of the testator, as indi- the particular language of the will. rt said: "After giving * * * an fee to his children, * * * it would fair presumption that he intended to the estate to an estate for life, if the sed were of dubious and uncertain ." In Dorsey v. Dorsey the devise his wife, and "in case of the death of self and wife," etc.; and it was held h expressions, unexplained, are to be to the event of death happening the life of the testator. And in the se the court also said that, from the character of the paper, such was the n of the testator." From what we id, it follows that we find no error ruling of the court below, and the nt will therefore be affirmed. Judg- firmed.

E LIFE INS. CO. v. SELIG et al.

of Appeals of Maryland. March 26, 1895.)

ON RESTRAINING ACTION AT LAW — ADEQUATE REMEDY AT LAW.

n injunction will not lie, at the suit of surance company, to restrain pending at law on policies issued by it, on the that they were obtained by fraud, and assignments thereof to defendant were udulent, and made without considera- the company has an adequate remedy

l from circuit court of Baltimore city.

y the Home Life Insurance Company Kate Selig as assignee of insurance issued by plaintiff, and others, to actions at law thereon, and for the tion of the policies and assignments. n order denying the relief prayed for, appeals. Affirmed.

d before BRYAN, McSHERRY, FOW- AGE, ROBERTS, and BRISCOE, JJ.

Gosnell and Jas. W. McElroy, for nts. John V. L. Findlay and Thos. zie, for appellees.

COE, J. This appeal is from an order uit court No. 2 of Baltimore city, on the 18th of November, 1894, "re- an application for an injunction, re- an order passed on the 11th day of the same year for an injunction, and ing the bill with costs." It will be d that the proceedings were some- regular, but the reasons therefor are by the learned judge below in the self. And inasmuch as the bill, upon did not disclose a case for the juris- of a court of equity, and was dis- upon final hearing, no injury was e plaintiff thereby.

The material allegations of the bill may be thus stated: The appellant, the Home Life Insurance Company of New York state, issued to a Mr. Hancock two policies of insurance upon his life,—one dated the 11th day of November, 1892, for $3,000, and the other dated the 21st of December of the same year, for the sum of $2,000. These policies were subsequently assigned, with the assent of the company, to Katherine Hohman, one of the appellees, in trust for certain purposes, specifically set forth in the assignments. And subsequently, by a codicil dated the 6th of May, 1893, to his will, Hancock directs the entire proceeds of these two policies to be paid by his executors to Katherine Hohman; that this will and codicil have been caveated by the testator's sisters, who claim under a will made by Hancock prior in date to the will, bearing date on the 15th of January, 1892; and that issues are now pending for trial in one of the courts of Baltimore city. And the bill further avers that suits at law were begun on the 6th of September, 1893, by the appellee Hohman against the insurance company, for the recovery of the money mentioned in said policies. It then charges that the two policies and the assent of the company were obtained by fraud, and that the assignments were also fraudulently procured, and are without consideration. And upon the facts, as thus disclosed, relief by injunction was asked, to restrain the actions at law; to decree a cancellation of the policies; and also, if they be valid and subsisting obligations, then to determine to whom the proceeds are payable. There was no testimony taken, but the case was submitted on the bill, the answer, and certain exhibits.

It is well settled by this court, and it has been held by the supreme court, "that whenever a court of law, competent to take cognizance of a right, has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must, in general, proceed at law, because the defendant, under such circumstances, has a right to trial by jury." Insurance Co. v. Bailey, 13 Wall. 616. And the authorities are abundant to prove the right to have a question of fraud adjudicated at law. Bank v. Lanahan, 60 Md. 514. Now, upon this case, as presented, it seems clear to us that the remedy at law is certain and adequate,—as practical and efficient to the ends of justice as the remedy here sought. The plaintiff here, but defendant in the suits below, duly appeared to the actions at law, and the pleas filed by it present the material defenses relied upon in the suit in equity. But, apart from this, it is clearly established, in cases of concurrent jurisdictions, that the court which has first assumed control over the subject-matter of controversy ought to be entitled to retain it. Here it appears that the actions at law were brought to the September term, 1893, of the superior court of Baltimore city, and the pleadings made up,

Digitized by Google

and the case specially set for trial on the 4th of June, 1894, by agreement. Four days afterwards, to wit, on the 8th of June, the plaintiff filed this bill. Mr. Pomeroy, in cases involving questions similar to those here, thus lays down the rule: "Where the jurisdiction is concurrent, or, in other words, where the interest and primary rights of the parties are legal, and the only question between the two courts relates to the adequacy of their respective remedies, as a general rule the tribunal which first exercises jurisdiction is entitled, or at least permitted, to retain an exclusive control of the issues." It is therefore a well-settled doctrine that in cases of this kind, where the primary rights of both parties are legal, and courts of law will grant their remedies, and courts of equity may also grant their peculiar remedies, equity will not interfere to restrain the action or judgment at law, provided the legal remedy will be adequate; that is, provided the judgment at law will do full justice between the parties, and will afford a complete relief. The adequacy or inadequacy of the legal remedy is the sole and universal test. 3 Pom. Eq. Jur. § 1364. Manifestly, in this case, a judgment for the insurance company in the actions at law would not only satisfy the ends of justice, if the life policies were fraudulently procured, but would be a full settlement of this controversy. The cases relied upon by the appellant in support of its contention are clearly distinguishable from this, and are not applicable here. We are therefore of the opinion that the plaintiff is not entitled to the relief asked for under his bill. So the order of the court below, appealed from, will be affirmed, with costs. Order affirmed, with costs.

GRABRUES v. KLEIN et al.

(Court of Appeals of Maryland. March 26, 1895.)

CONTRIBUTORY NEGLIGENCE — INJURY CAUSED BY WAGON IN STREET.

The evidence showed that plaintiff, while walking beside his wagon, met defendant's cart, loaded with bricks, and drawn by a mule, no driver being in view, and that when directly opposite plaintiff the mule turned across the street, catching plaintiff between the cart and wagon, and seriously injuring him. It was not denied that plaintiff used every effort to avoid the accident. *Held*, that it was error to charge that plaintiff's contributory negligence prevented his recovery.

Appeal from court of common pleas.

Action by Julius Grabrues against Klein Bros. Judgment for defendants, and plaintiff appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Hyland P. Stewart, for appellant. A. S. Niles and Oscar Wolff, for appellees.

BRISCOE, J. This was an action brought in the court of common pleas of Baltimore to recover damages for personal inj sustained by the appellant, resulting the negligence of the appellees' serva driving a cart along the streets of more. At the conclusion of the plai evidence the court instructed the jury the negligence of the plaintiff directly tributed to the injury, and their ve must be for the defendants; and it is the judgment thus entered on the ve that this appeal is taken.

The only question, then, presented b exception to the prayer is whether the should have been submitted to the or whether the facts were so clear and as to have justified the court in pronou them contributory negligence as a m of law; and, as the prayer is in the n of a demurrer, it becomes necessary t amine the evidence upon which it based. The plaintiff testified that a time of the accident he was on the ea ing car track on Hillen street, driving horses attached to a farm wagon l with manure, and was walking close b side of his wagon, and only occupying half of the east-going track; that wh first saw the appellees' cart it was 10 or 12 feet from him, coming dow west-bound car track, the cart being l with bricks, and drawn by a mule, b driver was in view. He further te that when about four or five feet fron the mule turned directly across the catching him between the hub of the of the appellees' cart and the rubbing or brake of his own cart, thereby infl a serious and permanent injury to hi leg. He also testified that as soon saw the mule and cart coming towards he made an effort to avoid the acc that he was prevented from advanci the front, and in endeavoring to esca trying to step backward was caugh dragged against the brake or rubbing of his wagon. In the language of th ness: "When I saw the mule comi wards me, I wanted to get out of the but the cart was too close before I coul away. I tried to run out of the way before I could do so, the wheel caugh The mule turned out quickly, and cu off." He further testified that he was ful, and tried to save himself, but cou do so. The witness Burns, who saw t cident, stated that the plaintiff was s opposite to him "when the cart pulle of the track, and shied on the other and caught the plaintiff." Now it wa on these undisputed facts at the close plaintiff's case that the court instructe jury that the plaintiff was guilty of contributing negligence as would prev recovery on his part, notwithstandin conceded negligence of the defen Plainly, there was error in this instru as applicable to the facts presented b record in this case. "Ordinarily," sai

Digitized by Google

he recent case of Bank v. Morgolofski, 1, 23 Atl. 1027, "the question of negli- one for the jury, but sometimes it be- e duty of the court to instruct them pite of the negligence of the defend- plaintiff cannot recover. The court, will never assume this responsi- less the case is a clear one, and pre- ne prominent and decisive act in re- he effect and character of which no left for ordinary minds to differ." has been the uniform current of of the courts upon this subject. to find any act on the part of the here that can be relied on tending such contributing negligence as d the court in withdrawing this n the jury. On the contrary, the testified that he made every effort the accident, but could not do it; in connection with the other testi- as not sought to be denied, but ad- nder the pleadings. We are all then inion that this case should not have hdrawn from the jury, and for this judgment will be reversed, and a awarded. Judgment reversed, and al awarded, with costs in this court w.

HOFFMAN et al. v. SHUPP.

(Court of Appeals of Maryland. March 26, 1895.)

MENT AGAINST MARRIED WOMAN.

judgment against a married woman business as a feme sole, rendered on a hich her husband did not join, is void.

from circuit court, Washington

Catharine A. Shupp, by her next gainst Hoffman, Eavey & Co., to e execution of a judgment. Decree tiff, and defendants appeal. Affirm-

before ROBINSON, C. J., and McSHERRY, FOWLER, BRISCOE, S, and PAGE, JJ.

ence Lane, for appellants. L. E. and F. F. McComas, for appellee.

, J. Catharine A. Shupp, a mar- an, suing by her next friend, filed equity against Hoffman, Eavey, et n injunction to restrain the execu- judgment which they had obtained er. After answer by the defend- court below passed a decree for a injunction, and the defendants ap- this court.

idence shows that on the 25th day 877, Mrs. Shupp executed her prom- te for the sum of $250 to the de- and signed an order for a judg- ment by confession, and that two days later the judgment was entered. She was then, and is now, a married woman; and her husband did not join in the execution of the note, and did not sign the order for a confession of the judgment. In September, 1888, a scire facias was issued on this judgment, and it was revived in due course on the fiat executio. On appeal to this court the decision below was sustained. The principal question in this court was whether the defendant in the judgment could plead her coverture in answer to the scire facias, and we held that it could not be allowed. We simply adhered to the well-established rule that no defense could be pleaded to the scire facias which might have been set up in bar of the original action. 73 Md. 360, 20 Atl. 5. The revival of the judgment worked no change in its nature, character, and effect as it originally existed. It was said in Moore v. Garrettson, 6 Md. 448: "The office of a scire facias to revive a judgment is to reinvest it with all the powers, attributes, and conditions which originally belonged to it, and which have been wholly or in part suspended by lapse of time, change of parties, or the like." We consider this principle as absolutely settled, and deem it unnecessary to cite any of the numerous cases which declare the same doctrine. The question, then, is whether the original judgment was valid. By Act 1872, c. 270, a married woman may be sued jointly with her husband on any note, bill of exchange, single bill, bond, contract, or agreement which she may have executed jointly with her husband. But very manifestly this act can have no application to the present transaction, where the proceeding is against her alone on a note signed by her alone. It has not been contended that the judgment can be maintained under either of the acts of assembly which, with some modifications, are consolidated in article 45, § 7, of the Code. These acts relate to proceedings against married women who have been doing business as femes sole. The first of them, in the form in which it existed at the time of the rendition of this judgment, did not permit proceedings against a married woman personally, but required that the proceedings should be by attachment against the property which she had acquired by her skill, industry, or personal labor. The other act comprised in article 45 (that of 1882, c. 265) was not passed until long after this judgment had been entered. It does not admit of a question in this court that judgments against married women are void unless they are upheld by the acts of assembly which we have mentioned. It is also well settled that the execution of them will be enjoined by decree in equity. Griffith v. Clarke, 18 Md. 457; Lowenkamp v. Koechling, 64 Md. 96, 3 Atl. 35. Decree affirmed.

Digitized by Google

HELDEN v. HELLEN.

(Court of Appeals of Maryland. March 26, 1895.)

ACTION TO QUIET TITLE — POSSESSION — FRAUDULENT CONVEYANCE—ACTION TO SET ASIDE.

1. To maintain an action to quiet title, plaintiff must be in possession of the land.
2. The grantee of a judgment creditor who purchased at the execution sale cannot sue to set aside as fraudulent a deed made by the judgment debtor prior to the sale.

Appeal from circuit court, Prince George's county, in equity.

Action by John R. Helden against William F. Hellen, trustee of William H. Hall. A demurrer to the bill was sustained, and plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, ROBERTS, PAGE, and BRISCOE, JJ.

M. Duckett and Elbert Dent, for appellant. C. H. Stanley and R. Ford Combs, for appellee.

BRISCOE, J. The appeal in this case is from an order sustaining a demurrer to a bill in equity. The bill charges that the appellant obtained by deed from Dr. Charles A. Wells and Mrs. Wells, on the 4th of January, 1894, a tract of land situate in Prince George's county, containing 129 acres; that Dr. Wells previously purchased the land at sheriff's sale at the suit of himself against one Thomas A. Mitchell, and on the 27th of June, 1892, obtained the sheriff's deed; that Mitchell on the 21st of March, 1890, being on that date indebted unto the appellant's grantor, executed an instrument of writing purporting to be a deed of trust, and professing to convey unto William F. Hellen, one of the appellees, this tract of land, together with other lands, to secure to one William W. Hall an indebtedness of $7,000, covered by six promissory notes from Mitchell to Hall. It further charges that Mitchell was never indebted to Hall in the sum set forth in the pretended deed of trust, or in any other sum; that the deed of trust is without consideration, was made in prejudice of subsisting creditors, is fraudulent and void, and operates as a cloud upon the appellant's title. The bill then prays that the deed of trust be annulled and set aside, that the notes secured by the deed be decreed to be brought in and canceled, that the cloud upon his title to the land be removed, and concludes with a prayer for general relief. And to this bill a demurrer was interposed, which was sustained by the court, and the bill dismissed.

The question, then, presented for our consideration, is whether the plaintiff has presented such a case by the bill as entitles him to the relief he seeks. It is manifest that the appellant is not entitled to invoke the jurisdiction of a court of equity for "the quieting of title, and the removal of a cloud therefrom," because his bill fails to allege that the plaintiff was in the possession of the property at the time the bill was filed; it being well settled in this state, as a general rule, that t diction of a court of equity cannot l tained to remove a cloud from title u party has the legal title and the posses the possession is in another, his reme an action of ejectment. Crook v. B Md. 158; McCoy v. Johnson, 70 Md Atl. 387; Livingston v. Hall, 73 Md Atl. 49. And the case of Steuart v 54 Md. 454, relied upon by the appe not in conflict with this rule, as appl a case like the one here presented. T Shipley, 77 Md. 479, 26 Atl. 1919, and 1060. Nor can there be any questio creditor who has pursued his remedy by an ineffectual execution on his j can invoke the aid of a court of eq have fraudulent conveyances, standin way and covering up the property, s and vacated. This relief is fully est by authority. Trego v. Skinner, 42 But the plaintiff here is in no sense a of Mitchell, the alleged fraudulent The relation of debtor and creditor Dr. Wells, the plaintiff's grantor, and ell, the grantor under the deed of trus to exist, by the execution sale, so fa property sold, and sought to be reco this proceeding, can be affected. The acquired the title of the purchaser at t iff's sale, and can assert no better equ those under whom he claims. Baxter ell, 3 Md. 338. And whether the con to the appellee, Hellen, was fraudulen can be tried in an action of ejectment. v. Scotten, 59 Md. 73; Hecht v. Colqu Md. 563; Bank v. Lanahan, 60 Md. the case of Polk v. Pendleton, 31 Md was distinctly held that a party not in sion of the land, but claiming title to an execution sale, could not maintain have the adverse title of the party in sion, claiming under a tax sale, declar or to have the question of title adju And in the case of Thigpen v. Pitt, Eq. 49, the supreme court of North C in treating of a case somewhat simila one here presented, held that where makes a conveyance of land with inte feat his creditors, and they proceed the land sold, treating the conveyance one who becomes a purchaser, and sheriff's deed, has no right to call on of equity to have the fraudulent deed in and canceled, upon the ground of r a cloud from his title. This, says th would be a novel attempt to extend t diction of equity, and have it try and of a pure legal question. And in the Welde v. Scotten, 59 Md. 76, this co that an injunction would not be gra prevent a judgment creditor from sel purchasing the property under an exec as to put himself into a position to law, through ejectment, the validity o er's title, alleged to be fraudulent. T tion was left to be litigated at law. " question," said the court, "for us to d

Digitized by Google

se, is, should he (the judgment creditor) ented by injunction from putting him- o such position that he may have the n of the bona fides of the appellee's e tested in a court of law, through an of ejectment? We are all of opinion ought not, and that it was error in the court to hold otherwise." Whatever, ay be the decision elsewhere, no case state has gone so far as to maintain a equity under the facts and circumstan- his case. We shall therefore affirm the ppealed from, sustaining the demurrer nissing the bill, with costs. Order af- with costs.

CHEW v. PERKINS.

of Appeals of Maryland. March 26, 1895.)

. FEES — PAYMENT FROM PUBLIC FUNDS — JURISDICTION OF EQUITY.

Where counsel are employed to collect by a trustee appointed on the death of nty treasurer, equity will not compel t of the attorney's fees from funds col- the counsel's claim being merely one of , for which he has a remedy at law.

l from circuit court, Prince George's

by R. B. B. Chew against James T. . There was a decree for defendant, intiff appeals. Affirmed.

d before ROBINSON, C. J., and BRY- cSHERRY, BRISCOE, ROBERTS, AGE, JJ.

B. Chew, in pro. per. C. H. Stan- appellee.

AN, J. R. B. B. Chew, counselor at d a petiton on the equity side of the court for Prince George's county, by he sought to obtain payment for cer- fessional services rendered to James kins. It was alleged that John G. s treasurer and collector of state and taxes, for Prince George's county, t he died in the year 1886, having in ds a large amount of tax bills uncol- and that Perkins was appointed by uit court, sitting in equity, trustee to e the collection of them; that the er was employed by Perkins to rep- him as his counsel in all matters per- to the settlement of the unfinished s; that this employment required kill and patient and unremitting la- d that the petitioner performed ardu- ccessful, and valuable services; and is entitled to recover $2,150.03 as sation for them, over and above what already received from Perkins. The alleges that Perkins has so far pro- with his collections and settlements ve the county commissioners only the 35,000, and it insists that the petition- titled to be paid out of this sum the due him as a preferred claim. It prays for an injunction to restrain Perkins from making any further settlement with the county commissioners, and from paying to them any further sums of money arising from the taxes, and for a decree for the payment of his claim, and for general relief. On demurrer, the court dismissed the petition, and the petitioner appealed.

The acts of 1886 (chapters 237, 238) ratify the appointment of Perkins as trustee which had been made by the circuit court. The occasion does not require us to decide whether the appointment by the circuit court would have been valid without the subsequent sanction of the legislature. By the Acts of 1886, Perkins was empowered to collect the state and county taxes, and to discharge all the duties and exercise all the powers appertaining to the office of treasurer and collector. He was required to account to the state treasurer and the county commissioners, and to settle with them. But the moneys in his hands were not required to be brought into the circuit court and distributed under its order. In case of a controversy, the circuit court would have the same jurisdiction over it as it would have in litigation of the like nature between other suitors, but neither more nor less. It appears to us that the question now presented is simply one of contract between counsel and client, and that the petitioner has a full, complete, and adequate remedy at law for any breach of it. We perceive nothing of an equitable character in the transaction; no matter of equitable cognizance in the dealings between the parties. If equity has jurisdiction in a case like this, it might with as much reason undertake the disposition of most of the controversies which are ordinarily settled by action of assumpsit. Moreover, the moneys in the hands of Perkins are not his property. They are public funds, and cannot be made applicable to the payment of indebtedness arising from his individual contracts. A court of equity sometimes, when it has a fund in its hands for distribution, decrees payment of counsel fees out of it. It does so when professional services have been rendered in suits which, in the exercise of its jurisdiction, it has ordered to be brought, or which it has approved of. It is often done in cases where one creditor has filed a bill in his own behalf, and also for the benefit of all other creditors, who may come in and contribute to the expenses of the suit. In such case, where a fund has been recovered in which a number of creditors participate, it would be unjust to cast the burden of the fees on the one who filed the bill. The creditors joining in the suit after its commencement are admitted on the condition that they will contribute to the expense of it; and the fairest and most convenient way of adjusting their contribution is by paying counsel out of the fund which has been recovered for the common benefit. It may be said that

Digitized by Google

there must always be some equitable grounds for awarding compensation. This was done for the best of reasons in Davis v. Gemmell, 73 Md. 540, 21 Atl. 712, where the counsel were equitable assignees of a portion of the fund. But it is beyond the power of a court of equity to decide a controversy between counsel and client depending on a contract of a purely legal character. It must be left to a court of law.

The professional services of the petitioner were rendered in many instances in this court, and we have personal knowledge of their value and importance, and of the skill, ability, and fidelity of the learned counsel; but the law has appointed another tribunal for settling this controversy, and we have no jurisdiction over it in its present phase. Decree affirmed.

HOOPER v. HOOPER et al.

(Court of Appeals of Maryland. March 27, 1895.)

LIMITATION OF ACTIONS—GUARANTY—ACTION FOR CONTRIBUTION—PAYMENT BY PRINCIPAL—LACHES—TRANSFER OF CREDIT BALANCE — GUARANTOR'S LIABILITY FOR INTEREST.

1. The statute of limitations does not commence to run against a guaranty "to pay on thirty days' notice" to W. "any sum that may now or may hereafter be due" W. "for goods sold and money loaned to H." till 30 days after notice.

2. Where three persons execute a guaranty whereby they jointly and severally agree "to pay on thirty days' notice any sum that may now or may hereafter be due * * * for goods sold and money loaned H." by a certain company, and, on demand of the company, two of the guarantors, after notice to the other of their intention so to do, and after demanding that such guarantor contribute his share, pay to the company the amount due it from H., the statute of limitations does not commence to run against their action for contribution by the other till 30 days after their notification to him of their intention to pay.

3. The payment by the principal debtor of interest on a guarantied claim before the claim is barred by limitation extends the statute as to the guarantor, there being no contract to the contrary.

4. Where, during the whole period covered by a guaranty, the principal was unable to pay the debt, the mere delay of the creditor in demanding payment of the principal will not discharge the guarantor.

5. Where the books of the guarantee showed credits in favor of two of three guarantors in an amount exceeding the sum due under the guaranty, and, by direction of such guarantors, their accounts are charged and their principal's account is credited with amounts sufficient to pay the sum due under the guaranty, there is such a payment thereof as will sustain an action against the other guarantor for contribution.

6. Where the treasurer of a corporation, knowing that it was its uniform practice to charge up interest on all accounts every four months, and to treat accrued interest as principal, agreed "to pay on thirty days' notice any sum that may now or may hereafter be due * * * said corporation, not exceeding in the aggregate $35,000, for goods sold and money loaned to H.," the guaranty included, in addition to the sum named, such sums as might b ged up as interest thereon under the prac the corporation.

Appeal from circuit court of Baltimo

Action by Theodore Hooper and a against Alcasus Hooper for contribut the amount paid by plaintiffs under tract of guaranty executed by plaintif defendant. Judgment was rendere plaintiffs, and defendant appeals. Af

Argued before ROBINSON, C. J., and ERTS, PAGE, BOYD, FOWLER, McS RY, and BRISCOE, JJ.

Ed. Otis Hinkley, John T. Morris Thos. Foley Hisky, for appellant. Th Lanahan and Frank Gosnell, for appel

McSHERRY, J. To understand the tions raised in the record now before is necessary, at the threshold, to c briefly the material facts disclosed b bill, the answer, and the evidence. Th William E. Hooper was possessed time of his death, in 1885, of an und one-half interest in certain lands an property, and three of his four son Theodore, James E., and Alcasus, wer sessed in equal shares of the remainin divided one-half interest therein; an father and those three sons were the previously had been, carrying on, partners, the business of cotton-duck facturers, under the firm name of W E. Hooper & Sons. The elder Mr. H by his last will and testament, auth his executors to unite with the other owners of the mill property in form corporation, and in 1886 a body corp known as the Woodberry Manufac Company, was duly chartered. One-h the capital stock of this company was to the executors and trustees named will of William E. Hooper, in payme the interest which he in his lifetime h the mill property, and the other half w sued in equal thirds to the other three owners, in payment for their respecti terests in the same property. The son, William J. Hooper, was largely i ed to the firm of William E. Hooper & His father had guarantied the payme that indebtedness to the firm, and, aft death of the father, William's debt firm was accordingly charged to the fa account, thus making William a deb the estate for the amount which h owed the firm; and when William was ited, as against this, with his part father's estate, it did not extinguish th debtedness in full, but still left him, the surplus, a debtor to the estate. In William failed in business, and convey property to trustees for the benefit creditors. In the year 1889, he was i ed to the Woodberry Manufacturing pany, whose stock was held, as just s by his father's estate and by his

Digitized by Google

s, and he desired to obtain from that
y further advances of money and
Accordingly, his three brothers (two
m are the plaintiffs in this case, and
whom is the defendant) executed and
ed to the Woodberry Manufacturing
ny the following guaranty: "Balti-
April, 1889. In consideration of the
five dollars, the receipt whereof is
acknowledged, we, Theodore Hooper,
E. Hooper, and Alcasus Hooper, joint-
severally, agree to pay, on thirty days'
to the firm of William E. Hooper &
nd to the Woodberry Manufacturing
ny, of Baltimore county (the latter a
orporate of the state of Maryland),
n that may now or may hereafter be
d firm and said corporation, not ex-
in the aggregate to both thirty-five
nd dollars, for goods sold and money
to William J. Hooper, individually or
as William J. Hooper & Co.; each
eserving to himself the right to with-
rom this agreement by written notice
of the other signers, and to said firm
said corporation, such notice, how-
ot to cancel his obligation as to in-
ness existing when it is given." Then
other provisions which need not be
to. The paper was signed by the
promisors named therein. The ad-
or loans to which this guaranty re-
egan October 8, 1888, and ran through
nth of December of that year, and the
of March, April, May, down to June
up to which latter date, exclusive of
, they aggregated $33,800. Interest
ember 30th of the same year, amount-
1,047.77, was added, making the sum
ne on that date $34,847.77. On this
illiam J. Hooper paid, in 1890, to the
erry Company, three installments of
; and on March 6, 1891, he paid
h installment, which settled the in-
n full to February 1, 1891. No fur-
terest was paid by him till February
when he gave his note, payable in
nths, for a part of the principal and
then due, and this was credited on
ount as a payment. During the
period of time covering these advan-
William J. Hooper, and up to July,
ne defendant, Alcasus Hooper, was
er of the Woodberry Manufacturing
ny. On April 15, 1891, Alcasus Hoop-
e notice in writing to the Woodberry
ny, to William E. Hooper & Sons, to
J. Hooper, and Theodore and James
per, that he declined "to be responsi-
any * * * indebtedness which
e incurred on and after the date of
tice," under the guaranty of April,
d that he withdrew "from said agree-
On March 26, 1894, the Woodberry
y demanded payment from William
er of the amount due by him to it,
the same day requested the three
ors to pay to it the amount whose
payment was jointly and severally guaran-
tied by them under the agreement of April,
1889. William J. Hooper made answer that
he would be unable to settle during that
year, and the evidence shows that such was
the fact. On the day following, the plain-
tiffs addressed a letter to the defendant ad-
vising him that they would, on the 2d day
of the ensuing April, meet this obligation to
the Woodberry Company, and requesting him
to contribute his share or proportion there-
of. They received no reply, and on the day
designated they paid to the Woodberry Com-
pany, in the manner which will be explained
later on, the sum of $41,224.17, being the
amount, including interest, due by William
J. Hooper. On the same day they notified
the defendant that they had paid the mon-
ey, and they thereupon made a formal de-
mand on him for contribution. On the next
day, April 3d, the plaintiffs filed a bill in
equity against the defendant for contribu-
tion. On May 14th the defendant filed
a demurrer to that bill, and relied, among
other things, upon the fact that the suit
had been prematurely brought. As under
the guaranty, according to his construction
of it, no action could be instituted thereon
until after the expiration of the 30-days no-
tice therein provided for, and as the notice
actually given bore date March 26th, the
bill filed on April 2d was filed prior to the
expiration of the 30 days from the date of
the notice, and therefore was filed prema-
turely. The court below, adopting that
view, dismissed the bill, without prejudice,
on May 28th, and on the next day the bill
now before us was filed. The prayer of this
bill, as it was of the former one, is for a de-
cree compelling the defendant, one of the
guarantors, to contribute and pay to the
plaintiffs, the other guarantors, the amount
claimed to be due to them by him on ac-
count of the payment made by them for him,
to the Woodberry Company, of his proportion
of the debt covered by the guaranty of April,
1889. In his answer he relies on the statute
of limitations, and insists that he is not lia-
ble after three years from the date of the
guaranty, or, at most, not after three years
from the date of the last loan by the Wood-
berry Company to William J. Hooper; and he
denies that the plaintiffs have paid any
amount under the guaranty at all.

There is no dispute that the guaranty was
executed, delivered, and accepted, or that the
Woodberry Company advanced money and
delivered goods to William J. Hooper; nor is
there the slightest pretense that Alcasus
Hooper has ever paid a single cent to reim-
burse his brothers any portion of the amount
they paid for him under the guaranty. The
defendant seeks to escape all liability to the
plaintiffs, and to avoid a compliance with
the obligation which he deliberately, and
with full knowledge of all the facts, as-
sumed, by now taking refuge behind the
plea of the statute of limitations. Utterly ig-

Digitized by Google

noring whatever of equity there is in the claim which they prefer against him, and without venturing to go upon the witness stand or to question under his oath any allegation of the bill, he repudiates the liability which has arisen under his explicit and formal contract; and he repudiates it because more than three years have elapsed between the date of that contract and the time when these proceedings were begun. It is difficult to conjecture how, under all the circumstances of this case, a less meritorious defense could have been attempted.

While the undertaking of a guarantor technically differs from that of a surety (Kramph v. Hatz, 52 Pa. St. 525), still the contract of guaranty is the obligation of a surety (Davis v. Wells, Fargo & Co., 104 U. S. 159). Both are accessory contracts. That of a surety is in some sense conditional; that of a guarantor is strictly so. A guaranty is a secondary, while a suretyship is a primary, obligation. A guaranty is a mercantile instrument, to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical accuracy, but in furtherance of its spirit, and liberally to promote the use and convenience of commercial intercourse. It should be given that effect which will best accord with the intention of the parties as manifested by the terms of the guaranty, taken in connection with the subject-matter to which it relates, and neither enlarging the words beyond their natural import in favor of the creditor nor restricting them in aid of the surety. The circumstances accompanying the whole transaction may be looked to in ascertaining the understanding of the parties. Lee v. Dick, 10 Pet. 482; Mauran v. Bullus, 16 Pet. 528; Bell v. Bruen, 1 How. 169; Davis v. Wells, Fargo & Co., 104 U. S. 159; Mussey v. Rayner, 22 Pick. 228. The contract of a surety must have such a construction given to it as will carry out the intention of the parties to it (Engler v. Insurance Co., 46 Md. 333; McShane v. Bank, 73 Md. 135, 20 Atl. 776); and the contract of a guarantor ought not to be interpreted by any different rule.

When it is remembered that the three guarantors obviously intended to aid in a substantial manner their less prosperous brother, who had but recently before the date of the guaranty assigned his property for the benefit of his creditors, and who was therefore practically beginning his business career anew, and when the terms themselves of the guaranty are considered, and the close kinship and intimate business relations existing between all the parties to the transaction are borne in mind, it may be fairly presumed that the intention of all the parties to the instrument was, not that the guarantors should only be liable for three years from the date of the guaranty, or for three years from the date of the last item in the account due to the Woodberry Company, but that they should remain answera long as the liability of the principal continued a subsisting, undischarged edness, and that their conditional liab pay would become a fixed and enfo obligation as against them as soon as days notice should be given and sho pire, if the principal debtor were the ble to pay. There is nothing on the the guaranty to indicate that the par it contemplated that the money loa the Woodberry Company was to be re the debtor within three years from i and much less is there a single w phrase which implies that they und or designed that their liability was u tionally and absolutely restricted or c to that period of time. On the contra ing to the instrument a perfectly natu unstrained construction, it discloses pose to continue liable without re to such a limit; and it, in terms, fi other period for payment by the guar from which date, and no other, the of limitations began to run in their Now, the statute of limitations com running in favor of a surety or gu from the time he is liable to suit, a may or may not be the same time t cipal becomes so liable. 1 Brandt, 143. When, then, were the guaranto cording to the terms of their contract, preted in the light of all the surro circumstances, bound to pay to the berry Company the amount which the ly and severally promised to pay? on demand or at once, upon the ex and delivery of the paper? or in thre thereafter? or at the time the principa or was liable to be sued? They joint severally agreed "to pay on thirty da tice." That is the period of time fixed guaranty. Until the notice had been and the 30 days had expired, they w viously not bound to pay. The notice condition precedent to the right of th itor to sue. Even a negotiable pro note, payable upon a condition, does n ture until the condition has happe Rand. Com. Paper, § 1050); and a gu whose words are to be taken as s against the guarantor as the sense w mit (Drummond v. Priestman, 12 515), is not, upon principle, subject to ferent rule. The guarantors had t doubted right to stipulate that their l should not be enforceable until after t piration of a designated time, and, incorporated that provision in the co both they and the creditor were bound by. The financial condition of Will Hooper, his large indebtedness to the of his father, which he was unable t the fiduciary relations which the gu held towards the estate as executors an tees, and the evident purpose they per had in view to help their brother vances which, though made in the n

Digitized by Google

odberry Company, were largely, in fact, the money of the estate, be- ne estate was a holder of much of pany's capital stock, and their inti- nowledge of all the surrounding cir- ces, give emphasis to the conclu- t they meant, by agreeing "to pay on ays' notice," to fix that period as the en their obligation could be enforced. e defendant understood the contract y this is put beyond all cavil or con- by the defense he took and suc- availed himself of when the first equity was filed against him. That we have already stated, was dis- at his instance, solely because, in the e of his demurrer, "neither the Wood- anufacturing Company nor the plain- * * claiming by subrogation, had t to claim and demand anything un- pretended assumpsit or guaranty, nor to bring any suit therefor until e expiration of the period of thirty om the date of the service of the no- ven on March 26, 1894. Having as- in a most formal and unequivocal this to be the true and correct con- of the contract, he now repudiates interpretation, and relies upon a to- riant and inconsistent one. He was the position he took then, and is in the one he assumes now. The nt to pay on 30 days' notice is not ement to pay before 30 days have nor is it an agreement to pay no notice be given; but it is, in legal ubstantially equivalent to a promise on demand after a designated date. uch instances it has been held that ute does not begin to run until the has been made. Rhind v. Hynd- Md. 530. As, then, by the terms of anty, the guarantors could not have quired to pay, and could not therefore en sued for a failure to pay, until e expiration of a 30-days notice, it is manifest that the statute of lim- did not begin to run in their favor hat time, however it might have af- ne principal debtor. The notice was given on the 26th day of March, 1894, ired April 25th, and from the latter statute began to run. The case of Edwards, 69 Md. 499, 16 Atl. 134, is distinguishable from this. That case a guaranty given for the guaran- terest in a judgment long overdue. unconditional and absolute, and suit ave been brought upon it immedi- ter it was given. Because this was tatute began to run from its date.

here is still another view of the sub- ch completely disposes of the statute ations as a defense. The liability of rantor is coextensive with that of cipal, unless it be expressly limited. Cont. (6th Ed.) *5; Richardson v. 4 Ga. 719. This, of course, is sub- ject to the qualifications arising out of coverture and infancy, where the guarantor is held, though the principal debtor is not bound at all. 1 Chit. Cont. 738, 739. Now, William J. Hooper's liability continued, and the debt due by him to the Woodberry Company was not barred by the statute of limitations when the plaintiffs paid it, and it was consequently not barred at that time as respects the guarantors. When the statute has become a bar to the recovery of a debt for which several are jointly and severally liable, the promise of one will not remove the bar as to the others; but, where one of several so indebted makes a new promise or a payment either of interest or of a part of the principal before the bar of the statute has attached, this will prevent the statute from running as to the others, even though they be but sureties. Such promise or payment fixes a new date from which the statute begins to run. Ellicott v. Nichols, 7 Gill, 86; Schindel v. Gates, 46 Md. 604; Burgoon v. Bixler, 55 Md. 392. William J. Hooper paid on March 6, 1891, the interest due up to February 1st of that year; and on February 7, 1894, less than three years afterwards, he again made a payment by giving his note, which was accepted and subsequently settled. On April 2, 1894, the plaintiffs (two of the guarantors) paid the debt to the Woodberry Company. There was consequently no point of time from the date of the first item in the account, October 8, 1888, till the 2d of April, 1894, when the statute of limitations had become a bar. The debt was during all that period enforceable against the principal debtor, and the liability of the guarantors, being coextensive with his, was equally unaffected by the statute. They had it in their power to guard against a liability lasting so long had they desired to do so, because it is always competent to a guarantor to limit his liability as to time, amount, or parties by the terms of his contract. Bank v. Hall, 83 N. Y. 348. They fixed no limit other than the one heretofore alluded to, and that cannot avail the defendant now. Besides these payments by the principal debtor, the plaintiffs (two of the guarantors), who were jointly as well as severally bound with the defendant, continuously recognized and asserted and admitted their liability under the guaranty during the whole period of time covered by it. The debt not having been barred when the plaintiffs paid it, there can be no question of their right to recover contribution from the defendant, because the statute of limitations did not begin to run against their demand or claim upon their coguarantor until April 2, 1894. Bullock v. Campbell, 9 Gill, 182; Davies v. Humphreys, 6 Mees. & W. 153.

Closely allied to the defense we have just considered is one of laches. Little need be said in regard to it. All of the guarantors knew the financial condition of William J.

Digitized by Google

Hooper when they executed and delivered the guaranty. The record does not disclose that he was at any time during the period covered by the guaranty even able to pay to the Woodberry Company the amount that he owed it; nor does it show that when the demand was made, in March, 1894, he was less able to settle than he had been previously. Under these conditions, a mere delay in making a demand upon him could not have resulted in an injury to the guarantors, because they were placed by such delay in no worse position than if demand had been made earlier. Mere prolongation of the time of payment will not discharge a surety or a guarantor (Benjamin v. Hillard, 23 How. 149), because, as concisely stated by the late Mr. Justice Mathews in Davis v. Wells, Fargo & Co., 104 U. S. 159, "both the laches of the plaintiff and the loss of the defendant must concur to constitute a defense." It is therefore incumbent on the party relying on this defense to establish the facts which compose it; and hence he must not only show that there has been an unreasonable delay, but, further, that an injury or loss consequent thereon has been sustained by him. Not only has that not been done, but the record contains evidence to the effect that at no time since his assignment, in 1886, has William J. Hooper been in a condition to pay his creditors all that he owed.

We now come to the question respecting the payment by the plaintiffs to the Woodberry Company of the amount for which they and the defendant were responsible under the guaranty. William J. Hooper was indebted to the Woodberry Company. The Woodberry Company was indebted to Theodore Hooper on April 2, 1894, in a sum amounting to nearly $23,000, and it was also indebted at the same time to James E. Hooper to an amount exceeding $60,000. These sums stood to their credit, respectively, on the books of the company. They could have demanded on that day these amounts in cash. Instead of doing so, they instructed the bookkeeper of the company to debit Theodore's account with $20,612.09, and to debit James E. Hooper's account with the like sum; and the total of these two debits, viz. $41,224 and odd cents, was credited upon William J. Hooper's account. The result of these entries was that William's debt to the Woodberry Company was extinguished to the extent of $41,224, and the debts of the Woodberry Company to Theodore and to James E. were reduced each $20,612. This process as effectually paid the Woodberry Company the amount due to it under the guaranty as though Theodore and James E. had demanded and received from the Woodberry Company checks for $41,224, and had presented those checks, had them cashed, and had then taken the cash and paid it to the Woodberry Company in settlement of William's indebtedness. After these entries had been made, William owed the Woodberry Company nothing on the guarantied edness, and the Woodberry Compan Theodore and James each $20,612 le it had owed them before. Clearly, thi action resulted in an absolute paym the plaintiffs of the entire indebtedn ered by the guaranty. It was, howe jected that, as no cash was in fact u payment was in reality made. But i have been an utterly idle and usele had checks been drawn and cashed, a the cash been then paid to the Woo Company. The money was in bank, ed in the name of William E. Ho Sons, in which name the Woodberr pany kept its bank accounts, and cou been drawn out and used; but it wou been redeposited at once, and beyond additional entries in the books of t cern the substantial result would hav ultimately identical. We ought to a there is nothing in the suggestio money belonging to the estate of W E. Hooper was included in the sum which William E. Hooper & Sons wer ited in their bank accounts, and on bank accounts the checks, had the used at all, would necessarily hav drawn; and the suggestion can be avail, because the estate was invariabl ited on the books of the Woodberry pany with whatever sums of money due to it, and the cash itself was all disposal of the Woodberry Company f of its own.

There is one more question to be ered, and that relates to the appellan bility to pay to the appellees one-third interest paid by them to the Woodberr pany. The sum of $41,224, paid by includes not only simple, but some pound, interest. The appellant insists: that he is liable, if liable at all, for on third of the sum of $35,000, with inte that one-third from April 2, 1894, th his coguarantors paid his share of th gation for him; and, secondly, that h not be held for any compound interes is clearly mistaken in assuming that l bility under the guaranty was abs limited by the terms of that instrume sum not exceeding $35,000 altogether limitation of $35,000 was not a limitati on the guarantor's ulterior liability creditor, but it was a restriction of the gate amount of the loans and advance made by the Woodberry Company to W J. Hooper. For goods sold and money to an amount not exceeding the sum o 000, they guarantied payment to the or; but as the guaranty did not provi an immediate payment, and the guar did not contemplate one, it is obviou their undertaking embraced, besides th ified maximum capital sum, the sa cessories and consequences (connexo dependentium) which measured the ex their principal's liability. Poth. Ob

Digitized by Google

v. Chalklen, 3 Maule & S. 502; Ben-
. Hillard, 23 How. 149.
all of the guarantors, including the
it, who was treasurer of the creditor
y when the debt was contracted and
ranty was given, knew that it was
ariable and uniform practice of the
y to charge up interest on all ac-
every four months. He knew that
was an incident, an accessory, and a
ence of every debt due to the com-
nd, therefore, that, when the limit of
for loans and sales would be reached,
or would be charged upon that sum,
terest, in the accustomed way. He
ed with reference to that incident or
y of the principal's debt, and, like
cipal debtor, he is accountable for it.
gard to compound interest there is no
y. This is not a proceeding to re-
mpound interest as a penalty for the
of a fiduciary duty, as in Ringgold v.
d, 1 Har. & G. 79, and Diffenderffer
ler, 3 Gill & J. 311; nor does it be-
the group of cases of which Rayner
n, 29 Md. 480, and Dennis v. Dennis,
73, are illustrations; but it is a pro-
involving the doctrine that where
ties to a transaction, among them-
reat accrued interest as an augmen-
f the original principal sum, and
p interest thereon, it is unobjection-
subsequent lienors without notice are
ed thereby. In Fitzhugh v. McPher-
Gill, 408, our predecessors said:
interest has once accrued, it becomes
There is no longer, therefore, any
n to an agreement inter partes that
e considered principal, and therefore
terest." Id., 9 Gill & J. 51. This was
in Brown v. Hardcastle, 63 Md. 498,
lly sanctioned by judicial precedent
re. Eaton v. Bell, 5 Barn. & Ald.
cox v. Howland, 23 Pick. 167; Stoke-
ompson, 34 Pa. St. 210; Calhoun v.
l, 84 Am. Rep. 101; Vaughan v. Ken-
Ark. 114; Wood v. Whisler, 67 Iowa,
N. W. 847; 5 Lawson, Rights, Rem.
§ 2443; Mueller v. McGregor, 28 Ohio
Talliaferro v. King, 9 Dana, 331;
v. Nixon, 69 N. C. 89; Pearce v.
y, 10 R. I. 223; Peirce v. Rowe, 1
9; Townsend v. Riley, 46 N. H. 300;
ead. Cas. (4th Ed.) 533, notes to Sel-
Trench. That all the parties agree to
pounding admits of no dispute. Ev-
y of compound interest made up to
91, was made while the defendant
asurer of the Woodberry Company,
le he had possession, or at least con-
he books. The plaintiffs have proved
roken custom to make such charges,
defendant has uttered no word of
It is simply incredible that the de-
did not know and did not fully ap-
this course of dealing. He was a
lt throughout. His failure to testify
ause must be treated as an admis-
sion of his assent thereto; and his conduct, while treasurer, in conforming to the uniform custom of making periodical rests, and thus computing interest on interest, not only in respect of this, but with regard to all other accounts, estops him to question its propriety now.

Upon a careful review of the whole record, we have discovered no error whatever; and, as a consequence, the decree, which required the defendant to make contribution as prayed in the bill, will be affirmed, with costs in this court and in the court below. Decree affirmed, with costs above and below.

BADART v. FOULON.

(Court of Appeals of Maryland. March 26, 1895.)

QUESTIONS FOR JURY — CONTRACT IN FOREIGN LANGUAGE—MERGER BY CONTRACT—RECOVERY OF MONEY LOANED.

1. Where a contract is in a foreign language, it is for the jury to ascertain the meaning of the terms from the evidence of persons skilled in the particular language.

2. To explain the meaning of a contract written in a foreign language, the original and translations are admissible.

3. A contract made by a person describing himself as agent cannot be admitted to bind the principal where there is no evidence of the agent's authority.

4. All preliminary negotiations being merged in the contract sued on, a previous contract and correspondence between defendant and a third party cannot be admitted to vary the contract or substitute a new one for it.

5. In an action for money loaned under a written contract, the declaration in which contains the common counts, it is error to instruct the jury to find for defendant unless the contract was delivered to plaintiff; since, if the contract was not delivered, defendant would be liable on the common counts.

Appeal from superior court of Baltimore city.

Action by Therese Catharine Foulon against Antoine F. Badart. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

C. J. Bonaparte, for appellant. E. H. Gans and B. H. Haman, for appellee.

BRYAN, J. Therese Catharine Foulon, widow, of Brussels, Belgium, brought suit against Antoine F. Badart. The narr, contained the common counts in assumpsit, and also a special count on a written contract. After a jury trial, judgment was rendered against the defendant, and he appealed to this court. It was shown in evidence that the parties entered into a written contract with each other, which was executed in duplicate, signed with their respective hands; and that, in consequence of this contract, the plaintiff sent to the defendant $10,000. The plaintiff and Mr. Schelfhoudt, her brother, were examined under a commission. They

Digitized by Google

both described the transaction as a loan of money, and both testified that the defendant was indebted to the plaintiff. The defendant contended that the money was not loaned to him, but that, by the written agreement, the plaintiff entered into partnership with him, and that the sum of $10,000 was her contribution to the partnership capital. The agreement was in the French language. Two competent interpreters were sworn, who made made separate translations, differing from each other in some particulars. According to the testimony of the interpreter examined on behalf of the plaintiff, the transaction was described as a loan, and the money was required to be paid back two years after the date of the loan. According to the testimony of the interpreter examined on behalf of the defendant, the transaction was described as a "contribution to the capital," and the delivery of the money to the defendant by the plaintiff was called "advance money," and the principal was redeemable two years after the date on which it was received. After the two translations had been offered in evidence, the defendant moved the court to exclude the contract from the consideration of the jury. The court overruled the motion, and the defendant excepted. This is the first exception.

It is undoubtedly the province of the court to construe all written instruments; but, if the language in which they are expressed is not understood by the court, its meaning must in some way be ascertained before the construction can be determined. The words may have a peculiar and technical meaning; they may be terms belonging to some art, trade, or science; they may by commercial or local usage have acquired an unusual signification; or they may be in a foreign language. In all these instances we must, of necessity, resort to evidence to disclose that which is unknown. The meanings of words are facts; and the jury is the tribunal to decide upon the existence of facts, except under circumstances of a special character, which have no connection with the present question. In Williams v. Woods, 16 Md. 252, it was held that, when the terms of a written instrument are technical or equivocal, parol evidence is admissible to explain their meaning, and that this evidence is for the consideration of the jury, and that the court must instruct the jury, conditionally or hypothetically, what should be the proper construction of the written instrument, accordingly as they find the meaning of the words from the evidence. There can be no possible reason for a difference in the mode of proving the meaning of unknown words, whether they belong to science, art, mercantile usage, or a foreign language. It is the circumstance that their meaning is unknown which makes it necessary to have the evidence to explain them. And this necessity applies to a foreign language in exactly the same manner as to any other description of unknown words. In Shore v. Wilson, 9 & F. 355, a question arose about the a sion of extrinsic evidence to explain c terms and phrases contained in the dee which Lady Hewley's charities were lished. The case was very fully and argued in the house of lords, in the pre of seven of the judges, whose atten was requested, and whose opinions asked by the lords. The decree was p in accordance with the opinion of six judges, and of Lord Brougham, Lord hurst, and the lord chancellor. Three learned judges took occasion to show where the writing to be interpreted wa foreign language, there was no differe the mode of proof from that which pre in the ordinary case of unknown words. Justice Erskine said: "Where the i ment is in a foreign language, * * jury must ascertain the meaning o terms upon the evidence of persons s in the particular language." Page Baron Parks said: "In the first place, is no doubt that not only where the lan of the instrument is such as the court not understand it is competent to receiv dence of the proper meaning of tha guage, as when it was written in a fo tongue, but it is also competent where nical words or peculiar terms or indee expressions are used which at the time t strument was written had acquired an priate meaning, either generally, or by usage, or amongst particular classes." 555. Lord Chief Justice Tindal, speaki ascertaining the meaning of a written i ment by external evidence, said: "Su vestigation does of necessity take pla the interpretation of instruments writt a foreign language; in the case of a instruments, where, by the lapse of tim change of manners, the words have acq in the present age a different meaning that which they bore when originally ployed; in cases where terms of art ence occur; in mercantile contracts, in many instances use a peculiar lan employed by those only who are conv in trade and commerce." Pages 566, 56 2 Starkie, Ev. p. 779, the learned a in speaking of the admission of evide explain terms in a contract which are in a special and peculiar sense, goes say: "The case seems to fall withi same consideration as if the parties, in ing their contract, had made use of eign language, which the courts ar bound to understand." For these reaso think that the original contract was pr admitted in evidence along with the lations.

The defendant tendered in evidence strument of writing purporting to be tract between himself and his son Ed in which his son described himself a duly-authorized agent of the plaintif Scheifhoudt, her brother. The court

Digitized by Google

dmit it. There was no evidence that Badart was authorized to make a t in behalf of the plaintiff, and con- ly we approve of the court's ruling.

third exception was taken to the refusal to permit the defendant to tes- at the plaintiff had an opportunity to to the above-mentioned contract. As tract was not authorized by her, and no way binding on her, it was entire- evant to inquire whether she had an nity to object to it or not. She had, r, testified under the commission that er agreed to it.

ourth and fifth exceptions were taken refusal of the court to admit an un- telegram and a letter stated to have ceived from Schelfhoudt, tending to ome change in the original contract n plaintiff and defendant. There was dence that Schelfhoudt had any au- to make any change in this contract. ixth exception was to the court's rul- excluding from the jury a contract be- Schelfhoudt and the defendant, dat- 26, 1888, and a letter from the same dated March 26th of the same year. papers had been admitted, subject to on. The letter was preliminary to the t between the plaintiff and defend- n this letter the following words oc- I have asked you for a contract simi- nine for Therese [the plaintiff]." The t referred to was the one just men- As the plaintiff's contract with the nt was executed subsequent to the nd contract in question, to wit, on the April, 1889, all the preliminary nego- were merged in it. The established stated in 1 Greenl. Ev. § 275: "When have deliberately put their engage- nto writing, in such terms as import obligation, without any uncertainty he object or extent of such engage- t is conclusively presumed that the engagement of the parties, and the and manner of their undertaking, duced to writing; and all oral testi- f a previous colloquium between the or of conversation or declaration at e when it was completed, or after- as it would tend in many instances stitute a new and different contract one which was really agreed upon, to judice, possibly, of one of the parties, ted."

dant offered eight prayers, but sub- ly withdrew the fifth and sixth. urt rejected the first, second, fourth, hth, and granted the third and sev-

first prayer maintained that there evidence legally sufficient to entitle intiff to recover. It was competent jury to find the execution of the t, the correctness of the translation in evidence by the plaintiff, the deliv- ery of the $10,000 to the defendant, and his failure to repay it at the expiration of two years. If they found these facts, the plaintiff's right of recovery was established.

We have already disposed of the questions in the second and fourth prayers by what we said on the second, third, fourth, and fifth exceptions.

The eighth prayer is in these words: "The jury are instructed that the contract of April 20, 1889, offered in evidence by the plaintiff, is not binding upon the defendant unless it was either delivered to the plaintiff personally, or to an agent of the said plaintiff authorized to receive it, by the defendant personally, or through an agent authorized to deliver it; and, unless the jury shall find such delivery, then, under the pleadings and all the evidence in the cause, their verdict must be for the defendant; but the jury are further instructed that possession and production of the said contract by the plaintiff is prima facie proof of its delivery." This prayer is drawn with great ingenuity. We will inquire whether it was proper to be given to the jury, under the evidence in the cause. The defendant showed by his own testimony that he had executed this contract; that it was in the plaintiff's possession with his knowledge; that he had received the plaintiff's money under it; that he had written a letter to her (October 14, 1890) in which he suggested a modification of it; and that he had paid money under it to Schelfhoudt for her use. It would hardly be just, in the face of such testimony, to allow him to deny the delivery before the jury. If it were necessary to decide the question, we should be inclined to adopt in this case the rule applicable to holders of promissory notes; that is to say, that possession is prima facie evidence of delivery, and that it is sufficient to enable the holder to maintain a suit unless mala fides is proved. Whiteford v. Burckmyer, 1 Gill, 145; Burckmyer v. Whiteford, 6 Gill, 16; Merrick v. Bank, 8 Gill, 71. We do not wish, however, to be understood as intimating that where two parties enter into a written contract, and one of them performs all the stipulations on his part, the other can defeat an action on the contract by refusing to deliver the instrument. This eighth prayer ought not, under any circumstances, to have been granted, because even if the instrument had not been delivered, and the nondelivery had nullified the contract, the defendant would have been liable on the common counts in the declaration for the plaintiff's money which had been delivered to him.

In the instruction given by the court, it was assumed that the translation asserted by the plaintiff was correct. We have seen that this question ought to have been left to the jury; but, as there was no special exception to this instruction, we cannot reverse for this reason. Judgment affirmed.

Digitized by Google

STATE v. SMITH et al.

(Court of Errors and Appeals of Delaware. Jan. 24, 1890.)

ALTERATION OF BOND—RELEASE OF SURETIES.

Where a tax collector, without the knowledge of the sureties on his official bond, affixes a seal to his signature after the bond has been signed and sealed by them, the sureties are released.

Error to superior court, Sussex county.

Action by Thompson R. Smith and others against the state of Delaware to set aside judgments against plaintiffs, as sureties on the official bond of Stephen W. Shockley, tax collector. Judgment for plaintiffs, and defendant brings error. Affirmed.

The following is the agreed case:

"That the levy court of said county of Sussex did on the 1st day of February, A. D., 1881, appoint Stephen W. Shockley the collector of Cedar Creek hundred; that on the 5th day of March, A. D. 1881, the said Stephen W. Shockley, and the said Thompson R. Smith, Elias W. Shockley, of W., and George R. Swain executed what purported to be a bond in favor of the state of Delaware for the penal sum of ten thousand dollars; that a copy of said bond is herewith appended, marked 'A'; that, at the time of signing said bond, there was no seal affixed to the name or signature of said Stephen W. Shockley, by omission or neglect to affix the same; that on the 9th day of February, A. D. 1883, at the instance and request of Samuel Bacon, president of the said levy court, the said Stephen W. Shockley affixed a seal to his signature in the presence of the said William F. Causey, who attested the same by and with the consent of the said Stephen W. Shockley; that the said seal was added or affixed by the said Stephen W. Shockley without the knowledge or consent of the said Thompson R. Smith, Elias Shockley, of W., or George R. Swain, the above plaintiffs, who had signed and executed the said purported bond as sureties thereof; that on the 12th day of February, 1883, four several judgments for ten thousand dollars each were confessed in said court under and by virtue of the joint and several warrant of attorney attached to said bond, being Nos. 165, 166, and 167 to October term, A. D. 1882, and execution issued thereon. Upon the above statement of facts, the said parties pray the judgment of the said superior court whether the addition of the seal to the same or signature of the said Stephen W. Shockley at the time and in the manner aforesaid did not release and discharge the said Thompson R. Smith, Elias Shockley, of W., and George R. Swain, the sureties of the said Stephen W. Shockley in said instrument, from all liability as sureties of the said Stephen W. Shockley therein, and whether said judgments and executions issued thereupon should not, so far as said sureties, the said Thompson R. Smith, Elias Shockley, of W., and George R. Swain, concerned, be vacated, stricken out, and for naught."

"Exhibit A.

"Know all men by these presents, we, Stephen W. Shockley, T. R. Smith, Shockley, Geo. R. Swain, and William Shockley, of the county of Sussex and s of Delaware, are held and firmly bound the state of Delaware, in the sum of thousand dollars, lawful money of the state of Delaware, to be paid to the state, or its certain attorney, to which ment well and truly to be made and d we bind ourselves, our heirs, executors, administrators, each and every one of t and as jointly for and in the whole, fi by these presents, sealed with our seals, dated the fifth day of March, in the yea our Lord one thousand eight hundred eighty-one. The condition of the above ligation is such that, if the above-b Stephen W. Shockley, being collecto Cedar Creek hundred, in Sussex county, faithfully and diligently collect all the and taxes which he shall, according to duplicate and warrant to be issued to as such collector, be required to collect, all the taxes whatever which shall be mitted to him for collection, and shall the amount of all such rates and taxes cepting only so far as allowances shal made to him by the levy court for delinq cies, commissions, or otherwise, to the ficers authorized by law to receive the s in the manner and within the times scribed by law or legally appointed by levy court of said county for that purp and, furthermore, if the said Stephen Shockley shall perform the duties of hi fice of collector as aforesaid, in all th with fidelity,—then the above obligation be void. And, further, we do hereby thorize and empower any attorney at practicing within the aforesaid state to pear for us, and each of us, and, after or more declarations filed for the above of ten thousand dollars, thereupon to fess judgment or judgments, as of any or time after the date hereof, with of execution, agreeable to the laws of aforesaid state of Delaware, hereby re ing all error or errors that may happe be in entering said judgment or judgm or the execution which shall be issued t on. Witness our hands and seals," etc.

The court below rendered the follo decision: "And now, to wit, this 14th of April, A. D. 1887, the above and foreg case stated coming on to be heard, and argument thereupon had by the counse both sides, and after mature deliber thereupon had by the court, it was adju that upon the facts set forth in the stated the said instrument was not bin upon the said T. R. Smith, Elias W. Sh ley, of W., and G. R. Swain, and that several judgments entered against the

Digitized by Google

tively by virtue of the warrant of attor- in said instrument are and are hereby ded to be null and void, together with executions issued thereon."

arles M. Cullen and David T. Marvel, the State. William F. Causey and Ed- l Ridgely, for defendants in error.

ER CURIAM. Affirmed.

JAMISON v. McWHORTER.

ourt of Errors and Appeals of Delaware. June 3, 1885.)

STRUCTION OF WILL — LIFE ESTATE — DEATH WITHOUT LEAVING CHILDREN—MORTGAGE OF TRUST ESTATE—VALIDITY.

1. A devise to a person of a legal estate for expressly, and, in case of his death leaving ld or children or the issue of such, remain- o such child or children or the issue of such, heirs and assigns, and, in case of his death out leaving child or children or the issue of , the estate to go to his brothers, vests in person an estate for life. Houston, J., nting.

2. Where a will creating a trust for the ntenance and education of testator's minor ren does not authorize the trust lands to be gaged, the court of chancery has no power rder the trustee to mortgage the same to money to execute the trust.

se reserved from superior court, New le county.

tion by Clarence Jamison against Leon- J. McWhorter to enforce a contract for sale of land.

hn H. Rodney, for plaintiff. Alexander ooper, for defendant.

OMEGYS, C. J. The questions submitted he foregoing case are, in effect: (1) What te did Clarence Jamison take under the of his father, the testator? (2) Was the gage made of the Capelle farm by virtue awful authority? There are two conclu- s which may be drawn from the lan- ge employed by the testator in settling his te. That language—or, rather, so much t as concerns the question of title—is hese words, bringing the several expres- s together: "I give, devise, and be- th unto my said executor and the guard- hereinafter named and appointed for my or children all my estate, real and per- l, not herein otherwise disposed of, to e and to hold the same unto them, or the ivor or survivors of them, the survivor's s and assigns, in trust, nevertheless, for ses, intents, and purposes hereinafter set h and declared. To have and to hold farm known as the 'Capelle Farm,' con- ing about two hundred and twelve acres, ated in Red Lion hundred, and the farm wn as the 'Homestead Farm,' containing t two hundred and thirty acres, situated t. George's hundred, aforesaid. In trust ent the same to good and careful tenants he best cash or share rents attainable as in their judgment shall be most advanta- geous, and to collect, expend, and invest the same as hereinafter provided until the ma- jority of my youngest son who shall live to attain the age of twenty-one years, then to raise out of or charge upon the said farms respectively such sum or sums as shall be necessary to make equal the shares of my sons Edgar, Clarence, and Oliver, as here- inafter provided, and subject to such charge and condition. To permit and suffer my son Clarence to use, occupy, and rent, and to receive the rents, issues, and profits of the said Capelle farm during the term of his natural life, for his proper use and benefit, and in case of the death of the said Clarence leaving a child or children, or the issue of such, remainder to such child or children or the issue of such, their heirs and assigns, free and discharged from the aforesaid trust. * * * In case of the death of any of my said sons Edgar, Clarence, and Oliver without leaving any child or children or the issue of such, the share of the one so dying shall go [to] the survivors or survivor and the issue of such as may be deceased, subject to the same conditions and limitations as their own shares respectively hereinbefore designated."

It was the obvious purpose of the testator to keep the lands in the hands of his trustees during the life of his sons respectively; but he was not aware of the rule of law that a trust estate cannot be supported where no active duty is to be performed by the trustee and the whole management of the property is in the hands of the cestui que trust. When, therefore, the testator provided, as he did, with respect to the Capelle farm and the homestead farm, he in effect gave his sons, respectively, legal estates in them. We are, then, to consider the devise with respect to the Capelle farm as a disposition of a legal estate. The question is, what legal estate? The plaintiff contends that the devise to him is of an estate of inheritance in fee sim- ple or fee tail which can be turned into a fee; the defendant that a life estate only is given him. They both cite authorities in support of their respective contentions. The testator's sons were unmarried, and without issue at his death. It may be considered settled law that where lands are devised to a person "and" his children, it is to them equally as tenants in common where there are any liv- ing at the date of the will; but that, where there are none at that time, the words are held to be those of limitation, and the same as "heirs of the body or issue." There could not well be a different construction. Adopt- ing the reasoning of Wild's Case, 6 Coke, 17, the children cannot take as immediate devi- sees, not being in rerum natura; nor in remainder, for the devise is immediate. But this is not a will of that kind, and Wild's Case does not govern it. Here the testator devises to Clarence, his son, a legal estate, for life expressly, and in case of his death leaving a child or children or the issue of

Digitized by Google

such remainder to such child or children or the issue of such, their heirs and assigns, etc., and in case of his death without leaving child or children or the issue of such, his share shall go to Oliver and Edgar, or the survivor of them, and the issue of such one of them as may be then dead leaving issue, subject, etc. This is the effect of the language used by the testator. The rule in Shelley's Case has no application to the devise to the testator's sons. Neither in the construction of a deed or will where the words "child" or "children" are used, and not "heirs" or "heirs of the body," has the rule any place. 3 Greenl. Cruise, tit. 38, c. 14, § 39; Id. tit. 32, c. 23, § 28. There is, therefore, no embarrassment of decision on account of that rule. It seems impossible to distinguish this case, in principle, from that of Loddington v. Kime, 3 Lev. 431; 1 Salk. 224; 1 Ld. Raym. 203. There the devise was to A. for life without impeachment of waste, and, in case he should have any issue male, to such issue male and his heirs forever, and, if A. died without issue male, etc., A. was held to be tenant for life, with a contingent remainder to his issue in fee, and a concurrent contingent remainder to the ulterior devisee. See Hayes, Heirs (7 Law Lib.) 29, 30, table 4. And in Wild's Case it is said to have been resolved (the reference is to Moore, 397) "that if a man, as in the case at bar, devises land to husband and wife, and after their decease to their children, in this case, although they have not any child at the time, yet every child which they shall have after may take by way of remainder according to the rule of law." The reason given is, "for his intent appears that their children should not take immediately but after the decease of Rowland (the husband) and wife." Further, where there is a limitation to children in remainder as a class, it will vest in them as they come in esse, and will open and let in each successive member of the class until the determination of the particular estate. Doe v. Perryn, 3 Term R. 484, cited in 3 Greenl. Cruise, 218, note 1. In this case there is a limitation to the child or children of Clarence, who had none at the time. It is to them as a class, and to the issue of such of them as should be dead at the time of his death, leaving issue. This shows that they were to take together, and not in succession one after the other, and precludes the idea of an estate tail. It would add nothing to the import of the language used to have provided that they should take as tenants in common. And then the children and grandchildren were to take in remainder, which they could not do if Clarence had an estate tail. Issue in tail do not take in remainder, but by descent per formam doni. From these authorities it seems clear that Clarence Jamison took only an estate for life under his father's will in the Capelle farm.

With respect to the question of title acquired by Clarence Jamison under the sale by the sheriff in execution of the mort made by the trustee under the order of court of chancery of New Castle cou there does not appear to be in the wi the testator any authority to make a m gage of the premises to raise money for maintenance and education of the testa sons; nor was there any, as it appear me, in the said court to make such o The whole proceedings for sale of the Ca farm, therefore, appear to have been wit authority.

HOUSTON, J. (dissenting). The cou in the case concur in the opinion that u the provisions of the will the legal e of the trustees in the lands devised to t continued only so long as the purposes o trust required it, but, when the active poses of it had been served, the legal e of the trustees in them ceased, and bec vested in the cestui que trust, and whic curred in the devise of the particular p ises in question, a part of the Capelle f in trust to permit and suffer his son Clar to use, occupy, and rent, and to receive rents, issues, and profits of the said Ca farm during the term of his natural life his proper use and benefit, "and in cas the death of the said Clarence leavin child or children or the issue of such them, their heirs and assigns, free and charged from the aforesaid trust," when ver, his youngest son, attained the ag 21 years, and which the counsel also a occurred in the year 1878. But they d as to the testamentary construction t given by us to the concluding terms o "and in case of the death of the said ence leaving a child or children or the i of such, to them, their heirs and assigns, and discharged from the aforesaid trus whether they are to be construed as w of limitation in analogy to the rule in S ley's Case, or as words of purchase in devise. The counsel for the defendant tends for the former, the counsel for plaintiff for the latter, interpretation; they agree that when the youngest son tained the age of 21 years the duties of trustees ceased, and the legal estate in Capelle farm vested in the cestui que t of it under the devise—Clarence Jamis for the term of his life, subject to the tation over of it on his death leaving a or children or the issue of such, to th their heirs and assigns, as directed in words of the devise; and the meaning construction of which presents for our sideration the first question to be determ between them in the case. For the plai it is contended they constituted a devis the Capelle farm to the son of the test Clarence Jamison, in fee tail, and for defendant that they constitute a devise to him for the term of his life only, an his death leaving a child or children, or issue of such remainder to them.

Digitized by Google

re I proceed, however, to express any
n upon this question, I think it proper
ır to and repeat the whole of the item
ch this devise occurs in the will as set
in the case stated, since all of the
and clauses of it must be considered
nstrued together in order to determine
rrect meaning and interpretation of it,
vhich are not fully presented in the
of counsel. It is as follows: "I give
evise unto my executor and the guard-
reinafter named and appointed for my
children all my estate, real and per-
not herein otherwise disposed of, to
nd to hold the same unto them or the
or or survivors of them, in trust, nev-
ess, for the uses, intents, and purposes
after set forth and declared. To have
hold the farm known as the 'Capelle
' containing about two hundred and
acres, situated in Red Lion hundred,
he farm known as the 'Homestead
' containing about two hundred and
acres, situated in St. George's hundred
aid. In trust to rent the same to good
reful tenants at the best cash or share
attainable as in their judgment shall
st advantageous, and to collect, ex-
and invest the same as hereinafter pro-
until the majority of my youngest
ho shall live to attain the age of twen-
years, then to raise out of or to charge
the said farms respectively such sum
ns as shall be necessary to make equal
ares of my sons Edgar, Clarence, and
, as hereinafter provided, and subject
h charge and condition. To permit and
my son Clarence to use, occupy, and
nd receive the rents, issues, and profits
said Capelle farm during the term of his
l life for his proper use and benefit,
n case of the death of the said Clarence
g a child or children or the issue of
remainder to such child or children or
sue of such, their heirs and assigns,
nd discharged from the aforesaid trust.
rmit and suffer my son Oliver to use,
, and rent and receive the rents, is-
and profits of the said homestead farm
the term of his natural life, for his
use and benefit, and, in case of the
of said Oliver leaving a child or chil-
or the issue of such, their heirs and
s, free and discharged from the afore-
rust. To invest all the rest and resi-
f my estate not herein otherwise dis-
of in bonds and mortgages as afore-
interest payable semiannually, and
he same so invested until the majority
youngest son who shall attain the age
enty-one years, whereupon I desire my
es aforesaid to have the said Capelle
and the said homestead farm valued at
just and true value in money by three
ntial men in the neighborhood, and
o such valuation the trustees shall add
our thousand dollars and all interest
ed thereon which hereinbefore is char-
ged upon the Jamison Corner farm, and all the rest and residue of my estate invested as first directed in this item, and also any other legacies or devises to which my said sons Edgar, Clarence, and Oliver may become entitled, and the aggregate sum thus ascertained to apportion in equal shares among my sons Edgar, Clarence, and Oliver, and their issue, the issue in all cases taking their parent's share. In the said apportionment my said son Clarence to take the said Capelle farm with such incumbrance or addition as may be necessary to equalize the shares of the said Edgar, Clarence, and Oliver, and the said Oliver to take the homestead farm with such like incumbrance or addition; but the share of the said Edgar shall be in money, invested in good bonds and mortgages as aforesaid, the interest payable to him after such apportionment semiannually, during his natural life, and from and immediately after his death the principal and all interest accrued thereon payable to his child or children or the issue of such. The rents and profits arising from the Capelle and homestead farms, and the interest of all sums invested as in this item prescribed, and so much thereof as shall be necessary, shall be expended by the said guardian in the maintenance and education of my said sons Edgar, Clarence, and Oliver, and the residue, if any, invested for their benefit, first deducting yearly a sum, not exceeding one hundred and fifty dollars, to be expended on each of said farms to keep the same productive and in good condition. In case of the death of any of my said sons Edgar, Clarence, and Oliver without leaving any child or children, or the issue of such, the share of the one so dying shall go [to] the survivors or survivor, and the issue of such as may be deceased, subject to the same conditions and limitations as their own shares respectively hereinbefore designated."

It is admitted that the youngest son of the testator attained the age of 21 years in the year 1878, and that the purpose and limitation of the trust then expired, and that his son Clarence Jamison then became seised of the legal estate in the Capelle farm for the term of his life, free and discharged from the trust; but it is denied that he took any larger estate or interest in it under the limitations over it in case of his death, leaving a child or children, or the issue of such, as directed in the devise, and the whole item of the will above referred to, while it is contended on the part of the plaintiff and the authorities cited by his counsel, that as it is a gift of the farm by will, the rule in Shelley's Case applies to it, the word "children," employed in the devise over at his death, should be construed to be a word of limitation, and not of purchase, and that he consequently took, under the devise, either an estate in fee simple or in fee tail in the farm. And there is no doubt that such words so employed in devises have been so construed in many cases more

Digitized by Google

than he has cited, although the general rule of testamentary construction is admitted by him to be to the contrary; that is to say, that ordinarily the word "children" in a will is used as a word of purchase, and not of limitation. But with regard to the class of cases which constitute an exception to that general rule, and to which I have just alluded, Mr. Jarman remarks that it should be observed, however, that in a considerable class of cases the word "child" or "children" has received an interpretation extending it beyond its more precise and obvious meaning, as denoting immediate offspring, and been considered to have been employed as nomen collectivum, or as synonymous with "issue" or "descendants," in which general sense it has often the effect, when applied to real estate, of creating an estate tail. Where this construction has prevailed, however, it has generally been aided by the context. There it was synonymous with issue in all events. 2 Jarm. Wills, 73. And where the intention of the testator clearly appeared to have used the term as equivalent to the word "issue" or "descendants," and the devisee for life had no child or children when the will was made, or at the time of the death of the testator, and it therefore could not apply as a descriptio personarum, such a construction was given to it as a word of limitation, and not of purchase. 1 Pow. Dev. 334. And accordingly it was held in such cases that the parent and devisee for life took an estate tail in the land devised. Broadhurst v. Morris, 2 Barn. & Adol. 1; Bifield's Case, cited by Hale, C. J., in King v. Melling, 1 Vent. 231; Robinson v. Robinson, 1 Burrows, 38; Seaward v. Willock, 5 East, 198; Raggett v. Beaty, 2 Moody & P. 512; Simpson v. Simpson, 5 Scott, 770. I consider that this construction of the words "dying without leaving child or children or the issue of such" as words of limitation, and clearly importing an intention on the part of the testator to use them as synonymous with the words "issue or descendants," is also aided by the context of the devise, and the repetition of the same identical words in each of the devises in it to his three sons respectively, and particularly by the terms employed by the testator in his final disposition and limitation over of the whole subject-matter of the devise in the last clause of the item, which are as follows: "In case of the death of any of my said sons Edgar, Clarence, and Oliver without leaving any child or children, or the issue of such, the share of the one so dying shall go to the survivors or survivor, and the issue of such as may be deceased, subject to the same conditions and limitations as their own shares respectively hereinbefore designated." And although the will seems to have been written with much care and deliberation in the dispositions and limitations of it, it is only by implication that any child or children of either of them, or the issue of such, who may be living at his or her or their father's death, can take any share or interest in the estates so devised to them, according literal import of the terms of the will, we interpret the words in question words of limitation, and to confer b struction an estate tail in the Capell on the said son Clarence Jamison, and tate tail in the homestead farm on th son Oliver Jamison. And yet it seems that no one can read this will, and c the manifest desire and solicitude of t tator reflected in it to limit the two fa the two sons named, respectively, f terms of their natural lives, with rem at their death to the issue of each of t they should leave any, without coming conclusion that it must have constitut main and paramount purpose in the m the testator for making the two dev particular as we find them in the i question. I am therefore of the opinio the testator intended by the use of the in the devise in question of the Capell to his son Clarence Jamison for the t his natural life, and, in case of the of the said Clarence leaving a child dren or the issue of such, remainder t child or children or the issue of such heirs and assigns, according to the rule tamentary construction applicable in case as this, a general failure of is his death, and that under the devise h an estate tail in the said farm, as it m be considered well settled that the wo sue" or its equivalent term, according clear intention of the testator, if em in a devise of real estate to a person f remainder to his issue at his death, is collectivum, a word of limitation, and purchase, and synonymous with the "heirs of his body," which are of all the most appropriate in legal phraseol confer an estate tail general on the firs of the land under the devise. 2 Jarm. 328, 329.

But it appears that the provisions m the testator in this item of his will maintenance and education of his so gar, Clarence, and Oliver until the m of the youngest son who should live to the age of 21 years out of the ren profits of the Capelle farm and hon farm, and the interest of all sums inve his trustees as prescribed in this item, inadequate for the purpose, and the ex who was also one of the trustees und will, preferred his petition to the cha representing that by the will of the t all his real estate was held by the pe in trust for his three minor sons, Edga ence, and Oliver Jamison, consisting o farms in New Castle county, and th gross annual rents and profits of amounted to about $3,000, subject to th ment of taxes, repairs, and improv provided for by the will; but that t rents did not then amount to a sufficie to comfortably board, clothe, and educ

Digitized by Google

ors, and that their guardian was in and then indebted on their account ount of $800 or more, and that, if he authorized to borrow as trustee un- vill a sum not exceeding $1,200 for a s, he thought he would then be able he sum out of the increased rents of e, and that sum would relieve the of the guardian, and enable him to the amount of indebtedness against minors. He therefore prayed the r to allow him to borrow upon the s he could the sum of $1,200 as trus- n his own name for the use of said ate, with which to pay the liabilities nding against said minors for past nce; and thereupon the chancellor order that he be authorized and em- to borrow on account of the trust e sum of $1,200 for three years, to be ed by the rents and profits of the ate; and that the sum, or so much as should be necessary, should be o the payment of debts then accrued id for the support, maintenance, and n of Edgar, Clarence, and Oliver the three minor children of Thomas deceased, to be expended by their John P. Belville, who shall give o the trustee for the same, and be le with it as for other moneys re- n account of said minor children. r was made on the 20th day of Feb- 374, and on the 10th day of April the executor and trustee borrowed of $1,200 from Bentley Worth for pose, and as such made, executed, ered his bond and mortgage to him sum, to be paid in three years from , the lands embraced and described ortgage consisting inter alia of the elle farm; and, the loan not having l at maturity, nor as late as six years e date thereof, the mortgagee pro- nd obtained judgment on the mort- l at the November term, 1880, of the court in and for said county the said s sold under a writ of levari facias by the sheriff of the county, and was t the sale by the said Clarence Jami- youngest of the said sons of the tes- ving in the mean time attained the wenty-one years), and who, since the conveyance of it by the sheriff to entered into an agreement with the t, Leontine J. McWhorter, to sell and o him the portion of it designated ribed in the agreement, and which t he refuses to comply with, on the lleged by him of insufficiency of title laintiff to the premises as set forth se stated.

view which I have taken of the ques- ady considered and disposed of by not for me to enter into the consid- f the remaining question as to the erred on the purchaser by the sale under the mortgage given by the trustee pursuant to the order of the chancellor, but, if it were necessary for me to consider and decide that, I should be obliged to hold, under the facts and circumstances of this case, that the mortgagee had a legal right to execute and sell on the mortgage at any time after the failure of the trustee for three years to pay it, and, being seised as such of the legal estate in the premises when he so mortgaged them by the authority of the chancellor, the purchaser took the legal title to them at the sheriff's sale upon it. The case falls within the reason and policy of the doctrine that a trust to raise money out of the profits of land will include a power to sell or mortgage, and such a construction of the power has long been an established principle in the courts of equity. 4 Kent, Comm. 148.

JONES v. CANNON.

(Superior Court of Delaware. Oct., 1887.)

CONVEYANCE TO WIFE — RIGHTS OF HUSBAND'S CREDITORS—DEED—PRESUMPTION AS TO CONSIDERATION.

1. There is a presumption that the grantee in a deed paid the consideration therefor.

2. Where the purchase money for land is paid by the husband, and deed made to the wife, in payment of a debt due her by the husband, the wife may hold the land as her separate property, as against the husband's creditors.

3. A wife may recover from her husband's administrator the value of her separate property taken and sold by her husband.

4. She may also recover the value of her husband's coffin, which was paid for by her with her own money.

Assumpsit for money had and received by Clara R. Jones against E. W. Cannon, administrator of L. R. Ellegood, who was plaintiff's husband.

Mr. Robinson, for plaintiff. Mr. Moore, for defendant.

COMEGYS, C. J., charging jury, defines what is meant by a married woman having a separate property. Courts of law have always protected such property for her. Such property she could always deal with independent of the control of her husband. At common law this had to be done through the instrumentality of a deed of trust or settlement; but it now may be done under our statute without the instrumentality of a deed of trust. Whatever was bought with her money for her use and to be her property became her separate property. A married woman, however, cannot sue her husband in a court of law, under our statute, if he borrows from her money belonging to her in sole right. A court of equity may compel him to repay it to her. The acts in relation to exemptions were entirely repealed by the repealing act with reference to Sussex county.

Digitized by Google

1. That the presumption is that the person to whom a deed is made paid his own money for it; but where the consideration is called in question, and evidence is given from which the jury may draw the conclusion that the consideration money paid was not that of the grantee, but of some other person whose land it is alleged by the party disputing the fact of payment by the grantee to be, the duty is cast upon such grantee or person asserting the payment by the grantee to prove the fact to the satisfaction of the jury; otherwise the presumption is to be taken to be overthrown.

2. That if the jury should believe from the testimony that the horse and carriage mentioned were purchased by the plaintiff with the fruits of her own labor, and that she sold the same to her husband for the price of $150, and that in the purchase by her husband from Robert Rickards it was arranged between her and her husband that the purchase should be made for her benefit, and the deed be made to her in part payment of the said sum of $150, then the land belonged to her for her separate use, and could not be reached by his creditors.

3. That if the jury believe from the testimony that the money alleged to have been paid by the husband of the plaintiff was in discharge in part of the said sum of $150, alleged, as aforesaid, to be the price of the horse and carriage, claimed to have been sold by the plaintiff to her husband, and that the same was paid by him for his said wife, and in discharge pro tanto of his indebtedness, then the jury are warranted in concluding that the Rickards land was conveyed to her bona fide, unless such inference is rebutted by the facts and circumstances shown in proof by the defendant, Cannon.

4. That the act passed on the 22d of March, 1877, the second section of which requires appraisers to appraise and set apart for widow of an intestate, for her own use, such of the goods and chattels of her husband as she may select, not exceeding $200 in value, has had no operation in the county of Sussex since the passage of chapter 146 of the sixteenth volume of the Laws.

5. That if the jury believe from all the testimony that the mare in question was in fact the property of the plaintiff, and not that of her husband, then she is entitled to recover the price for which the same was sold by the administrator, and interest from that time; but, if they believe from that testimony that it was the property of her husband, then she is not entitled to recover it.

6. That, unless the jury are satisfied from the testimony that the defendant did not pay back to the plaintiff the sum of $50 which she paid to Hatfield for the coffin, she is not entitled to recover that amount and interest on it from the time it was paid.

Verdict for the plaintiff.

In re CLARK.

(Supreme Court of Errors of Connecti
1, 1894.)

GRAND JURY—REFUSAL OF WITNESS TO
COMMITMENT—CONSTITUTIONAL L

1. Under Gen. St. § 91, authoriz
jurors, when assembled to investigat
committed, to summon witnesses, and
that on the refusal of any witness
proper questions they may complain t
of the peace, who shall cause the wit
brought before him, and commit him
til he shall give evidence as required
tice may commit the witness without
trial and judgment.

2. Gen. St. § 91, authorizing gra
when assembled to investigate offense
ted, to require a justice to commit to ja
es refusing to answer proper questions,
constitutional, as authorizing the exer
executive department of a judicial po

3. Nor is such act unconstitutio
priving a witness of his liberty wi
process of law.

Appeal from court of common ple
field county; Arthur D. Warner, J

Application for writ of habeas cor
matter of William J. Clark against
Cochrane, deputy sheriff. From a
discharging plaintiff from imprison
fendant appeals. Reversed.

Leonard J. Nickerson and Welli
Smith, for appellant. Daniel Dave
appellee.

HAMERSLEY, J. There are two
presented by this case:

First. Does section 91 of the Gen
utes authorize a justice of the peac
a mittimus without a regular trial
ment? The section is as follows: "
jurors in each town, or any three
may meet to advise concerning offe
mitted therein, and may call bef
at such meetings, any witnesses,
amined touching the same; and if a
shall refuse to appear before then
meeting, being summoned by comp
thority, they may apply to a justi
peace for a capias, who may issu
bring such person before them; a
person appearing, or, being broug
them, shall refuse to be sworn,
sworn, shall refuse to answer a
question, they may complain to any
the peace in the county where such
is had, who shall cause such per
brought before him, and commit hi
there to remain, at his own expe
he shall give evidence as requir
grand jurors, when so met, shall
the powers of a justice of the pe
holding court, to commit for conten
claim is, that the refusal to answe
question, asked in pursuance of th
constitutes an offense; that the co
a justice of the peace is the comm
of a prosecution by complaint;
such prosecution the witness is en

Digitized by Google

ny prosecution for a criminal of- that a mittimus for his commit- can issue only after final judg- een rendered. This meaning im- e statute would practically de- iciency. A witness who refuses eed only demur to the complaint e justice, appeal from the judg- demurrer to a higher court, and ase is determined the occasion for uestion was asked may have pass- as the course attempted in this ords of the statute will not bear truction; and although the stat- us forms, has been in force since as been in constant use as a e detection of crimes, yet no rec- found that the claim now made tiff has ever before been intimat- intiff suggests that the fact that ion of 1821, and until the Revi- 9, the statute read as follows: l jurors may make complaint to f the peace, who shall cause such e brought before him, and, on shall commit him to the com- Rev. St. 1821, p. 260, § 6),—proves 49 a trial by the justice was nec- that the omission of the words on" in the Revision of 1849 did law. The words "on conviction," retained in the statute until 1849, ar the interpretation which the es them. These words were used al act of 1750, and their mean- ppears by that act. The act pro- e grand jurors in each town shall three years, or oftener if neces- vise concerning such breaches of eir office they are to inquire aft- ent, and shall have power to call * * * any persons as wit- der to be examined touching such as they are inquiring after; and n refuse to appear * * * upon oned thereto by warrant from an r justice of the peace (who are ted to grant such warrant, on re- h grand jurors) or shall refuse to l upon oath, if thereto required, ses may, by such assistant, or onviction of such refusal, be com- e common jail." "On conviction sal," as thus used, did not mean n of an offense after trial, but t on being convinced of such re- y satisfactory manner, and es- the persistence of the witness l; and the meaning then attach- ords has never been changed.

grand jury was required to ap- every court yearly "to make of breaches of any laws or or- other misdemeanors they know urisdiction." 1 Col. Rec. 91. In t one grand juror was required rom each plantation in the coun- Rec. 98. In 1680 it was ordered that the grand jurors appointed by the county courts should serve at least one year. 3 Col. Rec. 52. In 1681 the oath prescribed for grand jurors, who had now become a permanent inquest, was altered so as to include the obligation "with all due care and faithfulness to make diligent search" for violations of law, as well as presentment of those within their knowledge. Id. 95. In 1712 each town was required to appoint two or more grand jurors to serve as before, whose names should be returned to the clerk of the court, and a sufficient number of them be summoned as needed. It will thus be seen that the grand jurors of the towns were officers, annually appointed, and not only constituted the grand inquest of the county attending the superior courts for the purpose of presenting crimes, but were also charged with the duty at all times of making diligent search, with all due care and faithfulness, for the discovery of violations of law, and of presenting offenses discovered to the judicial authority in each town, as well as at the sessions of the court. The act of 1750 practically authorized a local inquest to be held in each town, as well as the grand inquest at the sessions of the court, and directed an assistant, who was a judge of the highest court, or one of the justices of the peace, who was eligible to sit as judge of the county court, to issue the warrants necessary to enable the local inquest to perform its duties; and it is evident that when the act directed such judge to commit a witness who refused to be examined under oath upon conviction of such refusal, it did not contemplate any formal trial, or any hearing different from that which might precede the ordering of a mittimus if the judge were holding court and had occasion to commit a witness who refused to be examined under oath before a grand jury. The statute of 1750 has been modified in the process of time, both by changes in phraseology and in the duties of grand jurors and justices; but there has been no change in the purpose of the act, or in the authority for the summary commitment of a witness who refuses to testify. The omission of the words "on conviction," when the legislature enacted the Revision of 1849, was probably made because the words had lost much of their original significance, or were deemed unnecessary in the present form of the act, or liable to misconstruction, but, however that may be, it is clear that the alterations in the act made in 1849 were intentional, and that the act as altered does authorize a justice of the peace to issue a mittimus without a regular trial and judgment; and this operation of the act has been unquestioned for nearly fifty years.

Second. Is the issue of a mittimus, in pursuance of section 91, in violation of any provision of the constitution? The plaintiff claims that his imprisonment under the mittimus was unconstitutional, because the

Digitized by Google

statute authorized the mittimus to issue only upon conviction of a criminal offense, after trial; that the mittimus was in fact issued without such trial, and therefore he was imprisoned without due process of law. This argument of the plaintiff would be conclusive if his construction of the statute were correct. His brief also claims that the statute is unconstitutional if his construction is not correct, and as the discharge of the plaintiff by the court below was right if the statute authorizing the imprisonment is in violation of the constitution, we must consider that question. Section 91 does not create any criminal offense, nor does it relate to any judicial proceeding. The imprisonment imposed is not a penalty for any crime. It simply imposes a duty on the citizen, and seeks to enforce that duty when immediate obedience is essential by the temporary restraint of the person. The restraint of the person may be authorized by the legislature without the intervention of any court in many cases where such restraint is necessary to the execution of the law and the enforcement of police regulations. The defendant in a civil action, who refuses to turn out property for attachment, may be committed to jail without trial. Selectmen may, without trial, take children from the custody of parents who neglect them, and bind them out to masters. Gen. St. § 2109. For certain infringements of the pauper laws they may, without trial, order an inhabitant of another state to be forcibly taken out of this state, and may expel from their town the inhabitant of another town. Sections 3292, 3293. A tax collector may, if necessary, commit to jail a citizen refusing to pay his taxes, there to remain until payment is made, or he be discharged in due course of law. Section 3889. A collector who fails to collect and pay over the taxes may himself, without trial, be committed to jail, as on execution after judgment. Section 3879. The moderator of any town meeting, or of any meeting of any society or other community, may order into custody any person who refuses to submit to his lawful authority, and have him forcibly removed until he shall conform to order. Section 52. The instances are numerous and familiar where officers are authorized to restrain, without trial, and even without process, persons who persist in the open violation of law. This power of summary compulsion to compliance with law may be committed to administrative as well as to judicial officers, and when committed to judicial officers they act solely in an administrative capacity, unless the power is exercised in the course of judicial proceedings. Section 91 relates wholly to administrative proceedings. It is a police regulation for the purpose of protecting society against crime by providing efficient means for the discovery of crime and the detection of the criminal. Our state has followed a policy different from that of England in the investigation of crimes very early period in our history charged public officers with th investigating as to the commiss fenses, and have invested them power of compelling witnesses t evidence necessary to discover the the criminal. A remedy for the the law of England in this respec under consideration since the i in parliament of the criminal c 1880. In other countries the po vestigation is much more extensi dia, England has established guarded system. Code Cr. Proc. § But the power to authorize such tion is inherent in every govern the extent and manner of its use cretion of the legislature, subject tutional limitations.

In this case the law imposed upo tiff the duty of answering the p tions put to him by the grand j legislature clearly has the right to a law. His continued refusal to an open and persistent defiance when public interest demanded obedience. The power of the le authorize his restraint or impri long as he continues in such open law cannot be questioned. It is t right to examine a witness and to to testify belongs to courts of jus an essential part of a judicial When he refuses to testify the jud quire him to answer or stand There is no trial of such witness. committed as a punishment, but t particular duty; and no evidenc such case, be taken. Whart. Cr. Pl. when this power of compulsion is e a court of justice it is naturally h exercise should conform, as far as to the analogies of judicial proce it is also true that the power itsel sential to judicial proceedings, is ively a judicial power. It may b by administrative as well as by j cers, and is, in its essence, so fa be called distinctive of any depa tinctively an administrative p principle on which the power re when immediate enforcement of la tial to its execution, the state cann citizen to obstruct, by his disobed immediate execution of law, and h er to invest the officer charged w ministration of law, whether he b or administrative officer, with a compel, in such case of emergency, obedience in the manner prescrib The real nature of the power to co zen to answer a proper question fusal to answer obstructs the nec mediate execution of law has bee by the habit of calling every such contempt. It is a contempt in the every open defiance of law is a c

Digitized by Google

of the state; it is a contempt of done in the course of a judicial ne summary enforcement of an t an exercise by the court of its er to punish contempt of court as ffense, but of its administrative orce a law, which, if enforced at enforced at once. In Com. v. Pick. 476, Chief Justice Shaw ive effect to this power, it must as to compel a specific perform- duty. If it be said that a wit- e indicted and punished as for es of duty, the answer is obvious the long delay and postponement ich this would occasion, the wit- to prove the case against the con- itness might, in their turn, refuse to testify. Indeed the necessity tence and exercise of this sum- to compel actual and prompt at- witnesses, and to require them to plain to be seriously questioned." ion is clearly marked in our leg- ne power to commit for a refusal iven to every court, is not called but is a power given to enforce appear and testify (Gen. St. § the power given to every court r criminal contempt is given as wer (Id. § 843). There are many ere this power has been commit- nistrative officers. County com- re authorized to compel, by com- ormation necessary to the enforce- eir administrative duties. The rdons has like authority in the of its executive duties. Police rs of cities have like authority, mitment may be ordered by the rs, and the mittimus signed by Id. § 165. The coroner may ex- me power in the investigation of same power is inherent in the ithout the enactment of a special ame power has been committed ature to special commissions char- taining information necessary to sts. A noted instance is the com- vhich the late Chief Justice Sey- hairman; and the commitment of by the legislature to administra- has been held to be constitutional. xbee, 45 Conn. 382. In that case on is drawn: The power to com- to answer is inherent in a court ut, when the power to summon witnesses is given to a mere ad- officer, the power to compel an ot be inferred, but must be clearly tute. There is no power more es- vernment than the power to dis- letect crime. In the exercise of the legislature has authorized s to summon witnesses before o compel answers to proper ques- is an exercise of that police pow- to the existence of government, and does not violate any constitutional guaranty relating to the course of proceedings in judicial trials. The witness imprisoned in strict pursuance of that statute is imprisoned by due course of law, as truly as a prisoner duly convicted of a crime. Imprisonment in strict accordance with that statute involves, besides the official character of the persons acting under it, the refusal of the witness to answer a proper question put by the grand jurors, the application to a justice, the appearance of the witness before the justice, his continued refusal to answer, a finding by the justice of the facts necessary to commitment, a mittimus accurately reciting such facts, and signed by the justice. The finding by the justice of the necessary facts is not a judicial act, and does not involve a trial. The finding is of that quasi judicial character which characterizes the formation of opinion by every administrative officer when he is called upon to perform a ministerial act which the law authorizes only upon the existence of certain conditions. Yudkin v. Gates, 60 Conn. 426, 22 Atl. 776.

If any person is imprisoned under this statute, but not in strict pursuance of its provisions, he may be discharged upon habeas corpus. Upon such habeas corpus the court may be called upon to decide the following questions: the official character of the grand jurors and justice; the legality of the mittimus on its face; the propriety of the question asked; and if a case can be imagined where the mittimus has been issued after the witness has answered the question, that fact might be at issue. It is difficult to see, and unnecessary now to determine, what other questions could arise. A proper question is any question the witness may legally be compelled to answer. The pertinency of the question must be largely, if not wholly, left to the judgment of the grand jurors. They are authorized to investigate in secret session. The whole object of their investigation might be defeated by disclosing to a witness the purpose of a question. We do not, however, say that their authority may not be so abused in pursuing an unjustifiable investigation that the witness will be entitled to protection. The fact that we have no knowledge of such abuse during an administration of the law for 150 years does not demonstrate that such abuse may not occur in the future. In Anderson's Case (decided in chambers by the late Chief Justice Storrs in 1858), it was held that a witness imprisoned for refusal to give evidence which might tend to criminate him must be discharged on habeas corpus; but the judge carefully avoids saying that in other cases the decision of the grand jurors and justice may not be conclusive. The correctness of that decision cannot be questioned, and the principle on which it rests would require the discharge on habeas corpus of a witness imprisoned under this law, in case, if such

Digitized by Google

case could arise, such imprisonment violated any other guaranty of the constitution. While the constitutionality of this act has never been directly decided, it has never been questioned, and was plainly recognized in the case of In re Clayton, 59 Conn. 510, 21 Atl. 1005. In that case a commitment under a law authorizing the examination as a witness of a person who had been convicted of drunkenness, as to how he had obtained the liquor which caused his intoxication, and authorizing his commitment in case of refusal to answer, was held to be legal, and in due course of law. The court says: "For more than a century and a half we have had upon the statute book a law authorizing the grand jurors in the several towns to meet and advise, and inquire into the offenses that had been committed, with power to summon and examine witnesses, and, if need be, to punish for contempt. This proceeding is but an extension of the same power to other officers, for the same general purpose, namely, the protection of society, by preventing crime through the detection and punishment of offenders. * * * This objection misconceives the nature and character of the proceeding before the police court. The appellant was not then before the court as a defendant in a criminal prosecution. That had been his position, but upon his conviction that was changed, and he became, so far as this case is concerned, merely a witness. He was in no sense on trial,—no one was,—and therefore was not in jeopardy. The proceeding was not judicial, but ministerial. * * * It is the duty of all good citizens, when legally required so to do, to testify to any facts within their knowledge affecting public interests; and no one has a natural right to be protected in his refusal to discharge this duty. Public policy does not forbid, but, on the contrary, often requires, legislation to facilitate the administration of justice."

Judged by the analogies of past legislation, section 91 is a lawful exercise of legislative power, and in the case above cited we held that compelling a witness by commitment to give proper information essential to the investigation of crime was not an unwarranted exercise of judicial power by the executive department, where such compulsion was enforced by a magistrate acting in a ministerial capacity. The strongest case cited by the plaintiff, apparently in conflict with the doctrine of In re Clayton, is Whitcomb's Case, 120 Mass. 118. In that case the court held that a law authorizing a city council to commit a witness for refusal to testify was in violation of the constitution of Massachusetts. The decision is based in part on the special phraseology of the Massachusetts constitution, particularly of the clause granting power to the legislature to establish municipal governments, in connection with the fact that at the time the constitution was adopted it was no part of the law of the land that municipal boards of office have power to punish for contempt. pressions relied on in this case relati general relations of the several dep of government must be read in c with the particular facts and the constitution under discussion. The voked by the plaintiff is not neces volved in the decision of Whitcom It is the broad rule that a constituti lishing separate departments for the of the powers granted, and vesting cial power in one department, necess bids the legislature to authorize trative officers, in the exercise of executive power, to use any meth essential to the exercise of that pow is also a method in common and use in judicial proceedings; and act done in pursuance of such legi necessarily in violation of the cons guaranty that "no person shall be of life, liberty, or property but by d of law." This guaranty of the co relates primarily to the protection dividual against unlawful acts of or judicial officers, and is not by limitation on the power of legislatio course of law" was originally syn with "law of the land." This guara first appears in our declaration (Laws 1672, p. 1), is against any warranted by "some express law of ony." But the establishment of gov under written constitutions, without the meaning of the words, gave an their operation which was not felt land, nor in Connecticut until 18 written constitution placed limitatio exercise of legislative powers. A la sistent with such limitation is Hence an act warranted by a law ent with such limitation is done with course of law." And so, in determ validity of an act claimed to be c to this ancient guaranty, we may only the original question, is the ac warranted by any law? but also tional question, is the law authorizin itself inconsistent with the limitati tained in the fundamental law? But ference is only apparent. Under constitution the substantial questio same as it was before such constitu known,—is the act authorized by th the land? It is authorized if warr any specific law, unless such law i color of law by reason of its inco with the fundamental law. Hence, case when an imprisonment in purs statute law is claimed to be without cess of law, the question must deper circumstances of that case; not meaning of "due process of law," meaning is well settled, but upon pliance of the particular statute fundamental law limiting the exerci islative power. This view of the o

Digitized by Google

' the phrase "due process of law" d in the opinion delivered by Jus- in Davidson v. New Orleans, 96 See, also, Lawton v. Steele, 152 U. Sup. Ct. 499; Marchant v. Rail- 53 U. S. 380, 14 Sup. Ct. 894. No finition of the acts which, done of law, are without due process n be given, because the definition se depends not so much upon the the act as upon the relation of the law authorizing it to the funda- which limits the power of the leg- And so, in dealing with the provi- ction 1 of article 14 of the amend- ne federal constitution, the United rts have, in the main, avoided gen- ions, and treated each case as sug- Davidson v. New Orleans, in view tion whether the acts in that case ated by the law of the land. It ely be affirmed that the phraseol- amendment alters the meaning of ess of law" as understood at the guaranty to the individual against ful exercise of power by the agents ment was first incorporated into itutions and into the United States n by article 5 of the amendments. v of the constitutional guaranty be e imprisonment of the plaintiff was rocess of law." If it be claimed examination by the grand jurors, mmitment of the plaintiff to com- wer to a proper question, was in of a judicial proceeding, and that thorizing such a proceeding by ad- e officers is in violation of the of the constitution dividing the of government and vesting the ju- er in the courts, the sufficient an- hat these great functions of gov- re not divided in any such way s of the nature of the functions of ment can never be exercised by epartment. Such a division is im- , and, if carried out, would result alysis of government. Executive, and judicial powers of necessity ch other, and cover many acts in their nature common to more epartment. These great functions nent are committed to the differ- racies in all their fullness, and in- y incidental powers necessary to ution, even though such incidental their intrinsic character belong rally to a different department. n be more clearly within the func- e judicial department than the en- of the payment of a debt by the n of the property and the imprison- e person of the debtor; but when ture finds it necessary to the full of the powers confided to the ex- partment to authorize such collec- bts due the government without o the courts, such a law is not in violation of the division of powers made by the constitution. In Murray's Lessee v. Improvement Co., 18 How. 272, cited and approved in the opinion of Justice Miller (Davidson v. New Orleans, 96 U. S. 97), it was held that an act of congress authorizing the audit of the accounts of a collector of customs, and authorizing the solicitor of the treasury to issue a distress warrant for the collection of the amount of balance found due the government, was not invalid as authorizing the exercise by the executive department of a judicial power; and that the levy of such warrant was not a violation of the guaranty of article 5 of the amendments, that no person "shall be deprived of life, liberty, or property, without due process of law." And in disposing of the claim that the law of congress was invalid because the duty it authorized the treasury department to perform was in fact a judicial act, Justice Curtis says: "So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law."

It is unnecessary to multiply illustrations of this essential principle of constitutional law that a statute authorizing administrative officers to perform executive functions by methods which partake of the judicial nature is not necessarily in violation of the constitutional provisions dividing the functions of government, and vesting the judicial power in courts. The real question in each case is, not merely whether the act is of a judicial nature, but whether the act is legitimately incident and necessary to the execution of powers confided to the executive and legislative departments, and not obnoxious to any prohibition of the constitution. This question has been answered by the application of various tests. The one most frequently applied is the inquiry whether the particular act has been treated as a legitimate exercise of executive power prior to the adoption of the constitution. As a determination of principle by the process of analogy, such inquiry is useful, convenient, and, in most cases, conclusive; but can hardly be accepted as necessarily conclusive. The constitutional definition of the three departments of government cannot wholly depend upon the actual legislation in England, when parliament was little more than a court to register the expressions of royal will; or in Connecticut, when absolute political power was concentrated in a general court, and the effect of the common law was given to the penal codes of the Israelites. Another test, not infrequently applied, is the inquiry whether the act in question is a legitimate exercise of the police power necessarily inherent in government. The term "police power" is often used as a term of convenience, and not of clearly ascertained legal principle. It was found to be the most convenient phrase for designating the extent of state legislation, when such legiti-

Digitized by Google

mate legislation covered the same ground included in the exclusive power of legislation given to congress; notably in the wide field covered by the power to regulate interstate and foreign commence. As used in this connection, the term has acquired a more definite meaning through the many decisions of the United States supreme court, but such meaning relates rather to what it has been decided to cover than to what it may in fact cover. As Justice Grier says in the License Cases, 5 How. 504: "Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restriction or punishment of crime, for the preservation of the public peace, health, and morals, must come within this category." But the term is much more indefinite when used to designate that exercise of executive power which involves, and justifies, as a necessary incident, the performance of acts by administrative officers that may partake of a judicial nature; and the necessity for its use in this connection, except as a term of convenience, is much less obvious. The truth is that all such tests are useful aids in applying to each case the principles of constitutional law that must control. Our state constitution vests in the three departments of government the whole political power, and the power to be exercised in the several departments is coextensive with the exigencies of government, except as its exercise is restrained by the declaration of general principles and the specific limitations embodied in the constitution itself, including the United States constitution, which is also the fundamental law of each state. The mere apportionment of political power to separate departments does not diminish the political power vested in the government; and so, when the exigencies of government demand the exercise of executive power involving as a necessary incident the use of methods which are also necessary to the exercise of judicial power, the authorization by the legislature of such exercise of power in such manner is a legitimate exercise of the legislative power. The legislature must determine the existence of the exigency and of the necessity, and the courts must be the final judge in each case whether such particular exercise of legislative power has been restrained by the general principles or specific limitations contained in the constitution. The determination of such limitations of legislative power is often one of the most difficult and delicate questions that can be presented to the court, but the decision becomes more easy when it is remembered that the real question as to the exercise in such case of a judicial power exclusively vested in the courts is one of substance, and not of form. The language used by Justice Harlan, in the recent case of Mugler v. State, 123 U. S. 623, 661, 8 Sup. Ct. 273, while discussing the limitations imposed by the United States tution on state legislation in the exe police power, applies as well to the q under discussion: "While every presumption is to be indulged in f the validity of the statute, the cour obey the constitution rather than t making department of governmer must, upon their responsibility, de whether, in any particular case, thes have been passed. * * * The courts bound by mere forms, nor are the misled by mere pretenses. They ar erty—indeed, are under a solemn look at the substance of things, w they enter upon the inquiry whether islature has transcended the limits authority."

From whatever point of view we the imprisonment of the plaintiff, it "due course of law." The law autho follows the analogies of our legislati prior to the adoption of the constitut been in force for 150 years, and clearl within the most narrow definition of lice power inherent in the state gove It is also within the principles of tional law controlling such legislatio power to punish crime and to prese public peace and morals belongs to t government in all its fullness, and tial to its existence. Legislation aut investigation as to the existence of cr legitimate exercise of this power. T duct of such investigation prior to th cution of a person for the commissi particular crime is beyond doubt ar tive function, and in the execution of vestigation the state has the plainest proper information within the knowl every citizen, and to compel the disclo such information by any method co with constitutional limitations. In a gency demanding immediate action it right to compel, as Chief Justice Sha "the specific performance of this du ligatory on every person, and for th pose to hold him in custody of t Such compulsion may be as essentia efficient exercise of executive power a dicial power, and its use by admini officers is no more an infringement of clusive powers vested in the judicial ment because such compulsion is in use in judicial proceedings than is t mary enforcement of a debt to the ment because the payment of debts c narily be enforced only by judicial pr sued upon judgment of a court, or struction of a building to prevent the of a fire, or the taking of land to prev spread of disease, because property c narily be condemned only by judic ceedings. It would indeed be unfort the strength of the government for th tion and prevention of crime were by any constitutional provision forbid legislature to enact laws similar to

Digitized by Google

ecussion; but no such prohibition
und, either in the declarations con-
our bill of rights or in the specific
s of our constitution. It may be
t this law, in authorizing a commit-
ompel an answer to a proper ques-
ws the analogies and provides all
ial safeguards of a summary com-
by a court for a similar purpose,
additional security that the remedy
use of the power is more ample,
pon a writ of habeas corpus the
inquire more freely into the legal-
ommitment when made by an ad-
ve officer, whose only authority
ound in a special statute, than when
a court in which the authority to
inherent.

clude, therefore, that section 91 is
e of legislative power for a purpose
n the powers vested in the state
nt, and is not in violation of any
of our constitution or of the United
stitution applicable to the limitation
gislation. As section 91 authorized
e of the peace to issue the mittimus
e without a formal trial and judg-
was a lawful exercise of legislative
find nothing in the record to au-
e discharge of the plaintiff by the
w. By his return the sheriff jus-
er a mittimus, valid on its face, re-
ry fact required by law in order to
the issue of the mittimus. The
reply does not contradict a single
d. It does not make a single alle-
fact inconsistent with the validity
mmitment. It substantially admits
character of the grand jurors and
the peace; that the plaintiff ap-
fore the grand jurors lawfully con-
der the statute, and was duly
at the questions recited were asked
he willfully and contemptuously re-
nswer the questions; that the com-
s made by the grand jurors to the
nat he was duly called before the
nd then persisted in his refusal to
The reply is substantially a demur-
return, for three reasons: (1) Be-
oes not appear by the return that
jurors required the plaintiff to an-
questions relating to any offense
in the town of Sharon. It does
and clearly appear that the exam-
the witness was concerning offenses
in said town. (2) Because it does
r by the return that the questions
plaintiff were pertinent or proper
It does clearly appear that the
were proper questions. State v.
) Conn. 94. (3) Because it does not
the return that he was formally
ne justice as for a criminal offense,
vas allowed an opportunity to be
himself and witnesses in answer to
laint, or that he was confronted by
sses against him; and therefore it
does appear that he was imprisoned without due process of law. The insufficiency of this reason has been shown. As the proceeding before the justice was a ministerial, and not a judicial, proceeding, the provisions of the constitution relating to judicial trials do not apply. The reply, in addition to the statement that these matters do not appear by the return, makes the same claim of the necessity of a formal trial by way of alleging that the plaintiff demurred to the complaint, claimed the right to plead not guilty to the complaint, and to plead in answer to the allegations of the complaint, and to be confronted with the witnesses against him; that these claims were all denied, and that there was no such trial and judgment on the complaint. But the reply does not allege that the plaintiff was deprived of the opportunity of purging himself by answering the questions, or that he did not have full opportunity to make any statement, or present any reasons he saw fit, why the mittimus should not issue, or that the justice did not have ample reason for making his finding as recited in the mittimus. On the contrary, the reply is a substantial admission of all these facts. The reply is simply a claim that the return is no justification, because the mittimus could not issue except after a trial of the plaintiff and judgment against him, as in a criminal proceeding. This claim has no foundation in law. So far as the reply states this claim by way of demurrer, the reasons are insufficient, and so far as it states the claim by way of direct assertion the allegations are irrelevant. The court below should have adjudged the reply insufficient, and, unless the plaintiff offered to prove facts showing illegality in the proceedings, should have forthwith remanded him to jail. The case, as it appears before us, especially by the plaintiff's own claims, indicates that he openly and willfully obstructed the execution of the law. So long as he persists in such obstruction, his imprisonment is lawful, and well deserved. There is error in the judgment appealed from, and the case is remanded to the court of common pleas, to be proceeded with to judgment in accordance with this opinion. The other judges concurred.

Appeal of SMITH.

(Supreme Court of Errors of Connecticut. Nov. 28, 1894.)

INTOXICATING LIQUORS—LICENSE—EVIDENCE OF QUALIFICATIONS OF LICENSEE.

1. Proof of adjudications by a justice, subsequently vacated by an appeal which is pending, that an applicant for a retailer's license had been guilty of violations of the license law by selling to minors and on Sunday, does not raise an irrebuttable legal presumption that he is not a suitable person to be licensed, so as to preclude other proof to the contrary, and invalidate a finding that he is a suitable person.

2. Judgments of a justice, afterwards vacated by an appeal which is pending, adjudging that an applicant for a retailer's license has vio-

Digitized by Google

lated the license law, are not convictions, within the meaning of a statute making convictions of such violations conclusive proof that the applicant is not a suitable person.

Appeal from superior court, Litchfield county; Fenn, Judge.

Appeal by John B. Smith, a citizen and taxpayer, from the granting of a retailer's liquor license to Solomon Kirby. From a confirmation by the court of the decision of the county commissioners, the said Smith appeals. Affirmed, and new trial denied.

Leonard J. Nickerson and Wellington B. Smith, for appellant. Daniel Davenport and A. T. Roraback, for appellee.

HAMERSLEY, J. Under the provisions of section 3053 of the General Statutes, as amended (Pub. Acts 1889, c. 117), the county commissioners of Litchfield county granted a license to Solomon Kirby to sell spirituous and intoxicating liquors in the town of Sharon; and under the provisions of chapter 175, Pub. Acts 1893, John B. Smith, a citizen and taxpayer of Sharon, appealed from their decision to the superior court. The court confirmed the decision of the county commissioners, and this is an appeal by Smith from that order of confirmation.

The finding of the court states that upon the evidence the court found that Kirby was a suitable person to be licensed, that the place in question was a suitable place for the sale of liquors, that the town of Sharon is one where licenses may legally be granted, and thereupon confirmed the granting of the license. The finding also states that, upon evidence offered by the appellant as tending to show that Kirby was not a suitable person to be licensed, the following additional and subordinate facts were proved by a fair preponderance of testimony, viz.: That at the time of trial there were three distinct criminal prosecutions pending against Kirby in the superior court, which prosecutions had been commenced before a justice of the peace, who had, after demurrer overruled, found Kirby guilty, and imposed a fine, and from such judgments of conviction Kirby had appealed to the superior court (presumably, these prosecutions were for a violation of the license law, although the record does not so state); that Kirby, while holding a license, had on two occasions sold liquor to a minor, and on two occasions sold liquor on Sunday, and had habitually violated the "Screen Law," so-called; that, on a number of occasions, minors were in Kirby's barroom; that there were certain specified circumstances tending to show the claimed violations of law to have been willful, and the place in question an unsuitable place, but that no evidence was offered, and no claim made, that Kirby had ever been finally convicted of any violation of law. And the finding further states that the appellant claimed that, these facts existing, Kirby was an unsuit son, and could not by any other be shown to be a suitable person, t a license, under the statute. This the law the court overruled, and the ness of such ruling is the only qu law raised by the appeal.

Had the appellant claimed, as sion of fact, that the existence facts, in the absence of all other established the fact that Kirby w suitable person to be licensed, the doubtedly would have sustained h The only evidence then before t would have indicated Kirby as hav during the preceding year, a wil habitual violator of the license Plainly, such a person is not a person," and should under no circu have his license renewed; and pos conclusion of a court, on such fa such person was a suitable perso be an error in law, within the down in Hayden v. Allyn, 55 Conn Atl. 31. But the appellant did n and could not have made, such There was other evidence. Such idence should have been strong an cing, in order to rebut the presun unfitness arising from the facts fou it appears to have been sufficient t the court that the personal chara reputation of Kirby were such, or claimed violations of law were c under such circumstances of pallia take, or deception, as to clearly s he had not intentionally and delibe olated the conditions of his forme and was unlikely to violate the c of the new license.

The claim of law actually made b pellant is that the subordinate fac by the court raise an irrebuttable sumption that Kirby is not a suitab to be licensed. There is no found such a claim. The word "suitable scriptive of an applicant for licen the statute, is insusceptible of any inition that wholly excludes the views of the tribunal authorized mine the suitability of the applicant son is suitable who, by reason of hi ter,—his reputation in the commu previous conduct as a licensee,—is be suited or adapted to the orderly of a business which the law regar dangerous to public welfare that action by any other than a carefully person, duly licensed, is made a cri fense. It is patent that the adapt any person to such a business depe facts and circumstances that may cated, but cannot be fully defined whose probative force will differ in cases, and must in each case depen upon the sound judgment of the tribunal. The word is not new to

Digitized by Google

such connection. From the earli-
, retailing of liquors to be drunk on
ises has been treated by our legisla-
fficiently dangerous to public order
d its restriction to licensed persons.
he statute describes the persons who
licensed as those who shall be
fit by the justices themselves." In
statute, reciting that "many persons
t for that employment have imposed
unty court so as to obtain license,"
that the civil authority in the re-
towns shall nominate to the county
appointment the persons whom
k fit and suitable; and from that
the statutes regulating licenses to
uors have used the word "suitable"
ptive of the persons who may be
The statute in force at the time
ohibitory legislation of 1854 provid-
the civil authority in each town
minate such persons as they should
table, to the county court, and that
should grant licenses to such and
f such persons as they should judge
itable and necessary. When the
e, in 1872, returned to the policy of
licenses, the old phraseology was
ed. We think that in the present
e word is used with the meaning
npressed upon it by our early legis-
hat is, a personal fitness to perform
public duties required by law of
e,—and that such fitness of the man
gal requirement is, of necessity, in-
f general definition, and must in
be determined, in view of the stat-
ulations, by the licensing authority,
ercise of its best judgment. The
such authority may be illegal, if
ent is exercised arbitrarily or cor-
ut it is not illegal because another
might reach a different conclusion
same applicant.
eing the meaning attached to the
itable," the statute further guards
he licensing of unfit persons by ex-
rohibiting the granting of licenses
classes of persons, however suita-
plicant from any such class may be
y the licensing authority. Quite a
f such classes are specified. It is
ed that Kirby comes within any
s, unless he has been convicted of a
of the license law during the year
eding his application. It is claimed
the facts found the court below
ve held that Kirby had been so con-
It is too plain for argument that
ments of the justice of the peace
d in the record, which judgments
vacated by appeals to the superior
here the prosecutions were then
were not convictions, within the
of the statute. Therefore, the ap-
claim of law was properly over-
new trial is denied. The other
ncurred.

Appeal of HOPSON.

(Supreme Court of Errors of Connecticut. Nov. 28, 1894.)

LIQUOR LICENSE—DISCRETION OF COURT—REVIEW ON APPEAL.

Gen. St. §§ 3057–3061, giving to county commissioners the power of selecting suitable persons to conduct the business of selling liquors, and making their decision in the matter of granting licenses final, was amended by Pub. Acts 1893, p. 319, authorizing an appeal to the superior court from the decision of the commissioners. *Held*, that the latter act transferred to the superior court, on appeal, the discretionary powers of the county commissioners in the determination of a suitable person and place for the sale of liquors, and the exercise of such discretion by the court is not reviewable on appeal.

Appeal from superior court, New London county; George W. Wheeler, Judge.

John Hopson appealed from a decision of the county commissioners in granting a liquor license to one Morrissey. From a judgment revoking his license, Morrissey appeals. Appeal dismissed.

Donald G. Perkins, for appellant. Tracy Waller, for appellee.

HAMERSLEY, J. In the preceding case of Appeal of Smith, 31 Atl. 529, we held that a "suitable person" to receive a license to sell liquors, under the provisions of section 3053 of the General Statutes, is a person who is shown to the licensing authority to be suited or adapted to the orderly conduct of a business which the law regards as dangerous to public welfare, unless conducted by a carefully selected person, duly licensed, and that the fitness of the man to the legal requirement must, of necessity, in each case, be determined, in view of the statutory regulations, by the licensing authority, in the exercise of its best judgment. The term "suitable place," as designating a place adapted to the sale of liquors by such licensee, is used in the same section with a similar meaning, and the suitability of such place must be determined by the licensing authority in a similar manner. Batters v. Dunning, 49 Conn. 480. The appellant's claim of error in the exercise of its judgment by the court below in determining the suitability of the place in question, if the assigning of such error can support an appeal to this court, is disposed of by these cases.

The appellant also assigns error in the admission and rejection of testimony by the court below. Apparently, the errors assigned would not, if properly before us, furnish ground for a new trial; but we do not pass upon these questions, because we are of opinion that an appeal does not lie to this court from a judgment of the superior court for the correction of such errors as are assigned in this appeal.

The license law of 1872, as developed by amendments into its present form, may be regarded, to a limited extent, as a revenue

Digitized by Google

act; but its real and substantial characteristics are those of a police regulation, made in the exercise of the police powers of the state, to establish regulations appropriate for the preservation of public order, and the protection and promotion of public health and morals. In sustaining the constitutionality of the prohibitory statute of 1854, this court said: "The object of the legislature in passing it was to aid in the suppression of intemperance, pauperism, and crime,—evils which impose very heavy and onerous burdens upon the public. The expenses attending the prosecution of crimes, the support of criminals, and the maintenance of paupers are very great; and no one can doubt but that, to a very great extent, they have been caused by the multitude of tippling shops with which our community has been heretofore infested." State v. Brennan's Liquors, 25 Conn. 288. The failure of such legislation to accomplish its object induced the legislature to change the policy of prohibition to the policy of restriction, but its object remained the same. The main and controlling feature of the new policy consisted in provisions for the selection of persons suited to conduct the business of selling liquors in compliance with statutory regulations, and fitted to perform the quasi public duties which an acceptance of the special privileges granted involved. The duty of making such selection was imposed on county commissioners,—an administrative and not a judicial tribunal. This power of selection was, in its nature, a discretionary power, and the only limit placed by the legislature on the exercise of the discretion is found in the provisions forbidding the selection of specified classes of persons. So careful was the legislature to prevent any question as to the absolute nature of this discretion that in giving to county commissioners the power, and prescribing the manner, of revoking any license (a provision liable to be construed as affecting vested rights), it specially provided that such revocation "shall be final and conclusive, and not subject to appeal, review, or revision, by any other tribunal whatever." Gen. St. § 3061. Experience proved that the power vested in county commissioners was liable to abuse; that occasionally the judicial temper essential to its just exercise was lacking. In order to provide against such occasional abuse, the legislature of 1893 authorized an appeal from the decision of county commissioners to the superior court, to be tried by a judge of said court. Pub. Acts 1893, p. 319. If the legislation authorizing the appeal brings the matter within the exercise of judicial power, then this court has jurisdiction to correct any error in law committed in the exercise of such judicial power; and in that case we think the statutes regulating procedure should be construed so as to include the proceeding within their operation. The subject-matter of jurisdiction is the selection, under statutory limitations, of a person suited to perform in carrying out a system of police re The essential function of the selec.ing is the giving effect to a police regula dentally involving private rights or i It is evident that such a function c executed without the use of means in their nature, independently of the of their use, executive as well as We think such a function lies on th line of the division between execu judicial power, and that it is comp the legislature to commit its exerci to judicial or executive officers, as found necessary for the most effi forcement of its police regulations; do not think it necessary to exam ically the grounds for reaching suc clusion, for the practice of this st before and since the adoption of th tution, has treated the licensing of for the sale of intoxicating liquor execution of police regulations on t ject, as a function both judicial an tive in its nature, and as one which lature may properly commit to e partment of government, or to both, thus settled the true meaning of stitutional requirement that judicia ecutive powers shall each be confi separate magistracy, so far as it af question. Such a practical construc safely be accepted, when the theore tinction to be drawn by the court subtle and doubtful. This question Beard's Appeal, 64 Conn. 520, 30 and we held that "the cause becam a judicial nature when it was bro fore the superior court, and, as t ment there rendered was founded c conception of the law, it was as r subject of review as a judgment in er proceeding." In Appeal of Smit the error assigned was also the wr struction by the court below of the of the statute, and we held that su could properly be reviewed on appe in this case the only errors assign to the action of the judge in reac conclusion that the place mentioned a suitable place. The error so assig not be reviewed on appeal to this c

The granting of a license is no clusively an executive function that islature has no power to confide it to but it is nevertheless very clear function is different from that of disputed rights in the ordinary cou judicial trial. The technical rule bind a court in such a trial have be oped by the exigencies of judicial where each party is entitled, ex de titiae, to have a judgment, in case tains the facts alleged by testim must be received or rejected, and in strict compliance with the rul lished for the conduct of such comb the exercise of the judicial function

Digitized by Google

proceeding in question calls for no
al. The judge does not preside over
al combat, as in the trial of a civil
He receives aid in the formation of
onal judgment. The parties before
y properly attempt to influence that
nt, but it must be reached by the
ot in subordination to the particular
s of these parties, but in the inter-
he public, in whose behalf an appeal
exercise of the judicial power is al-
In reaching his conclusion, as well
recting the production of evidence to
in reaching that conclusion, he acts
xercise of a judicial discretion, which
he subject of review, and which is
l, for certain purposes, to the exer-
udicial power. The discretion should
cised in accordance with the appro-
nalogies of the rules governing judi-
ls; but, in the nature of things, the
nnot be bound in the particular ap-
of such analogies as it is bound in
ication of the strict rules of law in
al trial. The instances of the exer-
such discretion by courts, both in
; a result and in the methods by
he needed information is obtained,
iliar.

ct of 1893, in permitting an appeal
e decisions of county commissioners
superior court, called into action a
function for dealing with such ap-
ut it did not alter the actual nature
t of the power originally vested in
ty commissioners for the selection of
ersons and proper places for the sale
rs. The discretion necessary to the
of that power by the county com-
ers is, by the appeal, transferred to
e of the superior court; but there is
in the act which can be construed as
ng to vest in this court the final ex-
that discretion, or the control of its
by a judge of the superior court.
ng with such appeal the superior
bound by the rules of law regulating
ditions on which the discretionary
f selection shall be exercised, such
eaning and effect of the language of
lating statutes, and the acts required
tory regulations in order to permit
on on the original application or the
The court is also bound by those
ental rules of law that control all
of judicial or quasi judicial power.
not, for instance, arbitrarily refuse
ny evidence, or to listen to a person
to be heard. The failure of the
comply with such rules may be error
his court, upon appeal, will correct.
xercising the duty of determining a
person and a suitable place for the
liquors, imposed on the county com-
ers, and, by force of the appeal,
red, unchanged in its nature and ex-
a judge of the superior court, the
engaged in settling a matter of dis-
cretion. In this case, certainly, the court was not engaged in the trial of "matters of fact in any cause or action," within the meaning of the statute regulating appeals to this court.

Our conclusion is, the act of 1872, as now amended, is an exercise by the legislature of the police power of the state, for the purpose of promoting the suppression of intemperance, pauperism, and crime. The controlling feature of the act for the accomplishment of this purpose is the restriction of the sale of liquor at suitable places, by persons suited to the orderly conduct of the business, in accordance with the regulations prescribed by the act as essential to the accomplishment of its object. The selection of such persons and places is confided to the county commissioners, in the exercise, under statutory limitations, of their sound discretion and judgment. By the practical construction of our constitution, as settled by the contemporaneous and uniform action of legislature and courts, the function of such selection or licensing is one within the judicial as well as the executive power, and may be confided by the legislature to executive or to judicial officers. The act of 1893, authorizing an appeal from the decisions of the county commissioners to the superior court, made such an appeal a judicial proceeding, in so far that the judgment of the court confirming or refusing to confirm the decision appealed from may be reviewed by this court when such judgment is founded on a misconception of the law regulating such appeals; but the act, in transferring to a judge of the superior court the power of the county commissioners in the determination of a suitable person and place for the sale of liquors, does not alter the discretionary nature of that power, and therefore an appeal does not lie to this court for the correction of any errors claimed to have been committed by the judge in the lawful exercise of his sound discretion and judgment, and an appeal assigning only such errors must be dismissed, and may be dismissed on motion. The appeal is dismissed. The other judges concurred.

SEELEY v. HINCKS et al.

(Supreme Court of Errors of Connecticut. Sept. 1, 1894.)

WILLS—CONDITIONS OF ANNUITY—PERFORMANCE.

1. Under a will directing the executors to pay a grandson an annuity from testator's share of a certain partnership, if the grandson devotes so much of his personal attention to the business and to testator's estate as shall satisfy a committee named that he is entitled thereto, the performance of such services is a condition precedent to the payment of the annuity.

2. Where a will directs payment of an annuity to a grandson out of testator's share of a certain partnership, if the grandson shall devote so much of his personal attention to the interests of the business and the estate in general as shall satisfy a committee named that he is entitled

Digitized by Google

thereto, the formal tender by the grandson of his services, and the committee's rejection of them without a legal excuse, is an equivalent to the performance of the services, and entitles him to the annuity.

Case reserved from superior court, Fairfield county; Ralph Wheeler, Judge.

Action by Clinton B. Seeley against William B. Hincks and others, executors of Phineas T. Barnum, for an accounting and a recovery of a legacy. Case reserved, and judgment for plaintiff.

Goodwin Stoddard and William D. Bishop, Jr., for plaintiff. Curtis Thompson, for defendants.

TORRANCE, J. This action is brought to recover money claimed to be due under the second article of a certain codicil to the will of the late Phineas T. Barnum, dated September 24, 1890, which reads as follows: "It is my will and I hereby authorize and direct my executors to pay to my eldest grandson, Clinton Barnum Seeley, three per cent. of the net profits on the share of my estate annually in such shows which my estate shall have an interest in after my decease, if said Clinton Barnum Seeley shall faithfully devote so much of his personal attention to the interests of such shows, and of my estate in general, and render such services for the same, as shall sufficiently satisfy my daughter, Caroline C. Thompson, Benjamin Fish, and Henry E. Bowser, or a majority of them, that he is entitled to it; but if the said three per cent. amounts to ten thousand dollars or more a year, then no larger sum than ten thousand dollars a year shall be paid to him, and the excess shall belong to my estate; and I guaranty that said three per cent. thereof will amount to as much as five thousand dollars a year; and, if the sum does not, then I direct and authorize my executors to pay to him so much as will make up the sum of five thousand dollars a year, so long as he shall render such services satisfactorily as aforesaid." Mr. Barnum died in April, 1891, and since his death his estate has continued the partnership theretofore existing between himself and James A. Bailey in the business mentioned in the above extract from the codicil as the "shows." This suit is brought by the plaintiff, as beneficiary under said codicil, for the percentage of net profits which he claims to be due to him under said codicil for the year ensuing the death of Mr. Barnum. In his complaint he demanded an accounting for such profits, but on the trial below this claim was not pressed. It is conceded by all concerned that, if anything is to be paid to the plaintiff under said codicil in this suit, the sum to be so paid is $5,000.

The court below made a finding of facts, and reserved for the advice of this court the question what judgment shall be rendered thereon. The following is a statement of the substance of the main material facts so found: The plaintiff, now about 27 years of age, is the eldest grandson of the testator, a sessed in a high degree the affection grandfather. Mr. Barnum, who had n his own, desired to make the plaintiff cessor both in name and in the mana of the show business. In pursuance purpose, which he cherished very s the testator attempted more than procure for the plaintiff an interest copartnership of Barnum & Bailey, ing to the determined opposition of M ey, who was the active manager of t ness, was unable to accomplish it. time in the forepart of 1890, after t forts to get the plaintiff into the co ship had failed, Mr. Barnum prepared draft for a codicil to his will substanti same as the codicil which he subs executed, and under which this claim made. This draft he read to the some time before he executed the c September 24, 1890. At the time the died, in April, 1891, the shows had out for the season of 1891, and h exhibiting for some weeks. On the May, 1891, the plaintiff, both verbally writing, tendered his services to the e of Mr. Barnum, and to the persons n said codicil, to the satisfaction of w was to render the services therein for. In his written tender he said: to notify you I am willing to render t such services as may be required of m hereby tender to you, as executors estate, my services and personal atte the interest of said shows, and to sa generally, as may be reasonably req me." The finding then proceeds as "The executors had, prior to such te termined to refuse to give the plain employment whatever, which decisi communicated to him through Execut but not until after said tender had be Said executors have never change minds in this regard, but have at s absolutely refused, and still refuse, the plaintiff any employment, or ac services from him, either with sai or for Mr. Barnum's estate in gene for that reason the plaintiff has ren such services. * * * The executor it for the interest of the show not t nize Mr. Bailey, and of the estate n ploy the plaintiff in any position then another, and not to pay him the s tioned in the will." In view of t tiff's age and increased experience, finds there was "no evidence to show was not at least as competent to wor show, or the estate in general, at he tendered his services to the exec during the period of his services Barnum." No reason is found why not have been helpfully associated executors in the management of the some extent, or been employed a agent with the show, "unless it was Bailey may have done the estate s

Digitized by Google

consequence." Mr. Bailey's opposi-
ne plaintiff going with the show was
unced after as before Mr. Barnum's
nd he so informed the executors be-
plaintiff tendered his services to
On the 14th of April, 1892, the plain-
etter made demand upon the exec-
the moneys which he claimed to
to him under said codicil. To this
the executors replied in writing, to
t that when they received from the
a certificate signed by Mrs. Thomp-
Messrs. Fish and Bowser, or a
of them, that plaintiff had perform-
services required under the codicil,
ld pay the money. Nothing has ever
d to the plaintiff under said codicil.
und that the only reason why the
s did not pay the plaintiff was that
led to receive such a certificate as
ed for in the above letter; the only
hy said certificate was not furnished
the plaintiff had rendered no services
show or the estate; and the only
ne plaintiff rendered no such services
ause of the refusal of the executors
him employment, or to accept his

even a cursory examination of the
n the codicil upon which the plaintiff
s claim, it seems quite clear that
r gift or benefit is thereby conferred
n is conferred upon at least two con-
One of these is that he shall faith-
vote his personal attention to the
of the shows and of the estate in
and render services for the same;
other is that such personal atten-
such services "shall sufficiently sat-
e persons named, or a majority of
at he is entitled to the money. The
contends that these are conditions
ent, but we think it is quite clear
ey are conditions precedent. "It
o be agreed that, in regard to all
s, whether in a deed or will or in
ontracts, where the condition is in
re of a consideration for the conces-
performance will be regarded as in-
o precede the vesting of any right,
condition precedent." 2 Redf. Wills,
ere, in this codicil, what is required
laintiff is clearly, to some extent at
the nature of a consideration for
ey to be paid. There is no present
the money, subject to be divested
lure to do what is required of him
atisfaction of the persons named.
rative words used to confer the bene-
ot "give," or "bequeath," or other
nt words importing a present gift;
the testator does not, in form at
ake a gift at all; he merely au-
and directs his executors to pay the
f the plaintiff shall, by doing what
red of him in the mode prescribed,
he satisfaction of the persons named,
himself to it. The codicil provides
that the payment shall not be made—the money shall not be due—unless and until the plaintiff shall have previously done the prescribed things, and the persons named shall have in some way expressed themselves as satisfied that he is on that account entitled to it. He is to be "entitled" to the money by what he does, if it shall "sufficiently satisfy" those persons. His acquisition of the money, and not his retention of it, is made to depend on the fulfillment of the conditions. Construing this clause of the codicil as a whole, it seems manifest that the conditions in question are precedent, and not subsequent; and, consequently, the plaintiff takes nothing under its provisions unless and until the conditions are fulfilled, or that has been done which in law, or within the expressed intent of the testator, is equivalent thereto. It seems equally clear that the condition to devote his attention and render services, which is imposed on the plaintiff, must be fulfilled in and during each year, to entitle the plaintiff to the money for each year. The payments are to be made annually, and this condition must be fulfilled annually and during the year for which payment is claimed. The fulfillment of this condition by the plaintiff for and during one year will not avail him for the next year. In the present case the plaintiff is seeking to recover the money for the year ensuing the testator's death. To entitle him to recover, he must show performance of the conditions, or that which in law, or within the intent of the testator, is equivalent to performance for that year.

The executors contend that nothing but the strict, literal fulfillment of these conditions can avail the plaintiff; and that as this, at least for the year for which he now seeks to recover, has become impossible, he cannot succeed in the present action. It is doubtless true as a general rule that, before a gift or legacy made upon condition precedent will take effect, the condition must be performed or fulfilled; and the fact that the beneficiary in such cases is not at fault will in general make no difference. 2 Redf. Wills (3d Ed.) 284; 2 Woerner, Adm'n, 953; Johnson v. Warren, 74 Mich. 491, 42 N. W. 74. This rule, however, is not without its exceptions. Thus, "where a condition precedent is originally impossible, or is made so by the act or default of the testator, or is illegal as involving malum prohibitum, the bequest is absolute, just as if the condition had been subsequent." 2 Jarm. Wills (6th Am. Ed.) 15. Another exception exists where a testator confers a benefit upon a condition to be performed to or for the benefit of his estate, or to or in favor of some third party, and in his will he manifests an intent to dispense with its performance when that is prevented by those having charge of his estate or by such third party. Page v. Frazer, 14 Bush, 205. In such cases, though the condition is not performed, the benefit

Digitized by Google

takes effect, because such is the intent of the testator. From the record in the case at bar it is tolerably clear that the action of the executors in refusing to employ the plaintiff, or to accept his services on behalf of the show or the estate in general, when tendered, is the sole cause of the nonfulfillment of the condition to be performed by the plaintiff. He was presumably capable of rendering services as valuable to the shows and to the estate in general as during the period of his services to Mr. Barnum, and he was ready and willing and offered to perform them. Under these circumstances, if it was the duty of the executors to employ the plaintiff, or to accept his services when tendered, it is not too much to say that their conduct prevented the fulfillment of the conditions.

Was it their duty, or were they under any obligation, to employ the plaintiff, or to accept his services when tendered? They contend that they were not. Their claim in this behalf is thus expressed in the brief: "It is manifest that the testator did not intend to direct his executors to employ the plaintiff, nor confine him to such work as they might require of him. We think Mr. Barnum desired the plaintiff to devote his personal attention to, and render services for, the show and estate, not as an employé, but in some larger and more effective way, as he himself had been accustomed to do in his lifetime, by using his influence and devoting his talents to the advancement of them." But as the executors were in full control of the estate, and of the show as a part of it, and as they refused to employ the plaintiff, or to accept his services on behalf of either, it is somewhat difficult to see how he could have acted as his grandfather did in his lifetime in this regard, or how he could have rendered such services as the codicil contemplates. It is true, doubtless, that the testator did not intend to confine the plaintiff simply to such services as the executors might require of him, or that he should be treated as an ordinary employé; but, reading the codicil in the light of all the facts and circumstances under which it was made, we are satisfied that the testator intended that his executors should either assign the plaintiff to the performance of such duties in connection with the show and the estate as he was capable of, or should allow and permit him to select and perform such duties, in order that he might have an opportunity to entitle himself to the benefit conferred upon him. In this sense we think the testator intended the employment of the plaintiff by the executors. It is true the testator does not lay this duty upon the executors in express terms, but he makes the rendition of services the condition of his bounty, and he knew it could not be complied with without the aid and co-operation of the executors. Unless, then, we assume that the testator meant to insure the defeat of his gift to the plaintiff, he mus
intended that his executors should
him in the sense explained. Furth
this intention becomes quite manifes
we consider what the testator eviden
in mind when he executed the codic
strong desire was to have the plaint
ceed him in the show business, and h
ed him to have an opportunity to fit
for the business. In the codicil und
sideration, he directs his executors,
event of his interests in the show b
being offered for sale, to give the
the first chance to buy such interests
same price as any other party sha
and to extend to him every advant
regard to credit and terms of paym
the same, as the executors and his d
may consider reasonably safe for his
He contemplates the employment
plaintiff in connection with the sho
position to which he could not attai
out the appointment of the executo
he expressly specifies how he shall
commodated and treated whenever "
travel with the large show." It is
that the paramount intention of the
in making the gift in question was
provide for the support of the plain
cause it was only of a temporary
and by his will he leaves him so
like half a million dollars. The gift
tion appears to be in the nature of
ducement held out to the plaintiff t
into the employment of the estate, a
to acquire the knowledge, skill, an
rience which would enable him to p
eventually, and with safety to hims
interest of the estate in the show b
and to successfully carry on such b
as the successor of the testator. I
the paramount object of the testator
codicil, so far as it relates to the p
seems to be benefit to the plaintiff,
purpose above indicated, rather tha
fit to the estate of the testator, altho
had this in mind also; and as this
practically speaking, could not be
without the aid and co-operation of
ecutors in giving the plaintiff a f
fair opportunity to perform the requi
dition, the obligation to give the
such full and fair opportunity is by a
implication laid upon the executors
testator. In no other way could the
ed condition be performed so as to e
ly carry out the testator's intentions.

The executors failed to perform th
thus imposed upon them, without le
cuse. This is manifest from the facts
While undoubtedly they acted in goo
under an honest mistake as to their du
for what they deemed to be the best i
of the estate, it none the less remai
that their conduct is the sole cause,
speaking, why the conditions to be pe
by the plaintiff were not fulfilled; f
found that the only reason why the

Digitized by Google

render the services required was be-
f the conduct of the executors; and
y reason why the persons named did
ress their satisfaction, as required, was
the plaintiff had rendered no serv-
thus appears that the conditions to be
ed by the plaintiff were not fulfilled
ecause the executors prevented their
ent. This certainly is a result nev-
mplated by the testator, for he must
pposed that his executors would obey
lied obligation laid upon them in the
to give the plaintiff an opportunity
out the testator's plan and purpose
in expressed. In matters of contract
he party to whom or for whose bene-
ndition precedent is to be performed
its performance, he is not, as a
rmitted to avail himself of his wrong
oing. "It is a well-settled and salu-
e that a party cannot insist upon a
n precedent when its nonperformance
n caused by himself." Young v. Hun-
. Y. 203. "If he who is to be bene-
another's fulfilling his agreement is
sion why it is not carried into execu-
e party bound to the performance will
e same condition as if the agreement
n literally fulfilled." Hosmer, J., in
. Ward, 2 Conn. 500. This rule, if ap-
the case at bar, would determine the
favor of the plaintiff; but we do not
conclusion in this case upon that
t upon the broader ground that it is
ng with the intention of the testator.
have already seen, the main object
pose of the testator in this codicil, so
relates to the plaintiff, is benefit and
ge to him, and not to the estate; ben-
nniarily in the shape of an annual in-
r a time; and benefit in the shape of
ge, skill, and experience to fit him to
the successor of the testator in busi-
well as in name. To carry out this
the testator conferred upon the
the right to do what the codicil re-
f him. He imposed upon his exec-
e duty of permitting him to do so,
iding him, so far as might be neces-
carry out the plan of the testator;
at is of more significance, the power
t the gift of the money to the plain-
ested solely in the plaintiff himself
three persons named. Plainly, the
did not intend that anybody else
ave the power to defeat the payment
oney by anything they did or might
ading this codicil in the light of all
s and circumstances under which it
ade, as they appear of record, we
e intent of the testator is that if the
is ready and willing to do, and is
ly capable of doing, what the codicil
of him, and offers to do so, but is
d from so doing by the executors, or
having power and authority in the
this shall be accounted to him as
ance, and shall place him just where
performance of the condition on his part would have placed him. In Page v. Frazer, supra, a will with a condition precedent in it was construed in a similar manner. In that case the condition of the gift was that the legatee, a sister of the testator, should become reconciled, within a given time, to her brother and sisters. This was held to be a condition precedent. The court said that if the brother and sisters were unwilling to come to terms of amity and reconciliation with the legatee, and thus prevented the performance of the condition, this would not defeat the devise; that, if the legatee in good faith made advances to them for reconciliation, it was their duty under the will to receive those advances, and become reconciled to her; and that if they so acted as to prevent the accomplishment of the testator's will in this regard, then "the offer to perform, and the rejection or defeat of that offer by the brother and sisters, * * * will be equivalent to performance, and the devise will vest." This was simply carrying out the intent of the testator as gathered from the entire will. As the plaintiff was thus, at the end of the year ensuing the death of the testator, in the same position as if he had actually performed the services on his part, it then became the duty of the three persons named, or a majority of them, to do what the codicil requires of them in the premises, in the same manner as if such actual performance had taken place. This duty they did not then perform, nor have they since performed it. It is true they did, in point of form, certify to the executors that the plaintiff had not satisfied them, or a majority of them, that he was entitled to the money; but this action and conclusion was taken and reached under what was doubtless the honest but mistaken view that unless and until the plaintiff had actually done what the codicil requires of him they had no duty to perform with reference to him under the codicil; and so we think such certificate should be regarded as of no validity. We think the plaintiff is now entitled to the performance by the three persons named, or a majority of them, of the duty thus imposed upon them by the codicil, just as if he had actually rendered the best services that he was capable of rendering during the year ensuing the death of Mr. Barnum. As these persons derive their power to act in this behalf from the codicil, and not from the court, their discretion, exercised in good faith, in the performance of the duty imposed upon them, cannot be controlled by the court. All the court can require is that they shall act. It will be presumed that they will act in good faith to carry out the intent of the testator.

The superior court is advised to render judgment that Mrs. Thompson, Mr. Fish, and Mr. Bowser, or a majority of them, shall, within such reasonable time as said court may direct, perform the duty imposed upon them by said codicil towards the plaintiff,

Digitized by Google

and with reference to the year ensuing the death of the testator, as if actual performance of the services required of the plaintiff for that year had taken place, and shall signify their conclusion in the premises to the executors of said estate. The other judges concurred.

MORRIS et al. v. BOLLES et al.

(Supreme Court of Errors of Connecticut. Sept. 1, 1894.)

CONSTRUCTION OF WILL — DEVISE TO CHILDREN — RIGHTS OF SURVIVORSHIP—STATUTE OF PERPETUITIES—PARTIAL INVALIDITY OF DEVISE.

1. Testator gave the residue of his property to trustees, one-half of the income to be paid to his "children here named." All of his children were then named. The trust was to continue until the death of the last child. No provision was made for the disposition of the share of the income of any child after its death, except that in a codicil, made after the death of one of the children, it was provided that all legacies should be paid to the legal heirs of any beneficiary dying before testator. *Held*, that the children took individually as tenants in common, so that on the death of any child his share of the income became assets of his estate.

2. Testator devised the residue of his estate to trustees, the trust to continue until the death of the last of his five children. One-half of the income was to be paid to his children, and on the death of his last child the estate was to be divided equally among his "grandchildren and their heirs." *Held*, that the provision for the grandchildren violated the statute of perpetuities, as the title to the remainder did not vest in the grandchildren as a class at testator's death, but vested on the termination of the trust in the grandchildren then living and the heirs of any deceased grandchild.

3. Testator devised his estate to trustees, the trust to continue until the death of the last of his children, and provided (1) for the payment of certain annuities, (2) for the payment of one-half of the residue of the income to his children, (3) for the accumulation of the remainder of the income until the death of his last child, when the estate should be divided among his "grandchildren and their heirs." *Held*, that the invalidity of the bequest to the "grandchildren and their heirs," as contravening the statute of perpetuities, did not defeat the entire trust, since it was not the leading and primary object of the trust.

Case reserved from superior court, Hartford county; Shumway, Judge.

Suit by Jonathan F. Morris and others, executors, against William W. Bolles and others, for the construction of a will. The case was reserved for the consideration of the supreme court.

Charles E. Gross, for the executors and trustees, and certain of the grandchildren. Henry C. Robinson and E. Henry Hyde, Jr., for Margaret B. Quiggle and George A. Bolles, George A. Bolles, administrator, and Minnie S. Bolles, widow of John F. Bolles, deceased. Arthur L. Shipman, for George P. Bolles and William H. Bolles, children of Samuel P. Bolles, deceased.

FENN, J. This is a complaint brought by the executors and trustees under the will of William Bolles, late of Hartford, ed, claiming a construction of said w advice as to their duties. The s court, by consent of the parties, fo the allegations of the complaint true, served the questions arising upon th for the consideration and advice court. The testator died in 1889, lea estate inventoried at upward of $1, The will in question was executed and a codicil thereto was executed The testator was 81 years of age at t of his decease. He had been four tim ried. William W. Bolles, one of the ants, is the child of the second wife. other children named in the will plaint are the children of the thir He married his fourth wife after th tion of the will, but before the exec the codicil, which reaffirmed the w his last wife he had no children. entered into an antenuptial contra her, whereby she acquired by the n no interest in his estate. At the dat execution of the will the testator l living children, namely, four sons, W., Samuel P., George A., and J Bolles, and one daughter, Margaret gie. Samuel P. died in 1884, before cution of the codicil, leaving a wid living, and not remarried, and two s living, born respectively in 1881 a John F. died since the testator, le widow and two minor children. Th children of the testator are living, and each has issue.

So much of the will and codicil here material may be stated and sum as follows: The testator, in his wi direction for the payment of debts a ges, makes certain direct bequests to (except Samuel P., to whom noth given directly) and to a nephew; trustees, the plaintiffs, he gives certa fied sums to be held in trust for his respectively; providing: "If any children named in the above-mention shall die, not having received the any part of the sum, held in trust fo her or them, and not leaving any heirs of body, then the amount or su go back into my estate; but if, in su there shall be any lawful heirs of bo the said sum or sums, shall be held trustees in trust for said heir or he my trustees shall pay over the sum heir or heirs when they shall arriv age of twenty-one years, if they sh it best to do so." By the sixth claus will the entire rest and residue of th is given to the trustees named, as a be held and managed by them for poses of paying from the income of certain named sums or annuities, his son Samuel P. Bolles of $1,250 during his life; and three others, o mother of his late wife, and two t each of $200 annually. The first p

Digitized by Google

ext clause is as follows: "Seventh. e payment of all expenses, charges, c., and annuities, and all sums here- xpressed, my will is that one-half of me of my estate shall be paid in rts to my children here named, to W. Bolles, Samuel P. Bolles, George s, Margaret L. Bolles, and John F. but the said Margaret is to receive e of said income free from the con- her husband, if she shall marry. ainder of the income of my estate, accumulations thereon, I desire my to hold and invest in the manner expressed." The testator then, in ainder of this and in succeeding gives instructions as to investments, nent, and other matters, not here es- o note, and then in the eleventh ays: "My will is that the trusts n this will shall exist and last until h of my last surviving child; then cease, and my estate then existing divided equally among my grand- and their heirs. In the eighth the codicil it is provided that "all ests and legacies made in my will ally limited or directed nor changed odicil, and also those made in this shall be paid to the legal heirs of the beneficiaries of said will and icil as shall have deceased during me."

mplaint alleged that by reason of h of John F. Bolles the following have arisen, concerning which ad- n is asked, with direction to the in what manner they shall execute st: "(1) Are the children of said P. Bolles, to wit, George P. Bolles and H. Bolles, entitled to receive any f the one-half of the income of said entioned in and under the provisions eventh clause of said original will? the death of the testator, did the n F. Bolles take a vested right to share of said one-half of the income estate during the entire trust period by said will, to wit, until the death ast surviving child of said testator? o, from and after his death, was and duty of the plaintiffs to pay said said one-half of said income to George s as administrator of the estate of n F. Bolles? Or shall the plaintiffs e said share of said one-half of said o and among the widow and heirs John F. Bolles, deceased? (3) From the death of the said John F. Bolles, hare of said one-half of said income tate become a part of the remainder come of said estate, to be held and by the trustees with the other half income?" "(5) From and after the the testator's son John F. Bolles, as, is, and will be the duty of said , as trustees, as to that part of the one-half of the income of said trust estate which, by the provisions of the seventh clause of the original will, the trustees were directed to pay to said John F. Bolles? (6) Is the gift over to the grandchildren and their heirs upon the death of the last surviving child of the testator void as contravening the provisions of the statute against perpetuities? And if it is void, what are the respective rights and interests of the defendants hereto in said estate, and what are the duties of the plaintiffs, as executors and trustees, in respect to holding, dividing, and distributing said estate, both principal and income? (7) Upon the death of the last surviving child of the testator, will the estate then existing be intestate estate of the testator, or is it so to-day?"

We think that by the language used in the seventh clause of the will it is reasonably clear the testator intended to give to each of his five children named therein an equitable estate or interest in one tenth of the net income of his residuary estate remaining after the payment from the entire estate or from the gross income of "all expenses, charges, taxes, etc., and annuities, and all sums heretofore expressed"; that he intended such interest or estate in such share of the net income given to each of his children to continue during the existence of the trust,—that is, until the death of the last survivor of such children. It was, therefore, in effect a gift to each of his children for a period which might, and in fact in the case of four out of five of such children would, outlast their lives. In such event, the share of income for the remainder of the period of any child dying before the last survivor would be assets of the estate, testate or intestate, of such child. If this be the intention, there is manifestly nothing in it in any wise contrary to rules of law, or considerations of public policy. That such was the purpose of the testator several things unite to prove. In the first place, the testator made no provision whatever concerning the disposition of the share of income of any child, after the death of such child, during the continuance of such trust,—the event sure to happen in the case of four out of five of such children. In this respect the case is differentiated from that of Ketchum v. Corse, 65 Conn. 85, 31 Atl. 486, which has since come before us for consideration, where such events were specially provided for by the testator. It is not to be supposed that such failure to provide could be due to oversight. It is rather to be inferred that the testator believed that full provision for such contingencies had been made. This supposition is strengthened by the fact that in making his codicil, Samuel having then died, he directed in the eighth clause of that instrument that all bequests and legacies made in his will, not specifically limited or directed, and also those made in the codicil, should be paid to the legal heirs of such a-

Digitized by Google

the beneficiaries as should have deceased during his lifetime. We think, in making this provision, he had in mind, among other things, the seventh clause of the will, and limited the expression to children dying in his lifetime, because he believed the clause in question would effectuate a similar, though, as we shall see later, not identically the same, disposition in case of those dying during the continuance of the trust and after his own decease.

It is the claim in behalf of the surviving children, however, that this gift of income to the children is to those living at the death of the testator as a class, and belongs to the survivors of such class. If this be true, then in that way it would also be true that the testator has made full provision for the contingency of the death of each child dying during the continuance of the trust. It would also be true that the gift of income beneficial to Samuel P. Bolles, who died in the lifetime of the testator, goes to the survivors; for in that case the gift could not be saved for his estate by the eighth clause of the codicil, or by the provisions of Gen. St. § 541. If the gift to Samuel P. Bolles was to him as one of a class to which was attached the incident of survivorship, then neither the statute could give the issue what the parent was not intended to take, nor could the testator fairly be presumed by the language of the codicil to so change the meaning of his will as originally expressed in the said seventh clause. But we are convinced that the testator did not intend this gift of income to be to his children as a class. It is urged in favor of the claim that they are described as children, and that the succeeding recital of their names is simply a description of the several members of the class. It is said that in other portions of the will and codicil the gifts to the children are separate, and that where they are gifts of inheritance the testator plainly indicates it; that it is a familiar rule that "prima facie joint legatees take as a class," citing Bolles v. Smith, 39 Conn. 217, 218. In the case cited the language of this court was: "It is a general rule of construction that where a legacy is given to two or more persons nominatim, to be equally divided among them, and one of them dies before the testator, his share will become intestate; but where the legacy is to two or more as a class the share of a deceased legatee goes to the survivor or survivors. Prima facie, joint legatees take as a class; otherwise where the legacy is given to them as tenants in common. All these rules, however, yield to the manifest intention of the testator as gathered from the whole will, viewed in the light of the surrounding circumstances." It was further said in that case, the legatees being described as sons of a late brother, and the record showing they were all of his sons: "If there was nothing else in the case, it would be clear that they would take as a class. But the will names all the sons, and that they shall take equally. That dicates an intention that they shou as tenants in common. Thus far the used by the testator gives no cer dication of his will in this respect. therefore, look further for his intenti the quite recent case of Bill v. Pa Conn. 142, 143, 25 Atl. 354, Bolles is cited, the same judge (Carpenter) the opinion, and it is said: "The law a tenancy in common to a joint Even a joint tenancy does not, of force, always carry with it a right o orship." And it was further said, to the testatrix: "She simply name gatees, indicating in a general way tion which each sustained to herself, vided that her property should be divided among them. Thus each individually, and not as a member of as a tenant in common, and not as tenant." In the case before us the of the testator is not alone—as in t cited, and nearly all others on th in the books—to be considered as to such a contingency as that wh pened when Samuel P. died in his and the inquiry is not confined to the whether in such an event it was the that the part which would have to Samuel in case of his survival survive to the other children, or sh come the intestate estate of the testa the additional question arises as to h tions in case of the death of childr after his own decease, and after nary estate not continued by the exis a trust would have not only vested right, but have been distributed and ed. In such a case, where the dire the testator is, as here, that the po the income which the persons named ficiaries are to receive shall be them from time to time, not in on undivided sum or payment for the wh "paid in equal parts," and not to generally, but "to my children he ed," there can, we think, be no doubt son and precedent concur in the co that, in the language just quoted opinion in Bill v. Payne, each child take "individually, and not as a me a class; as a tenant in common, an a joint tenant." Such being our vi this point, namely, that the testator intend to make a class, that he did int gift to each of his children of a sha come, to continue during the life of t thereby outlasting the lives of all s dren except the last survivor, is evidenced by the whole scheme of from which it seems apparent that the controlling purpose of the tes treat with substantial equality all tho ing in the same relation to him, wh children or grandchildren; and it is

Digitized by Google

both from the whole will and from
icil, that the thoughtful care of the
extended to the families of those of
dren who should die before the ter-
n of the trusts created by his will.
ill next consider the construction and
of the eleventh clause of the will,
: "My will is that the trusts created
will shall exist and last until the death
ast surviving child; then it shall cease,
estate then existing shall be divided
among my grandchildren and their
Under this language, the first ques-
ich arises is as to the validity of this
n for final disposition or division
"my grandchildren and their heirs."
port of its validity two claims were
First, that by the word "heirs" was
l the heirs of such of the grandchil-
the testator as died in his own life-
econd, "that the gift is to the grand-
of the testator as a class, both those
t his death and those since born or
ay be born hereafter;" that it is "a
gift, speaking from the death of the
, and then vesting in the class which
o receive after-born grandchildren."
ing the first of these claims, there is
in the whole structure of the will to
any such inference as to the intention
estator; and, assuming that the words
heirs" meant the heirs of deceased
ildren, it would do violence to common
suppose that in making provision for
al division of then existing estate, at a
remote from his own death as the
the last surviving of his five children
bly would be,—a time when all possi-
dchildren would have been born, or in
the contemplation of law, and when
natural to suppose some of them would
eceased,—he should have intentionally
l that the heirs of those, if any, who
his own lifetime, should take, and the
those who survived him, but died
the continuance of the trust, should
e. The familiar rule invoked to deter-
hether a gift is of a fee or of a less
n many cases in this state, among oth-
lps v. Robbins, 40 Conn. 250; White v.
52 Conn. 518; Phelps v. Phelps, 55
59, 11 Atl. 596; Johnes v. Beers, 57
95, 18 Atl. 100; and Coe v. James, 54
11, 9 Atl. 392,—that where a bequest
to one, and in case of his death to his
r, in case of his dying without issue,
er, in the absence of anything else in
which is decisive, the testator is to be
ood as meaning in case of such death
wn lifetime, thus defining who should
ke by substitution, has, we think, no
ing or useful application to a case and
like the present.
g, then, to the claim that this gift is
randchildren of the testator as a class,
ther necessary, in order to enable the
benefit those in whose behalf it is
made, that it should either be held that the remainder vested in such class at the death of the testator, or that, vesting at the death of the last surviving child, it then vested only in the grandchildren then living; and that in either case there was no attempt by the testator to carry the estate, or undefined and uncertain portions of it, to the heirs of a deceased grandchild dying after the death of the testator. This is so because such a gift to such heirs, as purchasers, would offend the statute of perpetuities; and, since the gift to grandchildren would be inseparable from the offensive gift to heirs, and thus "coupled with an illegal bequest," the whole would fall together. Andrews v. Rice, 53 Conn. 566, 5 Atl. 823. This is not denied. But it is asserted that the words used, "my grandchildren and their heirs," should not be construed as meaning the same as "my grandchildren and the heirs of any deceased grandchildren"; that this is not the true interpretation and equivalent of the language actually used, but that by this expression the testator — a layman, using, it is claimed, his own language, or that of some other layman unskilled in the employment of technical terms—"simply used, as he understood, the ordinary language for the conveyance of real estate, or for the vesting of an absolute estate, by will"; that is to say, using the word "heirs" to denote an estate of inheritance, or absolute estate, as a word of limitation, and not of purchase. But it seems to us that there are difficulties in the way of such construction, and that these difficulties are not overcome by the further consideration urged that the other construction, as meaning "heirs of deceased grandchildren," would lead to uncertainty as to whether the testator meant such heirs to take by a per capita or per stirpes distribution; and that the former would, as it is asserted, be absurd, while the latter would be against the testator's express direction for an equal division. It is unnecessary to discuss this, for, even if it were conceded, the fact would remain that the construction claimed would be a forced one, and do violence to the language used. Whatever inapt technical expressions a layman might employ, it is hardly conceivable that any man of ordinary intelligence and business experience and capacity would order an equal distribution among his grandchildren and their heirs, when he intended to say that only his grandchildren should take. Nor is it probable the testator intended that at the presumably remote period when the trust should cease children of then deceased grandchildren should take nothing, either derivatively or otherwise, as would be the case if his meaning was as claimed, and the remainder estate did not vest in interest until the termination of the trust. On the other hand, that it cannot be held sooner to vest needs no argument, since it must be so decided in conformity to previous decisions in this state, and for the reasons and upon the considerations therein

Digitized by Google

fully stated. Wheeler v. Fellowes, 52 Conn. 238; Andrews v. Rice, supra; Landers v. Dell, 61 Conn. 189, 23 Atl. 1083. It seems to us, therefore, that this claim cannot be sustained, and that, in accordance with a long line of decisions in this state, the residuary devise and bequest in the eleventh clause of the will is void, and the residuum is intestate estate. Jocelyn v. Nott, 44 Conn. 55; Rand v. Butler, 48 Conn. 293; Alfred v. Marks, 49 Conn. 473; Wheeler v. Fellowes, supra; Bristol v. Bristol, 53 Conn. 242, 5 Atl. 687; Farnam v. Farnam, 53 Conn. 261, 2 Atl. 325, and 5 Atl. 682; Andrews v. Rice, supra; Leake v. Watson, 60 Conn. 498, 21 Atl. 1075; Beers v. Narramore, 61 Conn. 13, 22 Atl. 1061; Landers v. Dell, supra; Belfield v. Booth, 63 Conn. 299, 27 Atl. 585.

What effect, then, does this invalidity of the provision in the eleventh clause have upon the preceding provision in the same clause in reference to the trust, that it shall exist and last until the death of the last surviving child? It appears to us that this provision may stand and be effectual. Andrews v. Rice, supra; Beers v. Narramore, supra; Landers v. Dell, supra. The rule to be applied is stated in Andrews v. Rice, 53 Conn. 571, 5 Atl. 823: "How are these trusts, provided for in the will, affected by declaring the final disposition of the trust fund void? In answering that question we must ascertain the intention of the testator as to the object of those trusts, and whether that object is so independent of and severable from the illegal object that it can be carried into effect with due regard to the legal rights of all the parties interested, without annulling any of the legal provisions of the will, and without adding thereto. If the leading and primary object was to accumulate a fund for illegal distribution, or if the trusts were strictly subservient or auxiliary to such a distribution, so as to be themselves tainted with the illegality, or if they are so connected therewith that they cannot be separated and carried into effect without involving consequences substantially and materially different from what the testator intended, then they too must fall with the illegal distribution." Relying upon this statement, and upon the further principle laid down in Bristol v. Bristol, 53 Conn. 257, 5 Atl. 687, that a trust for several purposes, some valid and some invalid, "will be supported so far as it is good, provided such part is separable from the rest," it is the claim in behalf of the children of the testator that this trust is severable; that the gift of the income to the children, and of the fund to produce the income, is good; that the trust for accumulation is for an improper purpose, and is void. We think, however, that it would be difficult to thus sever the trust; that the whole must stand or fall together. And we think it may stand. The purposes of such trust are clearly threefold, not twofold merely. There is, first, the payment of certain annuities. These may continue as long as the contemplated the trust. And they may, at least sibility, exhaust at some time the en income of the fund. There is, then, t ment of income to the children, con indeed, claimed—to be valid. There i ly, the provision for the accumula "the remainder of the income of my and the accumulations thereon." It that the testator directed this accum to be added to and form a part of iduary estate, and that the provisio for the final division of such estate under our decisions, be held void. do not think it can be said that such a lation for "illegal distribution" was "t ing and primary object." On the co it seems to us much more probab this entire scheme was one devised testator for the controlling purpose ing to his children such provision ou large estate as seemed to him would ple for their wants, fully enough fo best interests and happiness, and mos to be of lasting benefit to them an families; that, therefore, the testator that a portion of the income of th iduary estate should be accumulate period of time in itself not illegal i to be considered so far independent ultimate disposition provided for that be presumed the testator intended it benefit of the beneficiaries receivi nuities and of the children receiving We therefore say, in the language drews v. Rice, 53 Conn. 576, 5 Atl. 8 "the illegal bequest is not dependent trust, and the trust is not necessari in any legal sense, auxiliary to the b and we are unable to see that avoid bequest produces any result in the istration of the trust not contempla the testator."

In using the language contained eighth clause of the codicil, we th we have already had occasion to s testator, among other things, had i the provisions of the seventh clause will, and that he intended that the heirs" of Samuel, who had then de should share or take to the extent o would have been the share of Samuel the income of the trust fund. But ther think that by the term "legal he here used, the testator did not intend clude the widow of his son Samuel, other of his sons, or the husband daughter, in case any other of such said daughter should decease in h time, but only the children. That he ed to include the "legal heirs" of Sa evidenced by other provisions of the among them the fifth clause, in wh same provision was made for such c both as to the gift of a sum in trust an annuity, as the will had made fo uel. Then the testator added a direc

Digitized by Google

disposition should be made in a contingency of "all the portions of te to which they would have been under my will and this codicil,"— inapt, unless such construction or, if it does not, nothing remains riginal will entitling the children of to anything thereunder. Further , any other construction of the lan- f the codicil would be opposed to ifest purpose of the testator to treat grandchildren as well as children ostantial equality; since, if the pro- r the final division of his residuary ad been valid, as beyond question ator believed it to be, such grand- would receive no portion of it, and ot now receive any part of the in- uring the continuance of the trust That the testator did not, however, o include in the expression "legal s here used, the widow of Samuel, n by the fact that in said codicil it ed that an annuity of $500 should be ner yearly as long as she should re- widow.

esult of these conclusions, it is our and the superior court is advised:

t by virtue of the eighth clause of cil the children of Samuel P. Bolles, George P. Bolles and William H. are entitled to receive one-fifth of of the income of the residuary es- ntioned in and under the provisions eventh clause of the original will.

n the death of the testator the said Bolles took a vested right to receive of said estate, during the entire riod created by said will, to wit, un- death of the last surviving child of tator. That being so, it is the duty plaintiffs to pay said share of said of said income to George A. Bolles, nistrator of the estate of said John es, and to his successors in office he continuance of said trust.

gift over to the "grandchildren and irs" upon the death of the "last sur- hild" of the testator is void, as con- g the provisions of the statute perpetuities. But such invalidity affect the preceding trust, which is nd will continue until the death of st surviving child. Subject to such e fee is vested in the heirs at law estator, at the time of his decease, tate estate.

her judges concurred.

NT & CO. v. NEW HAVEN STEAMBOAT CO.

e Court of Errors of Connecticut. Oct. 17, 1894.)

CATA—TITLE TO LAND — SCOPE OF DECI- N—PRESUMPTION AS TO PLEADINGS.

an action for the possession of land, t pleaded a judgment in a former action for the use of a wharf on part of the land. The record in that action contained no answer, but the formal judgment showed one to have been filed, and the report of the committee appointed therein to find the facts showed that the ownership of the wharf was the main issue, and the findings showed that that question was so treated by counsel. Counsel admitted that the ownership of a part of the wharf was adjudicated in the former action. *Held* that, in determining what was the issue in that action, the court would presume that the answer was appropriately framed for putting in issue the question of ownership. Andrews, C. J., dissenting.

2. The record of an action showed that the plaintiff owned reclaimed flats bounded on the west by a certain street extended, and on the south by flats on which he claimed the right to wharf out to low water; and that the defendant owned reclaimed flats on the opposite side of the street extended; that, to protect a sewer, the city constructed a wharf which extended from the northeast corner of defendant's flats, in a southeasterly direction, across the flats south of plaintiff's to low water; and that the action was brought to recover wharfage collected by defendant for the use of a part of the wharf lying south of plaintiff. *Held*, that the real issue was whether plaintiff had the right to extend a wharf from his flats south to low water, with the east line of said street extended as the western boundary of his wharf extension, and therefore the judgment determining that issue was a bar to a subsequent action between the parties for the possession of the land south of plaintiff's, and bounded on the west by said extended street line.

3. In such case defendant's right to extend a wharf south from his flats to low water, with the east line of said street extended as his eastern boundary, was not in issue.

4. In a subsequent action between the parties it was material error to hold that such question was in issue in the previous case, though the establishment of said line as plaintiff's western boundary necessarily resulted in establishing it as defendant's eastern boundary as between the parties.

5. When the record of an action unquestionably shows that matter subsequently controverted between the same parties must necessarily have been decided in rendering the judgment therein, it is immaterial that expressions in the court's opinion in the action indicate that such matter was not decided.

6. Error claimed in the findings of fact can be considered by the supreme court of errors only in connection with claimed errors of law assigned upon the record.

Appeal from superior court, New Haven county; Hall, Judge.

Action by Sargent & Co. against the New Haven Steamboat Company for the possession of land. From a judgment for defendant, plaintiff appeals. Modified.

John W. Alling and John K. Beach, for appellant. Charles R. Ingersoll and Edward H. Rogers, for appellee.

HAMERSLEY, J. This is an action brought to the superior court to recover possession of a piece of land which was originally a portion of the flats of New Haven harbor, lying between high-water and low-water mark, and situated southerly of Water street where that street is intersected by East street. Sargent & Co., the plaintiff corporation, alleges title to the demanded premises, with all the water privileges and rights of wharfage belonging thereto, and a wrongful

Digitized by Google

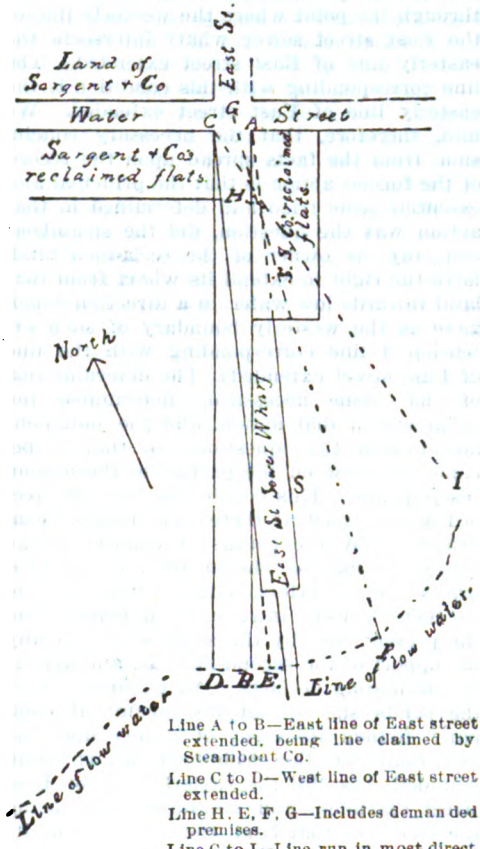
entry and dispossession by the defendant. The answer of the defendant, the steamboat company, contains two defenses. The first defense is a general denial. The second defense, in the nature of a plea in bar, alleges the defendant's possession of so much of the demanded premises as lie easterly of the east line of East street extended; that the right of possession and title to the same were adjudicated to be in the defendant, and that the right of possession and title to the remainder of the demanded premises were adjudicated not to be in the plaintiff, by a judgment of the court of common pleas in an action between the same parties, in which action the parties were at issue upon these questions. The plaintiff denies the adjudication set up in the second defense. By order of the superior court, the issues were separated, and the issues raised by the second defense were first tried. The court found these issues for the defendant, and that the judgment of the court of common pleas is a bar to any recovery by the plaintiff in this action, and rendered final judgment for the defendant. The plaintiff appeals from that judgment.

The main question involved in the appeal is, did the superior court err in holding that the right of possession to so much of the demanded premises as lie easterly of the east line of East street extended is res judicata by reason of the judgment in the former action between the parties? On this question we can entertain no doubt. The defendant claims that the identity of issues in this case and the former case is, under the circumstances disclosed by the record, a question of fact, upon which the finding of the superior court is conclusive. Without passing definitely upon this claim, we treat the question as one of law, because the question of the identity of issues has been fully argued as a question of law, and it seems clear to us that, in view of the circumstances of this case and the conclusions reached, we ought to express an opinion upon the error as assigned in the plaintiff's appeal, that "the court erred in finding that by the prior adjudication the title to so much of the demanded premises as lay east of the east line of East street was in the defendant." The former action was commenced by the New Haven Steamboat Company in 1881, and was nominally an action to recover from Sargent & Co. a sum due for wharfage. It was originally brought before a justice of the peace, and an appeal taken from his judgment, on demurrer, to the court of common pleas. In that court the case was referred to a committee to find and report the facts. The report of the committee was accepted. By consent of all the parties to the record, in pursuance of section 1114 of the General Statutes, the questions of law arising upon the facts so found by the court were reserved for the advice of the supreme court of errors. The supreme court advised judgment for the plaintiff, and in pursuance of that advice the court of common pleas found the issues for the steamboat company, and rendered judgment in its favor. The record in that action, containing the complaint, the finding of facts by the court of common pleas, and its judgment thereon, was put in evidence in the present case by the steamboat company, in support of its second defense, and appears in full in the finding of facts by the superior court. The steamboat company claims that the real issue tried and decided by the court of common pleas, as conclusively shown by this record, was its asserted right to reclaim the flats and extend its wharf from the land already reclaimed by it to low-water mark, along the westerly line of the land so reclaimed, which is the easterly line of East street extended. It is clear, and is admitted, that, if such were the real issue decided in favor of the steamboat company, then the judgment is a bar to the recovery by Sargent & Co. of any portion of the demanded premises lying easterly of that line. The answer is not printed with the record. The legal presumption from that fact alone might be that the case was tried on the general issue. But the formal judgment shows that an answer was in fact filed. The report of the committee, which, when accepted by the court, became a part of the record, shows that the ownership, and not the mere possession of the wharf at the place where the ship liable for the amount of wharfage in question lay, was the main point contested under the pleadings; and the facts found by the court below in this case show that the learned counsel in the former action argued that case as if the question of ownership was involved under the pleadings, and treated that question as the main issue contested, to which all other questions were subordinate. In view of these facts, and the admissions of counsel in their arguments before us that the ownership of that portion of the wharf indicated was undoubtedly adjudicated in the former action, and of their failure to question the fact that such ownership was, in law, a matter in issue under the pleadings, we feel bound to assume that the answer missing from the files was appropriately framed for putting in issue such question of ownership; and in view of the interests involved, and the gross miscarriage of justice that might otherwise be occasioned, we think the parties rightly considered themselves estopped from claiming that the missing answer did not in fact, as the finding of the court below assumes, legally put in issue in the former action the question of ownership, whose adjudication as a fact then in issue they have argued before us in this action. We refer to the subject only for the purpose of excluding any implication that we should consider the fact of ownership an issue presented by the pleadings, as distinguished from a mere evidential fact, did the record before us present the case of a trial upon the complaint and

Digitized by Google

issue alone. The question is not

ecord shows the following facts: bringing the action, the steamboat was in possession of a portion of bounded northerly by Water street, by the flats in possession of such , southerly by the flats upon which d the right to wharf out, and west- he flats included between the lines street extended,—being about 83 Water street and on the flats to the nd 231 feet on the easterly line of eet extended and on the flats to the ossession of the company,—and Sar- o. was in possession of a portion of bounded north by Water street 132 east, by the flats lying within the East street extended, 165 feet. The rporting to convey the title to these es of flats were from the authori- he town of New Haven; the first, teamboat company's predecessor in ng in 1807, and to that of Sargent 1772. The flats in possession of & Co., as well as those in posses- the steamboat company, had been l by filling in out to the southerly lines. Sargent & Co. also owned f land lying north of Water street, east by East street and south by treet, title to which was derived from a deed from the authorities wn of New Haven in 1771. In 1872 of New Haven completed the con- of the East street sewer, extending southerly line of Water street, and right angles to that line, beyond vater mark, and covered this sewer, a protection, by a structure known East Street Sewer Wharf," extend- nd the southerly line of the steam- npany's reclaimed flats about 325 a point about 75 feet northerly of vater mark. In building the sewer occupied a portion of the flats lying the lines of East street extended; ortion of the flats reclaimed by the t company, and a portion of the g southerly of the land so reclaim- city of New Haven claimed rights y and town to some control of these d especially of East street sewer ut no attempt to ascertain or en- h rights had been made, beyond an on by the city to the legislature for on to extend the wharf, which was In 1881 Sargent & Co. collected e, amounting to five dollars, for the he East street sewer wharf at a rked S on the map, as indicating ion of the ship on account of which rfage was collected, which point is feet from the southerly end of f structure, and opposite the inter- f its westerly line with the east line street extended. The action of the steamboat company was brought to recover the sum so collected, and the right to the ownership and possession of the wharf at such point was claimed by both parties. The following map shows the situation:



Line A to B—East line of East street extended, being line claimed by Steamboat Co.
Line C to D—West line of East street extended.
Line H, E, F, G—Includes demanded premises.
Line C to I—Line run in most direct course to deep water channel, being line claimed by Sargent & Co.

So much appears from the record affirmatively by direct assertion. The ownership and right of possession of the East street sewer wharf at the point indicated were the real, substantial, and main issue between the parties, just as truly and fully as if such ownership had been distinctly set out in the complaint as the basis of the plaintiff's right of action, and distinctly denied in the defendant's answer. But the record goes further. The ownership of the wharf at the point indicated depends upon the title of the plaintiff which establishes such ownership; indeed, in this case the validity of the title is essentially the same question as the ownership. Now, the record shows that the title, and the only title, by which the plaintiff can establish such ownership, is its right as a riparian proprietor, by virtue of the ownership of its reclaimed land, to wharf out from the southerly line of that land towards the low-water mark; and, upon a careful analysis of the whole record of the court of common pleas, we think that record

Digitized by Google

also shows that the only direction of riparian extension establishing such ownership, consistent with the facts of the record, is one by which the westerly line of the flats covered by such right shall extend from the southwesterly corner of the reclaimed land through the point where the westerly line of the East street sewer wharf intersects the easterly line of East street extended. The line corresponding with this condition is the easterly line of East street extended. We find, therefore, that the necessary conclusion from the facts spread upon the record of the former action is that the principal and essential issue tried and determined in that action was the question, did the steamboat company, as owner of the reclaimed land, have the right to extend its wharf from that land towards low water, in a direction which gave as the westerly boundary of such extension a line corresponding with the line of East street extended? The determination of that issue necessarily determined the judgment in that action, and the judgment adjudicated that question; so that it became, as between the parties to the action, res judicata. This conclusion from the record is confirmed, if there were need of confirmation, by the claims of counsel in the former action, as shown by their printed briefs. These briefs, with the maps attached thereto, were introduced in evidence in the present case by the steamboat company in support of the second defense, and appear in the finding of facts. An examination of the briefs shows that the steamboat company founds its right of action upon its ownership of the reclaimed wharf land, bounded west by the easterly line of East street extended, and maintains that, being the owner of that land, the extension of its wharf in the same direction with its original construction—the easterly line of East street extended—is a fair, just, and reasonable enjoyment of its rights as wharf owner, and within the principles of the rules applicable to such cases. Sargent & Co. deny the right of action—First, because the steamboat company is not legal owner of the flats as claimed, and, if owner, has, as such owner, no right whatever to any extension; second, because the rule of extension in this case calls for a direct line to the deep-water channel,—and, in illustration of the claims of the parties respectively, attaches to its brief a map showing the effect of the line of East street extended, as claimed by the steamboat company, and the line to the deep-water channel, as claimed by Sargent & Co.; and, in the supplementary brief replying to the brief of the steamboat company, insists that the steamboat company's claim of the line of East street extended would work injustice if applied to all the upland holders; and, also, that it cannot be maintained, because Sargent & Co.'s title to the uplands antedates that of the steamboat company, and therefore the steamboat company's rights, whatever they may be, are subordinate to the right of Sargent & Co., i. e. the right to extend in a direct line to deep-water channel, which right was incident to the ownership of the lot of land on the north side of Water street, purchased in 1771, and had never been lost by estoppel or otherwise, as claimed by the steamboat company.

It is impossible to examine this record, whether by itself or in connection with the briefs of counsel, without being fully satisfied that the issue in the present case, viz. the right of the steamboat company, as against Sargent & Co., to extend its wharf towards low-water mark in a direction bounded westerly by a line running from the southwest corner of its reclaimed land, and corresponding with the line of East street extended, is the very issue presented, tried and determined in the former suit. This was the issue presented by the steamboat company as conclusive of its right of action. The issue presented was not merely the general rule of law as applicable to a fair and equitable division of the whole shore of the harbor, but a right to extend in a specific line, which was the only line claimed by the plaintiff, and, so far as the record shows, the only line claimed by either party, that would entitle the steamboat company to recover in its action. This issue was accepted by Sargent & Co., and that company attacked this precise claim of the steamboat company in several ways, and in every way it saw fit. It had then its "day in court" upon this issue. The determination of the issue included many considerations of fact and law,—the title of the steamboat company to any upland, and to the reclaimed land; its title to any riparian rights; the title of Sargent & Co., as an upland proprietor with riparian rights, to extend in a direct line to the deep-water channel, which line included, not only the locus in quo, but also a portion of the steamboat company's land, and which right antedated and was therefore paramount to the rights of the steamboat company, whatever they might be; questions of adverse possession and abandonment; vested rights acquired in the shore which was more or less covered by wharves; rights of the public to the shore in the line of streets leading to the harbor; the general rules of law applicable to the division of the shore, and the modification of such general rules in their application to the precise claim of the steamboat company under the circumstances of the case. Some of these questions were necessarily involved in the judgment, and some were not; but the record demonstrates that the judgment necessarily involved the adjudication of the precise claim affirmed by the plaintiff and denied by the defendant; that, in view of all the facts offered in evidence, and of all the claims of law made by the parties, the steamboat company, as against Sargent & Co., had the right to ex-

Digitized by Google

wharf to low-water mark by the line of East street extended. This is icular matter sought to be concluded resent case.

aw on this point is settled beyond ersy. In Supples v. Cannon, 44 Conn. dge Pardee formulates the rule as n Packet Co. v. Sickles, 5 Wall. 592, ws: "To render the judgment con- it must appear by the record of the it that the particular matter sought to duded was necessarily tried or de- d,—that is, that the verdict in the ld not have been rendered without that matter,—or it must be shown insic evidence, consistent with the that the verdict and judgment neces- nvolved the consideration and deter- n of the matter." In Munson v. Mun- Conn. 433, Judge Butler says: "It tablished rule in the administration of hat all controversies between parties igated and fully and impartially de- l shall cease; and, to that end, that involved in such litigated controversy by the record to have been material etermination, and to have been put in nd decided, whether the proceeding law or in equity, shall again be liti- between the same parties or their And in Huntley v. Holt, 59 Conn. Atl. 34, these cases are affirmed, and rt adopts the rule as laid down in Hegeman, 98 N. Y. 358: "It is not y to the conclusiveness of a former t that issue should have been taken he precise point controverted in the action. Whatever is necessarily im- the former decision is, for the pur- estoppel, deemed to have been actu- ided." The rule of res judicata does wholly on the narrow ground of a l estoppel, nor on the presumption former judgment was right and just; he broad ground of public policy, that a limit to litigation, a curb to the ness of the obstinate litigant. Like ute of limitations, it is a rule of rest. essed by Judge Pardee in Supples v. supra: "The policy of the law is a claim has once been passed upon urt of competent jurisdiction, it shall reafter be controverted between the arties; and this in the interest of The question, therefore, upon the res judicata, is, has the matter once ssed upon by a court of competent tion? The correctness or justice of ner decision is not necessarily rele- the determination of that question, mmaterial if the record clearly shows e matter has been so passed upon. is so clear, and the conclusion from rd that the determination of the pre- nt now controverted is necessarily im- the decision of the former action is n, that the present plaintiff would have questioned the adjudication, in view of the record of the court of common pleas and of the briefs of counsel, had no other consideration intervened. And, indeed, the argument of the plaintiff deals very slightly with the significant facts of the record, but is mainly concerned with the contention that the opinion of this court upon the reservation in the former action (New Haven Steamboat Co. v. Sargent & Co., 50 Conn. 199) demonstrates that the point now controverted was not adjudicated, or, at least, leaves the precise nature of the adjudication so doubtful that the former judgment in relation to the controverted point is lacking in that certainty which is essential to its operation as an estoppel; and that the opinion of the court, although it may conflict with the necessary implications of the record of the court of common pleas, is paramount and decisive of the matters actually submitted by the parties, tried by the lower court, and determined by its judgment. And this contention seems to be pressed upon the theory that the judgment of the court of common pleas, given in pursuance of the advice of the supreme court of errors, is practically the judgment of the higher court, and that the opinion of that court is a part of the record in the action, and conclusive as to the points actually decided. We think such a theory, with the contention based upon it, cannot be maintained. A reservation under our practice is an anomalous proceeding. Originally a voluntary and informal consultation, it was regulated by rule of court, and remained without legislative sanction until 1855, when an act was passed requiring the court asking the advice to follow in its judgment the advice given; and, subsequent to the passage of that act, the peculiar nature of the proceeding was fully considered in Nichols v. City of Bridgeport, 27 Conn. 466. And in 1877 the act of 1855 was altered into substantially its present form (Gen. St. § 1114), which not only requires the trial court to render judgment in accordance with the advice given, but forbids it to ask advice unless with the consent of all the parties to the record. There is no occasion to determine whether the recitals and reasoning of this court in an opinion given in a case reserved for its advice can be considered as entitled to the same regard as if found in one given upon a formal judgment in a proceeding for correction of errors; for, treating the opinion cited as a record of which we may take judicial notice in this case, and giving it all the legal effect that can rightly be claimed for it, in explaining or supplementing the record of the court of common pleas, we think its language is consistent with the conclusion that must be drawn from the record of the lower court as to the litigated question of title, which all parties admit was in fact tried before that court under the pleadings in the former action.

We think the opinion in question shows that the court looked upon the right claimed

Digitized by Google

by the steamboat company to extend its wharf to low-water mark on the line of the shore already reclaimed and occupied by it, which is the easterly line of East street extended, as a question decisive of the right of action, and that all the reasoning of the opinion, from the first statement of the issue to the final advice of judgment for the steamboat company, was intended to support the conclusion reached, i. e. that, under all the circumstances of the case, the continuance of the extension on that line would effect an equal division of the flats in a manner not obnoxious to any rule hitherto established. The plaintiff selects a single phrase in the opinion, "we think in this case each party has the right to extend his upland in the most direct course to the line of low water," and claims that this phrase dominates the whole opinion; that by "the most direct course," as used in the phrase, the court meant a specific line from one of two points on the steamboat company's land to such point, on any slight deflection of the low-water mark from its general course, as a civil engineer should find was mathematically nearest to the starting point; that "the most direct course," as thus defined, diverges from the easterly line of East street extended so far as to leave nearly the whole of the sewer wharf, the sole ownership of which the opinion treats as the precise point at issue, westerly of the plaintiff's right of extension; and that this expression, as defined by the plaintiff, is the "deliberate, decisive, and definite adjudication" in the case. This phrase, read in its proper connection with the remainder of the opinion, does not establish such a claim. As we have already seen, the claim of the steamboat company, and the claim essential to the determination of its right of action, was its right to extend its occupation of the flats on the line of its existing occupation, a specific line marked on the maps of the plaintiff. This claim was attacked—First, on the ground that the steamboat company had no right of extension of any kind; second, that its rights, whatever they might be, were subordinate to the right of Sargent & Co. to extend by a line in a direct course to the deep-water channel, a specific line marked on the maps of the defendant,—and it was directly attacked on no other ground. The main part of the opinion is taken up with disposing of the first ground of attack. That question disposed of in favor of the steamboat company, the court deals very briefly with the second ground of attack, and argues that the application of the principle invoked by Sargent & Co. depends upon circumstances, and may conflict with the principle applicable to the division of the shore in cases relating to low-water line, and does so conflict where, as in this case, the lines of the channel and of low-water mark are divergent; in such a case, one must be adopted as the line to be reached, to the exclusion of the other; and in this case the line to be reached in the division of the flats is the low-water mark, and each party has the right to extend its upland in the most direct course to that line, and, as shown in the discussion of title in the former part of the opinion, the parties for more than 30 years have practically adopted that rule, to wit, extension to the line of low-water mark, to the exclusion of the line of the channel; the steamboat company has extended its wharf in that direction 14 rods, and no adverse right has been asserted by any one; and "to change the direction now would produce great confusion, while a continuance of the line as begun will effect an equal division of the flats, and in a manner not obnoxious to any just rule hitherto established;" and, as a result of this line of argument, running through the whole opinion, it follows that judgment should be rendered for the steamboat company. Undoubtedly the phraseology of the opinion would have been more definite could it have been anticipated that within a dozen years the parties would again attempt to litigate the very question necessarily settled by the decision. It is, however, sufficiently plain from the whole language of the opinion that the true implication of the words: "We think in this case each party has the right to extend its line in the most direct course to the line of low water,"—is an assertion that in the case under consideration the general rule applicable to a division of flats called for the extension of the upland to low-water mark, and not to the deep-water channel, and is not a specification of the western boundary of the steamboat company's right of extension. That precise line depended upon the application of the general rule in connection with specific facts before the court, and is described in the opinion as the continuance to low-water mark of the westerly boundary of the reclaimed flats; and it is also evident, both from the maps that were before the court as a part of the case presented, and from the language of the opinion, that the court understood that the specific line claimed by the steamboat company, and necessarily involved in the judgment advised, might diverge more or less from the exact line of the most direct course to low-water mark. And, in sustaining the line so claimed, the court considered, not only the general rule of extension, but also the particular facts controlling its application. It is immaterial now whether or not such divergence was really greater than the facts before the court indicated. The essential facts in issue in the former action involved the determination of the boundary of the flats appurtenant to the reclaimed flats belonging to the steamboat company, a question of detail often attended with great difficulty, and in this case rendered more difficult by the complications involved in the situation of the flats, the claims of vested rights from long occupation, and abandonment of adverse

Digitized by Google

as well as the peculiar nature of the evidence. The opinion does not purdeal definitely with all the questions , but only to state reasons deemed t for holding, upon the facts before rt, that the title to the boundary by the steamboat company is valid ast Sargent & Co.; and as bearing on stion whether the validity of such s presented, tried, and determined, essarily implied in the judgment renhe opinion is not in conflict, but con- with the record.

however, unnecessary to pursue this on, for the record, whether taken by r in connection with the facts exo it found by the court below, unably shows that the matter now cond must necessarily have been defore the judgment which was renould have been rendered, and in such en if there were plausible grounds plaintiff's claim of inconsistency, it terial to explain an expression in the of the court claimed to indicate that cise point was not decided. Laird v. De Soto, 32 Fed. 652. We find, thereat the court below did not err in ad- that by the prior adjudication the so much of the demanded premises ast of the easterly line of East street l was in the defendant. This dis- the main controversy between the

he plaintiff's appeal also claims that rt below erred in holding that by or adjudication the plaintiff was from recovering any portion of the ed premises. It appears that the urt, upon consideration of the record former action, in connection with all s proved, found as a fact that upon l in the former action the court fixed ended to fix the east line of East xtended as the west boundary of the nt's, the steamboat company's, rights e flats. We think this finding, if as a conclusion of law, is right; and ed as a conclusion of fact it cannot ewed. It does not appear that the elow finds as a fact that upon the trial the court fixed, and intended to west line of East street extended as t boundary of Sargent & Co.'s rights e flats; and we think the court below arly right in not making such a find- further appears that the plaintiff as a matter of law, upon the facts by the court, that the judgment dein the second defense did not constibar to any recovery by the plaintiff action. But the court overruled this and held that "said judgment fixed t line of East street extended as the nt's western boundary line, and that dgment was a bar to any recovery by ntiff in this action." The conclusion that the judgment was a bar to any recovery was erroneous. It is very clear from the facts found that the determination of the actual eastern boundary of Sargent & Co.'s land was not directly in issue, and not necessarily implied in the judgment in the former action. In that action it was not necessary for Sargent & Co. to prove any title. Its defense was complete upon the failure of the steamboat company to prove its title. The eastern boundary of its land was not material, except so far as it might conflict with the boundary established for the steamboat company. And the only question relating to Sargent & Co.'s rights adjudicated in the former action is that its boundary, as against the steamboat company, does not extend easterly of the east line of East street extended. The plaintiff, therefore, was not estopped by the judgment in the former action from claiming title in this action to that portion of the demanded premises lying westerly of the east line of East street extended, and the court erred in overruling the claim of the plaintiff, and in rendering judgment in bar of the plaintiff's whole action. We do not see how we can treat this error as immaterial, even if it be true, as claimed by the defendant, that it is apparent the same facts and law which establish the defendant's westerly boundary as the east line of East street extended must result in establishing the plaintiff's east boundary as the west line of East street extended, and that there will be no actual controversy over the remaining cause of action. However that may be, the question had not been adjudicated as between these parties.

There is nothing requiring discussion in the other assignments of error. The plaintiff excepted to the incorporation of some facts in the finding of facts by the court below, and to the refusal of the court to incorporate other facts. We think the finding fairly presents for review all questions of law raised and decided on the trial, contains no matter that injuriously affects the presentation of the plaintiff's case, and does not call for any correction authorized by section 1132 of the General Statutes and chapter 174 of the Public Acts of 1893. These exceptions of the plaintiff cannot be considered for any other purpose. Styles v. Tyler, 64 Conn. 432, 30 Atl. 165. The defendant objected to the admission of certain evidence offered by the plaintiff, extrinsic to the record of the former action. The court ruled said evidence to be admissible "for the purpose of identifying the subject-matter of the two suits, and of determining what was involved in said adjudication by the court of common pleas, and for the purpose of ascertaining whether by said adjudication said court had fixed the extension of the east line of East street as the western boundary of the defendant's property rights over said flats, but not for the purpose of showing that said decision was erroneous or unjust." Whatever the grounds of the defendant's

Digitized by Google

objections may be, the plaintiff certainly has no reason to complain of this ruling. The court below did not err in deciding the main issue presented by the second defense in favor of the defendant; but did err in holding that the judgment in the former action is a bar to any recovery by the plaintiff in the present action. There is error in the judgment of the superior court in holding that the plaintiff's right of action as to so much of the demanded premises as lie west of the east line of East street extended is barred by the judgment described in the second defense; and a new trial is granted, limited to that portion of the demanded premises. The other judges concurred, except ANDREWS, C. J., who dissented.

ANDREWS, C. J. (dissenting). I concur in the opinion so far as it holds that there is error in the judgment of the superior court, and that there must be a new trial. But I dissent from so much of the opinion as proceeds upon the assumption that title to any part of the demanded premises was in issue in the cause tried in the court of common pleas. A matter is "in issue," so as to be included in the estoppel of a judgment, only when it is alleged in the pleadings—affirmed on the one side and denied on the other—and is decided by the judgment. It is not necessary that the matter should be directly alleged; it is sufficient if it be a component part of a general allegation. Whenever pleadings are general, and include more than one matter, parol evidence is admissible to show that any particular matter so included was or was not heard and decided at the trial. In applying or explaining a former judgment, to ascertain whether or not it is identical with a case in hand, this is the full extent to which parol evidence may be used. I understand the opinion to recognize this rule. And, as the pleadings in the former case here involved do not contain any allegation of title, nor any allegation of which a component part is an averment of title, the court proceeds to supply such averment by its own fiat, by presuming "that the answer missing from the files was appropriately framed for putting in issue such question of ownership"; and does this without so much as a single word in the finding to indicate that there had ever been such an answer, or any answer whatever, which could be missed from the files. From this I dissent.

LENDER et al. v. KLINE et al.

(Supreme Court of Pennsylvania. April 1, 1895.)

BUILDING CONTRACTOR'S BOND—LIABILITY OF GUARANTOR.

Where a building contractor abandons the work before it is completed, and absconds, the guarantor of his contract, who elects to treat the failure and flight of his principal as settled facts, and to co-operate with the owner in completing the work, becomes liable as a surety.

Appeal from court of common pleas, Berks county.

Action by William Lender and G. Frederick Mertz, for the use of G. Frederick Mertz, against D. C. Sharp, W. A. Sharp, and Simon Kline, on a contractor's bond. From a judgment for plaintiffs, defendant Kline appeals. Affirmed.

C. H. Schaeffer, for appellant. Stevens & Stevens, for appellees.

PER CURIAM. The written agreement signed by Kline was one of guaranty for the performance by Sharp of his contract with the plaintiff. If he had stood upon this contract, his present contention as to his liability would have been correct. But when his principal disappeared, leaving his contract unperformed and his debts unpaid, Kline had to elect his position. He elected to treat the failure and flight of his principal as settled facts, and to co-operate with the plaintiff in the completion of the work that Sharp had left undone upon that basis. He examined Sharp's outstanding bills, and himself drew orders for, or authorized the payment of, the amounts as adjusted by him; and the plaintiffs completed the work, under an understanding with him, in the most economical manner practicable. He thus voluntarily assumed the position of surety. He has pointed out no substantial error by his assignments, and the judgment is affirmed.

In re LIVINGOOD'S ESTATE.

(Supreme Court of Pennsylvania. April 1, 1895.)

APPEAL—JUDGMENT OF ORPHANS' COURT—WHEN DISTURBED.

A decree of the orphans' court which logically results from the findings of fact will not be disturbed, where the testimony fairly sustains the findings.

Appeal from orphans' court, Berks county.

Settlement of the accounts of William H. Livingood, one of the executors of the estate of James A. Livingood, deceased. From a judgment dismissing exceptions to and confirming the account, Jacob S. Livingood and Michael T. Livingood, legatees, appeal. Affirmed.

Frank S. Livingood and Isaac Hiester, for appellants. Richmond L. Jones, for appellee.

PER CURIAM. The evidence in this case is singularly free from conflict, presenting no questions of credibility. The learned counsel for the appellants has presented one view of its effect with great clearness and force. The learned orphans' court, however, inclined to the opposite view of it. We have examined the testimony carefully, and are sat-

Digitized by Google

at it fairly sustains the findings of
wn from it by the learned judge of
ans' court. From these findings the
ollows logically, and it is now af-

NWEALTH ex rel. SCHWEYER v.
CH et al., County Commissioners.
ne Court of Pennsylvania. April 1,
1895.)

—REPEAL OF SPECIAL ACT BY GENERAL ACT.

t June 6, 1893 (P. L. 333), relating to
tax collectors, being in conflict with
h 18, 1852 (P. L. 153), a local law re-
the same subject and applicable to a
township, repeals the latter. Com.
rron. 25 Atl. 556, 152 Pa. St. 244;
Cumberland Co., 29 Atl. 289, 162 Pa.
ollowed.

from court of common pleas, Berks
G. A. Endlich, Judge.
by the commonwealth of Penn-
on the relation of Allen Schweyer,
rit of mandamus to compel John
Henry Stoyer, and Jeremiah R. Hart-
missioners of the county of Berks,
ertify and deliver to relator, as tax
of Longswamp township, of such
he tax duplicate of such township.
udgment granting the writ the com-
s appeal. Affirmed.
lator was, at the election of 20th
, 1894, elected tax collector of the
of Longswamp, under the act of
, 1893 (P. L. 333). On March 12,
gave bond, with surety, duly ap-
y the court and filed. Thereupon,
ed to the respondents, the commis-
f the county of Berks, for the tax
for the state and county taxes col-
n said township, but was refused,
ground that under the act of 18th
852 (P. L. 153), a local law ap-
to said township, the collection of
es is to be intrusted to the lowest
Thereupon, the petition was filed,
ich this rule was granted. The re-
s, in their answer, aver that the re-
ection was invalid, the act of 1852
repealed by the act of 1893, and
relator himself was a bidder to col-
taxes in conformity with the pro-
the former. This latter ground of
was withdrawn by the county so-
the argument, the defendants de-
decision of the principal question
d by the matter alleged.

ar Miller, Co. Sol., and William J.
or appellants. Ermentrout & Ruhl,
lee.

URIAM. Since the adoption of the
onstitution the legislature has sought
about uniformity in the administra-
tion of the affairs of counties and townships, as well as those of cities and boroughs. The constitution requires this, and we have felt constrained to interpret statutes relating to these subjects in the light of the constitutional requirements. This case is fairly ruled by Com. v. Macferron, 152 Pa. St. 244, 25 Atl. 556, and by Quinn v. Cumberland Co., 162 Pa. St. 55, 29 Atl. 289. We have no intention to depart from the rule laid down in these cases. The judgment is affirmed.

CROUSE v. BINKLEY.

(Supreme Court of Pennsylvania. April 1, 1895.)

MORTGAGEE IN POSSESSION—EJECTMENT—PAYMENT OF MORTGAGE DEBT.

1. Where, in equitable ejectment by a mortgagor against a mortgagee in possession the complaint alleges that the mortgage debt had been paid, the court will take an account to determine the truth of the allegation.

2. Where, in an equitable ejectment by a mortgagor against a mortgagee in possession, it appears that the amount of the mortgage debt has been paid, plaintiff is entitled to an unconditional verdict.

Appeal from court of common pleas, Berks county; G. A. Endlich, Judge.

Action of ejectment by George W. Crouse against Levi K. Binkley. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Herbert R. Green and A. G. Green, for appellant. A. K. Stauffer and S. M. Meredith, for appellee.

WILLIAMS, J. This is an equitable ejectment brought by a mortgagor out of possession against a mortgagee who is in under his mortgage. Ordinarily, in such cases, a tender of the amount due on the mortgage, made before suit brought, is a condition precedent to a recovery. But when it is alleged that the mortgagee has been paid out of the rents and profits received by him, or in any other manner, so that the land is no longer in pledge, an account may be taken at the trial to determine the truth of the plaintiff's claim. If the account so taken shows the payment of the debt in full, the plaintiff may recover an unconditional verdict. If the account results in showing a balance still unpaid, this may be secured by a conditional verdict which ascertains the amount due, and enables the plaintiff to recover subject to its payment. In this case the defendant was found to be a mortgagee in possession. It was made to appear, beyond all doubt, that his debt was fully paid. On such a state of facts the plaintiff was entitled to an unconditional verdict in his favor. The judgment is affirmed.

Digitized by Google

COMMONWEALTH ex rel. POTTER v. MEANOR.

(Supreme Court of Pennsylvania. April 8, 1895.)

ELECTION OF SCHOOL DIRECTOR—TIE VOTE — VACANCY.

Act 1862, p. 471, § 2, provides that, when candidates for school director shall have the same number of votes, the candidates shall appear at the next regular meeting of the board of directors, which board shall, in a certain manner, determine their rights to seats therein. *Held*, that where there was a tie vote as to two candidates for school director, and one of them appeared before the next meeting of the board of school directors, and offered to have his right determined as prescribed by the act, but the other refused to have his so determined, and the board adjourned without taking action, no vacancy was created in the office, as it was the duty of the reorganized board, at its first meeting, on application of one of the candidates, to determine his rights in the manner prescribed by the act.

Appeal from court of common pleas, Allegheny county.

Application by Frederick Potter for a writ of quo warranto to determine the right of A. M. Meanor to the office of school director. Judgment was rendered for relator, and defendant appeals. Affirmed.

H. L. Castle, for appellant. Seward W. Haymaker, for appellee.

McCOLLUM, J. At the spring election in Turtle Creek borough, in 1894, the relator and John T. C. Bowman were opposing candidates for the office of school director, and each received 79 votes. As they had an equal number of votes for the same term of office, it became their duty, in compliance with section 2 of the act of April 11, 1862 (P. L. 471),[1] to appear at the next regular meeting of the board of school directors to have their rights to seats therein determined, and the duty of the board to proceed, in conformity with the act, to decide which of them should hold the office. The parties appeared as by the statute they were required to do, but Bowman refused to participate in the drawing prescribed by it, and the board adjourned without taking any action in the premises. The relator again appeared before the board, at its reorganization in June, for the purpose of having his right to a seat in it determined; but the board declined to act, on the ground that the duty of deciding the issue raised by the tie vote rested exclusively upon the board as constituted at the next regular meeting of it after the election. The failure of the board, as constituted at that time, to determine the rights of the parties before the reorganization of it, was regarded by the reorganized board as destructive of the relator's right, under the statute, and as having created a vacancy in the office. It therefore declared that a vacancy existed, and appointed the respondent to fill it. His title to the office thus acquired is attacked in this proceeding on the ground that the board had no legal warrant for appointing him to it. The learned court below sustained the relator's contention, and entered a judgment of ouster against the respondent, from which he appealed.

It is conceded by the learned counsel for the appellant that the relator's right to have the case decided under the act of 1862 was absolute, and could not be taken from him, or in any wise impaired, by any act of the opposing candidate, but he insists that this right was lost by the inaction of the board prior to its reorganization in June. In other words, it is claimed in support of the appeal that the postponement by the board of the performance of its duty under the act deprived it of jurisdiction, extinguished the relator's statutory right, and created a vacancy in the office, to be filled by it under section 7 of the act of May 8, 1854. The consequences of an allowance of this claim are well calculated to raise a doubt respecting the soundness of it. In the first place, the proposition that the effect of the neglect or refusal of the board to discharge its plain duty when the parties appeared before it was to deprive them of their statutory rights, and it of the power to perform that duty at a subsequent meeting, is not tenable. There is nothing in the statute which, in terms or by necessary implication, attaches such consequences to the nonperformance of the duty it imposes. The provision in relation to the time of appearance by the parties was complied with by them; and, while it may be inferred from this provision that it was the duty of the board to determine their rights at that time, there is no legislative mandate to this effect, nor penalty prescribed for a failure to do so. Having regard to the subject-matter, object, and language of the act of 1862, we are of the opinion that the provision in regard to time is directory only, and that the board could have lawfully determined the rights of the parties thereunder at any lawful meeting held at or before the beginning of the school year, when the term of office for which they were candidates commenced. The law puts the duty of determining their rights under it upon the board of school directors of the proper district. The board is composed of six persons, two of whom retire from it at the end of each school year, and their places are taken by persons chosen for them at the preceding election. The change thus effected in the membership of the board has no effect upon its powers and duties under the act of 1862. It follows from these views that it was the duty of the reorganized

[1] Act 1862, p. 471, § 2, provides that, when two or more candidates for school director shall have the same number of votes, the candidates shall appear at the next regular meeting of the board of directors, which board shall, in a certain manner, determine their rights to seats therein.

Digitized by Google

board to comply with the relator's request, and determine his rights to a seat therein, and that neither its refusal, the neglect of the board before the change of membership in it, nor the act of May 8, 1854, authorized the appointment to which this litigation relates. We conclude, therefore, that the learned court below did not err in entering the judgment complained of. Judgment affirmed.

In re HUSTON'S ESTATE.

(Supreme Court of Pennsylvania. April 1, 1895.)

INDEBTEDNESS — EVIDENCE — BOOK ACCOUNT—SILENCE AS ADMISSION—EXCEPTIONS TO ADMINISTRATORS' ACCOUNT—SETTING OFF CLAIM AGAINST HEIR.

1. An account in the ledger, which does not purport to be a book of original entries, is not, by itself, competent to prove an indebtedness.

2. The fact that on exceptions to the account of administrators, filed to surcharge them with the amount of an alleged indebtedness of H. to the estate, H. was present at the hearing when the question of indebtedness was discussed, and made no objections when he heard that the books of intestate showed an indebtedness from him, does not justify the setting off of the same against his share of the estate, the discussion having been solely in relation to the attempted surcharge.

Appeal from orphans' court, Monroe county.

Accounting by Horace G. Huston and Milton Huston, as administrators of Robert Huston, deceased. On exceptions to surcharge their account with the amount of an alleged indebtedness of Oscar Huston to the estate, the amount thereof was set off against his share of the estate, and he appeals. Reversed.

W. A. Erdman, for appellant. Charles B. Staples and Storm & Palmer, for appellees.

STERRETT, C. J. If the question of Oscar Huston's alleged indebtedness to his father's estate had been properly raised before the learned auditor, and the fact of its existence and the amount thereof had been established by competent evidence, there would have been no error in setting off the same, or part thereof, against Oscar's distributive share in his father's estate; but no offer was made to prove such indebtedness for that purpose, nor was there any evidence before the auditor sufficient to justify him in finding such indebtedness for any purpose. Standing alone, and unsupported by any other testimony, the so-called "book account * * * against Oscar Huston as contained in the ledger of Robert Huston" was incompetent for either purpose. It does not purport to be a book of original entries. On the contrary, many of the entries therein are not in chronological order, and some of them evidently refer to other books, not produced, and in regard to which no explanation appears to have been given. The question of appellant's alleged indebtedness arose on exceptions to the account of the administrators, filed for the purpose of surcharging said accountants with the amount thereof. This course was resisted by them, and one of them testified, in substance, that Oscar denied owing the estate anything; and further, that, on account of the condition of decedent's books, they were advised by their attorney not to bring suit on the account, "as they would be beaten." In this he was corroborated by the attorney referred to, who testified, in substance, that he advised against the appraisement of the account, because on its face it was such as could not be collected, and, learning also that Oscar disputed the account, he advised against bringing suit. In view of this and other testimony, the auditor refused to surcharge the accountants with the alleged balance claimed to be due by Oscar Huston to the estate; but he proceeded to say that Oscar "was present at the hearing of the audit when this question of his indebtedness to the estate was discussed, heard that the books showed a large balance due from him to his father, * * * and made no objections. The auditor therefore decides to set off this balance, $2,070.26, shown by said books to be due the decedent from the said son Oscar, against his share as an heir; and, as this balance is considerably greater than his share in the present distribution, the whole fund for distribution is distributed to the remaining heirs." This conclusion, as we have seen, is unwarranted by any evidence in the case, unless the fact of appellant's presence at the audit, and his silence while the question of his indebtedness to the estate was discussed, can be construed as an admission of said indebtedness by him. In view of the fact that the discussion referred to was solely in relation to the attempted surcharge of the administrators, it cannot be possible that appellant's presence and silence will justify any such conclusion as that drawn by the auditor. It was wholly unwarranted, and the exception recited in the first specification should have been sustained. In so far as the remaining assignments of error involve the same erroneous conclusion, they are also sustained. Decree reversed, with costs to be paid by the appellees; and it is ordered that the record be remitted to the court below, with instructions to distribute the fund in accordance with this opinion.

In re HARKER'S ESTATE.

Appeal of TITLOW et al.

(Supreme Court of Pennsylvania. April 1, 1895.)

TRUSTEE—ACCOUNTING—INTEREST.

Where a daughter, incapacitated for management of her own affairs, and needing the same maternal care as in her childhood, assigned to her mother a $5,000 insurance policy to collect, and manage the money as she should deem best, for the care of the daughter, and for

Digitized by Google

more than 27 years no account of receipts and expenditures was asked or rendered, but during most of that time the daughter's clothing, board, and pocket money were supplied by the mother without question, it will, after the mother's death, be assumed that no account of the expenditure of the income was intended, and the mother will be charged only with the principal, and not, as a trustee, with legal interest for the whole time, when it is not known what she actually received or expended.

Appeal from orphans' court, Berks county; H. Willis Bland, Judge.

Accounting by J. M. Titlow and another, executors of Ellen J. Harker, deceased. From a decree allowing the claim of Ellena B. White against the estate for $5,000, the amount of an insurance policy, together with interest thereon from the time said claimant assigned the policy to deceased, the executors appeal. Modified.

Carrie B. Kilgore and David C. Harrington, for appellants. Philip S. Zieber and Baer & Snyder, for appellees.

WILLIAMS, J. There are two principal questions in this case. The first is over the effect of the assignment made by Mrs. Herman, now Mrs. White, to her mother, Mrs. Harker, of the policy of insurance on the life of her husband, made in 1865. The assignment was prima facie a transfer of the title to the proceeds of the policy to the assignee, and it cast upon the assignor the burden of showing that this was not its object as it was understood at the time by the parties. Considerable testimony was given for this purpose, and we concur with the learned judge in thinking that this testimony justifies the conclusion that the assignment was intended to put the mother in a position to collect and manage the insurance money in such way as should seem best to her, for the comfort and care of her daughter. The next question relates to the proper manner of stating an account between the mother, now deceased, and her daughter. For more than a quarter of a century the parties have shown their own understanding of their relation to each other and to this fund. No account of its investment, or of the items of receipts and expenditures from the income, seems ever to have been asked or rendered. It is conceded on all hands that the daughter needed, and it is clear that the mother has given to her, the same affectionate supervision and maternal care as in the days of her childhood. Her clothing, her board, her pocket money have all been supplied during most of these 27 or 28 years by the mother, and the question has never been considered whether the income from the insurance money was sufficient for this purpose or not. This voluntary and unrewarded stewardship has now been closed by the death of the mother; and the daughter, not content to receive the principal, for the very existence of which she is indebted to her mother's thrift and economy, seeks to charge interest upon it during the whole period, and to allow a pittance only for her own support, and nothing for her mother's labor and care. The orphans' court is clothed with full equity powers. These parties never interpreted their relations to each other in this way while the mother lived and the daughter enjoyed her care, and we will not so interpret them now. When the incapacity of the daughter for the management of her own affairs is considered, when the smallness of the income that could have been earned by this fund is also taken into account, and the absolute dependence of the daughter during most of this time on her mother for all the necessaries of life, we have no difficulty in concluding that the income was consumed year after year in a manner well understood and intelligently acquiesced in by the daughter. After a course of dealing extending over 27 years, we are fully justified in assuming that no account of receipts and expenditures was kept, because none was contemplated or desired by the parties; and that, under all the circumstances of this case, the mother's judgment was deliberately and wisely trusted for the management of the fund and the expenditure of the income therefrom, with no thought of an account in the mind of either. Under such circumstances to charge this mother, as a trustee, with the interest for the whole time at the legal rate, without knowing what she actually received, and to credit her with what we may guess she expended, with no knowledge of her actual expenditures, is to inflict upon her estate and her memory an injustice. The decree is affirmed so far as it charges the appellants with the principal of the insurance money and interest from the death of the decedent. It is set aside so far as it states an account of income during the decedent's lifetime. The costs of this appeal to be paid out of the fund.

In re HARKER'S ESTATE.

Appeal of WHITE et al.

(Supreme Court of Pennsylvania. April 1, 1895.)

Appeal from orphans' court, Berks county.

Accounting by J. M. Titlow and another, executors of Ellen J. Harker, deceased. From a decree allowing certain credits against the claim of Ellena B. White against the estate, said White, and the Guarantee Trust & Safe-Deposit Company, trustee for White, appeal. Modified.

Philip S. Zieber and Baer & Snyder, for appellants. Carrie B. Kilgore and David C. Harrington, for appellees.

PER CURIAM. This appeal is disposed of, so far as it relates to Ellena B. White, by an opinion filed in the appeal of J. M. Titlow et al. from the same decree, 31 Atl. 553. The decree as modified by the final order of this court made in that case is affirmed, with a di-

Digitized by Google

rection to the orphans' court to inquire into the claims of the Guarantee Trust & Safe-Deposit Company before requiring the money to be paid over by the executors, and to award the fund to said company as the trustee of the said Ellena B. White, if it shall be found entitled under the alleged trust deed to the custody of the same. The costs of this appeal to be paid by the appellants.

BECK et al. v. SNYDER et al.

(Supreme Court of Pennsylvania. April 1, 1895.)

PROMISSORY NOTE—SETTLEMENT BY THIRD PARTY—ACCORD AND SATISFACTION.

An agreement by the payee of a note, with the maker's widow, that certain sums paid by the maker, and by her after his death, for the payee's benefit, together with a sum paid by her to the payee, should be accepted in full settlement of the note, constitutes a valid satisfaction thereof.

Appeal from court of common pleas, Northampton county.

Action by John H. Beck and another, administrators of Thomas Beck, against Frank O. Snyder and another, administrators of Benjamin Shoemaker, on a promissory note. Judgment was rendered for defendants, and plaintiffs appeal. Affirmed.

O. J. Mutchler and H. J. Steele, for appellants. B. F. McAtee and W. S. & M. Kirkpatrick, for appellees.

PER CURIAM. The testimony referred to by the learned judge in that part of his charge recited in the first specification was to the effect that in an interview with Mrs. Shoemaker, after her husband's death, and before letters of administration were granted to defendants, the plaintiffs' intestate, Thomas Beck, admitted that payments on account of the note in question had been made by Mr. Shoemaker in his lifetime; that he (Mr. Beck) agreed to apply, as credits on the notes, certain sums for which he was liable on account of bills relating to the farm owned by him and Mr. Shoemaker as tenants in common, some of which bills had been paid by Mr. Shoemaker, and others by Mrs. Shoemaker after his decease; that, after allowing these credits for his contributive share of the farm bills thus paid by Mr. and Mrs. Shoemaker, plaintiffs' intestate claimed there was still due on the note a small balance of 67 cents, which was then and there paid by Mrs. Shoemaker, and accepted by him, in full settlement and discharge of the note. The defendants' sole contention was that by allowance of said credits, some of which were for payments made by Mrs. Shoemaker after her husband's death, and by payment of the small balance claimed, the note was fully settled and paid, and in support of that position they relied on the testimony referred to. It presented a question of fact, which was for the exclusive consideration of the jury, and they doubtless understood it correctly. There was no allegation of, nor was there any attempt to prove, payment and acceptance from the maker of the note or his administrator of any smaller sum than the amount actually due, in satisfaction of the note. Referring to the testimony as to what took place at the interview between Mrs. Shoemaker and defendants' intestate, the learned judge rightly said to the jury: "If this testimony is true, then this note was then and there settled, and plaintiffs would not be entitled to recover in this action. If you do not believe this to be true, and you believe there was no such conversation,—no such settlement,—or that the note then and there referred to was not this note, but some other note, and that the settlement then and there made was not the settlement of this indebtedness, but a settlement of some other matter, then your verdict will be for the plaintiffs, for whatever you find due on the note." This was substantially the only question submitted to the jury. There was no other question in the case. In view, therefore, of the testimony on which defendants relied, the charge cannot be regarded as misleading. In saying, by way of illustration, what is complained of in the second specification, the learned judge doubtless had in mind the facts of the case, as indicated by the defendants' testimony, and meant a settlement, not with the maker of a note, but with a third party,—such a settlement as that shown to have taken place between plaintiffs' intestate and Mrs. Shoemaker after her husband's death. There is nothing else in the case to which the language complained of could possibly apply. Considered as a whole, there is no substantial error in the charge. Judgment affirmed.

STOCKER v. DECH.

(Supreme Court of Pennsylvania. April 1, 1895.)

EXECUTION—FORTHCOMING BOND TO SHERIFF—INTERPRETATION.

1. Defendant and F. executed to S., sheriff, a bond which recited that whereas S., "sheriff as aforesaid, by virtue of the above-stated execution," had levied on certain barrels of paints; that such defendant was "desirous of shipping and forwarding said paints, in said cars, to their place of destination"; that if F. "shall deliver to the said S., sheriff as aforesaid, similar paints, so as aforesaid levied on, when legally required" by him under said execution, or other execution issued on said judgment, the obligation should be void, etc. *Held*, that F. was not only required to deliver the goods to S. when demanded, but whenever the demand should be legally made for such goods, either by S. or anybody else, acting under the law, on an execution upon said judgment.

2. The words "legally required" mean when a legal demand was made on the principal and surety for the return of the goods by any regular, legal process.

Appeal from court of common pleas, Northampton county.

Action by J. Mackey Stocker, to the use of Henry Erwin, against Joseph Dech, on a bond executed by Richard Foster, as principal, and defendant, as surety, to J. Mackey Stocker, sheriff of Northampton county.

Digitized by Google

From a judgment for plaintiff, defendant appeals. Affirmed.

Henry Erwin recovered a judgment by default against Richard Foster, on which a fi. fa. was issued, and placed in the hands of J. Mackey Stocker, sheriff of Northampton county, who levied on certain barrels of paint in box cars on the track of the Lehigh & Lackawanna Railroad Company. Afterwards, on petition of the judgment defendant, the court granted a rule on the judgment plaintiff to show cause why the judgment should not be opened, and defendant let into his defense, and execution set aside. Thereupon, such judgment defendant, Richard Foster, and Joseph Dech executed and delivered to J. Mackey Stocker the following bond: "Know all men by these presents that we, Richard Foster and Joseph Dech, all of the county of Northampton, are held and firmly bound unto J. Mackey Stocker, Esq., sheriff of Northampton county, in the sum of eight hundred dollars, lawful money of the United States, to be paid to the said J. Mackey Stocker, Esq., sheriff as aforesaid, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made and done, we do bind ourselves and each of us, our and each of our heirs, executors, administrators, and every of them, jointly and severally, by these presents. Sealed with our seals. Dated the 5th day of June, A. D. 1886. Whereas, the said J. Mackey Stocker, Esq., sheriff as aforesaid, by virtue of the above-stated execution, has levied upon certain personal property, inter alia, consisting of a lot of paints in one hundred and forty-seven barrels, or thereabouts, now in two box railroad cars standing on the track of the Lehigh and Lackawanna Railroad Company, at Shimer's Station, on said railroad; and whereas, upon the petition of the defendant above named, presented to the Hon. W. W. Schuyler, president judge of said county, the said judge granted a rule on the plaintiff, above named, to show cause why the judgment on which said execution was issued should not be opened, and the said defendant let into his defense, returnable on Monday, June 21, 1886, and moved the further order that the said execution be stayed in the meantime; and whereas, the said Richard Foster," etc., "the defendant, is desirous of shipping and forwarding said paints, in said cars, to their place of destination: Now, the conditions of this obligation are such that if the said Richard Foster." etc., "the defendant above named, shall deliver to the said J. Mackey Stocker, Esq., sheriff as aforesaid, paints of like quantity and quality so as aforesaid levied upon, and now on the cars aforesaid, when legally required by him to meet the exigency of said execution, or any other execution issued on the said judgment, that then this obligation is void; otherwise, to be and remain in full force and virtue."

The appellant assigns, among others, the following errors: "(6) The court below erred in their charge to the jury, as follows: 'The defendant contends that this was not an official bond given to the sheriff to protect him from any personal liability, or liability upon his personal bond, by reason of his releasing those goods from the effect of that levy, and the condition was that they should return to the said J. Mackey Stocker those goods whenever "legally" required by him, and that, as the goods were never demanded by him, but the succeeding execution having passed unto John I. Miller, sheriff, there never was a demand upon him for a substitution of the goods of like quantity and quality, and therefore there was no breach of this contract. I say to you, gentlemen, that this is not the law. The bond was given to J. Mackey Stocker, it is true, to protect himself from his action, as sheriff, in releasing those goods. They were released at the instance of the defendant in the execution for the reasons stated in the bond,—"in order that he might ship these goods to their destination." By releasing them, it is also true, as a legal proposition contended for by the defendant, that the sheriff himself incurred a liability to Henry Erwin, and that Henry Erwin might have proceeded against him, upon his official bond, for any damage he might have suffered by the releasing of those goods from the effects of the levy. That is true. But still, when this condition in the bond was placed in it that they "would deliver to the said J. Mackey Stocker, sheriff as aforesaid, paints of like quantity and quality," etc., they meant that they would deliver to J. Mackey Stocker, if he should demand it as sheriff, or they should be demanded by anybody else as sheriff, for the purpose of any execution issued on this judgment; that is to say, by the condition of this bond, Richard Foster was not to deliver only to J. Mackey Stocker when demanded by him during his term of office, or whenever he should individually make the demand, but whenever the demand should be legally made for those goods, either by J. Mackey Stocker or anybody else, acting under the law, upon an execution upon this judgment,—and that is the only proper interpretation of this bond.' (7) The court below erred in their charge to the jury as follows: 'The defendant further contends that the words "legally required" mean that when required by the regular steps and progress of the law, and that because after this levy was released, and the judgment closed by the verdict of a jury, a writ of venditionis exponas de bonis should have been issued, instead of an alias fi. fa., and that, therefore, there was no breach of the condition. I say to you, gentlemen of the jury, that that is not the law. "Legally required" does not mean by regular process of law,—that is to say, by the regular succeeding process of the law,—but when a legal demand was made upon the principal and surety in this bond for the return of the goods, by any regular legal pro-

Digitized by Google

cess, that the condition was complied with, and it was their duty to see that the goods were forthcoming to answer such writ.'"

O. H. Meyers, for appellant. J. B. Kemerer and W. S. & M. Kirkpatrick, for appellee.

PER CURIAM. We find nothing in either of the specifications of error that requires special consideration. The rulings of the learned trial judge, including his construction of the bond in suit, are substantially correct. There is nothing in either of them that would justify a reversal of the judgment. Judgment affirmed.

SMITH v. EASTON TRANSIT CO.

(Supreme Court of Pennsylvania. April 1, 1895.)

TRIAL—INSTRUCTIONS—PROVINCE OF JURY.

Where a case, in any view that can be taken of the testimony, involves questions of fact which are exclusively for the jury, it is proper to refuse a binding instruction.

Appeal from court of common pleas, Northampton county.

Action by Paul Smith against the Easton Transit Company for personal injuries caused by defendant's negligence. From a judgment for plaintiff, defendant appeals. Affirmed.

H. J. Steele and R. C. Stewart, for appellant. James W. Fox, for appellee.

PER CURIAM. In any view that can be taken of the testimony in this case, it involved questions of fact which were exclusively for the consideration of the jury, and it was accordingly submitted to them in a clear, impartial, and adequate charge of which the defendant has no just reason to complain. The only complaint now made is the refusal of the learned trial judge to withdraw the case from the jury by instructing them, in the language of the point submitted, "that, under the law and the evidence, the verdict must be for the defendant." To have done this would have been plain error. Judgment affirmed.

DAVIDSON v. YOUNG.

(Supreme Court of Pennsylvania. April 1, 1895.)

BOND—CONDITION—PAROL EVIDENCE TO VARY.

1. On an issue as to whether a bond absolute on its face was given to secure the obligee's support, evidence that, before its execution, the obligee stated that such was the purpose is admissible, where it is followed by evidence that after its execution the obligee stated that he and the obligor had made such an arrangement.

2. On an issue of whether a bond absolute on its face was given to secure the obligee's support, statements of the obligee to that effect, made after the execution of the bond, are admissible.

3. To justify a finding that a bond absolute on its face was given to secure the obligee's support, the preponderance of evidence that such was its purpose must be clear and convincing.

Appeal from court of common pleas, Bradford county.

On a confession contained in a bond, judgment was rendered in favor of Reuben Young, and against Isaac L. Young. Defendant's motion to open the judgment, and for leave to defendant, was granted, and, plaintiff having died, Samuel Davidson, his executor, was substituted in his stead. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

The following is the charge of the trial judge:

"The issue which you have been sworn to try was framed by the court to determine the question whether the bond given by Isaac L. Young to Reuben Young, dated December 14, 1875, was given for the payment of $2,100, with interest from date, or given to secure Reuben Young and his wife for their support in case they should come to want. The general rule is that a written instrument cannot be changed or altered by contemporaneous parol evidence. To this rule there are certain well-defined exceptions, which are fraud, accident, or mistake at the time of the execution of the written instrument, and where the party undertakes, after the execution of an instrument, to make use of it for a purpose contrary to the agreement made by the parties at the time of its execution. The bond in this case, according to the evidence of Gen. Madill was, as he thinks, prepared by him in October, 1875; that he thinks it was taken from his office by one of the parties; and that afterwards, in December, they changed the date of the month to December, but cannot remember whether the bond was signed in his presence. This bond was executed by the parties, and calls for the unconditional payment of $2,100 on or before the 14th December, 1895, with interest annually. This agreement should stand as an agreement of the parties, and be enforced as such, unless you find by evidence that is clear, precise, and satisfactory that, at the time it was executed, it was agreed by the parties to it that it was to be held by Reuben Young to secure him and his wife their support in case they should come to need, and for no other purpose. If it was the agreement at the time of the execution of this bond that Reuben Young was to hold it (although absolute upon its face) as security for his support and that of his wife in case they should come to need or want, and not for the absolute payment of the sum of $2,100 and interest, according to its terms, then for him or his executor to use this bond for any other purpose would be a fraud upon Isaac L. Young. In saying that it would be a fraud for his executor to use it, we don't mean that it would be an intentional fraud upon his part, because it is his duty to collect all

Digitized by Google

of the assets belonging to the estate; but should he, with or without knowledge of the alleged parol agreement, undertake to use the bond for purposes contrary to the agreement of the parties at the time of its execution, it would be a fraud upon Isaac L. Young, no matter whether it was intended by the executor or not. Now, unless you can find from the evidence in the case, by the evidence that we have said, which is clear, precise, and satisfactory, that, at the time the bond was executed, it was agreed that Reuben Young was to hold this bond as security for his support in case he should come to need, then you must find in favor of the plaintiff; for, unless that was the agreement at the time the bond was executed, it must stand as the agreement of the parties, even though his father afterwards made up his mind that he would not collect it unless he came to want; and declarations made to persons, such as tax assessors and others, that he did not intend to collect the bond, would not be such evidence as would do away with the leading import of this bond. The evidence offered upon the part of the defendant for the purpose of showing what took place at the time of the execution of the bond is by the evidence of witnesses, the first of which was that of Benjamin F. Young, who testifies as follows: 'We were at the breakfast table when grandfather came in, and he sat down, and said that he had that fixed now where he could let father have that 40 acres of land, and that he was going to deed it to him as he had agreed to do, and they talked a while, and finally he said he would have to ask a favor of him to give him a bond for his support, and he proposed to do the business that day. They said they would hitch up and go to Towanda, and they went. My mother said she would rather that he should keep it in his own hands than to give a bond; if he wanted to let them have the use of it, to do so, and she did not think it advisable to give a bond. Q. What did your grandfather say to that, if anything? A. Why, he said it was all right; that there would be no harm in giving the bond. He said, "You will never have to pay anything on it unless I come to want, and need it for my support and wife's;" and then he said. "I shall ask you to pay something on it whenever we need it."' Now, then, gentlemen, that conversation, standing by itself, being before the execution of the bond, would not be sufficient to set aside the obligation, because when parties enter into a written instrument, and execute it, in the contemplation of the law, they merge all former conversations and agreements into the written agreement. But there is something further in connection with this conversation. In a few days afterwards, from three days to a week, the grandfather of the witness (Reuben Young) came to Isaac Young's house, and there had a conversation with Mrs. Young, Isaac Young being away at the time. As the reporter has it: 'Grandfather came over there, and father was not there, and mother and him got to talking about it, and he said that they had made the arrangement just as they had talked, and mother did not really seem to fall in sympathy with it then, and he went on to explain to her that all he took that bond for was in case he should use up all the other property that he had, and then he would want something to take care of himself with, so as not to be dependent upon other people, and he told her she need not worry, that it would be all right just as he had said.' Now, then, gentlemen, it is for you to determine what Reuben Young meant when he said they had made the arrangement just as they had talked. Does that refer to the conversation that they had had in the presence of Mrs. Young in which she had taken a part, the morning of the execution of this bond? If it does mean that, then it would mean that the bond had been executed upon the conditions and terms which they had talked the morning before starting to Towanda, at Isaac Young's. In the cross-examination he states: 'Q. Now, will you state to me what your grandfather said to your mother when he came over there, and saw her, when your father was not present (after this day they had been to Towanda)? A. It was a good deal in force as I have given you. Q. Give the language of your grandfather and your mother, or the substance as near as you remember. A. Why I cannot remember all that he said, but I remember his saying that he had done the business just as they had talked, and she thought it was a very poor way, and she did not think she liked the way of doing it, and he went on to explain to her.'

"Elijah Horton was called, and he testifies as to three different conversations. He says that he was the brother of Reuben Young's wife; that Reuben Young married his eldest sister. Speaking of Reuben Young, he told him that he had deeded the land to Isaac; that he had taken a bond for his support; that Isaac was not to pay anything unless he came to want. Reuben told him, about the time he bought the land, he had bought it, and intended it for Isaac. Then, in the second conversation, he says he told him the same as in the first conversation. He said that it was agreed with Isaac and him, at the time he took the bond, that Isaac was not to pay anything unless he came to want. Speaking of the third conversation, he says it was substantially the same. George L. Fuller was called, and he testifies that he resided in Athens, and that he had formerly resided as a neighbor of Reuben Young's; says about 1875 or 1876 'I was riding with him. I had the Davidson farm. I said to Mr. Young, "I would like to sell Isaac the land that adjoins him." He said Isaac had enough land. I said he had only 50 acres. He said, "I have made a deed by which I have let him have the 40 acres that Susan Horton

Digitized by Google

had;" that he had taken a bond for $2,000 or a little more; that Isaac was not to pay anything unless Reuben and his wife came to want.' In the evidence before Mr. Beers, there has been some little discussion as to what he meant by an expression in his deposition; but, as that has been so fully commented upon by both parties in this case, I will not go all over it again. Theo. G. Smith was called, and he said that he was a tax assessor of Sheshequin township, and he went to Reuben Young for the purpose of assessing him. He was a tax assessor instead of a tax collector, and desired to know what money he had at interest, and in that way had a conversation with Reuben Young. He said that he had a legal paper against Isaac; that it bore interest, but it was never to be paid unless he came to want; that the bond was never to be paid unless he or his wife came to want; that he did not think that it ought to be returned against him. The next year he said that he had a $2,100 judgment; that the $2,100 judgment remained the same as the year before. He said it was the understanding between him and Isaac Young at the time it was given that the bond was never to be collected unless he came to want. Avery J. Thompson was called. He was an assessor of Sheshequin township, and had a conversation with Reuben Young in relation to this bond. 'I asked him if he had any money at interest. He said he had some claims against his boys, but they had never paid any interest, and he did not expect they ever would; that he only held them against them in case he needed it.' Horace H. Johnson was called. He was also a tax assessor; had a conversation with Reuben Young. 'I asked Mr. Young with regard to his money at interest. He said he had a note against his son, but he did not expect him to pay it, and he got no interest upon it, and did not expect any unless he needed it for his support.' Horace Horton was called. He had a conversation with Reuben Young about a claim he said he had against Isaac L. Young; that he held a bond for the purpose of his support should it be needed. He said that he did not want it to get into the hands of Isaac's wife, and he wanted Isaac to have it; that he only held it (on croos-examination) to keep Isaac right, and in case he should need it for his support. R. Osborne says he had a conversation with Reuben Young in which he told him that he had a writing against Isaac Young in case he should come to want, and it was not to be paid unless he came to want. W. H. H. Gore was called. He was also a tax assessor. 'I was assessing him in 1866. He gave in some money at interest, and then spoke that he had let Isaac have the land; that he took a judgment from him; that he only expected he should pay it in case he came to want; that he was receiving no interest, and never collected any interest on it, and never expected to unless he came to want. He never expected to call on him for the principal or interest only if he came to want.' John R. Post was also called: 'I live in Wysock township, and knew Reuben Young in his lifetime. I had a conversation with him. I met him on Shore's Hill. He said he had let his son Isaac have 40 acres of ground, and had taken a judgment for $2,100; that he had never paid a cent of interest, and he never expected his son to pay any interest or principal.' Lemuel Post, of Sheshequin, says that he rode with Reuben Young at one time when he was going to Towanda to get exonerated; that he had taken a bond or note for the purpose of securing him in case of want, and he said he was never to call on Isaac for it unless he came to want. F. M. Vought was called, and he was an assessor of taxes, and speaks of a certain return that was made to him by Reuben Young, in which he returned as follows:

" 'Plaintiff. Defendant. Remarks.
Reuben Young ..... $680, judgment.
Reuben Young ..... $500, note.
Reuben Young ..... $648, judgment.

" 'Other judgments on the docket are not subject to taxation, as I receive nothing from them, and only serve as my security. Reuben Young.'

"Reuben L. Young, a son of the defendant, testifies that at one time his father was owing his grandfather a judgment of $600. His father sent a check by him to pay the interest. The grandfather refused to receive it because it was not in full. He said he must have the principal and interest, but as to the other judgment he never expected to call for that unless he came to want. Gen. Madill was called, and he testifies that he drew the bond in this case; that he thinks it was prepared in October, 1875; that one of the parties took it from his office, and that in December he changed the date of this bond; that it is his impression that this bond was given for the support of Reuben Young. 'I got that impression from the parties.'

"This, gentlemen, is substantially what has struck the court as being the most important points of evidence on the part of the defense; but, as you shall take this evidence and retire into the jury rooms, take the whole evidence into consideration, no matter whether I have called it to your attention or not, and upon the whole of the evidence you are to determine this issue.

"On the part of the plaintiff, they call Samuel Davidson. He says that on one occasion—I think he says about the time that this land was conveyed to Isaac Young: 'I said to Isaac L. Young, "We want to sell him the land adjoining him." He said that he had all the debt he could shoulder.' He identifies certain papers that have been given in evidence. Now, then, what debt did he refer to? Was it this $2,100, or was it some other debt? If it referred to other matters, of course, it would have no relation to this suit whatever; but, if he referred to the judgment owing his father, then it would have some bearing as to whether Isaac L. Young at that time considered it an indebted-

Digitized by Google

ness, or only a bond for the purpose of securing his father's support, or is it left in such shape that he had all the indebtedness that he could shoulder? He said that he had purchased the 40 acres, and that he had all the debt that he could shoulder. William P. Horton was also called by the plaintiff, and he testifies to a conversation that he had with Isaac Young soon after this bond was executed. He says that, about the time that this bond was executed, that he also executed a bond to Reuben Young for $1,000, and that Isaac said to him one day, 'We ought to be able to straighten this up in 20 years.' This, as I understand it, had relation to the bonds that they had given their father, and that, gentlemen, is for you to determine. Upon the part of the defendant, they claim that at other times Mr. Horton has made statements that are contrary, or would seem to be contrary, to this statement; that he had said that he understood that these bonds were never to be paid unless Reuben Young came to want, and some evidence of that kind has been offered. Gentlemen, you have heard the evidence on the part of William P. Horton, and also heard the contradictions that have been made, and it is for you to say which are correct, and you are to consider the fact that William P. Horton is now an interested witness in the case; that he has sold his place to his son, and taken the amount that would come to his son as heir of the estate in the first division of Reuben Young's estate, and that amount will depend upon your verdict; so that he is in some way interested in this case. It is proper for you, gentlemen, to take notice of this interest here.

"Now, gentlemen, in looking over this evidence, you will discover that some of Reuben Young's declarations referred to what took place at the time this bond was executed, and some did not. Now, then, from this evidence, it is for you to determine what did take place at the time that bond was executed, and unless you can find, at the time the bond was executed, that it was given for the support of Reuben Young in case he should come to want, from the declarations of Reuben Young himself when he refers to the time of the execution of this bond, then you must find for the plaintiff, because what you have heard when he says that he intended that he never had received any interest upon it, and never intended to collect it unless he came to want, can only be used as corroborative evidence, or evidence to sustain the evidence which refers to what took place at the time the bond was executed; and if you fail to be satisfied that at the time the bond was executed, that that was the agreement of the parties, then you must find for the plaintiff; but if you find from the evidence and declarations of Reuben Young that at the time that that bond was executed, that it was agreed that he should hold it for his support, and that Isaac Young should not be called upon to pay anything upon it unless he came to want, and you are satisfied that this evidence upon which you find your verdict is of such character, that it is clear, precise, and satisfactory, then we say that you should find for the defendant. If you find that this bond has not been changed by any agreement that had been entered into by these parties at the time of the execution, then find for the plaintiff; but if, on the other hand, you are satisfied from the evidence, clear, precise, and satisfactory, that at the time this bond was executed, that there was an agreement between these parties that this bond was only to be held by Reuben Young for his support, and was only to be paid in case he came to want, then we think that your verdict should be for the defendant.

"I also desire to call your attention, gentlemen, to some communications which have passed between these parties, and they are as follows: On January 11, 1890, Isaac L. Young wrote a letter to his father, and we need not read this whole letter, as it has been read to you several times, and commented upon by the parties, except, perhaps, the latter portion of it, on the margin. But, gentlemen, you are to take these letters, and give consideration to what the purpose was, and not to what the counsel say they say. You are to look at these letters, and see what the parties wrote to each other, and not what the counsel or any one else say they wrote to each other. The letters speak for themselves, and the comments must be left out. After speaking in relation to some trouble that he had with his father for which he expresses regret, he then comes down to speak in relation to the indebtedness to his father: 'The judgments that I owe you I want you to have every dollar. The judgments are past due; they ought to be paid; but the fact is I have not the means to pay, and the probability is I never can pay. I think it wisdom in me to give up now while I can have a little left that I can call my own. I have always worked hard, as you well know, and am pretty well broken down. I am sorry, and have been many a time, I ever bought that 40 acres, and I am now realizing more fully the folly of it. We are now both of us alive, and no one can settle this matter cheaper and better than ourselves. The way this matter stands now on the docket, in a very little time my home and the home I intended for Frank will be consumed. Will you be kind enough to take the 40 acres back? I will do anything in my power to satisfy you if I can have a few hundred dollars left with the feeling it is mine to do with as I choose. If you will favor me, I am willing to talk the matter over with you kindly. Your son, Isaac L. Young. P. S. As I remember, you promised me when I bought that 40 acres that the $2,100 judgment should only be a lien against the 40 acres, and not against my other property,

Digitized by Google

and that I would have no interest to pay unless you really came to need it. Your son, Isaac L. Young.' Now, then, gentlemen, you will remember that this is a letter in January, 1890. In December of that same year, about 11 months afterwards, the father writes this letter to the son: 'That matter of yours is due, and I wish you would come and see to it at once, for I want the money to use, and must have some this week. I mean the $600 note. That for the 40 acres I shall never trouble you for unless I need it for my support, as I have told you time and again; but the other I must have.' Now, gentlemen, it is for you to take these letters, and say what the parties intended.

"The plaintiff requests us to charge you as follows: '(1) That inasmuch as no witness in this case has testified to having been present at the time of the signing nor delivery of the bond in question, nor that he heard anything that was said, nor saw anything that was done at such time between or by either of the parties thereto, your verdict must be for the plaintiff.' We refuse this point. We are of opinion that the supreme court have never yet gone that far, unless we are mistaken; and, if we are, the supreme court will correct us, and we shall be very glad to follow any indications that they shall give us. '(2) The plaintiff is entitled to your verdict in this case, unless you find from the evidence that, at the time Isaac L. Young executed the bond in suit, Reuben Young agreed with him that he should never call upon him to pay any part of the principal of said bond or interest; that it should be held by him as security in case he (Reuben Young, and his wife) should come to want or need the same for their support; and that it was the agreement made between them at the time the bond was executed; and that Isaac L. Young would not have signed the bond had not this agreement been made with his father, and the evidence of this alleged agreement set up here by the defendant must be established by evidence that is clear, precise, satisfactory, and indubitable.' We affirm this point. '(3) The bond in this case is presumed to contain the whole contract between Reuben Young and his son Isaac L. Young, and that all previous conversations and talks between the parties are presumed to have entered into and merged in the bond; and the jury must so find, unless satisfied by clear and convincing evidence that another part of the agreement was in fact made at the time the bond was executed, but by fraud, accident, or mistake was omitted from the writings.' We refuse to charge you as requested here. If the parties entered into that arrangement, although there was no fraud, accident, or mistake, if Reuben Young or his executor afterwards undertook to use the bond for a purpose that was not contemplated, and contrary to the agreement of the parties at the time the bond was executed, then we say that the defendant would be entitled to recover, for that would be a fraud. '(4) The defendant setting up in this case, as a defense to the bond in suit, that he was induced to execute the said bond under an agreement with his father that he would never have to pay the principal of said bond or interest unless he came to want and needed it for his support or that of his wife, is an attempt upon the part of the defendant to change the solemn contract of the parties entered into in writing and signed by the defendant; and, before you can change, alter, or do away with the bond, the evidence offered by the defendant must be clear, convincing, and satisfactory, and by preponderance of testimony.' We affirm this point. '(5) There being no witness present at the execution of the bond in suit, the evidence of the declarations of Reuben Young made since the execution of the bond in suit have been admitted in evidence, for the sole purpose of assisting you in determining what was the bargain or contract made between the parties at the time the bond was executed; and if these declarations, as testified to by the several witnesses, are uncertain and confusing, and do not satisfy you clearly of the truth of the defense set up here, considering also the evidence offered by the plaintiff, then your verdict should be for the plaintiff.' We affirm this point. '(6) The burden is on the defendant in this case, and if the evidence offered by the plaintiff, together with the bond in suit, equally balances in your minds the evidence offered by the defendant, then your verdict should be for the plaintiff.' We affirm the proposition. In other words, gentlemen, the defendant has the burden of proof that, at the time this bond was executed, there was an agreement, as alleged by him; and if he fails in that, or if you are not convinced by the evidence which you deem clear, precise, and satisfactory that such agreement was entered into at the time of its execution, then it would be your duty to find for the plaintiff."

William Maxwell and James Wood, for appellant. E. Overton, for appellee.

PER CURIAM. This feigned issue, awarded for the purpose of determining how much, if anything, was due upon the judgment in question, depended on questions of fact which were exclusively for the consideration of the jury. It was fairly submitted to them in a clear and adequate charge, in which there appears to be no substantial error. An examination of the record, with special reference to the assignments of error, has satisfied us that neither of them should be sustained. There is nothing in any of them that requires discussion. The evidence properly before the jury was quite sufficient to warrant them in finding in favor of the defendant. Judgment affirmed.

Digitized by Google

MAREAN v. NEW YORK, S. & W. R. CO.

(Supreme Court of Pennsylvania. April 1, 1895.)

INJURY TO EMPLOYE—ASSUMPTION OF RISKS.

Where plaintiff went into defendant's employ as car inspector, after stating that he would not unless furnished with a proper signal to protect him while under the cars, on the promise that the signal should be furnished, but before it arrived he was injured by the backing of a train against a car under which he was working, defendant is not liable, plaintiff having assumed the risk.

Appeal from court of common pleas, Monroe county.

Action by Henry Marean, by his next friend, against the New York, Susquehanna & Western Railroad Company, for personal injuries. Judgment for defendant. Plaintiff appeals. Affirmed.

The opinion of the court below on denying new trial was as follows:

"The reasons stated by the lamented Judge Dreher when he directed the jury to find for defendant are unanswerable. From the testimony on plaintiff's part,—testimony introduced to show how the accident complained of occurred,—it is plain that the negligence of plaintiff contributed to the injury. The law is well settled that, where there has been negligence by the party injured which contributed in any degree to the injury, there can be no recovery. Monongahela City v. Fischer, 111 Pa. St. 9, 2 Atl. 87.

"A further reason is also apparent. Plaintiff was hurt and maimed while inspecting cars, not attached to a locomotive, standing on a side track. While he was under the cars, or, rather, while getting out from under them, a section of a train was backed up against and moved the cars plaintiff was engaged upon. This was on the night of November 25, 1889. Plaintiff had been engaged about the same place, upwards of a year, as car repairer. In the beginning of November, 1889, his employment was changed to inspecting. The following is found in plaintiff's own testimony: 'At the time I was changed to car inspecting, there was a conversation between the foreman of the repair shop and myself, as follows: James Mahlon came to me, and said that he wanted me to go to work as car inspector, and I told him I would not inspect cars unless the company would furnish me with the proper signal to protect me while under the cars. He said "Go on to work, and I will furnish you the signal for that purpose." On being promised to be furnished the signal, I went to work as car inspector. About two weeks after I went to work as inspector, I had occasion to go under the cars to examine a drawhead spring, etc.; and in a short time after this I went to the foreman, James Mahlon, and asked him why he did not furnish me the signal as he had promised. He said that the signal ought to be here now; that he wrote to the superintendent about it, and he sent him an answer saying that the signal would be furnished immediately. In a short time after this conversation, to wit, on the night of November 25th, it became necessary for me to go under the cars.' (Then he was hurt.) So this was not a case where an appliance became defective or disappeared during the employment of the complaining party, and he continued to work upon the promise and expectations of repair or restoration. The plaintiff entered upon his new employment as inspector knowing or believing that a signal lamp and flag, which were not in use then, were necessary to his safety; but, notwithstanding it was not furnished, he entered upon and continued in said employment without the signal. He took the risks knowing the danger. In such a case a plaintiff cannot recover. Russell v. Hutchinson, 15 Wkly. Notes Cas. 482, is one of the many cases demonstrating that. That case also answers the argument of plaintiff's counsel concerning the age of the plaintiff. He was about nineteen when he was injured. What was said of the plaintiff in Reese v. Clark, 146 Pa. St. 465, 23 Atl. 246, applies to this plaintiff. 'He was under no obligation to continue working in a dangerous place of employment, and if he did so he assumed the risk himself.' While deploring the unfortunate plight of the plaintiff, it must be declared that, under the rules of law laid down by the supreme court of this commonwealth, he is not entitled to compensation at the hands of defendant."

C. Smith and H. J. Kotz, for appellant. John B. Storm and A. M. Palmer, for appellee.

PER CURIAM. All that need be said on the questions involved in this case will be found in the clear and satisfactory opinion of the learned president of the Thirty-First judicial district, who presided specially at the hearing of the rule for new trial in this case. Neither of said questions requires further elaboration. There was no error in directing a verdict for defendant. Judgment affirmed on the opinion above referred to.

COMMONWEALTH, to Use of WYKOFF, v. ROONEY et al.

(Supreme Court of Pennsylvania. April 1, 1895.)

CONSTABLE — LIABILITY ON BOND — FAILURE TO SELL PROPERTY LEVIED ON—RETURN TO EXECUTION—PAROL EVIDENCE—INDEMNITY BOND.

1. In an action on a constable's bond, for refusal to sell property levied on under execution, defendant may explain by parol evidence his return to the execution, "Exemption claimed by wife of defendant and A., * * * and indemnity refused by plaintiff," to show that A. claimed the property levied on, and gave defendant written notice thereof.

2. Even if parol evidence is not admissible to explain such return, it is conclusive that plaintiff refused indemnity, and therefore

Digitized by Google

against his right of recovery, as he could not make defendant liable on his bond, for refusing to make a sale of property levied on, without tendering an indemnity bond.

Appeal from court of common pleas, Clinton county.

Action by the commonwealth of Pennsylvania, for the use of Royal D. Wykoff, against John Rooney and others, on a constable's bond. Judgment for defendants. Plaintiff appeals. Affirmed.

The opinion of the court below was as follows:

"After the evidence was closed the court directed a verdict for the defendants, being of the opinion that the plaintiff could not maintain his action. On the 16th day of February, 1892, a summons in assumpsit on the official bond of John Rooney, constable of Noyes township, and C. R. Noyes, his surety, was issued. The plaintiff filed a statement, which, after reciting the bond, declares that the condition of said bond was broken by the constable, in this: that having an execution in his hands in favor of the plaintiff against one David Walters, dated November 12, 1891, he made a levy upon certain articles of personal property, but did not sell said goods at public sale, nor did he summon three disinterested and competent persons to appraise the property levied upon, nor did he, on or before the return day of the execution, produce to the justice the receipt of the plaintiff, or make such other return to said execution as is sufficient, and required by law, but on the 30th day of November, A. D. 1891, said constable made the following return to said execution, viz.: 'Exemption claimed by wife of defendant and A. S. Walters and Girard Walters and C. R. Noyes, and indemnity refused by plaintiff.' On the trial of the case, we allowed parol proof to be introduced to explain the return of the constable, which was unintelligible without such proof. To this the plaintiff's counsel excepted on the ground that the return of the constable was conclusive, and could not be explained by parol testimony. If this position of plaintiff's counsel is correct, and the court was in error in admitting said parol testimony, then the plaintiff has no case, and the return of the constable is conclusive that indemnity was refused by the plaintiff. But in our opinion the parol evidence was admissible to explain the return, and it was shown that the personal property which was levied upon was claimed by A. S. Walters, Girard Walters, and C. R. Noyes, and that the constable received written notices of these claims, which were exhibited in evidence on the trial. After these notices had been served on the constable, he demanded indemnity from the plaintiff before he would proceed to sell the property. This was refused, and no bond of indemnity tendered or offered to the constable, and the execution was returned without a sale. It was the duty of the plaintiff to have tendered or offered a bond of indemnity to the constable, before he could make him liable on his bond, for refusing to make a sale. Without determining whether this case comes within the purview of the sixth section of the act of March 21, 1772, we are of the opinion that our instruction to find a verdict for defendants was right and just, as it is an attempt to make an officer liable without any default having been shown."

Seymour D. Ball, for appellant. Jesse Merrill, for appellees.

PER CURIAM. The learned president of the common pleas was clearly right in directing a verdict for the defendants, and there is nothing in the record that would justify a reversal of the judgment entered thereon. We affirm it on the opinion of the court below. Judgment affirmed.

EVANS et al. v. McCORMICK.

(Supreme Court of Pennsylvania. April 1, 1895.)

GUARANTY—ACCEPTANCE.

One who, in response to a telegram from the seller as to whether he will guaranty the payment of the price of goods sought to be purchased by another, answers that he will, is not liable for such price unless notified of the acceptance of his guaranty.

Appeal from court of common pleas, Clinton county.

Action by T. G. Evans & Co. against C. S. McCormick on a contract of guaranty. Judgment, on a compulsory nonsuit, was rendered for defendant. A rule to take off the nonsuit was discharged, and plaintiffs appeal. Affirmed.

The following is the opinion of the trial judge:

"The cause of action was the alleged guaranty of C. S. McCormick, the defendant. Plaintiffs were in the wholesale crockery and queensware business at Pittsburgh, Pa. Early in July, 1889, they received an order for certain goods from Mrs. S. M. Bierly, of Du Bois, Pa. Their traveling salesman had taken the order from Mrs. Bierly, at Du Bois. Not satisfied of Mrs. Bierly's solvency, before proceeding to fill the order they telegraphed defendant, at Lock Haven, as follows: 'Pittsburgh, Pa., 12. 2-13-89. C. S. McCormick: Bierly's purchases amount to about seven hundred dollars. Will you guaranty payment? T. G. Evans & Co.' To which defendant, three days later, wired the following answer: 'Lock Haven, Pa., 16. 2-16-89. T. G. Evans & Co., 213 Market St., Pgh.: I will guaranty payment of Bierly bill. C. S. McCormick.' Just what led to this inquiry, does not appear. Upon receipt of McCormick's telegram, and on the strength of the alleged guaranty, plaintiffs shipped the goods ordered,—some to Mrs. Bierly, and some to McCormick, at Du Bois. All were received by Mrs. Bierly.

Digitized by Google

On plaintiffs' book of original entry, some of the goods were charged to Mrs. Bierly, and some to McCormick. On their ledger, all were charged to McCormick. Because no notice had been given to McCormick of the acceptance of his guaranty, and that the goods had been sold on the strength of the same, plaintiffs were nonsuited.

"The decisions leave no room for doubt that, except in 'cases of absolute guaranty, accepted when given,' notice of acceptance is necessary to fix the liability of the guarantor. Gardner v. Lloyd, 110 Pa. St. 278, 2 Atl. 562, and cases there cited. It is contended by counsel, however, that, 'if the guaranty is made at the request of the guarantee, it then becomes the answer of the guarantor to a proposal made to him, and its delivery to and for the use of the guarantee completes the communication between them, and constitutes a contract.' As authority for this position, Davis v. Wells, 104 U. S. 159, and Machine Co. v. Richards, 115 U. S. 524, 6 Sup. Ct. 173, are cited. These cases do so hold, although the decisions turned on other points. Looking to our own decisions, we find a different doctrine held in Kay v. Allen, 9 Pa. St. 320. It was argued by counsel 'that a precedent request by the creditor to the party subsequently offering the guaranty was equivalent to notice of acceptance.' Mr. Justice Bell, delivering the opinion of the court, could find no warrant for any such view. In rejecting the proposition he reasons as follows: 'Indeed, it is difficult to imagine how a precedent request alone can supply the place of subsequent notice, since, after request made, and proffer of guaranty, the merchant may refuse the credit or advance craved, and, without notice, the surety cannot know whether he has or not. So far is this insisted on that it is said, without notice there can be no contract, for, like all other contracts, that of guaranty requires both a proposal and acceptance thereof.' This doctrine was distinctly recognized and reaffirmed in Gardner v. Lloyd, supra, decided since the case in 104 U. S., Mr. Justice Green quoting the very language of Judge Bell. The reasoning of the supreme court of this state is convincing, while for the doctrine of the United States court no reason is offered, and we feel bound to follow the decisions of our own courts. In the case at bar, the most that can be said for plaintiffs is that their telegram was a precedent request which was followed by a subsequent offer of guaranty from the defendant. Defendant was entitled to notice before he could be held on his guaranty. To my mind, plaintiffs have not made a better, if indeed so good, a showing as did Coe in his case against Buehler, reported in 110 Pa. St. 366, 5 Atl. 20. There the guarantor signed the guaranty at the instance of the agent of the guarantee. The contract guarantied, though executed by the debtor, had not yet been signed by the guarantee. It was executed by him soon afterwards, but no notice thereof was given to the guarantor. The supreme court held that absence of notice of acceptance was fatal, and sustained a judgment of nonsuit. This is in harmony with the unbroken line of decisions preceding it, and is conclusive of the question under consideration.

"It is urged that there is testimony from which the jury could find that defendant was interested in Mrs. Bierly's purchase; that the goods were in fact bought for him. We do not think so. Joseph Bensinger, the tenant of the hotel under McCormick and Seener, says he purchased from McCormick a one-half interest in these goods on December 13, 1889. This was ten months after the sale to Mrs. Bierly. It was not shown how McCormick came by this one-half interest, or that he knew where the goods came from. The fair and natural presumption would be that he bought from Mrs. Bierly. There is nothing in plaintiffs' testimony to show that McCormick ever, prior to the bringing of this suit, had knowledge that Evans & Co. had sold the goods in question, or any other goods, to Mrs. Bierly. Plaintiffs could have shown how this was, and it was their duty to do so. They seek to recover from McCormick, not as the original debtor, but as surety. 'In all cases when a plaintiff seeks to make one man liable for the debt of another, the case must be plainly made out. Every ambiguity in the evidence weighs in favor of the defendant.' Kellogg v. Stockton, 29 Pa. St. 460."

W. C. Kress, for appellants. Cline G. Furst, for appellee.

PER CURIAM. The only error properly assigned is the refusal of the court below to take off the judgment of nonsuit. For reasons given by the learned president of the Eighth judicial district, who specially presided at the hearing, we are satisfied that the rule to take off the compulsory nonsuit was rightly discharged. The judgment is affirmed on his opinion.

TOBYHANNA & LEHIGH LUMBER CO. et al. v. HOME INS. CO.

(Supreme Court of Pennsylvania. April 1, 1895.)

JUDGMENT BY DEFAULT—AFFIDAVIT OF DEFENSE.

A rule of court provided that plaintiff should be entitled to judgment by default for want of an affidavit of defense to be entered in the court on the third day of the next succeeding term to which the process was returnable, or in the prothonotary's office at any time after. Laws 1887, p. 271, § 5 (passed subsequent to the rule), provides that judgment may be moved for in accordance with the present practice if no affidavit of defense be filed within 15 days after notice of the filing of plaintiff's statement. *Held* that, where defendant fails to file an affidavit of defense within 15 days after notice of the filing of plaintiff's statement, the prothonotary has authority at any time thereafter to enter judgment in favor of plaintiff.

Appeal from court of common pleas, Monroe county.

Digitized by Google

Action by Tobyhanna & Lehigh Lumber Company and another against Home Insurance Company on a fire insurance policy. Judgment by default was entered in plaintiff's favor. A rule to show cause why the judgment should not be vacated was discharged, and defendant appeals. Judgment affirmed, and appeal dismissed.

The following is the opinion of the trial judge: "The summons in this case was issued on the 11th day of September, 1894. On the same day plaintiff filed its statement. The summons and statement were served upon the defendant on the 14th of September following. The return day of the summons was the first day of next term,—the 24th of September, 1894,—just ten days after service. The defendant caused its appearance to be entered on the return day. No affidavit of defense was filed in the prothonotary's office by the defendant within fifteen days of the service of the statement; and thereupon, on the 1st of October, 1894, the plaintiff took judgment by default, for want of such affidavit, against the defendant in the sum of $735. in the prothonotary's office. The court was not in session at the time this judgment was entered. It seems that on the 10th of October, 1894, the plaintiff again took judgment in the prothonotary's office against the defendant in the sum of $736.05 by default for want of an affidavit of defense. At the argument it was conceded by the plaintiff that this second judgment was void. We so treat it. The contention, therefore, is confined to the judgment entered October 1, 1894. The defendant alleges that the judgment was entered without warrant of law, and contrary to the rules of this court. It is argued that under the act of 1887 (P. L. 271) the motion for judgment must be made in court; that it cannot be taken in the prothonotary's office before the prothonotary; and that, under our rules of court, this judgment could not have been moved for in the prothonotary's office until after the third day of the next succeeding term to which the process issued was returnable. The identical points made by the defendant were overruled by the late president judge of this district, Hon. S. S. Dreher, in Oswego River Pulp Co. v. Delaware Water Gap Pulp Co., 10 Pa. Co. Ct. R. 812. This is a well-considered opinion, in our judgment, and we adopt it as sound. He says: 'The defendant contends that the motion for judgment for want of an affidavit of defense should be made in court, and that the prothonotary cannot enter judgment on motion before him. Our rule of court adopted before the passage of the act of 1887 provides that the plaintiff shall be entitled to judgment by default for want of an affidavit of defense, to be entered in court, at his request, on the third day of the next succeeding term to which the process issued is returnable, * * * or in the prothonotary's office, or in court, at any time after, unless the defendant shall have made an affidavit, and filed the same with the prothonotary. * * * As I understand the fifth section of the procedure act of 1887, judgment may be moved for if no affidavit of defense be filed within fifteen days after notice of the filing of the plaintiff's statement, in accordance with the present practice in actions in debt and assumpsit; and as under our rule of court and practice, the plaintiff is entitled to judgment by default for want of an affidavit of defense to be entered in court at his request on the third day of the next succeeding term to which the process is returnable, or in the prothonotary's office at any time after, unless the defendant shall have made an affidavit and filed the same, I am of opinion that the prothonotary had authority to enter judgment in this case. The act of assembly has fixed fifteen days after notice of the plaintiff's statement having been filed, instead of the third day of the next succeeding term, leaving the rule of court and practice thereunder to stand in all respects, and excepting as to the time when judgment may be moved for or requested.' This ruling is fully sustained, we think, by our supreme court in Newbold v. Pennock, 154 Pa. St. 591, 26 Atl. 606; Marlin v. Waters, 127 Pa. St. 177, 17 Atl. 890; Weigley v. Teal, 125 Pa. St. 498, 17 Atl. 498. The defendant cites the act of 1889 (P. L. 41), and argues from it that, prior to its passage, judgment for want of affidavit of defense under the act of 1887 could only be entered when properly moved for in court. It will be observed that the decision of Judge Dreher, supra, was rendered in 1891. As we look at the act of 1889, it settles a practice concerning which there may have been theretofore a diversity of opinion and practice. Taking the record as it is, we see nothing to warrant our interference with the judgment. And now, November 12, 1894, the rule, heretofore granted to defendant on the 23d of October, 1894, is discharged."

Jas. W. Oakford and S. Holmes, for appellant. John B. Storm and Charles B. Staples, for appellee.

PER CURIAM. If the refusal of the court to vacate the judgment entered against the defendant for want of an affidavit of defense needs any vindication, it will be found in the opinion of the learned judge, sent up with the record, and authorities therein cited. Plaintiffs' statement, with copy of the policy on which their claim is founded, was filed, and summons issued on September 11, returnable on September 24, 1894. On September 14, the summons and copy of statement were duly served on defendant, and on October 1, 16 days thereafter, judgment was entered for want of an affidavit of defense. According to Weigley v. Teal, 125 Pa. St. 498, 17 Atl. 498, and subsequent cases, the judgment thus entered is regular and valid. The defendant company's affidavit of de-

Digitized by Google

fense was not filed until November 6, 1894, more than a month after entry of the judgment, and no excuse appears to have been offered either for the original default, or for the subsequent unreasonable delay in presenting the affidavit of defense. In the circumstances disclosed by the record there was no error in refusing to disturb the regularly entered judgment. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

WELLMAN v. BOROUGH OF SUSQUEHANNA DEPOT.

(Supreme Court of Pennsylvania. April 1, 1895.)

HIGHWAYS—LIABILITY OF BOROUGH—FAILURE TO PROVIDE BARRIERS—NOTICE OF DEFECTS—CONTRIBUTORY NEGLIGENCE.

1. Whether a borough was negligent in not erecting barriers on the part of a road running along a railroad track 28 feet above the grade of the track, there being a 60-feet length of grade between the road and the track, is a question for the jury.

2. Though a borough may have been negligent in failing to provide barriers on a road running along an embankment, it is not liable to one injured by being thrown over the embankment by a horse suffering from blind staggers.

3. Where a borough is negligent in failing to provide barriers on the part of a road running along an embankment at the foot of which there are railroad tracks, the borough is liable to one whose horse through fright from a train runs over the embankment.

4. One who, knowing a road to be unsafe, uses it, with knowledge that there was a safe road to his destination, cannot recover for injuries resulting from defects in the former road.

Appeal from court of common pleas, Susquehanna county.

Action by David Wellman against the borough of Susquehanna Depot for personal injuries. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

The following is the charge of the trial court:

"On the 22d day of July, 1891, David Wellman, the plaintiff in this case, was traveling from the borough of Susquehanna Depot to his home, in New Milford township. While in the borough of Susquehanna Depot, at a point on Front street, not far from where the depot of the New York, Lake Erie and Western Railroad is, the horse which he was driving plunged off from the bank, which is elevated some distance from the level ground below, taking with him the wagon and the plaintiff, and he was carried by this accident down to the edge of the railroad tracks which ran at the foot of this embankment. He alleges that the borough authorities of Susquehanna Depot were negligent in not keeping this road which he was traveling upon in proper repair, and he has brought this suit for the purpose of recovering compensation for the injuries which he alleges he received at that time. It is admitted on the trial that the road at the place where this accident occurred was within the limits of the borough of Susquehanna Depot, and was a public road, which the borough authorities were bound to keep in repair. It is the duty of borough or township authorities to keep constantly open and in repair all public roads or highways within the municipality, township, or borough clear of all impediments to easy and convenient passing and traveling, at the expense of the borough or township. If the borough or township neglects to keep the public roads in a reasonably safe condition and repair, it is negligence on its part, and, if any person traveling on the public highway in the exercise of ordinary care is injured because of the negligence of the township, he has the right to recover the damages occasioned by the injury. Negligence is the want of ordinary care. The degree of care which is required of the township or borough authorities has no exact legal standard. The law does not impose any absolute liability for every insufficiency of the road, or for every impediment to easy and convenient traveling. The authorities are required to do what is practicable to be done, and to preserve a reasonable condition of safety, with reference to the kind of road, its peculiar location, its adjacency to places of peril, and the amount and kind of travel that it accommodates. Generally they are bound to exercise reasonable and ordinary care, according to the circumstances. The object of a public road is to afford a convenient and reasonably safe means of passage for persons traveling thereon with horses, wagons, etc., and it is the duty of the supervisors or borough authorities as far as practicable to do what is reasonably necessary to secure this object. That is the duty of the supervisors of a township or the authorities of a borough in maintaining a public road.

"There is another principle in connection with suits for damages by accidents. Wherever an accident occurs upon a public road to a party, in order to allow any recovery against the township for damages by reason of a defect in the highway, it must appear that the party injured was free from negligence himself; negligence being the want of the care of an ordinarily prudent man under the circumstances. Therefore, where one brings suit against a township or borough for injuries received on account of a defect in the public highway, he cannot recover if he has in any manner been guilty of contributory negligence, or has not exercised the care which a reasonably prudent man would under the circumstances. (The supreme court has held that where there are two roads, one of which is known to be dangerous by the party using it and the other safe, where the roads go to the same destination, it is the duty of the party to take the safe road instead of the unsafe one; and if he, knowing the conditions of the two roads, and one to be safe and the other unsafe, voluntarily takes the

Digitized by Google

unsafe road, that of itself is an act of contributory negligence, and he cannot recover for any damages he may have sustained by voluntarily passing over the unsafe road when he had a safe one which he could have traveled.)

"It is claimed by the plaintiff in this case that at the time that he passed over this road the road at the point where he went off the bank was defective by reason of not having barriers erected upon the sides of the embankment. It appears from the uncontradicted evidence in this case that at the point where he went over the bank the road is between 28 and 29 feet perpendicularly from the level of the railroad tracks below, and between 50 and 60 feet length of grade from the edge of the embankment to the edge of the track, and that along the bottom of that embankment there are several tracks of the New York, Lake Erie & Western Railroad, a part of which are the yard tracks at the station of Susquehanna, upon which engines and cars are frequently passing and repassing, and that, by reason of this passing and repassing of the locomotives and cars, all horses are liable to become frightened at the cars, either by the escape of steam or the blowing of the whistle or the rumbling of the cars or the smoke; and that, in view of this situation of the road, the high bank, and its being adjacent to this railroad with these objects of fright, it was the duty of the borough authorities to use all reasonable care to protect that road from the effects of frights occasioned to horses and teams by those causes. Ordinarily, the supervisors of a township or the borough authorities have completed their duty when they make a safe roadbed, level, smooth, and broad enough for ordinary travel. But when there are objects adjacent to the road, calculated to produce fright, and danger to travelers upon it, then the question arises whether it is not their duty, under such circumstances, to go further, and provide preventatives from accidents by reason of such dangers. And the supreme court have held that in such cases it is a question of fact for the jury to determine from all the circumstances of the case, the proximity of the dangerous objects, etc., whether it was the duty of the authorities, in the exercise of ordinary care, to provide such protection for the traveling public over the road. The plaintiff claims that the authorities were negligent in not providing and erecting barriers along the edge of this road, so that in case a horse was frightened he would not run off the bank.

"The first question for you to pass upon is the question of the negligence of the township. That, under all the evidence, is for you. If it was their duty, under such circumstances, to provide such barriers, and they did not, then the officers of the township were negligent, and the township liable for accidents that occurred by reason of its negligence. But if you shall find from the facts in this case that there was no negligence in the borough of Susquehanna in not providing barriers there, then you will find for the defendant, and that would be the end of this case, because all that the borough is held responsible for is for the ordinary care required in the protection of the road under the circumstances of the case. The plaintiff claims that his horse took fright, in going along there, from the trains upon the railroad, the whistle, the escape of steam and smoke. The defendant denies this, and claims that the horse was not frightened at the railroad or the steam or the smoke; that the horse was subject to blind staggers, or sickness of the stomach, and became unmanageable by reason of such sickness, and plunged off the bank. Now, the township authorities are responsible in providing for only such dangers as might be reasonably foreseen, and they would not be responsible for injuries that occurred by reason of a horse being taken with the blind staggers, and becoming unmanageable, and plunging over the side of the bank, although they may have been negligent in not erecting barriers at that point. You will remember all the evidence in relation to this question of the sickness of the horse, and dispose of that question in the light of all its surrounding circumstances. If the accident was caused by this intervening cause,—the sickness of the horse,—which the borough authorities could not have foreseen, they would not be responsible for it. But if you shall find that the plaintiff in this case himself was free from contributory negligence; that under all the circumstances, as we have instructed you with regard to contributory negligence, he was free from any contributory negligence on his part; and that the horse took fright from this car or the engine, and plunged down this bank, and that the township was guilty of negligence in not having erected barriers suitable to protect it from accidents of such a nature,—then the plaintiff would be entitled to recover compensation for such injuries as he has received. And in estimating the damages the jury should allow for the direct expenses incurred by the plaintiff by reason of the injury, for the inconvenience he is subject to, for the pain and suffering, bodily and mentally, already experienced and likely to be experienced, for the pecuniary loss he has sustained and is likely to sustain from his injury, and also his actual permanent loss of earning power caused by the accident.

"The counsel for the plaintiff have submitted certain points in writing, requesting us to charge you as follows:

"'(1) It is the duty of a borough to keep its streets or highways in a safe condition for public travel; and if it neglects that duty, and a person is injured in consequence of such neglect, and without any act of his own, or any negligence on his part in any manner contributory to the injury, then the

Digitized by Google

borough is liable to the party injured for such damages as he may have sustained in consequence of the negligence of the borough.' Answer. That is affirmed.

"'(2) In a large borough, containing four or five thousand population, a higher degree of care is required to be exercised by the borough authorities over its main streets and highways than is required of township officers in a sparsely settled country district, where there is comparatively little travel, and a limited rate of taxation for road purposes.' Answer. That is affirmed.

"'(3) A roadbed in a borough may be of sufficient width, with a smooth roadbed, but if it is so situated, by reason of its proximity to a railroad, upon a side hill, with a steep decline to a railroad, where trains are frequently passing, it is the duty of the borough to take all needful precautions for the safety of travelers who have to use the road, to guard them from accidents; and where such duty exists, but is neglected by the borough, and injury results to any person in consequence of such neglect, the borough is liable for the damages sustained, if there was no negligence upon the part of the person injured that in any manner contributed to the injury.' Answer. That is affirmed.

"'(4) If the jury in this case find from the evidence submitted to them that common prudence required that safeguards should have been placed along the highway where the accident occurred, then the omission of the borough to erect such guards was negligence; and if, by reason of the want of such guards, the plaintiff, with horse and wagon, were precipitated down a steep declivity, and received the injuries complained of, and the plaintiff was not guilty of any contributory negligence, then the plaintiff is entitled to recover for the injuries sustained such an amount of damage as the jury shall find will probably compensate him for his injuries.' Answer. That is affirmed.

"'(5) If the absence of barriers was a neglect of the duty the borough owed to persons traveling upon the street where the accident occurred in order to protect them against injury, and for want of such barriers the plaintiff was thrown from the highway down upon the railroad track, and injured, without any fault of his own, and without any contributory negligence on his part, then such defect was the proximate cause of the injury, and the plaintiff, if he was injured at the time complained of, is entitled to recover compensation for such injuries.' Answer. That is refused. The question of whether the absence of barriers was the proximate cause of the accident, or whether such proximate cause was the struggle of the horse, rendered unmanageable by reason of sickness, is a question of fact, and is left to the jury to determine.

"'(6) If the railroad adjoins the highway at the place where the accident occurred, and if there were no barriers between the street and the railroad, then, if the jury find that it was the duty of the borough to have erected such safeguards at such point to protect persons traveling with teams from injury, then the neglect to erect barriers was negligence upon the part of the borough, and the plaintiff is entitled to recover damages for the injuries by him sustained, if any, such as will compensate him for such injuries, if there was not any contributory negligence on his part tending to produce his injuries.' Answer. This is affirmed, with the proviso that the jury shall also find that the accident was not occasioned by the sickness of the horse.

"'(7) If the borough was negligent in the protection of the street, then, although some other event may have concurred with the borough's negligence to cause the accident, yet, if the jury find and are satisfied that the injury would not have happened had the borough not been in fault in not protecting the street, and there was no negligence on the part of the plaintiff, then the plaintiff is entitled to recover for the injuries sustained.' Answer. This is affirmed, provided such concurrent event was not the sickness of the horse.

"'(8) If the jury find for the plaintiff, in estimating the damages they should allow not only for the direct expenses incurred by the plaintiff by reason of the injuries, but also for the privation and inconvenience he is subjected to, and for the pain and suffering which he has already endured, both bodily and mentally, and which he is likely to experience during the remainder of his life, as well as the pecuniary loss he has sustained, and is likely to sustain during the remainder of his life, in consequence of his injuries.' Answer. That is affirmed.

"The counsel for the defendant have also submitted certain points in writing, requesting us to charge you as follows:

"'(1) Under all the circumstances and the evidence in this case the verdict must be for the defendant.' Answer. That is refused.

"'(2) If this is denied, then, if the jury find from the evidence that the defendant was negligent, and its road was defective, yet, if they further find that the plaintiff was also guilty of negligence which contributed in any degree, no matter how slight, to the happening of the accident and injury complained of, he cannot recover.' Answer. That is affirmed.

"'(3) That the law does not require public highways to be constructed and maintained in a condition of absolute safety, and free from every defect, but that only ordinary care shall be used to keep them reasonably safe for the ordinary travel upon them. When this duty is performed, townships or boroughs are not insurers of the safety of travelers, nor responsible for accidents happening upon their highway.' Answer. That is affirmed.

"'(4) If the jury find from the evidence that at the time of this accident the plaintiff's horse became unmanageable, either from sud-

Digitized by Google

den fright or from any cause for which the defendant was not responsible, and rushed down the embankment, thus causing the injury to plaintiff; and further find that, had the horse been subject to control, the plaintiff would have safely passed over the road in question,—then he cannot recover in this action, even if the road was defective; and the verdict must be for the defendant.' Answer. This is refused. As this point is drawn, the fright of the horse may have been occasioned by the locomotive on the railroad, and it is therefore refused on that account.

" '(5) One who undertakes to use a public road, knowing that it is unsafe, and knowing the defects which make it so, but not choosing to avoid them, although he could do so by taking another road, cannot recover against a township or borough for an injury resulting from such defects.' Answer. This is affirmed, provided the person knew of the safe road.

" '(6) It appearing from the evidence of the plaintiff and all his witnesses that the road or place where the accident occurred was unsafe and dangerous at the time of the accident, and had been for a long time before, and that the plaintiff knew its condition, both before and at the time of the accident; and it appearing from the evidence that the plaintiff knew there was another and safer road to the place of his destination, which he might have taken without material delay or inconvenience, and traveled over with greater safety,—he should have taken the safer road, and when he did not he assumed and took upon himself the risks encountered on the dangerous road, and was therefore guilty of contributory negligence. which must defeat a recovery in this action, and the verdict must be for the defendant.' Answer. This asks us to take the case from the jury, and is refused.

"The facts in the case are for you, under such instructions as we have given to you. You have heard the witnesses on the stand, and listened to their testimony; and it is for you to determine, under the evidence in this case, the various questions which we have submitted to you, and to do what is right and just, under the evidence and the instructions of the court."

G. P. & R. B. Little and R. J. Manning, for appellant. McCollum & Smith, for appellee.

PER CURIAM. It is not alleged that there was any error in the admission or rejection of evidence. In view of the testimony properly before the jury, the case involved the questions of defendant's negligence and the alleged contributory negligence of the plaintiff. Both of these controlling questions of fact were for the exclusive consideration of the jury, and to them they were fairly submitted in a clear, concise, and fully adequate charge, to which no just exception can be taken. The verdict in favor of plaintiff is necessarily predicated of a finding in his favor of every material fact. The record discloses no error that would justify us in disturbing the verdict. There is nothing in either of the specifications of error that requires special comment. The case was ably and correctly tried, and the judgment is affirmed.

In re WHITE'S ESTATE.

(Supreme Court of Pennsylvania. April 1, 1895.)

GROUND RENTS—RIGHT TO REDEEM — NATURE OF LANDLORD'S ESTATE.

Ground rent redeemable at any time by the grantee on payment of the principal sum will be treated as realty till the grantee exercises his option.

Appeal from orphans' court, Franklin county.

Petition by Thomas Dallas and another for the partition of ground rents belonging to the estate of John White, deceased. The prayer of the petition was granted, and Martha White, widow of deceased, appeals. Affirmed.

The following is the opinion of the orphans' court: "By a rule of property early established and consistently followed, ground rents in Pennsylvania are regarded as real estate. This rule was first declared in Ingersoll v. Sergeant, 1 Whart. 350, and it has been adhered to in all subsequent adjudications with respect to this species of property without any departure or variation. These adjudications were with reference to ground rents differing from those now under consideration in but a single particular. By the terms of the instruments under which these earlier rents were created, the grantee had the right to extinguish them by paying the grantor the capitalized sum of the annual charge upon a day certain or within a fixed period. His failure to exercise this right made the rent irredeemable thereafter. The rents in the present case are payable in half-yearly payments 'in every year hereafter, forever,' but are redeemable by the grantee 'at any time hereafter' by payment of the principal sum. Under this covenant the grantee can never be in default with respect to such payment, for it remains optional with him to make it; and hence, though by its terms it runs forever, it is yet a redeemable rent, and not repugnant to our recent legislation forbidding perpetual or redeemable rents. It is urged by those who oppose this proceeding on behalf of the widow of the decedent that this difference, however, is so radical, that it changes the character of the estate in the rent; that when redeemable it is not realty, but personalty,—a debt charged on the land. A sufficient answer to this is found in the fact that the circumstance of these rents being or becoming irredeemable did not contribute in the least to fixing their character as real property. What determined that was the conclusion reached by the court that they were a rent service, as dis-

Digitized by Google

tinguished from a rent charge. That they were the subject of an estate of inheritance resulted necessarily from this decision. And this estate is not changed by the fact that it is subject to be redeemed at the option of the grantee of the land, any more than real estate ceases to be real estate when its owner contracts to give another the option of the purchase. Indeed, such a contract will illustrate this case with respect to that feature of it we are asked to consider. The real estate which is the subject of the option remains real estate until the option is exercised. The rule as stated by Pomeroy in his Equity Jurisprudence (volume 3, p. 132) is 'that in contracts of sale upon the purchaser's option the question whether or not a conversion is effected at all cannot, of course, be determined until the purchaser exercises his option; but the moment when he does exercise it the conversion as between the parties claiming title under the vendor relates back to the time of the execution of the contract.' It is discussed at length in Kerr v. Day, 14 Pa. St. 112, and there unqualifiedly applied. What we are called upon to decide is the present character of these rents. The grantor is dead, intestate as to them. The grantee, as yet, has not exercised his option of purchase. They continue real estate, for purposes of descent, until he does. What they may become by payment of principal hereafter it is not necessary now to inquire. Sufficient unto the day. And now, 23d April, 1894, rule absolute: Inquest awarded."

Hastings Gehr and W. Rush Gillan, for appellant. T. M. Daly, for appellees.

PER CURIAM. The learned president of the orphans' court rightly held that for the purpose of distribution the ground rents in question must be treated as realty, and therefore subjects of partition. It is not our purpose, nor is it at all necessary, to add anything to what has been so well said by him in support of that position. On his opinion the decree is affirmed, and appeal dismissed, with costs to be paid by appellant.

BALFOUR v. RUSSELL et al.

(Supreme Court of Pennsylvania. April 8, 1895.)

LANDLORD AND TENANT — COVENANT TO RENEW LEASE—PERFORMANCE BY TENANT.

Plaintiff leased the land to defendants' assignor for three years, "or while oil or gas is produced in paying quantities," the land containing seventy acres, reserving therefrom four acres on which no well was to be drilled without the written consent of plaintiff. The rent fixed was three dollars per acre. Plaintiff also was to receive a certain portion of the oil. After the four acres were designated by plaintiff, defendants' assignor, by plaintiff's written consent, drilled a well thereon. After the assignment of the lease, and before its expiration, defendants, with plaintiff's acquiescence, drilled a well on such four acres, which produced oil in paying quantities. *Held*, that defendants were entitled to continuance of the lease, on the ground that the leased property was producing oil in paying quantities.

Appeal from court of common pleas, Butler county.

Action of ejectment by John Balfour against C. T. Russell and another. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

Lev. McQuistion, J. C. Vanderlin, and A. B. C. McFarland, for appellant. James Bredin and S. F. Bowzer, for appellees.

McCOLLUM, J. We think this case was correctly decided in the court below. The plaintiff leased the land in dispute to John A. Snee, for the purpose of exploring for and obtaining oil or gas. The lease was for three years, or while oil or gas was produced from the demised premises in paying quantities. The continuance of the lease beyond three years was contingent upon the production of oil or gas in such quantities within that time. Snee drilled two wells. One of them was not worth operating, and he abandoned it. The other produced oil in paying quantities. He then assigned his interest in the lease to the defendants, who drilled two wells, with a like result. All the wells were drilled within the three years; and, as two of them were paying wells, the learned court below thought they were sufficient to continue the lease while oil was obtained from them at a profit. It is conceded that this is a correct view of the case if the producing wells are upon the demised premises. The plaintiff, however, contends that these wells are on land expressly excepted from the lease. Is this contention sound and consistent with a fair construction of that instrument? We think it is not. In the first place, it is not in accord with the construction adopted by the parties, and under which rent was paid for three years. The land on which the producing wells were drilled is admittedly a part of the 70 acres described in the lease, and on which the lessees paid rent at the rate of three dollars per acre. If the parties had understood that the lease included only 66 acres, the lessor would not have exacted and the lessees would not have paid rent on 70 acres. If the language of the lease fairly raised a doubt respecting the intention of the parties, their interpretation of it during the definite term of three years would be entitled to great, if not controlling, influence in the decision of the question before us. But this is not all that is opposed to the plaintiff's present contention. He expressly consented in writing to the drilling of one of the producing wells, acquiesced in the drilling of the other, and received his share of the oil, in accordance with the provisions of the lease. During the definite term allowed for the development of the property, he permitted the lessees to drill these wells without an intima-

Digitized by Google

tion of his present claim. If he then entertained the view of the lease which he now advances in aid of his suit, his silence was misleading, and the purpose of it fraudulent. He must have known that the lessees would not have drilled the wells under such an interpretation as he now insists upon, because it renders the time consumed and expenditures incurred in drilling them of no account in determining their rights under the lease. It is an interpretation which makes the time and labor so expended operate as an extinguishment of these rights, and a development of the plaintiff's property without compensation to the parties by whom the development was accomplished. Surely, such results cannot be tolerated, unless there is a clear warrant in the lease for a construction which produces them. But there is no such warrant in the lease. The so-called "exception" or "reservation" is nothing more than a restriction upon the lessees' right respecting the location of wells on the 70 acres included in it. It is a stipulation that the lessor may designate the boundaries of "four acres around the buildings" within which the lessees shall not drill wells without his written consent. When such consent was given, and the work done under it resulted in the establishment of a well which produced oil in paying quantities, the effect of it upon the rights of the parties, under the lease, was the same as if it had been drilled outside of the boundaries designated by the lessor. This is a construction which harmonizes with the understanding of the parties as manifested by their conduct during the definite term, and which, independent of their interpretation of their contract, best accords with the language and object of the instrument which defines their rights. Judgment affirmed.

PHILADELPHIA CO. v. BOROUGH OF FREEPORT.

(Supreme Court of Pennsylvania. April 8, 1895.)

NATURAL GAS COMPANIES—RIGHT TO LAY PIPE LINES IN BOROUGHS.

Act May 29, 1885 (Pub. Laws, p. 29), entitled "An act for the incorporation and regulation of natural gas companies," confers on companies engaged in the business of producing and transporting natural gas when the act was passed the right of eminent domain, and makes the system provided for by the act for the assessment of damages occasioned by the exercise of the right applicable to such companies. Section 13 forbids companies incorporated under it, not referred to or included in section 14, to "enter upon or lay down their pipes or conduits on any street or highway of any borough or city" without its assent. The companies "referred to or included in" section 14 are such companies then "engaged in the business of transporting or dealing in natural gas for any purpose" as accepted its provisions. Section 16 declares that the act shall not be so construed as to permit any corporation accepting its provisions under and by virtue of section 14 to enter into any city or borough without the assent of councils, except where the corporation so accepting under such section had to some extent, prior to the passage of the act, begun supplying natural gas within such city or borough, or had laid pipes for such purpose therein. *Held*, that a company engaged in the business of producing, transporting, and selling natural gas before such act was passed, and which has not accepted its provisions, cannot lay its pipes in the streets of a borough within which it had not been supplying natural gas or laid pipes before the act was passed, without first obtaining the assent of the borough.

Appeal from court of common pleas, Armstrong county.

Bill by the Philadelphia Company against the borough of Freeport to enjoin defendant and its officers and employés from interfering with the construction by plaintiff of a natural gas pipe line on its adopted line through such borough. From a judgment for complainant, defendant appeals. Reversed.

W. D. Patton and Geo. M. Hill, for appellant. Dalzell, Scott & Gordon and Orr Buffington, for appellee.

McCOLLUM, J. The Philadelphia Company is a corporation engaged in the production, transportation, and sale of natural gas. It was engaged in this business prior to and at the time of the passage of the act "for the incorporation and regulation of natural gas companies," approved May 29, 1885 (Pub. Laws, p. 29). It has not accepted the provisions of this act, but it has located and partially constructed "a twenty-inch wrought-iron gas line" for the purpose of conveying gas from its wells in Armstrong county to its customers in the cities of Pittsburgh and Allegheny. The line so located passes through the borough of Freeport, and along Stewart and Washington streets, in said borough, the authorities of which have refused to permit it to lay its pipe on said streets. The result of this refusal was that the company filed a bill in the court of common pleas of Armstrong county against the borough, praying, inter alia, for a decree enjoining and restraining "the defendant, its officers, agents, and employés, from interfering in any way with the construction by plaintiff of its twenty-inch pipe line on its adopted location through said borough." The case was proceeded in, by agreement, as if upon final hearing, and a decree was entered in conformity with the prayer of the bill.

The principal question for our consideration, on appeal from this decree, is whether the assent of the borough is necessary to enable the company to construct its pipe line, as located, on Stewart and Washington streets. In considering this question, we observe, first, that the Philadelphia Company is not authorized by its charter to lay a pipe line on a street of a municipality, and that whatever right it has in this respect it derived from the act already referred to. The tenth section of the act is comprehensive, and plainly includes corporations then engaged in the business of transporting and distributing natural gas. In Carothers v.

Digitized by Google

Philadelphia Co., 118 Pa. St. 468, 12 Atl. 314, this court said, in substance, that the act of 1885 conferred upon such corporations the right of eminent domain, and that the system provided by the act for the assessment of damages occasioned by the exercise of the right was applicable to them. In that case the appellee in this case was a party, and its rights and liabilities in regard to these matters were discussed and considered. Its claim of a right to lay a pipe line on a borough street appears to accord with the conclusion reached in Carothers v. Philadelphia Co., because the grant of such a right to corporations then or thereafter engaged in the transportation and distribution of natural gas is as clear as the grant to them of the right of eminent domain. But the rights so conferred must be enjoyed, if at all, in the manner and subject to the precedent conditions prescribed by the act in relation to the exercise of them. By the thirteenth section of the act, companies incorporated under it, and not referred to or included in the fourteenth section thereof, are forbidden to "enter upon or lay down their pipes or conduits on any street or highway of any borough or city of this commonwealth without the assent of councils of such borough or city, by ordinance duly passed and approved." The companies "referred to or included in" the fourteenth section were such companies then "engaged in the business of transporting or dealing in natural gas for any purpose" as accepted the provisions of the act. The sixteenth section declares that "this act shall not be so construed as to permit any corporation accepting its provisions under and by virtue of section fourteen hereof, to enter into any city or borough without the assent of councils, except where the corporation so accepting under section 14, had to some extent prior to the passage of this act, begun supplying natural gas within such city or borough or had laid pipes for such purpose therein." It follows that all other companies to which the act relates, whether incorporated under it, or engaged in the business of transporting and distributing natural gas at the time of its passage, are within the purview of the thirteenth section, and must secure municipal consent before entering upon, or laying down their pipes on, any street or highway of any borough or city of the commonwealth. In order to prevent misapprehension of our meaning, it is proper to state, in this connection, that we now refer to such corporations only as look to the act of 1885 for their warrant to lay their pipes on the street of a municipality. It seems to us that a construction of the act which places nonaccepting companies, in respect to rights conferred by it, upon a higher plane than companies incorporated under it and companies accepting its provisions, is not reasonable, or in accord with the legislative purpose. We conclude, therefore, that the Philadelphia Company is not authorized to construct its pipe line on Stewart and Washington streets, in the borough of Freeport, without the consent of the borough authorities; and, as it has not obtained such consent "by ordinance duly passed and approved," it is not necessary to consider the effect of municipal consent clogged with unreasonable conditions. Decree reversed and bill dismissed; the costs to be paid by the appellee.

COMMONWEALTH v. KARPOWSKI.

(Supreme Court of Pennsylvania. April 1, 1895.)

FALSE PRETENSE—VENUE—INDICTMENT—VARIANCE OF PROOF.

1. One who, under false pretenses, obtains goods ordered from a salesman, may be tried in the county from which the principal shipped them.

2. Under an indictment charging that defendant obtained goods under the false pretense that he had money in M. National Bank of S., proof that he said the money was in M. Bank of S. is not a material variance, where the evidence is that the only M. bank in S. was a national one.

3. Under an indictment charging that defendant obtained goods under the false pretense that he had $300 in bank, proof that he said he had more than enough to pay a bill of that amount past due to the prosecuting witness is not a material variance.

Appeal from court of quarter sessions, Northampton county.

Andrew Karpowski was convicted of obtaining goods under false pretenses, and appeals. Affirmed.

The following is the opinion of the trial court on a motion in arrest of judgment:

"It is claimed that this court has no jurisdiction of this case because the offense was not complete in this county. Andrew Karpowski lives and does business in the borough of Shenandoah, in Schuylkill county. Stephen G. Reynolds was employed by the prosecutors, J. Hay & Sons, as a salesman, and solicited orders for the sale of goods for them in that section of the state. In pursuance of his duties, he went to Schuylkill county, visited the defendant in his place of business, and presented a bill for a past due account. Karpowski said that he had money enough in the Merchants' Bank to pay the account, but that he wanted to use it to buy a piece of real estate, and that he would pay the account later,—wanting a little time. He then asked, according to the testimony of Reynolds, and which the jury have found to be true, that more goods be sold to him. Reynolds took his order for more goods, submitted it to the firm for which he was an agent in Easton upon his return, repeated the statement of Karpowski as to the amount of money he had in bank in Shenandoah, and upon the strength of that statement, and because of it, the prosecutors filled the order, and delivered the goods, addressed to Karpowski, the defendant, to the Lehigh Valley Railroad Company. The defendant now claims that this

Digitized by Google

court has no jurisdiction to try him for the offense charged, because the offense was not completed in this jurisdiction. It is true that the matter came up before the court of quarter sessions of Schuylkill county, and that that court determined that it had no jurisdiction, and that the jurisdiction for the trial of the offense charged was with this court. This, however, must be regarded as a dictum, and not a decision binding upon us, except so far as it affects the question of the jurisdiction of the Schuylkill county court.

"It is a well-recognized principle of law that the jurisdiction of a court is statutory, and, unless we have jurisdiction under a statute, we can take no cognizance of a criminal offense. It is also a well-recognized fact that criminals have again and again, before our statutory law had made sufficient progress to cover cases of such a character, escaped punishment because of the noncompletion of an offense within any jurisdiction, and statutes had to be enacted in order to give jurisdiction somewhere in order that criminals should not go unpunished. It is true, however, that, unless this offense was completed within the jurisdiction of either the courts of Northampton county or of the courts of Schuylkill county, neither court would have jurisdiction. The false pretense being an essential element of the offense, if it were made without our jurisdiction to the parties parting with their property, who had also delivered the goods to the party making such false representation within another jurisdiction, then this court could take no cognizance of and enter no judgment for such offense. It might be a matter of doubt whether, if the false representations were made to the owners of the goods in one jurisdiction, and the delivery of the goods made to parties in another jurisdiction, the courts of either jurisdiction could take cognizance of such offense. But I do not consider that that is the question before this court now. Reynolds was not the party owning these goods. He was an agent of another for the purpose of soliciting orders for the sale of goods. He had no power, according to the testimony in the case, to sell goods. He had simply the power under his agency to solicit orders for the goods, and submit them to his principals, which orders they might or might not accept and fill. He took this order. At the time it was given, he also received the statement of Andrew Karpowski that he had money in the bank more than sufficient to pay the old account, which was in the neighborhood of three hundred dollars, this being the same as if he had said, 'I have three hundred in the bank in Shenandoah.' This statement by Karpowski was submitted to J. Hay & Sons, and upon the strength of that statement the goods were shipped and delivered to a common carrier for Andrew Karpowski. A delivery to the common carrier of these goods addressed to Andrew Karpowski was a delivery to him. The goods, therefore, were delivered to Karpowski himself, within the jurisdiction of this court. Had Karpowski written a letter to J. Hay & Sons containing this statement as made to their agent, could it be successfully contended that because that letter was written in Schuylkill county the false pretense had been made in that county? Could it be contended that if he had sent a messenger from Schuylkill county to repeat verbally the statement which he made through Reynolds to J. Hay & Sons, and it had been so repeated to them by his messenger, and upon the strength of that the goods had been delivered to a common carrier addressed to Karpowski, the offense was not completed within this jurisdiction? Whether the messenger were one employed by himself or one employed by J. Hay & Sons could make no difference. The false representations in this case were made, according to the testimony, by Reynolds, as the messenger of Karpowski, to J. Hay & Sons, within this jurisdiction. The goods were delivered to a common carrier for Andrew Karpowski, within this jurisdiction. Therefore, there can be no question in our mind as to the power of this forum to try this case, and the motion in arrest of judgment must therefore be denied.

"The defendant further contends that the verdict should be set aside, and a new trial granted, because of a variance between the indictment and the proof. The indictment alleges that the defendant represented that he had money in the 'Merchants' National Bank of Shenandoah,' whereas the proof of the commonwealth was that the defendant stated that he had it in the 'Merchants' Bank of Shenandoah.' That there is such a variance between the indictment and the proof in this particular is unquestionably true. We also believe it to be true, as a legal principle, that this is not such a variance as would defeat this verdict. Andrew Karpowski, the defendant, when upon the stand, testified that there were but two national banks in Shenandoah, and that one was the First National Bank, and the other the Merchants' National Bank. He also said that he did not know of any other banks; that he only knew of the national banks. This must be taken, in the absence of any other testimony, as being prima facie true. It is a matter of common custom, familiar to us all, in speaking of a bank, to speak of it as 'the First Bank,' 'the Easton Bank,' 'the Merchants' Bank,' leaving out the word 'National.' Under the testimony in this case, therefore, the statement laid in the indictment that he said it was the Merchants' National Bank in which he had the money deposited, and the proof being that it was in the Merchants' Bank, and there being no other bank in Shenandoah of that name so far as the evidence discloses, it must be assumed that the 'Merchants' Bank' and the 'Merchants' National Bank' are names for the same bank. Therefore, the variance from the evidence, which consists in the introduction in the indictment of the word 'National' is im-

Digitized by Google

material, and not sufficient to defeat this verdict. This is also true of the difference in the statement in the indictment and in that of the testimony regarding his declaration as to the amount of money he had. The indictment charges that the defendant stated that he had more than three hundred dollars in bank. The testimony was that the defendant stated that he had money enough, and more than money enough, to pay the bill that was past due, and which was in amount about three hundred dollars. This is not a sufficient variance to defeat this verdict. It is in effect the same statement. If a man says to another, 'I will sell a property for ten thousand dollars,' and the other, in reply, says, 'I have more than enough money to buy that property now in bank,' he in effect says, 'I have more than ten thousand dollars now in bank;' and if, upon an indictment for false pretense, he is indicted for having said that he had more than ten thousand dollars now in bank, it is in effect the very declaration that he has made. Although not in the same terms, it is equivalent to it; and, under the policy of our latter-day administration of the law, such a variance between the indictment and the proof will not be permitted to defeat the ends of justice.

"Now, July 23, 1894, the motion in arrest of judgment is set aside, and the motion for a new trial is refused, and the defendant will present himself for sentence in this court upon the third Monday of August next."

W. D. Seltzer, for appellant. A. C. La Barre, Dist. Atty., and Edward J. Fox, for the Commonwealth.

PER CURIAM. In his opinion, disposing of the motion in arrest of judgment, etc., the learned trial judge has satisfactorily shown that the averment of jurisdiction in the indictment was fully sustained by the evidence, and that the conviction of the defendant in manner and form as indicted should be sustained. We affirm the judgment on his opinion, and it is ordered that the record be remitted to the court below.

TALCOTT v. BRENNISER et al.

(Supreme Court of Pennsylvania. April 8, 1895.)

SALE—RESCISSION BY SELLER.

In replevin to recover goods obtained by fraudulent representations as to financial standing, a statement of defendant's itemized nominal assets when he failed is admissible.

Appeal from court of common pleas, Philadelphia county.

Action of replevin by James Talcott against John B. Brenniser and others. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

The specification of error referred to in the opinion is as follows:

"The court erred in admitting the following testimony in the deposition of Lester J. Blauvelt: 'Q. State what the total nominal assets and actual assets of Nowell & Presby at the time it failed were, as obtained by you from the result of this investigation made. A. Nowell & Presby's liabilities, at the time of their failure, amounted to $383,415.74. The following is a statement of their nominal and actual assets:

	Nominal.	Actual.
Merchandise, furniture, real estate, etc.	$ 46,817 99	$29,124 19
Cash and checks	4,350 33	4,350 33
Bills receivable	1,400 39	
Mining stocks, etc.	718,983 00	600 00
Book accounts	89,678 96	19,042 69"

Josiah R. Adams and Samuel B. Huey, for appellant. Frederic R. Kellogg, John S. Freemann, and John F. Keator, for appellee.

PER CURIAM. We find nothing in this record that would justify a reversal of the judgment. The testimony recited in the specification of error was neither incompetent nor irrelevant, and hence there was no error in admitting it. This being the only subject of complaint, there is nothing on which to base a reversal. Judgment affirmed.

SAAKE v. DORNER.

(Supreme Court of Pennsylvania. April 8, 1895.)

HUSBAND AND WIFE—SAVINGS OF WIFE—HUSBAND'S INTEREST.

Where there is evidence that a wife received money from her mother, and there is nothing to suggest that an amount accumulated by her could have been from money given her by her husband, a bill by the husband, after her death, to compel decedent's sister to turn over to him money given her by decedent in trust for decedent's children, will be dismissed.

Appeal from court of common pleas, Philadelphia county.

Action by Charles Saake against Elizabeth Dorner for money had and received. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

Henry J. Scott, for appellant. Wm. Henry Lex, for appellee.

McCOLLUM, J. This is a case in which a husband tried to annul a trust created by his wife for the benefit of their children, and to appropriate the subject of it. To accomplish his purpose, he entered a court of equity, and craved its assistance. He made his wife's sister defendant in his bill, and, as he proceeded upon his suspicion rather than upon his knowledge of the existence of facts entitling him to what he sought, he inserted in it a prayer for discovery. An answer was filed, and a master was appointed, who, upon a hearing had, reported that the defendant received from the plaintiff's wife

Digitized by Google

$375 in trust for his children, and that the money so received belonged to him. The master allowed the plaintiff to testify in his own behalf, although it was objected that, his wife being dead, he was not a competent witness. There was not a word in his testimony tending to support the allegation in the bill that his wife took his money without his consent, and gave it to her sister, or which indicated that anybody had taken his money without his permission. The substance of his testimony was that he was married in 1873, and his wife died in 1890; that she had no money when he married her, and he was not aware that she acquired any by will or descent during coverture. In regard to money he let her have from time to time, he said: "I gave her money for the house and whatever she needed, and that is all. I gave her no spending money." He did not claim or suggest that this money was more than sufficient for the purposes for which it was given, or that any portion of it entered into the trust fund. He called the defendant for cross-examination under the statute, and she testified to receiving the money as stated by the master, and that, when she received it, her sister told her it was money she had "saved up," and that none of it belonged to her husband. She also testified that her mother, who was "a woman of means," gave her sister money from time to time, and sometimes in her presence. In regard to money given in her presence, she said: "I was present several times when my mother gave her money. Sometimes the amount would be as high as $50. One time I know she got $25. I think it would aggregate more than $100. I can't say it was over $200." The plaintiff and the defendant were the only witnesses in the case, and we have referred to all of their testimony which affects the ownership of the trust fund. In this testimony there is no fair basis for an inference that this fund was saved from money which the plaintiff let his wife have, or that she at any time appropriated any of his money surreptitiously. His own evidence excludes such an inference. True, he alleged in his bill that his wife took his money without his consent or knowledge, but the answer to this allegation was responsive, and specifically denied it. There is no presumption arising from the marital relation which, in the presence of this answer and the testimony in the case, is sufficient to establish the plaintiff's claim to the trust fund. All the evidence harmonizes with and supports the declaration of his wife when she created the trust, and rejects the imputation of dishonesty on which his bill was based. It shows that his wife received from her mother, from time to time, gifts of money, from which she might have accumulated the fund in dispute; and, as there is nothing in the evidence which suggests that it could have been raised from her husband's money, we think the learned court below was justified in rejecting the learned master's conclusion as to the ownership of it, and in dismissing the plaintiff's bill. The only inference fairly deducible from the testimony is that Mrs. Saake was the owner of the money with which she created the trust, and, being the owner of it, she had a clear right, under the act of June 3, 1887 to dispose of it as she did. There is no presumption arising from a wife's possession of money that she stole it from her husband, and, if he alleges that she took it from him without his consent or knowledge, he must support his accusation by evidence. It is not sufficient to aver in his bill that she did so when that averment is specifically denied by the answer. Decree affirmed, and appeal dismissed, at the cost of the appellant.

KYTE v. FORAN, Sheriff.

(Supreme Court of Pennsylvania. April 1, 1895.)

WITNESS—COMPETENCY—CONVERSATION WITH DECEDENT—ADVERSE INTEREST.

In an action by the administrator of H. against a sheriff for levying on and selling the property of H. under an execution against K., the interest of a surety on the indemnity bond given the sheriff is adverse to plaintiff, so that he cannot testify to a conversation with H. in which she admitted that the title to the property was in K.

Appeal from court of common pleas, Susquehanna county.

Action by Henry D. Kyte, administrator cum testamento annexo of Hannah Kyte, deceased, against Richard Foran, sheriff, for selling personal property of deceased under a levy on an execution against Joseph R. Kyte on a judgment in favor of Blakeslee & Williams. Judgment for plaintiff. Defendant appeals. Affirmed.

The first assignment of error was to the rejection of defendant's offer to prove by T. W. Kyte a conversation with deceased, in which she admitted that the title to the property was in Joseph R. Kyte. This was excluded on the ground that the interest of witness, who was a surety on the indemnity bond given to the sheriff by Blakeslee & Williams, was adverse to deceased, within the statute as to evidence of conversations with deceased in her lifetime.

Wm. D. B. Ainey, Searle McCollum, and J. M. Kelly, for appellant. McCollum & Smith, for appellee.

PER CURIAM. We are not convinced that either of the assignments of error should be sustained. The witness referred to in the first specification was incompetent to testify to what occurred in the lifetime of plaintiff's testatrix, and hence the offer to prove conversations in which it was alleged she admitted that title to the personal property on the farm was in Joseph R. Kyte was

Digitized by Google

rightly rejected. The case depended on questions of fact which were fairly submitted to the jury, with instructions which appear to have been substantially correct and adequate. There is nothing in any of the specifications of error that requires further notice. Judgment affirmed.

WAGNER et al. v. CROOK.

(Supreme Court of Pennsylvania. April 1, 1895.)

CHECKS—NEGLIGENCE IN COLLECTION—FAILURE OF DRAWEE.

1. Where a payee of a check deposits it in a bank for collection, and a bank to which it passes for collection sends it direct to the drawee, and the drawee gives no attention to it, though the drawer had sufficient funds with it, and a loss thereby occurs, the check not being paid, or the funds withdrawn from the drawee before it fails, the loss will fall on the payee, he being chargeable with the negligence of the bank in sending the check direct to the drawee.

2. The status of the parties, as to the loss, is not affected by the fact that the drawer forwarded to the payee a duplicate check, and that the drawee failed before it could be presented to it; it being represented by the payee, and believed by him and the drawer, that the first check had been lost in the mails, in transmission.

Appeal from court of common pleas, Susquehanna county.

Action by G. N. Wagner & Bro. against L. B. Crook for price of goods sold. Judgment for defendant, and plaintiffs appeal. Affirmed.

The opinion of the court below was as follows:

"The parties in the above-entitled case have agreed upon the facts, and submitted them to the court, in a case stated, in the nature of a special verdict. The facts necessary for the determination of the case are briefly as follows: October 1, 1889, defendant was indebted to plaintiffs in the sum of $140. On that day he sent his check for that amount, drawn upon Summers & Hayden, bankers, doing business at New Milford, Pa., to plaintiffs, by mail, directed to their place of business,—Grand Rapids, Michigan. This check was received by plaintiffs October 3, 1889, and same day deposited in a bank for collection. This check passed, in the usual course of collection, to the Girard National Bank of Philadelphia, October 8, 1889. Same day, the Girard National Bank sent this check, by mail, directly to the drawees, Summers & Hayden, for collection. Said Summers & Hayden received it, in due course of mail, October 9, 1889, during business hours, at their banking house, in New Milford, Pa. Said Summers & Hayden, upon receipt of this check, laid it aside; neither charging it to the account of defendant, or protesting it, or sending the check, or the amount of it, to the Girard National Bank. December 16, 1889, Summers & Hayden made an assignment for the benefit of their creditors, and plaintiffs have never received any money upon said check, or from the defendant, upon the original indebtedness. At the time the defendant sent this check to plaintiffs, he had more than sufficient money upon deposit with Summers & Hayden, subject to check, to pay this check, which remained upon deposit with them, subject to this check, up to their failure, December 16, 1889; and defendant has never received or demanded the same from Summers & Hayden, or their assignee, and the reason of the nonpayment of this check was the negligence of Summers & Hayden. Nov. 4, 1889, plaintiffs wrote defendant as follows: 'L. B. Crook, Hallstead, Pa.—Dear Sir: Your check, $140.00, to us, on account, was deposited in the Fourth National Bank, who forwarded the same to their correspondents. It seems that it was lost in the mails, and the bank now wish to procure a duplicate. Will you please forward the same to us, or the bank, as desired? We inclose the letter from the Fourth National Bank, requesting as above. [Sgd.] G. N. Wagner & Brother.' Dec. 14, 1889, plaintiffs wrote defendant as follows: 'L. B. Crook, Hallstead, Pa.—Dear Sir: Some time ago the bank requested us to ask you for duplicate check, which you sent us on account car of shingles. The check was $140.00, on Summers & Hayden, New Milford, Pa. Our bankers have called on us again for same. Will you kindly favor us with duplicate, and oblige. [Sgd.] G. N. Wagner & Brother.' These letters were mailed the day they were written, and received by defendant each two days thereafter. Defendant, soon after receiving the last letter, sent a duplicate check to plaintiffs. Summers & Hayden closed their place of business, and made an assignment, before this last check could have been presented for payment at their bank in the usual course of collections.

"The holder of a bank check assumes the duty of presenting it to the bank upon which it is drawn, and demanding payment of it within a reasonable time; and if he neglects so to do, and the bank fails after the time within which it ought to have been presented, the loss is to be borne by the holder, by reason of his negligence, which occasioned the loss. McIntyre v. Kennedy, 29 Pa. St. 448; Kilpatrick v. Association, 119 Pa. St. 30, 12 Atl. 754. It was admitted upon the argument that this check was presented in due time at the banking house of the drawees, Summers & Hayden, but it was claimed that the holder, by his agent, the Girard National Bank of Philadelphia, was negligent in sending this check by mail directly to the drawees, Summers & Hayden; that by so doing they made Summers & Hayden their agent, and became responsible for the admitted negligence of Summers & Hayden, in not paying the check from funds of the drawer in their hands for that pur-

Digitized by Google

pose. In the case of Bank v. Goodman, 109 Pa. St. 422, 2 Atl. 687, Harrington & Goodman deposited with the Merchants' National Bank of Philadelphia a check drawn by Ruhman & Co. on the Mississippi Valley Bank, doing business at Vicksburg, Mississippi, for $489.20. The same day the Merchants' Bank remitted this check by letter directly to the drawees, the Mississippi Valley Bank, requesting payment. The cashier of Mississippi Valley Bank mailed to the Merchants' Bank a letter inclosing, in payment of this check, a draft of the Mississippi Valley Bank upon the Hanover National Bank of New York City, to the order of cashier of Merchants' Bank, for the amount of the check. The Mississippi Valley Bank was doing business at the time this draft was sent, but failed a few days after, and the draft drawn by them on the Hanover National Bank was not paid. The check sent by Merchants' Bank to Mississippi Valley Bank was by the Valley Bank charged to drawers' account, and canceled, when draft on Hanover National Bank was sent to Merchants' Bank. Harrington & Goodman brought suit vs. Merchants' Bank for amount of check deposited for collection; Merchants' Bank having charged the amount of the check back to their account, upon notice of nonpayment of the draft. The case was submitted upon a statement of facts, and judgment entered for Harrington & Goodman. Allison, P. J., wrote an elaborate opinion, in which he reviewed all the authorities upon the question at issue. The case was carried to the supreme court, and affirmed upon the opinion of Judge Allison. In his opinion, Judge Allison sums up the principles which govern the case as follows: 'The weight of authority preponderates greatly in support of the doctrine that it was the duty of the defendant to transmit to a suitable agent to collect, and it seems to us that the Mississippi Valley Bank, on whom the check was drawn, was in no sense a suitable agent to demand payment against itself. Its interest was plainly to delay, instead of speeding, payment. The defendant put it in the power of the Mississippi Valley Bank to do what it pleased with the check, and that which it did please to do, on the eve of insolvency, was to cancel and surrender the check, and to transmit, not money, but a worthless draft, in payment. We think the principle may be stated as a true one, as the plaintiff's counsel have presented it, that no firm, bank, corporation, or individual can be deemed a suitable agent, in contemplation of law, to enforce in behalf of another a claim against itself. The only safe rule is to hold that an agent with whom a check or bill is deposited for collection must transmit to a suitable subagent to demand payment, in such manner that no loss can happen to any party, whether he be depositor and indorser, or the indorsee and holder. In this instance, had the demand for payment been made by such agent, the amount of the check would have been collected over the counter of the Mississippi Valley Bank. It was doing business on the 19th day of November, 1883, and the cancellation of the check on that day shows there was money of the drawer in bank sufficient to pay the check. We interpret the cases to which we have referred as establishing the rule of transmission to a suitable correspondent or agent, to mean that such suitable agent must, from the nature of the case, be some other than the party who is to make the payment. By no other rule can the rights of indorsers be protected, if it is the interest of the party who is to make payment to hinder, postpone, or defeat payment. This imposes no hardship on the institution undertaking to transmit for collection, which can always protect itself by stipulating that special instructions shall be given, which will save the collecting bank from all risk or peril.' As regards the liability of the Girard National Bank to the plaintiffs, this case of Harrington & Goodman v. Merchants' National Bank rules the question. The cancellation of the check, and sending of a worthless draft in payment of it, is no worse a breach of duty or negligence than keeping possession of the check, and neglecting or refusing to notify the sender of its reception; and the Girard National Bank, under the facts in this case stated, would be liable to the plaintiffs for the amount of the check, lost by their negligence in transmitting it to Summers & Hayden, the payees of the same, for collection; Summers & Hayden having money on deposit with them, belonging to the drawer, to pay the same, but, instead of paying the check, they retaining the same. As between the maker and the payee of this check, the Girard National Bank was the agent of the payee; and the negligence of the bank in sending the check to Summers & Hayden for collection, instead of to a suitable agent, was the negligence of the payee, and the loss of the amount of the check was therefore caused by this negligence of the payee. It has been held that the neglect of the payee of a check to cause the same to be presented to the drawee for payment within a reasonable time, where the check has been given to apply upon a debt of the maker, and a loss is occasioned by such neglect, converts the acceptance of the check from a conditional payment of the indebtedness into an absolute payment of the same. The rule rests upon the loss occasioned by the neglect of the payee to use due diligence. I have been unable to find any case exactly in point, but cannot draw a distinction between a loss occasioned by neglect to use due diligence in transmitting for collection, and a loss occasioned by a neglect to perform the equally essential duty of having the check presented to the drawee for payment by a suitable agent. The sending of a duplicate check,

Digitized by Google

under the circumstances of this case, cannot affect the status of the parties. The check was sent upon representation which proved to be untrue, and would not have been given, had the actual facts been known. Judgment is therefore directed to be entered for the defendant."

Edson W. Safford, for appellants. Horton H. Drury, Alfred Wolcott, and Miller S. Allen, for appellee.

PER CURIAM. This appeal is from the judgment entered in favor of the defendant on the case stated. All that need be said in vindication of the correctness of the judgment will be found in the opinion of the learned president of the court below. For reasons given by him, the judgment was rightly entered, and should not be disturbed. Judgment affirmed.

SMITH v. TOWN COUNCIL OF THE TOWN OF BURRILLVILLE.

(Supreme Court of Rhode Island. April 9, 1895.)

CERTIORARI—RETURN.

A common-law writ of certiorari brings up for review only the record proper of the proceedings sought to be reviewed, of which the evidence forms no part, and the return thereof need not set it out.

Writ of certiorari by Seneca N. Smith to review the action of the town council of the town of Burrillville with respect to certain charges made against the petitioner. Petition dismissed.

George J. West, for petitioner. Stone & Lovejoy, for respondent.

TILLINGHAST, J. The only question presented for decision in this case is whether the return to a common-law writ of certiorari should set out the evidence upon which the judgment or finding complained of was based. This question was practically answered in the negative by this court in the case of Maroney v. Council (decided at the present session) 31 Atl. 265, in which case it was held that certiorari brings up nothing for review, except the record proper of the proceeding, of which the evidence before the tribunal below, strictly speaking, forms no part, and which it is therefore under no obligation to send up as a part of the record. And, while we are aware that there are cases which hold to the contrary, yet we think the decided preponderance of the authorities supports the position taken in that case. In addition to cases cited in Maroney v. City Council of Pawtucket, supra, see In re Carlson (Pa. Sup.) 18 Atl. 8; Harris on Certiorari (section 12, and cases cited in note 8; also, section 45); Hayward, Petitioner, 10 Pick. 358; Stratton v. Com., 10 Metc. (Mass.) 217; Farmington River Power Co. v. County Com'rs, 112 Mass. 206; Miller v. McCullough, 21 Ark. 426; Stone v. Mayor, etc., of New York, 25 Wend. 164–185, and cases cited; Morewood v. Hollister, 6 N. Y. 309; Ross v. Ellsworth, 49 Me. 417; Whittaker v. Village of Venice, 150 Ill. 195, 37 N. E. 240. The practice in this state, so far as we are aware, except in the case of Maroney v. Council, supra, has always been to send up nothing but the record proper, by way of a return to the writ. It is true that, in determining whether or not the writ should issue in a given case, this court has examined the allegations of the petitioner regarding the proceedings below, which allegations have sometimes contained a statement of the evidence submitted, or an abstract thereof. Thus, in Rodden v. Commissioners (R. I.) 21 Atl. 1020, and in Keenan v. Goodwin, 17 R. I. 649, 24 Atl. 148, cited by petitioner's counsel, the petitioners, respectively, presented as a part of their allegations the evidence, or an abstract thereof, for the purpose of showing that certain errors of law were committed by the tribunal below. In the former case the question raised was whether the allegations, as thus presented by the petitioner, showed that the license commissioners were authorized to infer that the petitioner (the licensee) had permitted his premises to be used in violation of law, by the sale of intoxicating liquor therein on Sunday. The petitioner contended that they were not so authorized, because he alleged that no direct evidence was offered connecting him with such sales. As it did appear, however, from his said allegations, that the premises were in fact used on two successive Sundays for the illegal sale of liquor, and as there was nothing to show, and no reason to believe, that the store had been twice broken into and unlawfully used by a trespasser in a manner so open and liable to detection, we held that the inference of guilt which the commissioners drew from such evidence was not so unwarrantable as to become an error of law, and that, therefore, upon petitioner's own showing, no case was made out for the issuing of the writ. We also expressly held in that case that "the purpose of certiorari is to correct errors of law, and not to review findings of fact." In the case of Keenan v. Goodwin, which came before us in the same way, numerous causes of error were assigned by the petitioner, prominent among which were the admission of irrelevant and incompetent evidence on the one side, and the exclusion of that which was competent on the other, the petition alleging that objections were taken by the petitioner to the rulings thereon; thereby raising questions of law, which we were asked to consider, and which we did consider, for the purpose of determining whether the writ should issue. This, however, was not reviewing the evidence, but simply examining the grounds upon which the petition was based. In the later case, also, we held that the petitioner was not, upon his own show-

Digitized by Google

ing, entitled to the writ. We did not decide in either of said cases, however, nor has it ever been held by this court, so far as we are aware, that the evidence offered below was, or could properly be made, any part of the record, or that it is the duty of the tribunal before whom the proceedings are instituted to send it up. And, moreover, no question was raised in either of said cases as to the propriety of the court's considering the petitioner's allegations so made as aforesaid for the purposes mentioned. See Haven v. County Com'rs, 155 Mass. 468, 29 N. E. 1083. In Lonsdale Co. v. Board of License Com'rs of the Town of Cumberland, Index LL, 1, 25 Atl. 655, and in all of the other cases which we have been able to find upon the files, but which are not reported, in which the writ was issued, the evidence was not sent up with the record. And we are of the opinion that as certiorari does not serve the purpose of an appeal or bill of exceptions, and does not involve the investigation of facts not appearing upon the record, unless they are jurisdictional, the proper practice is not to send up the evidence adduced before the inferior tribunal. Commissioners of Highways v. Supervisors of Carthage, etc., 27 Ill. 143. Indeed, there being no provision of law which requires such tribunal to have the evidence submitted to them reduced to writing, nor any provision by which they could be compensated therefor if they should, it would seem to be imposing an unwarrantable duty upon them, to require them to do so. If it is desired to enlarge the scope of the common-law proceeding so as to make it serve the purposes of a bill of exceptions or of a petition for new trial, and thereby confer upon this court jurisdiction to correct errors of law and also to review findings of fact, thus necessitating the sending up of the evidence, it is, of course, competent for the general assembly to provide therefor by statute, as has already been done in many of our sister states. This would secure uniformity of practice, and prevent the possibility of any such arbitrary proceedings on the part of inferior tribunals as are suggested by counsel for the petitioner. But until some such statute shall have been enacted we must limit the proceeding to its common-law functions. In the case at bar the record, which is made a part of the case by agreement of parties, shows that the petitioner was fully and properly informed of the charges against him, that he was notified of the time and place appointed for hearing of the same, and that sworn testimony was submitted in support thereof. And it is therefore to be presumed that he had a full and fair trial, and that the evidence produced warranted the action of the defendant town council in revoking his license. See Kenny v. State, 5 R. I. 385; State v. Board, Index NN, 9, 28 Atl. 347; McGale v. McGale, Index OO, 164, 29 Atl. 967; In re Gross, 29 Atl. 25. We therefore decide that the return made by the defendant town council in response to the citation, which return, by agreement of the parties, has been treated as a return proper, is not defective by reason of its failure to set forth the evidence submitted, and, no other objection having been made to the proceeding, that the petition must be dismissed. Petition dismissed.

In re FISHER et al.

(Supreme Court of Rhode Island. April 5, 1895.)

CONSTRUCTION OF WILL—CONFLICTING CLAUSES—RESERVATION OF PROPERTY FOR REPAIRS—DEBT DUE BY LEGATEE—PAYMENT FROM LEGACY—DIVORCE—DECREE FOR ALIMONY—DESCRIPTION OF PROPERTY.

1. One clause of a will gave to testator's wife a life estate in certain property, and provided that the taxes, repairs, etc., thereon should be paid out of his general estate. In a later clause he directed that one-fourth of all his property should be given to each of his three sons when the youngest should be 40 years old, and that the remaining one-fourth should go to his wife for life, and to the youngest son at her death. *Held* that, upon the youngest son reaching the age of 40 years before the death of the wife, the administrator should retain enough of the personal estate undivided to pay the taxes and repairs on the property devised to the wife.

2. An administrator may properly apply the income of a legacy to the satisfaction of a judgment obtained by him against the legatee for a debt due the estate.

3. A decree granting a divorce to the wife of one of the devisees under a will, and awarding her as alimony, and for the support of her children, the rents and profits of the real estate given to the husband by the will, and also the husband's "personal estate," did not entitle her to the personalty which he was afterwards to receive under the will by a division of the testator's estate.

Petition of Lewis A. Fisher, administrator with the will annexed of the estate of Edson A. Sammis, deceased, for a construction of the terms of the will, and directions relative to the proper disposition of the estate.

E. M. Bosworth, for Lewis F. Fisher, administrator, Albert A. Sammis, Frederick E. Sammis, Martha G. Sammis, and Edward A. Sammis, administrator. S. S. Lapham, for Charles E. Medbury, Cora E. Medbury, George L. Sammis, and Eileen P. Sammis. F. Rockwood Hall, for Anna G. Sammis.

MATTESON, C. J. This is a case stated for the opinion of the court. Edson A. Sammis, of Barrington, died in September, 1877, leaving a last will and testament, duly admitted to probate, of which the portions material to the questions involved are as follows: "Second. I give and bequeath unto my beloved wife, Martha G. Sammis, the lot of land, with buildings and improvements thereon, situated on Lockwood street, in the city of Providence, for and during her natural life, and the expenses of keeping the same in repairs, together with taxes, shall be paid out of my estate, by my executors

Digitized by Google

hereinafter named; and, at her decease, it is my wish that the same be given to my two sons Frederick E. Sammis and Albert A. Sammis, subject to the same conditions as the property mentioned in the clause fourth of this, my last will and testament. * * * Fourth. I give and devise unto my beloved wife, Martha G. Sammis, the income arising from one undivided quarter part of all my estate, real, personal, and mixed, and to my three sons, George E. Sammis, Albert A. Sammis, and Frederick E. Sammis, the income arising from the remaining three-quarter part of all my estate, real, personal, and mixed, until my youngest son then living shall have attained the age of forty years. At the expiration of said time, it is my will that all my property, real, personal, and mixed, shall then be divided into four equal quarter parts, and that my said sons, George E. Sammis, Albert A. Sammis, and Frederick E. Sammis, shall each, respectively, receive one equal quarter part of said property, to them, their heirs and assigns, forever. I give and devise the remaining quarter part of all my estate, at the expiration of said time, to my beloved wife, Martha G. Sammis, for and during her natural life, and at her decease it is my wish that said quarter part of the income (if she should decease before the youngest son living shall have attained the age of forty years) shall be equally divided between my two sons Albert A. Sammis and Frederick E. Sammis, subject to the same conditions as to income or property herein devised and bequeathed, and to the further condition on the part of my said son George E. Sammis that he shall sell or otherwise dispose of the trotting or sporting horse now owned by him, and shall not buy or replace said horse by another for the purpose of trotting or sporting, and shall attend strictly to his business; and in case he shall not observe and obey these, my wishes, he shall not have or draw the said income, or any part thereof, but said income shall be divided equally among my other heirs until the youngest son shall have attained the age of forty years; but this is not to interfere or encroach in any way upon my said son's (George E. Sammis') quarter part of the property." The testator left a widow, Martha G. Sammis, who is still living, and three sons, George E. Sammis, Albert A. Sammis, and Frederick E. Sammis. George E. Sammis, at his father's decease, was the husband of Cora E. Sammis, by whom he had three children, viz. Edward A. Sammis, George L. Sammis, and Eileen P. Sammis, all of whom are now living, and the first of whom has attained the age of 21 years. At the October term, 1879, of this court, Cora E. Sammis obtained a divorce from George E. Sammis. The decree for divorce awarded her the custody of their children, and provided that she should be allowed the rents, profits, and income of all the real estate belonging to George E. Sammis at the time of the filing of the petition for divorce, and the rents, profits, and income arising from the same given to him in and by the last will and testament of Edson A. Sammis, deceased, and also the personal estate of said George E. Sammis; one-half of the rents, profits, and income of the real estate being allowed to said Cora during her natural life, together with the half of the personal estate as alimony; the other half of the rents, profits, and income of the real estate, together with the half of the personal estate, until the further order of the court, for the purpose of supporting, educating, and maintaining their children, for which purpose the decree also awarded to her all the right, title, and interest of the said George E. Sammis in his real estate, including that which belonged to Edson A. Sammis in his lifetime, and devised to said George in the last will and testament of said Edson. Subsequently to the divorce, Cora E. Sammis married Charles E. Medbury, and George E. Sammis married Anna G. Sammis. In June, 1894, George E. Sammis died, leaving the said Anna G. Sammis his widow, but no children by his second marriage. His eldest son by his first marriage, Edward A. Sammis, is the duly-qualified administrator of his estate within this state. Frederick E. Sammis, the youngest son of the testator, Edson A. Sammis, attained the age of 40 years July 18, 1894. Lewis T. Fisher, administrator de bonis non with the will annexed on the estate of the testator, has a large amount of personal estate of the property and estate of the testator, and also a large sum of money, being the balance of the one-quarter part of the income, dividends, and profits arising and accruing from the personal estate of the testator, after deducting the amount of a judgment referred to below, and which, except for the conditions contained in the will and the decree for divorce mentioned above, would, by the terms of the will, be payable to the said George E. Sammis. The administrator desires to pay this balance of the income, dividends, and profits to the person or persons entitled to it, and also to divide and distribute the personal estate of the testator in his possession among the persons entitled thereto.

At the time of the decease of the testator, and before the petition for divorce was filed, George E. Sammis was indebted to the testator in a large sum of money. At the December term, 1883, of the court of common pleas for Providence county, Albert A. Sammis and Henry Staples, then executors of the will of Edson A. Sammis, recovered judgment against George E. Sammis for $762.93, and costs of the suit, taxed at $7.80. Fisher, after his appointment as administrator, took out execution on this judgment, and had it levied on the right, title, and interest of George E. Sammis in a lot of land on Crary street, in Providence, which was afterwards sold at public auction, under the exe-

Digitized by Google

cution, for $50. A sufficient amount of the quarter part of the income, dividends, and profits arising and accruing from the personal estate of the testator, and which, except for the conditions of the will concerning George E. Sammis and the decree for divorce, would be payable to him, has been applied by the administrator to the satisfaction of the balance of the judgment, which is now fully satisfied and paid. The residue of said one-quarter, after the payment of the balance due on the judgment, in the hands of the administrator, is $970.28. Albert A. Sammis and Frederick E. Sammis, who are the only persons entitled to take advantage of the failure of George E. Sammis to observe the conditions in the will, have waived all right to insist on such failure, if failure there was.

The questions raised in the petition, in which all persons have joined, relate only to the personal estate of the testator, all questions concerning his real estate having been passed upon by the court in its former opinion. Sammis v. Sammis, 14 R. I. 123.

The first question is, shall the personal estate of said Edson A. Sammis be divided into four equal parts, and paid to the parties entitled to receive the same, as provided in the fourth clause of the will; or shall the personal estate or some portion thereof remain undivided for the purpose of enabling the administrator to continue to pay the expenses of keeping the Lockwood street estate in repair and the taxes assessed against the same, as provided in the second clause of the will? In considering clauses in a will which are inconsistent, it is the duty of the court to give effect to the testator's intention, if it can be ascertained. If there is no room for a construction which will harmonize the conflicting provisions, the general or predominant intent of the testator, if discoverable, is to be given effect, and the particular or subsidiary intent must yield. If no general or predominant intent is discoverable, and the clauses are irreconcilably repugnant, the court, as a last resort, will give effect to the intent expressed in the later clause of the will. It is contended, by counsel for the administrator and for Albert A. and Frederick E. Sammis and the children of George E. Sammis, that the second and fourth clauses of the will are irreconcilably repugnant; and that the intent of the testator that all his property shall be divided as expressed in the fourth clause should be held to be paramount to his intent expressed in the second clause relative to the payment of expenses for repairs and taxes on the Lockwood street estate during the continuance of the life estate of his widow; or, if not paramount, that it should prevail because it is the later expression of the testator's intent. It is suggested in argument that, in view of the postponement of the division of the property to the late period at which it is directed to be made, the testator had in mind the probability that the life estate of his widow in the Lockwood street estate would have terminated before the time for division arrived, and hence that the second clause should be read that the executors should pay out of the estate the expenses of keeping the Lockwood street estate in repair, and the taxes thereon, until the time when the youngest son then living should attain the age of 40 years, provided Martha G. Sammis should live so long. This suggestion is based on the assumption that the testator, in framing the second clause, contemplated the probability of the death of his widow before the time for division, as provided in the fourth clause. But it can hardly be assumed that the probability of his widow's death before the time for division of the property was in the testator's contemplation, since the fourth clause itself provides for the payment of the income to her of one-quarter of the property after the division during her natural life. We find no indication in the will that the testator's intent as expressed in the fourth clause should be paramount to that expressed in the second; nor do we think that the fourth clause should be held to be paramount to the second merely because it is the later expression in the will. Both clauses are contained in the same instrument, and are both therefore simultaneous expressions of the testator's intent; and there is on that account less ground for inferring a change of intent than there would be if the provisions of the fourth clause were contained in a codicil executed after the lapse of a considerable interval of time. And, besides, as already stated, the rule which gives effect to the later expression of the testator's intent is to be resorted to only when all attempts to reconcile inharmonious provisions have proved unavailing. We think that it is hardly to be presumed, in the absence of any other indication of the will than that afforded by the inconsistent language of the fourth clause, that it was the intention of the testator to impose the payment of the expenses for repairs and taxes on his widow's life estate, from which he had previously exempted it, at a period when presumably, by reason of her advancing years, she would be less able to provide for the payment. We think that it is a more reasonable presumption that he intended that his widow's life estate should continue unburdened by the expenses for repairs and taxes, and that the omission to except from the division of his property so much as should be necessary to provide for repairs and taxes on the Lockwood street estate was inadvertent. We are of the opinion, therefore, that the fourth clause should be modified to this extent, and that so much of the personal estate as shall be required to enable the administrator to pay the expenses for keeping the Lockwood street estate in repair, and the taxes assessed against the same, as provided in the sec-

Digitized by Google

ond clause, shall remain undivided in the hands of the administrator, to be held by him for such payment.

The second question is: "Should a sufficient portion of the rents, income, and profits of the personal estate in the hands of the said Lewis T. Fisher, administrator as aforesaid, given and bequeathed to said George E. Sammis in said will of said Edson A, Sammis, have been applied by said Lewis T. Fisher to the payment of said judgment against said George E. Sammis?" We are of the opinion that this question should be answered in the affirmative. In Armour v. Kendall, 15 R. I. 193, 2 Atl. 311, it was held that a legatee indebted to the testator's estate is entitled to the excess only of the legacy over the debt. The present case is within the principle of that decision.

The third and fourth questions submitted are as follows: "Should the one-quarter part of the rents, income, and profits arising and accruing from the personal estate of said Edson A. Sammis, deceased, and now in the hands and possession of said Lewis T. Fisher, administrator as aforesaid, given and bequeathed in said will to the said George E. Sammis, be paid to the said Cora E. Medbury, by virtue of the provisions contained in said decree for divorce entered upon the petition of said Cora E. Sammis v. George E. Sammis, or to the administrator on the estate of said George E. Sammis?" "In the distribution of the personal estate of said Edson A. Sammis, to whom shall the quarter part bequeathed to said George E. Sammis be paid?" We are of the opinion that the rents, profits, and income and the quarter of the personal estate in question are to be paid to the administrator on the estate of George E. Sammis, and not to Cora E. Medbury, under the decree for divorce. Though the term "personal estate," as used in the decree, standing by itself, would be broad enough to have included such rents, profits, income, and personal estate, we think that it is evident, from a consideration of the decree as a whole, that they were not in the contemplation of the court in the entry of its decree. The decree, it will be observed, awards to the petitioner as alimony, and for the support, education, and maintenance of her children, not only the rents, profits, and income of the real estate belonging to the respondent, but also specifies the rents, profits, and income arising from real estate given to him in the will, and, further, for the support, education, and maintenance of her children, all the respondent's right, title, and interest in his real estate, including all belonging to the testator and devised to the respondent in the will; while the award of the personal estate is merely of the personal estate of the respondent, without referring to that which he was to receive at some future date under the will. The express reference to the real estate which was given to the respondent in the will, and the absence of any reference to the personal estate given to him in the will, exclude the idea that the court, in framing its decree, intended that it should include the personal estate coming to the respondent under the will. "Expressio unius personae vel rei est exclusio alterius."

BEHLER v. DANIELS et al.

(Supreme Court of Rhode Island. March 27, 1895.)

NEGLIGENCE—DANGEROUS PREMISES—IMPLIED INVITATION.

1. The provisions of Pub. Laws 1878, c. 688, § 25 (Providence Building Act), requiring hoistways and elevators not inclosed to be protected, does not render a property owner liable for injuries sustained by falling into an unprotected elevator well on his premises, where he would not be liable therefor independently of such statute, because of the injured person being a mere licensee, to whom the owner owed no duty.

2. A member of the fire department is not an employé of the taxpayers, in such a sense as to create an implied invitation from them to enter their premises to extinguish fires, so as to render them liable in a case where such liability would not otherwise exist for personal injuries sustained by him because of the dangerous condition of the premises.

Action by H. R. Behler against Daniels, Cornell & Co. for negligence in failing to guard an elevator well, whereby plaintiff fell and was injured while discharging his duty as a member of the fire department. Demurrer by defendants to plaintiff's declaration. Sustained.

Walter B. Vincent and Amasa M. Eaton, for plaintiff. William G. Roelker, for defendants.

STINESS, J. The declaration in this case, as originally framed, charged the defendants with negligence in failing to guard an elevator well, whereby the plaintiff, a fireman, in the discharge of his duty, fell and was injured. A demurrer to this declaration was sustained upon the ground that it set forth an entry by the plaintiff into the defendants' premises only as a licensee, to whom the defendants owed no duty. Index OO, 61, 29 Atl. 6. The declaration is now amended, and the third count avers that Pub. Laws R. I. 1878, c. 688, § 25, commonly known as the "Providence Building Act," requires hoistways and elevators not inclosed to be protected with railings and trapdoors, and that it thus became the duty of the defendants to so protect their elevator, which they negligently omitted to do. The fourth count sets out that the plaintiff received his salary as a member of the fire department of the city of Providence from the defendants and others, taxpayers of Providence, and so became bound to respond to a fire call, and to enter upon their premises in putting out fire, and so was invited by the defendants to enter. In the former opinion, we said that the owner owed no duty to a licensee, as to the condi-

Digitized by Google

tion of his premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril, or willfully cause him harm, while, to one invited, he is under obligation for reasonable security for the purposes of the invitation. The declaration did not set out a cause of action upon either ground. The present amendments are made to inject into the statement of the case a statutory duty and an invitation. The first question, therefore, is whether there was a statutory duty. In considering this question, we need not discuss the limit of legislative power in imposing such a duty, for it is not necessary to decide it. We may assume it, and the question still remains whether an actionable duty is imposed by this statute. It has been before the court in several cases. In Grant v. Power Co., 14 R. I. 380, it was held that the scheme of the act was simply to secure safe structures, as a police measure for the general safety, not to create any duty which could be made the subject of an action by individuals, and that no remedy in favor of individuals, beyond what is expressly given in the act, should be implied for neglect to perform the duties created by the act. Baker v. Power Co., Id. 531, was brought under Pub. St. R. I. c. 204, § 21, which gives an action for injury caused by the commission of a crime or offense, the offense charged being a violation of the building act. It was held that an action under that statute could not be maintained until after a complaint had been made for the crime or offense and process issued. In Maker v. Power Co., 15 R. I. 112, 23 Atl. 63, this condition of a criminal complaint was met; but the court held that the terms of the act were too indefinite and uncertain to impose a criminal liability for noncompliance with the statute, and hence no action could be maintained for such alleged offense. In that case the defendant was sued as the owner and person in control of the building, and one ground of the decision was that the act does not specifically impose the duty of compliance with the statute either upon the owner or person in control. It simply says that certain things shall be done, without saying who shall do them. Some of the things would naturally, if not necessarily, be done by an owner, some by a contractor, and some by tenants. A person cannot be made liable for neglect of a statutory duty, unless that duty is clearly imposed upon him. An owner cannot be liable for a duty imposed upon a tenant, nor a tenant for a duty imposed upon the owner. Whether the defendants in this case are owners or tenants does not appear. The declaration simply states that they were in possession of the building on the day of the accident. But, even if their relation to the property were stated, we do not see how it could avail, in view of the difficulties set forth in the previous decisions under this act. In Parker v. Barnard, 135 Mass. 116, the suit was against the owners and occupants of the building, and the statute expressly imposed the fine upon the owner, lessee, or occupant. But, even so, the court did not consider the respective duties of the owners and of the occupants of the building as to the protection of the elevator well, because the facts were not reported, and we are not aware that this interesting problem has since been solved. The demurrer to the third count must be sustained.

The fourth count seeks to state a case of legal liability by averring an invitation to the plaintiff to enter the premises in question; but, as it is an implied invitation, the declaration, accurately drawn, sets out the facts as stated above, from which the invitation is to be implied. The idea is that the plaintiff is in the employ of the taxpayers collectively, and so of the defendants individually; that the relation sustains the invitation; and that he is thus invited to enter the premises of his employers, in the discharge of his duty. This presents the same question which we considered in our former opinion; the only difference being that now the invitation is averred which was then claimed to be implied from the facts, and there is also now added the fact that the defendants are taxpayers in Providence. The question, however, is the same, and the answer must be the same,—that the facts do not amount to an invitation. There is no relation between a fireman and a taxpayer to raise it. There is no individual employment nor responsibility, in respect to public officers or servants, on the part of taxpayers, and so no basis for an implication of service and invitation. Of course, firemen have a right to enter premises to stop a fire; but it is under the same law which allows others to enter, called by Judge Cooley "the law of everruling necessity." Cooley, Torts (2d Ed.) § 313. None of the cases cited by the plaintiff and considered by the court in the former opinion go so far as his claim, in this respect. In each of them, excepting Parker v. Barnard, there was something in the nature of a personal and direct invitation, which does not enter into this case, e. g. the calling of a police officer in Learoyd v. Godfrey, 138 Mass. 315; the placing of a box for a letter carrier (Gordon v. Cummings, 152 Mass. 513, 25 N. E. 978); a passenger in a depot (Bennett v. Railroad Co., 102 U. S. 577). The reasons for holding that there was no invitation in this case were sufficiently stated in the former opinion. The demurrers are sustained.

FOX v. MERFELD.

(Court of Appeals of Maryland. March 26, 1895.)

CLAIM FOR RENT—INSOLVENCY OF TENANT.

A landlord who fails to distrain for rent until after the tenant has applied for the benefit of the insolvent laws acquires no lien or priority by a subsequent levy or distress.

Digitized by Google

Appeal from court of common pleas.

Action by Moses Fox against Louis Merfeld, trustee named in a conveyance for the benefit of creditors. From a judgment that plaintiff, as landlord, did not acquire any lien or priority over general creditors by distress warrants issued after the tenant had filed his petition in insolvency, plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, and PAGE, JJ.

Thos. R. Clendinen, for appellant. Martin Lehmayer, for appellee.

ROBERTS, J. This appeal is taken from an order of the court of common pleas of Baltimore city, passed in the case of Charles Coblens, an insolvent. The facts are substantially as follows: On the 22d day of December, 1893, Charles Coblens filed his petition in the court of common pleas to obtain the benefit of the insolvent laws of the state of Maryland. On the same day, Louis Merfeld was appointed preliminary trustee, to whom the petitioner conveyed all of his property, in trust for the benefit of his creditors. At the time of filing his said petition the petitioner was occupying, as tenant of Moses Fox, certain premises on Wilson street, in said city, and was then over four months in arrear for rent due and unpaid. The petitioner at the time of his assignment was conducting on said premises a livery stable, and engaged in the business of boarding horses, and had in his possession a number of horses and carriages belonging to his customers, as well as certain property belonging to himself. The preliminary trustee on the day of his appointment filed his petition in said court, calling the court's attention to the facts just stated, and to the further fact that Coblens was in arrear for unpaid rent; and requested an order of court authorizing him to return to the respective owners their several horses and carriages, and to remove from the demised premises all property belonging to the insolvent, which order the court passed, authorizing the trustee to deliver the horses and carriages to the owners thereof, and directing the removal of the property of the insolvent estate, and hold the same subject to the further order of the court. On the day following, Moses Fox, the owner of the premises on Wilson street, issued a distraint, under which he seized all the property remaining on the premises at the time of levying the distress, which consisted of a horse, buggy, and dayton. Fox on the same day issued another distress, under article 53, § 18, Code, for the purpose of reaching the property which had been removed from said premises, and seized certain other property of the insolvent. Subsequently it was agreed between the parties to this controversy that the trustee in insolvency should sell all the property of the insolvent, subject to any lien which the court might find Fox had acquired by virtue of his two distresses. The property was accordingly sold by the trustee, and the question was then argued and determined by the court below that Fox had acquired no lien by the levy of the distresses, and that he only stood in the position of a general creditor. The question now to be decided is one free of serious difficulty. In no material respect does it differ from the case of Buckey v. Snouffer, 10 Md. 149, which settled the law in this state, and has only recently been approved by this court in Gaither v. Stockbridge, 67 Md. 228, 9 Atl. 632, and 10 Atl. 309. It is the declared doctrine in this state that, when a debtor applies for the benefit of our insolvent laws, his property passes in custodia legis for the benefit of his creditors; and, it being well settled that goods in custodia legis are not liable to be distrained upon, it follows necessarily that the distresses, or either of them, cannot be sustained, as the property at the time when the warrants were issued had passed beyond the reach of any legal right to distrain. It is clearly settled law in this state that rent is not per se a lien on goods found on the demised premises, unless the same have been seized under a legal distress. In this case the rent had been due since the 15th of December, 1893, but Fox slept upon his rights, and allowed Coblens to apply for the benefit of the insolvent law, before he issued his first distress. He was then without a remedy, as the property of the insolvent had passed into the custody of the law, subject only to such liens or incumbrances as had been acquired before Coblens' application. Of course, the second distress, under the provisions of article 53, § 18, Code, occupies no better position than the first, and both are without authority of law to sustain them. It was contended at the hearing in this court that Buckey v. Snouffer, supra, was decided when the act of 1805, c. 110, § 7, was in force, and that the then terms of the act were wholly different from the provisions contained in the act of 1854, c. 193, which is now codified as section 11, art. 47, Code, and reads as follows: "The estates of the insolvent, shall be distributed under the order of the court, according to the principles of equity; and no creditor shall acquire a lien by fieri facias, or attachment, unless the same be levied before the filing of his petition." It is insisted that this section provides another and entirely different method for the distribution of the estates of insolvents. We have not, however, been referred to any authority sustaining this view, nor are we aware that distribution of estates in the insolvent courts has at any time, either in England or in this country, been made, save "according to the principles of equity." A quarter of a century before the decision of Buckey v. Snouffer it was an-

Digitized by Google

nounced by this court, after a most careful examination of the English and American cases, that the proper rule for the distribution of the estates of insolvents was "according to the principles of equity." McCulloh v. Dashiell's Adm'r, 1 Har. & G. 96. We find no error in the order of the court below, and therefore affirm it. Order affirmed, with costs.

RILEY et al. v. FIRST NAT. BANK OF GRAFTON et al.

(Court of Appeals of Maryland. March 26, 1895.)

EQUITY PRACTICE—DISMISSAL AS TO CERTAIN PARTIES—RIGHTS OF PLAINTIFFS—JUDGMENT—ON WHOM BINDING.

1. In a suit by creditors to set aside an assignment by their debtor, plaintiff's counsel cannot, without leave of court, after the case has been remanded on an appeal from an order sustaining a demurrer to the bill, and a demurrer to the bill has been overruled, dismiss the action as to certain plaintiffs and as to attaching creditors brought in on plaintiff's petition.

2. In an action by creditors to set aside an assignment by their debtor a decree sustaining the assignment is binding on attaching creditors who were made parties by order of the court, though the case was dismissed as to them, without the sanction of the court, by an order of plaintiffs' counsel.

Appeal from circuit court, Baltimore county.

Bill by John H. Riley and others against the First National Bank of Grafton and others. Appeal from an order ratifying the auditor's account. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, ROBERTS, PAGE, and BOYD, JJ.

R. S. Culbreth and Wm. J. O'Brien, Jr., for appellants. Charles Marshall, Frank Woods, E. N. Rich, Wm. S. Bryan, Jr., Jas. Pollard, R. R. Boarman, Saml. D. Schmucker, and Geo. Whitelock, for appellees.

ROBERTS, J. Some of the preliminary stages of this controversy will be found to have received consideration in the case of Riley v. Carter, reported in 76 Md. 581, 25 Atl. 667. In that case the decree was neither affirmed nor reversed, but the case was remanded for further proceedings, under article 5, § 36, of the Code, in accordance with the views of the court therein expressed. After the case had been remanded, the circuit court of Baltimore city overruled the demurrer to the bill of complaint, and the defendants therein answered the same. At this juncture the counsel for plaintiffs filed orders with the clerk of that court directing him to enter the case dismissed as to all of the attaching creditors, but the same counsel continued in the management of the case, representing certain coplaintiffs, who were general creditors of Nicholson & Sons, and conducted said case to final decree. The legal effect of the manner adopted by counsel in seeking the dismissal of the attaching creditors as parties to said proceeding is a question on this appeal to be hereinafter considered. In the further progress of the case in the circuit court of Baltimore city, replications were filed to the answers, and the case was heard upon the pleadings and testimony. The court, by its decree, declared that the deeds of trust which had been executed by John H. R. Nicholson to Carter and Aiken, trustees, were not fraudulent in law or in fact as against the creditors for whose benefit the same were executed, but, as against the claims of the permanent trustee in insolvency, they were void and inoperative and said Carter and Aiken, trustees, were directed to deliver to said trustee in insolvency all the assets and property conveyed to them by said Nicholson, which they did. In accordance with the practice sanctioned by this court in Buschman v. Hanna, 72 Md. 1, 18 Atl. 962, the trustee in insolvency intervened as claimant in all of the attachment suits, and procured judgments in his favor, whereby the litigation under the attachments was transferred to the insolvent court for its decision. The trustee in insolvency, in accordance with legal requirement, transferred the assets received by him from Carter and Aiken, trustees, to the circuit court for Baltimore county for distribution, where Nicholson had been declared an involuntary insolvent. An audit having been filed in said insolvent case, which distributed the assets thereof pro rata and without preference to the creditors who had proved their claims in said case, the attaching creditors filed objections to the final ratification of the auditor's account on the ground that they were severally entitled to priority in the distribution of said assets, and should not be dealt with upon the same equality as that of general creditors of said Nicholson & Sons; and further, because the said deeds of trust were fraudulent in fact, and presented no legal bar to their right to have judgments of condemnation entered in said attachment suits which would establish their right to preference in payment out of said trust fund. The circuit court for Baltimore county overruled the objections to the auditor's account, and ratified the same, and this appeal is taken from the order of that court.

Many interesting questions arise on this appeal, but it will not be necessary to give all of them consideration. Those which are requisite to a proper determination of the rights of the parties are few, but not free of some difficulty. It will be proper, in the first instance, to consider the legal status of those attaching creditors who, through the intervention of the plaintiffs below, had been made parties defendant in Riley and others v. Carter and Aiken, trustees, by an order of the court based upon a petition of the plaintiffs, in which it is averred that in consequence of said attachments they were nec-

Digitized by Google

essary parties. Nothing in the progress of the case occurred to render them less necessary parties, so far at least as the reasonable purposes of the cause indicate; yet, after having remained parties litigant during the progress of this case on the appeal in 76 Md. 581, 26 Atl. 667, and until the demurrer filed to the bill of complaint had been overruled, plaintiff's counsel, without the authority of the court in which the case stood for hearing, filed with the clerk of that court two orders of the same date, one of which sought to dismiss the bill as to certain plaintiffs, and the other order sought to deprive the case of not less than 60 defendants by dismissing the bill as to them. This statement suggests a question of importance in the practice of courts of equity in this state, and one of consequence to the decision in this case. We have given it careful consideration, and we all agree that, after the case had progressed to the extent it had, counsel for plaintiffs had no authority to file an order with the clerk of the court directing the dismissal of the bill as to certain plaintiffs or defendants, without having previously obtained the permission of the court to make such an order. We cannot conceive of a practice better calculated to lead to unsatisfactory results than that followed in this case. After a bill has been filed, and proceedings had under it when counsel have appeared, and costs have been incurred, it would be an unfair advantage to allow to the plaintiff's attorney the right to dismiss his client's complaint as to parties, either plaintiff or defendant, without the previous sanction of the court. Our practice of allowing amendments as to parties would be practically nugatory and without purpose if the mode pursued in this case were to obtain. Mr. Daniel, in his work on Chancery Pleading and Practice, 790, says, when there has been any proceeding in the cause, which has given the defendant a right against the plaintiff, the plaintiff cannot dismiss his bill as of course. Thus, where a general demurrer had been overruled on argument, Lord Cottenham was of opinion that the plaintiff could not dismiss his bill of course. Wiswell v. Starr, 50 Me. 384; Railroad Co. v. Stewart, 19 N. J. Eq. 69. As having some bearing on this subject, it will be found by reference to the case of Roberts v. Gibson (1823) 6 Har. & J. 117, that the names of certain parties had, by methods somewhat similar to those adopted in this case, been stricken out of the bill, but Kilty, Ch., said that, with respect to the parties, he must consider those originally named as being still the complainants notwithstanding the writing filed by one and the deposition by another, inasmuch as they had not applied to the court to be struck out of the bill. What would be the inevitable result if a practice different to that just indicated were allowed to prevail? Courts could never know with certainty who the parties actually were at any particular stage of the case without looking at the record of proceedings to ascertain the fact whether the plaintiffs' attorney may have allowed a few plaintiffs and as many defendants permission to retire from the case since the cause was last before the court. The legal status of those creditors whose names appear in the two orders hereinbefore mentioned, and who sought thereby to escape the effect of the decree finally passed in said cause, has been in no respect changed or affected, but they are, for all legal purposes, concluded to the same extent as if said orders had not been filed with the clerk, professing to dismiss the bill as to them. But, independently of the views expressed, we have a list of attaching creditors who were parties to the cause, and fully advised of the nature and character of the controversy, who continued as such as long as they thought it beneficial for them to do so; and when they had reached a certain stage in the progress of the cause, the plaintiff's counsel, without the sanction of the court, filed his order with the clerk of the court, dismissing the bill as to said parties. Here is a case in which the creditors named had been by order of court made parties, because they were necessary to a just determination of the interests of all parties concerned. To tolerate such a practice would be, in effect, a substantial denial of the doctrine so often recognized by the court, "that persons who are directly interested in the cause, and have knowledge of its pendency, and who refuse or neglect to appear and avail themselves of their rights, are concluded by the proceedings as effectually as if they were parties named in the record." Albert v. Hamilton, 76 Md. 311, 25 Atl. 341; Robbins v. Chicago City, 4 Wall. 672; Parr v. Cockey, 71 Md. 235, 17 Atl. 1020. It follows from what has been said that the attaching creditors are estopped from setting up in the insolvent court any defense which was appropriate for them to have interposed in the circuit court of Baltimore city, or of now controverting any question which has been settled and determined by the decree of that court. If they were aggrieved by the action of the circuit court of Baltimore city, an appeal to this court was open to them. There are other questions in the record, which do not now demand consideration, and are not requisite to the decision of this case. The order of the court below overruling the objections to the audit, and ratifying the same, must be affirmed. Order affirmed, with costs.

FLINN et al. v. FENNIMORE.

(Superior Court of Delaware. Sept. 22, 1885.)

LEVY OF FI. FA.—RETURN.

A writ of fieri facias which shows that the inventory and appraisement were made by the sheriff alone, and verified by the defendant, and which was indorsed with a return reciting, "Levied on goods and chattels as per inventory

Digitized by Google

and appraisement annexed," is sufficient to cut out subsequent levies, where it appears that it was in conformity with a long-continued practice in the county. Comegys, C. J., dissenting.

Action by Flinn & Jackson against Edward C. Fennimore. Plaintiffs had judgment, and issued a writ of fieri facias thereon. A second writ was subsequently levied on the same goods under a judgment against defendant by another creditor. The goods were sold, and the proceeds deposited in court. The return on plaintiffs' writ recited that it "was levied on goods and chattels as per inventory and appraisement annexed," and the appraisement was verified by defendant, but had been made out solely by the sheriff. Plaintiffs petition for the application of the proceeds of the sale to their claim. Granted.

Mr. Davis, for subsequent fi. fa. creditors. Austin Harrington, for first execution creditor.

THE COURT, on being informed that such had long been the practice of making levy of writs of fi. fa. on goods and chattels in this county, and of inventories and appraisements of them returned by sheriff, held the levy of the first fi. fa., in this case, to be sufficient and binding, and directed that the money arising from the sales of the goods and chattels on which it had been levied should be first applied to the payment of it

COMEGYS, C. J., dissenting.

GRIER v. SIMPSON.

(Superior Court of Delaware. October, 1887.

SALE—DELIVERY—ACTION ON PURCHASE PRICE.

1. An action for the price of chattels cannot be maintained until the purchaser accepts them.

2. Under a contract to deliver an engine which would act in connection with the vendee's machine, the delivery of the engine on vendee's premises does not constitute an acceptance of the engine while the vendor is working thereon to adjust it to the purposes of the vendee's machine.

3. Whether, after the engine was in operation, the expression of the defendant that it was working "elegant" was an acceptance of the engine, is for the jury.

4. There being a conflict of evidence, it is the duty of the jury to find for the party which has the greater probable truth to support him.

Action of assumpsit by George S. Grier against William I. Simpson. Verdict for defendant.

Lofland, for plaintiff. James Pennewill and George V. Massey, for defendant.

COMEGYS, C. J. (charging jury). This is an action brought by George S. Grier, the plaintiff, to recover from William I. Simpson the sum of $200, with interest, on the following, which is treated as an agreement between the parties: "We, the undersigned, contract and agree as follows: George S. Grier is to make for William I. Simpson a machine to run by his engine to mix fertilizers, the machine to do the work in mixing and emptying the same, and the said W. I. Simpson is to pay not over two hundred dollars for the same all complete, and, if I can afford to make the machine for less than $200, I am to do so. [Signed] Geo. S. Grier." This is a very simple paper, the meaning of which there is and can be no dispute about. It is to make by Grier, for Simpson, a machine to run with the latter's engine, and mix fertilizers, and to do the work of mixing and emptying the same. A model of the machine in its general features has been exhibited to you by the plaintiff in proving his case. The price agreed upon was the sum named, but it was further agreed that, if the plaintiff could afford to make the machine for less than that price, he was to do so. The plaintiff made a machine, as he claims, in fulfillment of his contract, and set it up in the factory of the defendant, attaching the engine therein to it. This was in the latter part of the spring of 1880, near the close of the manufacturing season of fertilizers. It seems that the defendant was not present at this time, though he does not appear to have been out of the town of Milford, where his factory was, on business or otherwise. His factory was open, and in the charge of his servants. The plaintiff, therefore, had the right to deliver and set up the machine there, in pursuance of his agreement, in which there is no provision that the defendant shall have notice of the purpose of the plaintiff to fulfill his part of the contract; nor is there any implied by law. But, notwithstanding this right of the plaintiff, the defendant could not be fixed with acceptance of the machine by such act alone of the plaintiff. The thing bargained for was something to be manufactured by the plaintiff for the specified purpose of mixing and emptying fertilizers. Before, therefore, acceptance of the machinery bargained for could be complete, so as to bind the defendant for the price, he must have had opportunity to try it, and decide whether he should accept and pay for it, or not. Thus, you will see that there cannot be said to have been any acceptance of the machine by the defendant by the bare fact that it was set up at his factory, of which fact, however, he soon became aware. Something more was necessary, which was that he should try, and then decide with respect to it; this, however, in a reasonable time. It is proper to explain to the jury that where, as in this case, there is a contract to make and deliver an article to be manufactured by one party, the other party cannot be sued for the price of it, unless he accepts it; that is, receives and treats it as his own. If he refuse to accept, he may be sued, upon his refusal, to recover damages for not accepting, but not to recover the price of the thing

Digitized by Google

itself. The contract must be completed on both sides, before a suit will be for the price agreed upon. The one party must have made and delivered; the other must have accepted. It, therefore, is of the first importance to ascertain what an acceptance of property bargained for is, and how it may be shown to have taken place.

Acceptance, in a case of this nature, may be, if the parties so stipulate, without any trial whatever of the machine to test its sufficiency for the purpose designed in its construction; but, if there be no such stipulation, it cannot be said to exist until the machine has either been tried, and the purchaser has become satisfied with it, or he has had a reasonable time in which to make the trial, and has not availed himself of it. In this case trial was made of the machine by defendant soon after it was set up, the plaintiff being present, as well as the defendant's servants and the plaintiff's also. It very shortly broke in one of its arms, as has been proved on both sides; the defendant using, as his witnesses state, strong language with respect to it. The plaintiff declared, as they also state, that he would take from it or add to it until it was made right. They also state that the plaintiff used language to the effect that it was not reasonable to expect him to make a perfect machine in the first instance, he not having built one before. Here was a trial then, and a mishap from faulty construction. There cannot be said to have been any acceptance at that time. In pursuance either of this alleged language on the plaintiff's part, or of his duty if he expected to recover the price of the machine, the plaintiff made and put upon the machine a new arm, which, there is no proof before you, ever gave way. There is also testimony before you on the defendant's part that the stirring blades, knives, or plows (whichever may be their proper name) were in that season of 1880, spring or fall, changed twice to do better work. Whether they fulfilled the conditions requisite for such implements it is for you to decide, weighing the proof on both sides. It is also testified before you that the mixing tub leaked in its bottom seams, or some of them, and also at the apex or top of the cone of wood within which the shaft was inclosed inside the tub, and that the plaintiff said, if it continued to leak (or words to that effect), he would line it with sheet lead. The defendant's witnesses state that the tub continued to leak, and that the plaintiff did not so line it. It was also testified by one of them that sometime in the year 1881, at the instance of the defendant, he called upon the plaintiff, and required him to come and take the machine away; but that he did not comply with such requirement. In the spring of 1881 some other work was done by the plaintiff to the machine; the defendant's witnesses speaking concerning it, stating that it was simply an effort to start the machine, which they said could not be accomplished, on account of rust and clogging from the mixture made in the tub, which had hardened around the shaft where it revolved in the iron box they describe, which effort resulted in breaking the box with a hammer by the witness Robert D. Grier; while the latter says the breakage of the box, if there was any (he does not remark that there was), was done in his work, not of trying to start the machine, but of attaching to it other apparatus to make the stirrer run slower. Another box, however, was put around the shaft, and thus the damage was repaired. Supposing the testimony of the witness Robert D. Grier, to be true, there was still, nevertheless, experiment going on to perfect the machine for its work; and therefore down to this time there would not seem to have been such acceptance of the machine as would make the defendant liable for the price of it, especially as no claim is here made by the plaintiff for anything but the contract price of the machine, or the value of it, if you think it was not fully worth the contract price. But afterwards, according to the testimony of three witnesses on the part of the plaintiff, conversations occurred with the defendant, which, if you credit the statement, apparently alter the condition of things very materially. I refer to the evidence given by Robert D. Grier and by Thomas E. Draper and Thomas Draper. Grier says that some time in 1881, after he had made the change so as to lessen the speed of the mixer in the tub, he called to the defendant, whom he saw in the street at Milford, to know how the machine worked, and was answered, as he says, by the expression, "Elegant, elegant." As those are words not correctly applicable to the movements of machinery, it is for you to say what the defendant intended should be understood by their use. The Messrs. Draper are phosphate manufacturers; and in 1881, in August of that year, as Capt. Thomas Draper stated (his nephew did not fix the time, but thought it was July or August), they went to Milford to procure a stirring machine. They there saw the defendant, and he invited them, as one of them stated, to go with them to his factory to look at the machine the plaintiff had set up for him. They did examine it, and, in reply to questions put with respect to the quality of the machine, obtained, as they state, the answers to which they have sworn. Now, these answers, as well as that made to Robert D. Grier, if you credit the witnesses who speak of them, are not only at variance with the state of things sworn to by the defendant's servants when describing the machine, but are evidence for you to weigh and consider of acceptance in fact by the defendant of the machine as that which he contracted for. And, in support of the inference of acceptance, you have the further fact, sworn to by both the plaintiff and his son, of lan-

Digitized by Google

guage used, on a certain occasion (mentioned by them) in the town of Milford, by the defendant in response to a demand or request for payment for the machine,—language which certainly was no denial of liability.

When liability for a demand is charged against or imputed to a person, and the occasion or circumstances of making it are such as to call upon him, if he dispute such liability, to deny it, he ought to do so, in order to avoid the admission which is reasonably implied by silence. But it is not to be forgotten that the defendant emphatically denies the alleged demand and conversation, as he also denies, with equal emphasis, the statement which Robert D. Grier swears he made to him about the working of the machine when he alleges he inquired of him about it, and also the declarations alleged by the Messrs. Draper to have been made to them at his (the defendant's) factory in the summer of 1881. So that there is a complete conflict between the testimony on the part of the plaintiff, consisting of his own statement and those of his witnesses, and the denial of the truth of them by the defendant. he alleging that he never made any such. You are therefore called upon to decide between them. In case of conflict, the jury should give their verdict (when deciding the conflict determining the rights of the parties) to that side which has the greatest weight of testimony; that is, to that side which has the greater probability of truth to support it. And, in so doing, the jury cannot, in any sense, be taken to impute falsehood to anybody. If you think the weight is on the side of the plaintiff, then such statements as sworn to have come from the defendant appear to be inconsistent with any idea of nonacceptance of the machine as a substantial compliance with the contract. Whether they are or not is left to you, who are the judges thereof. If, upon a review of all the testimony on both sides bearing upon the question, directly or indirectly, you should believe that the defendant's expressions with respect to the quality of the machine made, as stated by Robert D. Grier to him, and by the Messrs. Draper to them (supposing them to have been made, and that is a matter for you to decide), are inconsistent with the idea that he was not then satisfied with it, then the plaintiff is entitled to your verdict for his claim; but if, on the contrary, you do not believe that such or like expressions were made by the defendant, or that, if made, they are not inconsistent with the denial of acceptance and ownership here set up in his behalf, then he is entitled to your verdict.

The whole case is with you, upon all the testimony given by the witnesses, and you are to decide it alone upon that testimony and all the circumstances shown by it.

Verdict for the defendant.

SPRUANCE v. TRUAX.

(Court of Errors and Appeals of Delaware. Jan. Term, 1890.)

IMPOUNDING LIVE STOCK—CATTLE ON HIGHWAYS—APPLICATION OF STATUTE.

Plaintiff and defendant owned farms on opposite sides of a public road in school district No. 68. Plaintiff's cattle strayed from his inclosure, through bars which had been carelessly left down, and entered defendant's field. Defendant impounded them, giving only verbal notice, and, after holding them 30 days, advertised them for sale. *Held*, in an action to replevin the cattle, that defendant was justified and entitled to recover under chapter 65 (volume 15) Laws 1875, which provides for impounding live stock running on the highways, without notice; and that chapter 452 (volume 14) Laws 1873, providing that no fine or penalty shall be recovered in cases of impounding, unless written notice be given, was not applicable to the case.

Error to superior court, New Castle county.

Action by James W. Spruance against William Truax to replevin cattle impounded by the defendant. Judgment for defendant, and plaintiff brings error. Affirmed.

The defendant avowed the taking, and justified under chapter 65 [1] (volume 15) Laws Del. 1875, which statute he set forth in full. To this avowry the plaintiff filed several pleas, based upon chapter 452 (volume 14) Laws Del. 1873, alleging, in substance—First, that the defendant did not give forthwith notice to the plaintiff, being the owner of said cattle, of such taking up and impounding, by written notice to him, although the defendant well knew the plaintiff to be such owner; second, that the defendant did not give forthwith notice to the plaintiff of such taking up and impounding by posting written or printed notices in five of the most public places in the school district in which said stock was taken up; and, third, that said cattle accidentally escaped from the inclosure of the plaintiff. The following is the bill of exceptions:

"At the trial of this cause, at the November term, 1888, the following facts, inter alia, were proved and admitted on the part of both the plaintiff and defendant:

"That the plaintiff and defendant own farms in school district No. 68, Blackbird hundred, county of New Castle, and lying on opposite sides of a public road; that the plaintiff's farm was carried on by a superintendent named James Moffet, and that the defendant personally conducted his farm; that the dwelling, barn, barn inclosures, etc., of the plaintiff, lay above 400 yards from the said road, in a field; that said field was fenced against said public road with a post and rail fence, two-thirds new, and one-third old fence repaired; that in said fence against said road were bars, through which ingress and egress to and from said field, in which stood plain-

[1] Chapter 65 (volume 15) Laws Del., is a special act relative to strays in school district No. 68, New Castle county, where the facts in this case transpired.

Digitized by Google

tiff's house, etc., to and from said public road, was secured, and that said bars, on the ——— day of January, 1887, upon which the said taking and detention, in the declaration in this cause complained of, is alleged to have taken place, were down and open, and had been repeatedly so down and open during all of the said winter, down to said date; that otherwise said fence against said road on the side of said plaintiff was sufficient; that the fence of the defendant, upon the opposite side of the public road, was a hedge in so defective repair that it offered no sufficient obstacle to prevent the entrance of cattle into the wheat field of said defendant; that in the rear of the plaintiff's buildings, about 200 feet distant therefrom, ran a small water course, at which said Moffet had been accustomed daily, for upwards of one month, to water about 30 head of cattle owned by said plaintiff, and kept on said farm; that said Moffet had occasionally left said cattle beside said water course, for hours at a time, but that until the day in question, during said period of upwards of one month since said cattle had been kept up from their grazing, and daily watered as aforesaid, none of said cattle had strayed from their inclosure, or gone upon said public road; that upon the day in question said Moffet turned out said cattle beside said stream to drink, as usual, then departed about his other avocations upon the farm, and remained absent about one hour; that upon his return a portion of said cattle were found to have strayed over said public road into the wheat field of said defendant; that said Moffet, after taking care of the cattle still in plaintiff's field, went after the remaining cattle; that said defendant had theretofore seen a part of said cattle crossing said road and entering said wheat field, had seized 17 head of the same in said field, and was impounding the same in the barnyard of said defendant; that all of said 17 head of cattle so seized and impounded were seized exclusively upon the land and wheat field of said defendant; that said Moffet, for said plaintiff, thereupon made immediate demand for return of said cattle, and said defendant did return 1 cow, having a calf, but retained and wholly refused to deliver up the remaining 16 head of cattle; that said plaintiff himself, upon the following day, and upon two other subsequent occasions, but within 30 days from said seizure, made further demands for the return of said cattle, and offered the sum of $10 in settlement of any damage which said cattle may have done; that said defendant had his damages duly appraised at the sum of $1.50; that said defendant, after holding said cattle for the space of 30 days, then duly advertised the same for sale; that 2 or 3 days before said advertised sale, said plaintiff sued out his writ of replevin, which began this action; that said defendant, upon the day following said seizure, notified said plaintiff by messenger, by word of mouth, that he, said defendant, had seized said cattle as aforesaid; but that said defendant did not give forthwith or other notice of such taking up and impounding, by written notice to said plaintiff, the owner of said cattle, although known to him, said defendant, as such owner, nor by posting written or printed notices in five of the most public places in the school district in which said stock was taken up. It was also proven in behalf of the defendant that during the grazing season said cattle, or some of them, had several times escaped from their fields and annoyed the defendant. It was testified in behalf of the plaintiff, by Moffet, that this escape in question, from this inclosure, was entirely unexpected, it not having before occurred since the keeping up of the cattle from their fall grazing; and he said such escape was accidental, and that said cattle were not more mischievous than cattle in general.

"And said plaintiff, by his counsel, did thereupon, and in accordance with his plea to said avowry, maintain, and ask the court to charge, that chapter 452 (volume 14) Laws Del. 1873 (Rev. Code, p. 314) should be construed in connection and together with chapter 65 (volume 15) Laws Del. 1875, as the law applicable to the case, and that, therefore, said defendant could not justify the taking of said cattle unless he showed that he forthwith gave the notice of said taking and impounding, as provided for in said chapter 452 (volume 14). Also, that if it appeared to the satisfaction of the jury that said cattle did accidentally escape from the plaintiff's inclosure, and not through the negligence of said plaintiff or his agent, then the provisions of said chapter 65 (volume 15) should not be construed to apply to the cattle in question in this case. And also that it having been proven by the defendant that all the cattle so taken up and impounded as aforesaid were so taken up and impounded while upon the land of said defendant, although, to reach the same, said cattle had just crossed over the said public road, the avowry of said defendant should have been for taking cattle damage feasant, and not based upon the statute—said chapter 65 (volume 15)—in said avowry set out, and that there was hence a fatal variance between said avowry and the proof thereunder. But the said court did then and there charge the jury, inter alia, that chapter 65 (volume 15) Laws Del., was the sole law applicable to the facts of this cause, and that said defendant, if the jury believed that he had proceeded according to the terms of said statute, was entitled to recover against the plaintiff; that the said chapter 452 (volume 14) Laws Del., was not a law applicable to this case; and that the cause was to be decided upon the law of chapter 65 (volume 15) aforesaid, alone. And further that, if the plaintiff could show that said cattle were in said wheat field and public road without the negligence of himself or his agents, then said defendant could not recover, but if the

Digitized by Google

jury believed that said bars were on the day in question down and open, and by the act of the plaintiff or his agents, and that the cattle did escape into said road, and so into said wheat field, through those bars, that then said cattle did escape through the negligence of said plaintiff, and not accidentally. And further, in reply to the contention of the plaintiff, by his counsel, that according to the evidence said defendant should have avowed for taking cattle damage feasant, instead of under the provisions of said chapter 65 (volume 15) Laws Del., the court charged the jury that the justification of the defendant under said last-mentioned statute alone was proper and competent."

H. H. Ward, for plaintiff in error. Thomas Davis, for defendant in error.

PER CURIAM. The judgment of the court below is affirmed.

CURTIS v. BRADLEY.

(Supreme Court of Errors of Connecticut. Oct. 4, 1894.)

APPEAL — ACTION ON BUILDING CONTRACT — EVIDENCE—MEMORANDA—JUDGMENT—RES JUDICATA.

1. An appeal does not lie on the ground that the evidence does not support the facts found, but supports a different state of facts, which the court found were not proven.

2. In an action for moneys advanced to a builder for labor and materials under an agreement with the owner, slips of paper containing the dates, hours of labor, names of laborers, and amounts due them, made out each week, in the presence of and from information furnished him by the builder, who testifies to their correctness, and bills for work and materials which plaintiff and the builder went over in the owner's absence, and verified on the builder's statements that the items were correct, are admissible in evidence as original evidence of the facts therein entered.

3. On an issue as to whether money advanced by plaintiff was expended for materials used in defendant's house, by the builder, as defendant's agent, persons rendering the bills for materials, and who testify to their correctness, may testify that the material and labor furnished for defendant's house were ordered by the builder.

4. A judgment against the owner of a building in an action by the builder to foreclose a mechanic's lien, in which one who advanced money to pay for the labor and materials, and took an assignment, was substituted as plaintiff, concludes the owner from claiming adversely thereto that the contract for the erection of the house was made with the builder, and not with such plaintiff in a subsequent action by the latter for the amount of his advances.

Case reserved from superior court, Fairfield county.

Action by Lewis F. Curtis against Frederick H. Bradley to recover for moneys advanced by plaintiff to defendant for labor and materials used in the construction of defendant's building. Judgment for plaintiff, and motion for a new trial by defendant. Motion denied.

J. C. Chamberlain and Elbert O. Hull, for appellant. Allan W. Paige and George P. Carroll, for appellee.

HAMERSLEY, J. In the summer of 1890 the plaintiff sold the defendant a building lot. In September of that year the defendant decided to have a house erected on the lot. It was then understood that one Simeon E. Plumb, a builder, should build the house, and that the plaintiff, a merchant, should advance the money for the cost of construction. The decision of this case depended on the actual terms of the agreement then made, the defendant subsequently claiming that his only agreement was with the plaintiff, and that by such agreement the plaintiff undertook to have the house built for the agreed price of $1,700. Plumb built the house under the directions of the defendant. The plaintiff paid to Plumb the amount of all bills for labor and materials as they came due. The house was finished in March, 1891, and the defendant accepted and occupied it. At the time the house was completed, Plumb and the plaintiff went over the labor and other bills, and the account of money paid for the cost of construction as charged on the plaintiff's ledger, and at the foot of that account Plumb wrote the following: "I have examined the above account, and find it correct. S. Plumb." The 14th of the same month, the plaintiff made a copy of this ledger account, and gave it to the defendant as the bill due from him to the plaintiff, in pursuance of their agreement. The defendant examined the bill, obtained the labor and material bills, made inquiries among the men who furnished materials whether the prices of the materials were correct, and found that they were correct. The defendant made no objection to the bill rendered as regards amount or price, except the claim that one item of 32 cents was charged twice; but the defendant did object to the total amount of the bill, and refused payment. Subsequently Plumb, as an original contractor, placed a mechanic's lien on the land upon which the house stood, to enforce payment for its construction, and brought an action against the defendant for the foreclosure of said lien. The plaintiff then brought an action against Plumb to recover the money paid for the cost of the house, and garnished the defendant as the debtor of Plumb. Subsequently, Plumb assigned to the plaintiff his interest in said mechanic's lien, and in the sum due from the defendant to Plumb for the construction of the house; and the plaintiff then withdrew his action against Plumb, and became substituted as party plaintiff in the action to foreclose said lien. The action of foreclosure was tried, and in December, 1892, judgment was rendered in favor of Bradley, the present defendant. By the record of the judgment, it appeared that the court found that the lien had been made and recorded, and had been assigned to the plaintiff, who became sole owner, and was the actual and bona fide holder and owner of the chose in action; but that the contract for the building of the house had not been made with Simeon Plumb, as al-

Digitized by Google

leged in the complaint; and that neither he nor the plaintiff, as his assignee, was entitled to foreclose the same. After this judgment was rendered, the plaintiff brought the present action.

The complaint follows the form called the "common counts," authorized for the commencement of an action. The counts relied on are those for money paid, goods sold and delivered, goods bargained and sold, and work performed and materials furnished, under which counts a bill of particulars was filed, detailing each item that the plaintiff claimed entered into the cost of the house, and also the count for money due on account stated, under which count the bill rendered the defendant in March, 1891, was filed as the bill of particulars. The answer is a general denial. Upon the trial there appears to have been no contest as to the fact that the plaintiff had paid for the construction of the house, and no serious contest as to the accuracy of his account as rendered. The claim of the defendant appears to have been in the alternative,—either the defendant's contract was made with the plaintiff for a fixed price, or the contract was made only with Plumb, and therefore the plaintiff has no cause of action against the defendant; the position of the defendant under the latter claim, which was the one mainly relied on in argument, being that, having induced the court in the former action to hold that the contract was not with Plumb, he had escaped all liability on that ground, and, if he now induced the court to hold that the contract was made with Plumb, he would escape all liability whatever, and secure his house without any payment, obtaining judicial sanction for the practical theft, under two contradictory judgments. So far as the record shows, the main question at issue was: What agreement, if any, had the defendant made with the plaintiff? It was not claimed on the trial that any question of law was involved in the determination of this issue, and the court found from the evidence that there was an agreement between the plaintiff, Plumb, and the defendant "that Plumb should perform work in erecting a house for the defendant on this lot. Plumb, as carpenter, was to work by the day, under the defendant's directions, at twenty-five cents an hour, and was to employ other carpenters at the same rate. He was also to order materials and work other than carpenter work for the house, and have the bills for the same charged to the plaintiff. The plaintiff, at the request of the defendant, agreed to be responsible and liable for all such materials and other work as Plumb should order for the house, and advance the money for the payment of them, and also to advance money to Plumb from time to time as he might require to meet his weekly pay rolls. The defendant agreed that on the completion of the house, in consideration of the money thus to be advanced by the plaintiff for the building of said house, and in consideration of the building of the same, he would repay the plaintiff the total amount of the moneys so paid out by the plaintiff." Upon these facts, the court rendered judgment that the plaintiff recover of the defendant the sum of $2,974.51, such sum being, as the court found, the total amount paid by the plaintiff in pursuance of that agreement, with interest. From this judgment the defendant appeals.

The appeal contains two distinct grounds for an appeal from the judgment:

1. Because the evidence introduced on the trial, and printed in the record, does not support the facts found by the court below, but does support a different state of facts claimed by the defendant, and which the court below found were not proved by the evidence. The law does not authorize an appeal from the judgment of a trial court for such reasons, and this court will not take jurisdiction of such appeal. Styles v. Tyler, 64 Conn. 432, 30 Atl. 165. The record discloses no reason for the correction of the appeal on the ground that the finding of facts does not fairly present the questions of law actually raised and decided.

2. Because the defendant is entitled to a new trial on account of errors alleged to have been made in the admission of evidence. Under this ground of appeal four errors are assigned:

First. The plaintiff offered in evidence certain slips of paper, testifying that Plumb came to the store each Saturday during the building of the house, and gave him the names of the men employed by him during the week, and their time; that the plaintiff wrote down at the time, in the presence of Plumb, on these slips, these names, the hours of time, the amount due each man, the total amount due, and the date; that he paid Plumb the total amount of money called for by each slip, and filed the slip on a spindle; and that he had no personal knowledge of the facts so stated to him by Plumb, and so written by him on the slips, but that he made such memoranda correctly as Plumb then stated the facts to be. Plumb had already testified that he had employed these men on the Bradley house, and that the slips of paper were correct statements of the facts of each case as far as he could recollect; that he knew them to be correct when made; and that he had given the names, hours of time, and the amounts to the plaintiff, in the manner that the plaintiff subsequently testified; and that, after deducting his own wages, he paid each man the amount due him. This evidence was offered to prove that the plaintiff had incurred liabilities and paid out moneys upon the order of and as required by Plumb, as agent for the defendant, in the manner agreed upon by the parties, and to prove the correctness of the items and prices. The defendant objected to the

Digitized by Google

introduction of these slips, and to the testimony of the plaintiff and of Plumb as shown. The court admitted the slips, not as themselves evidence apart from the oral testimony, but as memoranda made at the time and in the manner shown, and to be used by the witnesses Plumb and Curtis in the manner indicated, the witnesses reading the contents of the slips, and admitted the testimony of Curtis and Plumb in connection with them as stated. Said slips were marked as exhibits.

Second. The plaintiff offered in evidence certain bills, testifying that they were rendered him from time to time, and that he went over the bills with Plumb, in the defendant's absence, at various times as they came due, while the house was building or upon its completion; that some of these bills were exclusively for materials and work for the defendant Bradley's house, and some contained other items not for that house, and Plumb picked out the items of material and work that went into the Bradley house, and stated that the items and prices were correct; that when the designation "Bradley house" was not in the body of the bill when rendered, as it was in many bills, he (the plaintiff) wrote it in at the time in Plumb's presence, and correctly as given to him, and that he also made the check marks appearing on the bills when offered in evidence, to indicate Plumb's assent to the correctness of the items and prices; that these check marks were made in Plumb's presence, and correctly, as then stated by him to the plaintiff; and that he could not recall those items or prices without referring to the bills and memoranda made on them at the time. Plumb had already testified that he had given the orders to the persons thus rendering bills to the plaintiff, and that he had gone over these bills in the manner that the plaintiff testified, and that he had stated to the plaintiff that the items and prices as picked out were correct, and that these items represented materials and labor that had gone into the house, and that he had no recollection of the details of those items independently of the bills and the memoranda upon them, which he had seen at the time, and which he then knew to be correct. This evidence was offered to prove that the plaintiff had incurred liabilities and paid out money as required and ordered by Plumb as agent for the defendant, in the manner agreed by the parties, the correctness of the items and prices, and that the materials went into the Bradley house. The defendant objected to the introduction of the bills, and to the testimony of the plaintiff and of Plumb as above set forth. The court did not admit the bills, marked and designated as stated, as themselves evidence apart from the oral testimony, but admitted them as memoranda made or seen by witnesses who at the time either had knowledge of their truth or made them upon the statements of one who had such knowledge at the time, and to be used by witnesses in the manner shown, the witnesses reading their contents as marked, and their value depending upon the oral testimony accompanying them, and admitted the testimony of the plaintiff and Plumb as stated above.

There is no error in the above rulings. The court found that Plumb was authorized by the defendant to perform and to employ the labor on the house, and present his weekly pay rolls to the plaintiff; also, to order other work and materials for the house, and present the bills for such materials and work to the plaintiff; that the plaintiff was authorized by the defendant to pay to Plumb such weekly pay rolls, and to pay such bills for materials and work so ordered by Plumb, and charge the amounts of the pay rolls and bills so paid by him against the defendant. The court was bound to admit the testimony of the plaintiff and of Plumb as to the liabilities incurred and the payments made under such authority. The use of the slips and bills made at the time of the transaction, and known to the witnesses to have been correctly made, as memoranda to be used by them in connection with their oral testimony, comes within the settled rules of evidence. "A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the judge considers it likely that the transaction was at that time fresh in his memory. The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if, when he read it, he knew it to be correct." Steph. Dig. Ev. art. 136. "How far papers not evidence per se, but proved to have been true statements of fact at the time they were made, are admissible in connection with the testimony of a witness who made them, has been a frequent subject of inquiry, and it has many times been decided that they are to be received. And why should they not be? Quantities and values are retained in the memory with great difficulty. If, at a time when an entry of aggregate quantities or values was made, the witness knew it was correct, it is hard to see why it is not at least as reliable as the memory of the witness." Insurance Co. v. Weide, 14 Wall. 380; Town of Bridgewater v. Town of Roxbury, 54 Conn. 213, 6 Atl. 415.

The defendant also claims error in marking the slips as exhibits, on the ground that, if they might properly be read by the witness, they are not themselves admissible as evidence. Courts in other jurisdictions have made different rulings as to the admissibility of such a writing. In England it is excluded. In Massachusetts and some other states it is excluded. Costelo v. Crowell, 133 Mass. 355; Morrison v. Chapin, 97 Mass. 72; Duggan v. Mahoney, 11 Allen, 572. In Vermont it seems to be treated as evidence. Lapham v Kelly,

Digitized by Google

35 Vt. 195. In New York and some other states the writing is admitted as evidence. Guy v. Mead, 22 N. Y. 462, 465; Mayor, etc., v. Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905; Haven v. Wendell, 11 N. H. 112; Kelsea v. Fletcher, 48 N. H. 282; State v. Rawls, 2 Nott & McC. 331; Pearson v. Wightman, 1 Const. (S. C.) 336; Owens v. State, 67 Md. 307, 10 Atl. 210, 302; Milling Co. v. Walsh (Mo. Sup.) 18 S. W. 905. In the federal jurisdiction the question is still open. In Insurance Co. v. Weide, supra, the court indicates the admissibility of the evidence; but the opinion in Bates v. Preble, 151 U. S. 155, 14 Sup. Ct. 277, shows that the court is not committed to the general doctrine that such memoranda are admissible for any other purpose than to refresh the memory of the witness. We do not attempt to cite all the cases bearing on the question, or to weigh the conflicting authorities; for we are satisfied, on principle, that the evidence in question is admissible. The discussion would be endless, unless confined to the precise question presented, which may be stated as follows: The litigated question is, did the plaintiff pay to the agent of the defendant a certain sum on a certain date, as wages due for labor performed by a certain man employed by the agent? The plaintiff and the agent testify that a sum was paid for such purpose; that at the time of payment the agent gave to the plaintiff the exact amount due, and the name of the employé entitled to the same, and the plaintiff then, in the presence of the agent, wrote on a piece of paper the date, the amount, and the name; that these items, as then written by the plaintiff, were correct; that the paper produced in court is the identical paper then written upon by the plaintiff, and since unchanged; that they have no recollection, either before or after examining the paper, of the date, the amount, or the name. Is that paper admissible as evidence? All courts concur in holding that the witness may read the statement of such paper to the jury, and that the jury may draw the conclusion that the statement so read to them is a true statement of the facts; but some courts hold that the paper is not evidence. It seems to us to be pressing the use of a legal fiction too far for a court to permit the statement made by such paper to be read as evidence, while holding that the law forbids the admission as evidence of the paper which is the original and only proof of the statement admitted. In other words, it would seem as if, in admitting the paper to be so read, the court, of necessity, admitted the paper as evidence, and therefore, by the concurrent authority of all courts, the paper is itself admissible. But, waiving the question whether, in admitting such paper to be read, the courts have gone so far as to make the denial of its admissibility no longer tenable, we will deal with the matter as if wholly undecided. Is the paper itself admissible as evidence? Its admissibility, in the first instance, depends on its relevancy. Of this there can be no doubt. Being relevant, it must be admitted, unless excluded under some legal principle or rule of public policy which forbids the admission of certain classes of evidence, no matter how relevant and material. It cannot be said that the paper is not capable in its nature of being treated as competent evidence. Legal evidence is not confined to the human voice or oral testimony; it includes every tangible object capable of making a truthful statement, such evidence being roughly classified as documentary evidence. In oral evidence the witness is the man who speaks; in documentary evidence the witness is the thing that speaks. In either case the witness must be competent,—i. e. must be deemed competent to make a truthful statement. And in either case the competency of the witness must be proved before the evidence is admitted; the difference being that in oral evidence the competency is proved by a legal presumption, and in documentary evidence the competency must be proved by actual testimony, and the further difference that in oral evidence the credit of the witness is tested by his own cross-examination, while in documentary evidence the credit of the witness is tested by the cross-examination of those who must be called to prove its competency.

The competency of this paper is clearly established by the testimony, and it would seem to follow, of necessity, that it should be admitted on the same ground that any relevant and material documentary evidence, proved to be competent, is admitted. The doubt has arisen from the complication of the admissibility of such paper with the right of a witness to refresh his memory. In fact, the two questions may be entirely distinct. The right of a witness to refresh his memory is a settled and necessary rule of evidence. The application of that rule is often difficult, involving delicate distinctions. We are not called upon now to draw the line which limits the right of a witness to the use of such aids as, under the subtle laws of association, serve to refresh his memory. All courts recognize that right, and rightly hold that the thing used to refresh the memory is not, by reason of such use, itself admissible as evidence. When, in the application of the rule, a document like the one in question was presented to the witness, and absolutely failed to refresh his memory, its exclusion as a means of refreshing his memory became imperative; but the evidence of the document was so clearly essential to a fair and just trial that its use in some form seemed also imperative. Instead of treating the paper as itself competent documentary evidence, resort was had to a palpable fiction. The paper is read by the witness, and the knowledge the witness once had of the facts stated by the paper is imputed to him as still existing, and the statement of the paper is received as the

Digitized by Google

testimony of the witness, and the paper itself, the only witness capable of making the statement, is excluded. The use of such a fiction in the administration of justice can rarely, if ever, be justified. It is certainly uncalled for in this instance. The principles of law invoked to justify the fiction are amply sufficient to support, indeed to demand, the admission of the document as evidence. There is no occasion to sacrifice truth in order to secure justice. As regards its admissibility as evidence, there is no substantial difference between this paper and any other tangible object capable of making a truthful and relevant statement. It is true that a writing may be a mere declaration, and practically equivalent to a spoken declaration, and so be excluded as hearsay evidence. This possibility has played a conspicuous part in the discussions that have finally resulted in the admission as evidence of account books, whether kept by a clerk or by a party to the suit (a subject closely related to the one in hand, but involving too large a field to justify an attempt to define that relation). But it is also true that a writing may, by reason of the circumstances under which it was made, be a documentary witness to the fact the paper itself tends to prove, and this, although the particular writing may also in a certain sense be a declaration. Indeed, nearly all documentary evidence is in a certain sense a declaration; yet it is admitted as a witness, not of a declaration, but of a fact. We think this paper is admissible as a documentary witness. Suppose the litigated question turns on the dimensions of a man's foot. A witness produces a plaster cast of the foot. The testimony conclusively shows that the cast was so taken that it can state accurately the dimensions of the foot. Another witness produces a paper on which the exact measurements are written. The testimony conclusively shows that the paper also was so made that it can state accurately the dimensions of the foot. Is it not evident that the paper and the cast is each a witness to the fact that each tends to prove? How does the paper now in question differ? Upon this paper was stamped an accurate delineation of existing facts. In the one case the fact stated by the document relates to a physical object, and in the other to a mental object; but in both cases the fact is clearly relevant and accurately stated by the document. It is immaterial whether or not a critical analysis may impute to these documents, to a greater or less degree, some element of a declaration; the controlling principle of law is not based on such refinements. If there is any element of a declaration, it does not make the document in a legal sense a declaration. The conditions required by law to make such documents legal evidence are: The substance offered as a witness must be proved to have been made or found and preserved in such manner that it states directly, accurately, and truly a fact relevant and material to the issue. The paper claimed as evidence in this case fulfills these conditions.

In the discussions on the admissibility of account books, it has often been assumed that such books are declarations, and are admitted as exceptions to the class of hearsay evidence. Without stopping to consider whether such ground for the admission of account books is logically accurate, and, if so, whether the same reasoning applies to this paper, we will assume that it may be classed as hearsay evidence. It should then be admitted as an exception to the rule excluding such evidence. The limits of the field covered by the term "hearsay evidence" are so uncertain, and the exceptions are so many and important, that it is often very difficult to draw the distinction between those matters that are admitted as not subject to the rule and those that are subject to the rule, but excepted from its operation. It is significant that most matters supposed to be covered by the rule, whose relevancy and materiality come to be recognized as so close and clear that their admission seems essential, come to be classed as exceptions to the rule. If this paper must be classed as a declaration and hearsay evidence, it must also be classed as an exception to the operation of the rule. The reasons on which the rule is founded plainly do not apply to such evidence, and the arguments adduced in support of the admissibility of this paper as original evidence are sufficient to demonstrate that it does not come within the reason of the rule excluding hearsay evidence. Whether this paper is not within the scope of hearsay evidence, or, being hearsay evidence, is excepted from the operation of the rule, as not within its reason, is immaterial so far as concerns the question of admissibility, though the distinction may be quite material as affecting the symmetry of the law of evidence, and the clear understanding of the underlying principles that must control the development of that law. It does not, however, necessarily follow from the admissibility of such evidence that the document should be sent to the jury room. Under the general rule of practice, the jury must depend on their memory in the case of oral testimony, but may take documentary evidence to their consultation. But there is a difference in documentary evidence. Some is not given to the jury, either because its possession is agreed to be of no consequence or is inconvenient, or the document is of such a nature that it testifies to facts not relevant, in addition to the relevant facts. It might be claimed in the case of some writings offered in proof of the facts stated by the writing that a jury would confuse the effect to be given such writing with the peculiar effect sometimes given to a record or a deed, and so give an illegal weight to the evidence.

Digitized by Google

Possibly, some such consideration may have had influence in keeping such writings from the jury; but, whatever force such a consideration may once have had, it is entitled to little weight under the present policy of the law, which tends to submit to the jury all relevant and material evidence, and even trusts them to discriminate the allowance to be made for the interest of a party to the suit, or the character of a convicted felon. If the writing admitted in evidence clearly tends to prove nothing but the fact that it was admitted to prove, it should go to the jury. If, by reason of peculiar circumstances, it clearly may be treated by the jury as evidence of other facts not admissible, it should not go to the jury. Between the two extremes the question is largely one of discretion in the trial judge.

In the present case it is clear that the writing could only be used for its legitimate purpose, and that the court did not err in marking it as an exhibit. The conditions under which the general question we have discussed may arise are so various, and the different principles that may be involved in each case are so related, that there is special need to confine the application of the views expressed strictly to the particular question presented in this case. The only point now decided is: A memorandum of details which are essential to the full proof of a transaction at issue, proved to have been made substantially at the time of the transaction, and under such circumstances that the memorandum can make a correct statement of such details as they were then known to the person who made the memorandum or saw it made, and who is himself a witness and testifies to the transaction, but has lost all recollection of such details, is, in connection with the testimony of such witness, admissible as evidence, because such memorandum is in itself evidence of a fact closely relevant, plainly material, and essential to a just trial, and because no principle of the law of evidence or rule of public policy justifies its exclusion; and such memorandum may properly be marked as an exhibit.

Third. The persons rendering the bills above mentioned testified that the bills as a whole were correct as regards amounts and prices, and that, when the body of the original bill indicated what items went to the Bradley house, those items of material and labor were ordered for that house by Plumb. The defendant excepted to the admission of the testimony of these persons. The error assigned by the defendant is that the court erred in allowing the evidence of the parties furnishing this material, to the effect "that, where the body of the original bill indicated what item went to the Bradley house, these items of materials and labor were ordered for that house by Plumb." The fact that the money paid by the plaintiff was paid for materials used in building the house, and ordered for that purpose by Plumb, as the agent of the defendant, was a fact in issue; and the testimony of the persons from whom it was claimed that Plumb had so ordered such materials, that he had in fact ordered the same, was relevant to that issue. The use by such witnesses in their testimony of the bills made by them at the time, in pursuance of such orders from Plumb, and of the written memoranda made by them at the time to the effect that Plumb, the agent of the defendant, ordered the materials specified for the defendant's house, is plainly authorized by law.

Fourth. The plaintiff offered the record of the judgment above mentioned, in the case of Curtis, assignee of Plumb, against Bradley, for the purpose of showing that in this case the defendant was estopped from claiming that the contract for the erection of the house was made with Plumb. The court admitted the record against the objection of the defendant. The fact that the contract for the construction of the house was not made with Plumb was one material fact at issue in this case, and the plaintiff was entitled to show that the defendant was estopped from claiming that the contract was made with Plumb. It is not claimed that the record of a judgment in a case between the same parties, which appears on its face to have adjudicated a matter in issue between them in a subsequent action, is not admissible in the latter suit in support of a claim of estoppel; but the claim is that in this case the parties to the record offered were not the same as the parties to the present suit. This claim has no foundation in fact. The plaintiff in this suit was the actual plaintiff in the former action, and, moreover, was substituted for the nominal plaintiff, and by such substitution became also the plaintiff of record. Gen. St. §§ 981, 887–889; Buckingham's Appeal, 60 Conn. 143, 22 Atl. 509.

A new trial is denied. The other judges concurred.

TYNAN v. WARREN et ux.

(Court of Chancery of New Jersey. March 21, 1895.)

EQUITY PLEADINGS—PAROL CONTRACT—LACHES.

1. The rule that a court of equity will enforce a trust created by parol in a suit brought for that purpose, where the answer to the bill alleging the trust admits the same, but does not claim the benefit of the statute of frauds, will be applied, although the answer is in no way signed by the defendant.

2. A., holding the legal title to a tract of land, but, as to a moiety thereof, in trust for B. cannot acquire B.'s equitable interest therein through a parol agreement that B. would relinquish the same on A.'s paying certain claims against both.

3. The rule that laches in bringing suit will deprive one of his remedy is not applied unless such neglect has so prejudiced the other party, by loss of testimony or means of proof or changed relations, that it would be unjust to now permit him to enforce his rights.

(Syllabus by the Court.)

Digitized by Google

Bill by Joseph E. Tynan against Richard Warren and another to establish a trust. Heard on pleadings and proofs. Decree for complainant.

George S. Hilton, for complainant. Michael Dunn, for defendants.

GREEN, V. C. This bill is to establish a trust. The complainant, Tynan, and defendant Warren were sureties on an administrator's bond, dated February 8, 1876, in the penalty of $16,000, filed in the Passaic county surrogate's office. On a rumor that the administrators were mismanaging the estate, one of them, on May 6, 1876, assigned to Tynan and Warren, as indemnity in respect of their liability, all his interest in a mortgage of $7,000 on property in Paterson, which mortgage at the time of such assignment was held by the Passaic County Savings Bank, as collateral for a note for $5,000, on which there was $3,400 due. The mortgage was afterwards foreclosed by the savings bank, and the property sold by the sheriff to Tynan and Warren, on their bid of $3,400. The costs, interest, and fees were paid by Tynan and Warren, each advancing one-half thereof. They then agreed to raise $3,500 by mortgage on the property, to pay the debt of the savings bank and other expenses. The bill alleges that then it was agreed between Tynan and Warren that the deed should be made by the sheriff to Warren; that Warren should execute a new bond and mortgage for such loan, pay the amount due the savings bank out of the loan, and apply the remainder thereof to the payment of other claims, including past-due taxes, expenses, etc., "and to hold the premises for the joint and equal benefit of himself and complainant, until the reason for the arrangement stated should cease to exist." The answer of defendant admits that the property was sold by the sheriff to Tynan and Warren; that each advanced one-half of the amount paid on the sale; that it was arranged between complainant and defendant that they should procure a loan of $3,500 from the Paterson Savings Institution on the property, to pay the balance of the purchase money and other expenses; that the deed was made out in defendant's name, at the suggestion of the complainant, and that it was agreed that he (the defendant) "should hold the title to said land in trust for the equal benefit of himself and the complainant, subject to the said mortgage for $3,500, * * * until a purchaser could be found for it." The defendant thus does not deny the allegation of the bill that the title was put in his name, to be held by him in trust for himself and complainant, but expressly admits that he did agree to take the title and hold the same in trust, for the equal benefit of himself and complainant, until a purchaser could be found for it.

This is an express trust. It is not one raised by law from the circumstances of the case, but created, and its terms and conditions fixed, by the express agreement of the parties. 1 Perry, Trusts, § 73. It was not necessary that it be created by writing (Jamison v. Miller, 27 N. J. Eq. 586); but, resting in parol, the complainant, under the statute of frauds, could not enforce it by suit if properly contested; and this is all that is meant by the quotation from Baldwin v. Campfield, 8 N. J. Eq. 891, at page 892; "An express trust must be in writing." If a trust has been created by and rests in parol, and the defendant either does not answer (Smith v. Howell, 11 N. J. Eq. 349), or if he, by his answer, denies the trust, it cannot be enforced against him, for it cannot be legally proved (Walker v. Hill, 21 N. J. Eq. 191, affirmed 22 N. J. Eq. 513; Wakeman v. Dodd, 27 N. J. Eq. 564); or, if he admits the creation of the trust, he may successfully invoke the protection of the statute. This was at one time doubted, but is now indisputably established. Van Dyne v. Vreeland, 11 N. J. Eq. 370, 12 N. J. Eq. 143; Dean v. Dean, 9 N. J. Eq. 425; Ashmore v. Evans, 11 N. J. Eq. 151; 1 Perry, Trusts, § 85. On the other hand, the rule that if the defendant, by his answer, admits the alleged trust, and does not claim the benefit of the statute, equity will enforce the trust, if continuing (Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4,847), is recognized as long ago as Hampton v. Spencer, 2 Vern. 288; Nab v. Nab, 10 Mod. 404; Ryall v. Ryall, 1 Atk. 59; Cottington v. Fletcher, 2 Atk. 155. When this last rule originated, the answer of the defendant was taken under oath, and was required to be signed by the defendant. This latter requirement was so often disregarded that Lord Hardwicke (April 27, 1748) promulgated a rule of court making it obligatory. 2 Atk. 290; Hindes, Prac. 199; Daniell, Ch. Prac. 745.

The practice of the defendant signing the answer has not obtained in this state, the signature of counsel only being required (Dickerson v. Hodges, 43 N. J. Eq. 45, 10 Atl. 111); but the signature of the defendant was, of course, subscribed to the affidavit, and in this way became part of the answer when it was verified. The fact that bills now generally waive answer under oath results in the answers being rarely signed in any way by the defendant, and the answer filed in this suit is not in any place signed by the defendant. Does this fact take the case out of the rule stated, that where the bill charges a trust, and the answer admits it, it will be enforced if subsisting, unless the defendant claims the benefit of the statute? The solution of this question must depend largely on the reason of the rule. In ascertaining this reason, we may obtain much light from cases brought for the specific performance of parol agreements for the sale of lands, of which there are very many (see Pom. Spec. Perf. § 140, note 5); for the terms of the statute of frauds with reference to trusts and agreements for the sale of lands are, so far as the requirement of a writing signed by the party is con-

Digitized by Google

cerned, so similar that the application of the statute and the reasoning with reference thereto, in one case, must undoubtedly apply to the other,—a conclusion recognized in Story, Eq. Pl. § 76; in Mitf. Eq. Pl. 267, 268; Dean v. Dean, supra; Browne, St. Frauds, § 113. Our statute relating to trusts (Revision, p. 445, § 3) is an almost exact copy of 29 Car. II. c. 3, §§ 7, 8; and the fifth section of our act relating to agreements for the sale of lands is taken from section 4 of the English act (Append. Browne, St. Frauds). Prof. Pomeroy, speaking of the enforcement, by decree of the court, of a contract within the statute of frauds when a verbal contract is alleged by the plaintiff, and the defendant admits it in his answer, without at the same time interposing the statute of frauds as a defense in his pleadings, says (Pom. Spec. Perf. § 140): "Although this rule is firmly established, the cases and text writers are not agreed as to the reasons for its adoption. Three principal ones have been suggested: First. It has been said that such an admission by the defendant obviates all the dangers which the statute was intended to prevent; that the object of the legislature was to remove all the opportunity and occasion for frauds and perjuries which are furnished by mere parol testimony, and the written statements by both the parties in their pleadings, as to the terms of their agreement, leave no possible room for any fraud or perjury. Secondly. It has been suggested, and especially by Judge Story, that the answer signed by the defendant or by his attorney, and admitting the contract as set forth by the plaintiff, technically and literally satisfies the very demands of the statute, since it is a note or memorandum in writing, signed by the party to be charged, or by his agent duly authorized. Thirdly. It is argued that an admission of the contract, without at the same time setting up its invalidity or the impossibility of enforcing it resulting from the statute, is a deliberate and formal waiver of all benefit which the defendant might have derived from the legislation; this benefit being personal, and therefore capable of being waived. Both the first and second of these reasons are open to an objection fatal to each of them. If sound, they should apply with equal force to the case where the defendant sets up and relies on the statute after admitting the contract, and to that where he does not set up the statute. If an admission of the agreement obviates the dangers of perjury, or constitutes itself a memorandum, this would be none the less true if defendant should add to such admission a plea of the statute as a defense. The rule cannot be accounted for on either of these grounds. Its explanation must be found in the third reason, which alone is consistent with either doctrine." Story, Eq. Pl. § 763, states the ground as being that the defendant has, by not claiming the benefit of the statute, thereby renounced its benefit, although in Story, Eq. Jur. § 755. he suggests that the answer being signed by the defendant is a compliance with the statute. Chancellor Vroom, in Hutchinson v. Tindall, 3 N. J. Eq. 357, in which he refused to follow Hampton v. Spencer, 2 Vern. 288, in that it executed a trust set up in the answer, although not charged in the bill, says: "I am inclined to believe that if the present complainant had filed a bill claiming this deed to be a deed of trust, and praying that it might be so decreed according to the original intention of the parties, the answer of the defendant, admitting the trust, would have been good evidence of it. It would have amounted to a sufficient declaration of the trust." Chancellor Williamson, while he does say in Dean v. Dean, 9 N. J. Eq. 425, at pages 427, 428, that the reason why the court will execute a parol trust admitted by the answer is because it takes the answer as the writing by which the trust, in the language of the statute, "is manifested and proved," at page 429 says: "It appears to me that the answer contains such an admission of the trust alleged in the bill that the court can execute it without the assistance of parol testimony, and that, therefore, the defendants not having insisted on the statute for their protection, they must be considered as having renounced the benefit of it." In Jamison v. Miller, supra, some significance would seem to be attached to the fact that the answer is signed by the defendant. As the result of authorities cited, Perry on Trusts (section 84) says: "In all cases, however, the defendant may answer; and if, in his answer, he confesses the trust without insisting upon a statute of frauds, he will be held to have waived the benefit of the statute, and his answer may be used as a written declaration and proof of the trust, on the ground that the plaintiff is not called upon to introduce evidence, and the trust appears upon the written answer before the court." Hill, Trustees, p. 95, note 1. If defendant, by answer, admits the parol trust, but does not set up the statute of frauds, he will be deemed to have waived it. So, also, Tiff. & B. Trusts, p. 15; 8 Am. & Eng. Enc. Law, p. 747, "Statute of Frauds." 2 Reed, St. Frauds, p. 529, says: "Not pleading the statute waives it, not because the answer is such a memorandum as the statute requires, but because the latter is waived by not being set up." In Whiting v. Gould, 2 Wis. 552, at page 594, Judge Crawford says: "On this subject, from an examination of the authorities, we believe the rule may be stated thus: If a defendant admits an agreement or trust, but insists on the statute of frauds as a defense, the court will not permit his admission to override the positive provision of law, unless the statute is sought to be made a cover for fraud, and will not decree against the defendant; but if, after admitting the agreement or trust, he does not rely by plea or answer on the statute, a decree may be rendered against him, because he may be deemed to have renounced the benefit of the statute,

Digitized by Google

and no objection to the nature of the proof can be offered, because the agreement or trust is admitted, and no proof of any kind is required."

The rationale of the rule would seem to be this: The statute offers protection to a defendant against a parol trust or agreement for the sale of land, by providing a rule of evidence which prevents its proof if he denies the alleged trust or agreement, or if, admitting the one or the other, he claims the benefit of the statute. If, however, he admits the trust or agreement, but does not vouch the statute, no rule of evidence is brought into operation, as there is no issue on that point to be tried, and the benefit of the statute is waived. In such case the court proceeds to enforce the trust or agreement if it can establish the one or the other from the admissions made by the answer, without resort to parol proof to ascertain its terms and conditions. In this point of view, the fact that the answer is in no way signed by the defendant does not prevent the application of the rule, and the defendant, having by his answer admitted the trust, and set out its terms, conditions, and limitations, and not having claimed the benefit of the statute, the same being an express trust with reference to the land, must be held to its terms and conditions, unless he has been in some way effectively relieved from the obligation of the trust.

The defendant claims by his answer that the trust is no longer subsisting, because the complainant relinquished his interest in the property in consideration of the defendant's assumption of certain claims. These allegations of the answer are put in issue by a general replication, and the parties, as witnesses, tell different stories. It is, however, admitted that the agreement, whatever it was, was a verbal one. Could it, if it was even as stated in the answer, have the effect defendant claims for it? It being admitted that the defendant took the title to the whole property on an agreement to hold it for the joint benefit of himself and complainant, he was the legal owner, subject, as to an undivided half, to a trust in favor of the complainant. As to this half, then, there was a legal estate in the defendant, and an equitable estate in the complainant. The latter might not be able to enforce it, as has been shown; and this was probably what Mr. Williams meant by saying no papers were necessary. But defendant could not acquire complainant's equitable interest, as he claims to have done by his answer, through a parol agreement. This would be a transfer of a trust estate; and section 4 of the statute of frauds provides that "all grants and assignments of any trust or confidence shall be in writing signed by the party granting or assigning the same, or by his or her last will in writing, or else shall be utterly void and of no effect." This is substantially section 9 of the English act. Chief Justice Marshall, in Hughes v. Moore, 7 Cranch, 176, at page 191, says: "The court can perceive no distinction between the sale of land to which a man has only an equitable title and a sale of land to which he has a legal title. They are equally within the statute." In Darling v. Butler, 45 Fed. 332, plaintiff had executed and delivered to defendant a deed of certain land; but it was intended by both parties that the deed should not take effect until the defendant made a sale of the land for the plaintiff. It was held that the legal title passed, but the equitable title still remained in the plaintiff, and a subsequent oral sale thereof to the defendant was within the statute of frauds, and void; and in an action for the balance of the purchase money a demurrer to the complaint was properly sustained. Wallace, J., at page 335, says: "Nevertheless, the equitable interest could not be transferred by parol; and, without a new deed or a formal assignment or release of the plaintiff's equitable title, the defendant could acquire no better title to the lands than he had before [viz. the legal title, subject to the other's equitable title]. An oral agreement for the transfer of an equitable interest in lands is as inoperative under the statute of frauds as one for the transfer of a legal title." Dougherty v. Catlett (Ill. Sup.) 21 N. E. 932; Clitus v. Langford (Tex. Civ. App.) 24 S. W. 325; Richards v. Richards, 9 Gray, 313; Smith v. Burnham, 3 Sumn. 435, Fed. Cas. No. 13,019; West v. Randall, 2 Mason, 203, Fed. Cas. No. 17,424. It is unnecessary, therefore, to ascertain which version of this parol agreement is correct, as it, whatever it was, was inoperative to transfer complainant's equitable title to defendant.

The defendant next claims that complainant has forfeited any rights he may have had in equity by his delay in prosecuting the same. Mr. Justice Story in Oliver v. Piatt, 3 How. 411, thus expresses a well-established rule: "The mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust,"—which, of course, refers to express trusts. This trust was recognized as an active subsisting one at the time of the alleged agreement at Mr. Williams' office. If the acts of the defendant since that time amounted to a renunciation of the trust, the rule that this court acts by analogy to the statute of limitations does not apply, because the statutory period has not elapsed, it being only 12 years prior to the filing the bill. This defense, if available, must come under the rule either of acquiescence or laches. I do not see how the first applies. The distinction between the two is pointed out in Hall v. Otterson (N. J. Ch.) 28 Atl. 907, at page 912. The complainant does not now object to the acts of defendant in which he has acquiesced. He does not challenge his collecting the rents or placing a mortgage on the property. The rule as to laches is well defined and is clearly stated by the chancellor in Van Houten v. Van Winkle, 46 N. J. Eq. 384, 20 Atl. 34, and

Digitized by Google

in McCartin v. Traphagen, 43 N. J. Eq. 323, 11 Atl. 156, and in the citations in Hall v. Otterson, supra. I do not understand that mere delay in bringing a suit will deprive a party of his remedy, unless such neglect has so prejudiced the other party by loss of testimony or means of proof or changed relations that it would be unjust to now permit him to exercise his right. Applying this test, how has the defendant been injured by delay? There is no substantial dispute as to the terms of the trust. Some witnesses are dead, but, if alive, their testimony could only relate to the oral agreement as to the relinquishment of the equitable interest, which would be of no benefit. Defendant has collected the rents, and paid the expenses, and there is nothing to prevent his accounting. He still holds the title, so that the trust can be executed; and, if he had sold the property, he presumably would have the price or what represented it. Of course, the interests of the mortgagee cannot be affected. I see no reason why, under the authorities, the doctrine of laches should be applied.

I will advise a decree for complainant, in accordance with the prayer of the bill.

ADAMS v. CAREY et al.

(Court of Chancery of New Jersey. April 10, 1895.)

TRUSTS—COVENANTS RELATING TO LAND—STATUTE OF FRAUDS.

Covenants relating to the management and sale of real estate, contained in a declaration of trust which was signed only by the trustee, cannot, in case of resulting trusts, be considered as covenants or limitations of their estates, on the part of the other persons for whose benefit the trusts are declared. Nor does their acceptance of the declaration of trust, in such cases, dispense with the necessity of their signatures, under the statute of frauds, when the declaration is claimed to limit, or give an interest in, their equitable estates, which arose independently of the declaration of trust.

(Syllabus by the Court.)

Bill for partition by Washington Irving Adams against Stephen W. Carey and others. Decree for complainant.

Robert M. Boyd, for complainant. Edwin B. Goodell, for defendant Carey.

EMERY, V. C. The bill in this case is filed for partition, by a complainant claiming an equitable estate in lands, against the defendant holding the legal estate, who is also admitted to be the equitable owner of one half interest in the lands, and against the other owners of the equitable interests. The existence of these equitable interests or estates in the lands is not denied. The case is heard on the bill and answer of the defendant Carey, the holder of the legal title; and the question to be decided is as to the effect upon the complainant's equitable interests of a declaration of trust signed by the defendant Carey at or shortly after the date when the legal title was conveyed to him. It appears from the bill and answer, and from the express statements in the declaration of trust, that the land was purchased by the complainant, Adams, the defendant Carey, and two others (Samuel Parker and Calvin H. Carter), each contributing equally to the payment of purchase money, and that the conveyance was made to Carey for the joint and equal benefit of all. Considering simply this payment by four persons, and a conveyance to one of the four, there can be no doubt that each of the four persons became at once, upon the payment and conveyance, an equitable owner of one fourth interest, and that Carey held the legal title in trust for all, and subject to the right of each owner of an equitable interest to call upon the trustee for a conveyance of the legal title to his share, and consequently to a partition.

The dispute in the case arises upon the question whether the subsequent provisions of Carey's declaration of trust change these equitable rights, and to what extent. A copy of the declaration of trust is annexed to the bill. It is signed only by Carey, and after declaring that the conveyance was made to Carey, in trust, to and for the joint and equal use and benefit of Adams, Parker, Carter, and himself, and that each one of these had paid, or agreed to pay, the one equal fourth part of the consideration money for the premises conveyed to Carey, Carey covenants in the following words: "And that in consideration of the above, and of the sum of one dollar to me in hand paid by each of the said W. Irving Adams, Samuel M. Parker, and Calvin H. Carter, the receipt whereof is hereby acknowledged, I do hereby covenant and agree to and with them and each of them, their and his executors, administrators, and assigns, that I, the said Stephen W. Carey, my heirs and assigns, shall and will hold, use, and manage, lease, sell, dispose of, and convey the said land and premises, and every part thereof, in such manner, and upon such terms, and for such prices or considerations as may be from time to time fixed and determined upon by any three of the aforesaid owners (including myself),—the executor or administrators of any deceased owner representing his one-fourth share or interest,—the same to be fully expressed to me in writing, and shall and will account for and pay over to each of said owners, or his heirs, executors, administrators, or assigns, the equal one-fourth part of all moneys which may be received by me, or my heirs, executors, administrators, or assigns, for or on account of the said land and premises, whether by lease, sale, or otherwise, after deducting and paying all taxes, assessments, and other necessary charges or expenses imposed upon or incurred by reason of the same."

After the execution of the declaration of trust dated October 30, 1875, and in 1876

Digitized by Google

Parker, one of the purchasers, died intestate in the city of New York, leaving a widow and two children, all made defendants (one of the children being an infant); but no executor or administrator of his estate has been made defendant, nor does it appear whether any has been appointed in New York, or in this state. Carter, another of the four purchasers, died in 1887, intestate, and the interest he held has since been purchased by the defendant Carey, who is now, therefore, the equitable owner of one half interest in the lands. One of the owners of the Parker interest being an infant, and incapable of consenting to or requesting sale, and Carey being now the owner of one half interest, the complainant files his bill for a partition of the lands, alleging that Carey refuses to sell, or to name the price at which he would sell, and that it is now impossible equitably to enforce or comply with the conditions of the covenant in the declaration of trust. The complainant claims that the conditions specified in the declaration of trust as to the sale by Carey are no bar to the bill for partition, for the reasons (1) that the situation of the equitable owners has been substantially changed by the act of the trustee himself, in acquiring the additional interest, so that he actually now controls the sale adversely to the other cestuis que trustent; (2) because no limitation of time or provision for termination of Carey's right of sale was fixed, and it was therefore void, as violating the rule of law against perpetuities, and illegally suspending the power of alienation; (3) because no consent can be given, as to the Parker share, because of the infancy of one of the owners. The defendant Carey, by his answer, admitting the facts above stated as to the payments of the purchase money and the conveyance in trust, denies complainant's right to a partition, and claims to hold a legal title to the lands, subject to be divested only in the manner expressed in his covenant in the declaration of trust. This claim is based upon the contention that Carey, under his covenant, holds the lands as trustee under an active trust, prescribed by the declaration of trust, and that the entire rights of all the parties in the lands are fixed by the declaration of trust, so that the trustee has the right to insist upon a sale in this manner only.

The case, upon both sides, has been fully and ably argued upon the construction and effect of the provisions of this covenant in the declaration of trust, and upon the theory that this declaration of trust, signed by Carey alone, and in which this covenant on his part is inserted, was equivalent to a declaration or grant signed by the other equitable owners, limiting their estates in the lands to the language or terms of Carey's covenant. But, as it seems to me, this would be giving to Carey's sole declarations and covenant a force against the other owners to which it is not entitled. The equitable estate of the complainant in the land resulted, not from Carey's declaration of trust, but from his payment of a portion of the purchase money, and arose as soon as the money was paid, or agreed to be paid, and the deed was taken in Carey's name. It would have existed, had no contemporaneous or subsequent evidence of it been signed by Carey. Carey's written declaration that the money of the complainant was so paid, and that he held the legal title in trust, was sufficient evidence against him of the facts from which complainant's equitable estate arose, but these facts might have been proved otherwise, and even by parol. How, then, can the addition of a covenant by Carey to this declaration of trust, declaring how he will hold the property, be a sufficient writing, under the statute of frauds, against the other owners, to impose conditions on their equitable estate in the lands?

The declaration of trust was not made by Carey dealing solely with lands which were legally and equitably his, and which he was conveying to the complainant, in which case he might have attached whatever conditions he chose, provided they were legal, in the instrument which conveyed an equitable estate in them to others; but he was here only furnishing written evidence for the other owners, and against himself, of the facts showing that he held as trustee, and admitting the trust. The other owners, in accepting this declaration of trust and acting on it, if they did so, would not, it seems to me, thereby make Carey's covenant their covenant for all purposes, or supply the defect of the writings required to be signed by them under the statute of frauds, in order to give any interest in or power over their equitable estates. This is not the case where the grant of an estate is made, by the deed creating it, subject to a condition or covenant to be performed by the grantee, and where the acceptance of the estate by the deed containing the covenant of the grantee makes it his covenant, although he did not formally execute it. The covenant, therefore, in my view, was a covenant of Carey alone, and, as against the other equitable owners, cannot be made to operate as a covenant or grant against them on their estates, in the absence of the writing on their part required by the statute of frauds. To the extent that the parties have acted under the declaration, they are equitably bound, of course; but a court of equity should, it seems to me, on the application of any equitable owner, interested adversely to the trustee, give him the benefit of his whole equitable estate in the lands, subject only to such lawful restrictions thereon as have been authorized in writing signed by him. Under this view of his rights, the complainant has, therefore, an equitable estate in these lands, which would entitle him to a partition, and I shall so advise, without determining the further questions raised by the complainant as to the construction and validity of the provisions of Carey's covenants in the declaration of trust.

Digitized by Google

MERSHON v. CASTREE.

(Supreme Court of New Jersey. March 28, 1895.)

APPEAL—RECORD—WRIT OF ERROR — EJECTMENT BY MORTGAGEE.

1. A copy of the judgment must be returned with the writ of error.
2. A rule striking out a sham plea is not reviewable by writ of error.
3. A mortgagee may maintain ejectment, notwithstanding the statute requiring a foreclosure as the first proceeding in the collection of the debt.

(Syllabus by the Court.)

Error to circuit court, Monmouth county; Conover, Judge.

Action in ejectment by John W. Castree against Harvey H. Mershon, to which the statutory plea was filed. From a judgment striking out defendant's plea, he brings error. Dismissed.

The plaintiff moved to strike out the defense, on the ground that the suit was on a mortgage to which, under the circumstances, there could be no legal opposition, and presented affidavits to that effect. The sole contention of the defendant was that the only action that a mortgagee could take on his bond and mortgage was to foreclose the latter. This plea was struck out by the Monmouth county circuit court as a sham and frivolous plea. To that decision this writ of error was brought. Diminution having been alleged, the proceedings at the circuit on the motion to strike out were placed before this court by certiorari.

Argued June term, 1894, before BEASLEY, C. J., and DEPUE and VAN SYCKEL, JJ.

Voorhees & Booraem, for plaintiff in error. Frederick Parker, for defendant in error.

BEASLEY, C. J. This writ of error must be dismissed on two grounds. The first of these is that the record is essentially incomplete. It consists of a copy of the pleadings and the proceedings on the motion to strike out the plea. The papers do not include the record of a judgment. This court could not affirm or reverse a judgment that remains in court below. The second objection is as radical as this first one, and is more incurable. It is this: that a rule striking out a plea is not subject to review in error. This is expressly decided by the court of errors in the case of Brown v. Warden, 44 N. J. Law, 177. It may be a satisfaction to the plaintiff in error to know that the court has looked into the merits of the defense attempted to be set up by him, and that its conclusion is that such defense is not sustainable. The statute does not deprive a mortgagee of any right possessed by him prior to its passage, except the right to sue on his bond before foreclosure. The regulation of the act is thus expressed, viz.: "That in all cases where a bond and mortgage has or may hereafter be given for the same debt, all proceedings to collect said debt shall be first, to foreclose the mortgage," etc. Supp. Revision, p. 490, pl. 6. But a proceeding to obtain possession of the mortgaged premises is not a "proceeding to collect the debt," its object being to secure and protect the pledge. This is the view expressed in the books of the purpose of the mortgagee's ejectment. 15 Am. & Eng. Enc. Law, tit. "Mortgage," p. 817. The hardship that the statute was intended to alleviate was the seizure and sale of the chattels of the mortgagor by virtue of a judgment on the bond before resorting to the land. No purpose is observed in it to abridge the right of the mortgagee beyond that measure. The statute must be construed strictly, as it is in derogation of the common-law force inherent in the bond and mortgage. Let the writ be dismissed, with costs.

SALOMON v. PFEISTER & VOGEL LEATHER CO.

(Court of Errors and Appeals of New Jersey. March 29, 1895.)

NEGOTIABLE INSTRUMENTS—NOTICE OF PROTEST.

1. A notice of protest is sufficient, if it informs the indorser, either in express terms or by reasonable implication, that the bill or note has been dishonored, and that he is looked to for payment.
2. The notice of protest mailed to the indorser of a note stated that payment of the note had been duly demanded of the maker, that payment was refused, and that the note was protested for nonpayment. *Held*, that this notice was sufficient to charge the indorser.

(Syllabus by the Court.)

Error to supreme court.

Action by the Pfeister & Vogel Leather Company against Rudolph G. Salomon, on a note. Plaintiff had judgment, and defendant brings error. Affirmed.

Coult & Howell, for plaintiff in error. Woodruff & Meeker, for defendant in error.

VAN SYCKEL, J. The only question which it is deemed necessary to discuss in this case is whether a notice of protest must contain an express statement that the holder of the protested note will look to the indorser for payment. This question was before our supreme court in Burgess v. Vreeland, 24 N. J. Law, 71, in which case there was a failure to state in the notice that the holder looked to the indorser for payment. The chief justice in deciding the case said: "The object of the notice is to apprise the indorser that the note is dishonored, and that he is looked to for payment. It is not necessary to state, in terms, that the holder looks to the indorser for indemnity. It is enough if that fact appears by just and natural implication. The modern cases agree that the fact of giving notice to the indorser that the note is dishonored for nonpayment is in itself a sufficient notice that the indorser is looked to for payment." Many authorities

Digitized by Google

supporting this rule are cited in the opinion. In the later case of Howland v. Adrain, 30 N. J. Law, 41, the rule recognized was that the notice must be sufficient to inform the party, either in express terms or by necessary implication, that the bill or note had been dishonored, and that he was looked to for payment. In the case in hand the notice mailed to the indorser stated that payment of the note had been duly demanded of the maker, that payment was refused, and that the note was protested for nonpayment. The only inference which the indorser could reasonably have drawn from such a notice was that the holder of the note intended to look to him for payment. The liability of the maker to the holder was fixed without presentment and protest, and therefore the only purpose which the holder could have had in sending such notice was to charge the indorser. The notice in this case was, in my opinion, sufficient, and the judgment below should be affirmed.

WOOLVERTON et al. v. VAN SYCKEL et al.

(Court of Errors and Appeals of New Jersey. March 30, 1895.)

WITNESS—TRANSACTIONS WITH DECEDENT.

That a representative party to a suit has not testified to a transaction or conversation with his testator or intestate does not preclude testimony by the other party or parties concerning transactions and conversations at which the testator or intestate was not present, and in which he did not participate.

(Syllabus by the Court.)

Error to supreme court.

Action by Chester Van Syckel and others, executors, against Margaret Woolverton and her husband. Plaintiffs had judgment, and defendants bring error. Reversed.

For report on demurrer to plea, see 27 Atl. 938.

The executors of John C. Wene brought suit against Margaret Woolverton and Sylvester G. Woolverton, her husband, on a promissory note, of which the following is a copy: "$200. April 1st, 1882. One year from date, I promise to pay to John Wene or order two hundred dollars, with interest from date, for value received. Margaret Woolverton. Sylvester G. Woolverton." Margaret Woolverton pleaded non assumpsit, and that, when the note was made, she was the wife of Sylvester G. Woolverton, as surety for whom she signed the note. At the trial, before the Hunterdon circuit court, both the defendants were called as witnesses to show that Mrs. Woolverton signed the note for the accommodation of and as surety for her husband, at their own home, before the note was offered to Mr. Wene. The several questions asked them in this behalf were overruled by the trial justice, upon the ground that the matter related to a transaction with the plaintiff's testator, concerning which they were incompetent to testify.

Chester Van Syckel, in pro. per. Henry A. Fluck, for plaintiffs in error.

McGILL, C. (after stating the facts). In its form, the note sued upon is the joint and several undertaking of Margaret and Sylvester Woolverton. Hemmenway v. Stone, 7 Mass. 58; Brown v. Fitch, 33 N. J. Law, 420; Chaffee v. Jones, 19 Pick. 263. It is admissible for Margaret Woolverton to show by parol evidence that no consideration passed to her for her signature to that note, and that, when she signed it, she was a married woman, and her signature was affixed by her purely for the accommodation of her husband. Chaddock v. Vanness, 35 N. J. Law, 520. Such a contract would be one of suretyship, which, on the part of a married woman, is unlawful. Revision, p. 637, § 5. The inhibition of the statutes (Revision, p. 378, §§ 3, 4; Supp. Revision, p. 287, § 1) where the representative party to a suit does not testify to a transaction or conversation with his decedent is against testimony by the other party touching any transaction with or statement by the decedent. The design of that legislation is to produce equality between the parties to such a suit, by silencing the one who may, by his own mouth, be able to testify to transactions and conversations with the decedent, possibly to the disadvantage of his estate, unless the representative of that estate should, by his own conduct, remove the interdict. McCartin v. Traphagen, 43 N. J. Eq. 328, 11 Atl. 156; Id., on appeal, 45 N. J. Eq. 265, 17 Atl. 809. Neither the language nor the reason of the legislation extends the disability beyond transactions and conversations in which the decedent participated. In the present case the testimony proposed by the overruled questions was to relate to the circumstances which surrounded the execution of the note, which happened when the defendant's testator was not present. It was to tell of a transaction between others at which an instrument was created which, in a subsequent transaction with the testator, came to his hands. We are of opinion that the testimony proposed was not within the inhibition of the statutes referred to, and that the questions were improperly overruled, and hence that the judgment below must be reversed.

SCHMID v. LISIEWSKI.

(Court of Errors and Appeals of New Jersey. April 1, 1895.)

ASSESSMENT OF DAMAGES IN EQUITY.

The general rule of equity, that damages of an intangible character will not be admeasured by a court of chancery, will not be applied in a case where the party found to be liable for such damages admits the amount thereof. In such case the determination of damages by a jury would be useless.

(Syllabus by the Court.)

Digitized by Google

Appeal from court of chancery.

Frederic A. Lisiewski was permitted to redeem land from a mortgage, and Katie Schmid appeals. Affirmed.

Charles Borcherling, for appellant. Frederick W. Stevens, for respondent.

MAGIE, J. This appeal is from a decree permitting the redemption of a mortgage given by Lisiewski, the respondent, to Mrs. Schmid, the appellant, to secure a part of the purchase money of a building and lands conveyed by her to him by a deed, containing covenants against incumbrances. The decree, among other things, directed the application to the payment of said mortgage of the sum of $3,517.42, which had been paid under the direction of the court of chancery in this cause by the respondent, in satisfaction of a judgment recovered in an action in favor of Ringler & Co. against appellant upon a lien claim filed by Ringler & Co. against said building and land, prior to its conveyance by her to respondent. The petition of appeal challenged the decree only in respect to the direction above specified. No other objection was presented by the petition of appeal or by the argument before us. This objection to the decree was supported in the argument upon only two grounds. It was urged that the direction complained of ought not to have been made, because respondent's damages for the breach of appellant's covenant against incumbrances had not been fixed by an action at law. It is doubtless a general principle that damages will not be admeasured by a court of equity when they are of an intangible character. Palys v. Jewett, 32 N. J. Eq. 302. When, therefore, in a cause in equity, appropriate equitable relief requires an assessment of such damages, the court of chancery will, in some mode, have them assessed by a jury. But when the right to damages is established, and the amount thereof is admitted and undisputed, it would be absurd to require an action at law or an issue to be tried by jury. Such is the case before us. Appellant, by her answer, admitted the breach of her covenant against incumbrances, and the existence of an incumbrance by way of a lien claim prosecuted to a judgment in an action against her. She admitted, also, that the judgment was justly due, and ought to be paid. It was paid by respondent under direction of the court, and such payment fixes the amount of such damages, and under such admissions an action at law was unnecessary. Appellant further contended that, although the lien was filed for a just claim, and the judgment thereon fixed its proper amount, the respondent was not entitled to damages upon the covenant against incumbrances, because of an accord and satisfaction passing between her and respondent subsequent to the delivery of the deed containing that covenant. This contention raised a question of fact, which the learned vice chancellor in the court below resolved against her. It is unnecessary to review the evidence, which is fully and fairly stated in the opinion below. It is sufficient to say that, in our judgment, the conclusions reached are entirely satisfactory for the reasons given therein. No other questions have been considered. The result is that the decree must be affirmed, with costs.

LANG et al. v. BELLOFF et al.

(Court of Chancery of New Jersey. April 7, 1895.)

ATTORNEY FOR INFANT—POWER TO APPOINT—TERMINATION OF CONTRACT—DISMISSAL OF SUIT FOR LACK OF PROSECUTION.

1. An infant party to a suit cannot appoint an attorney or solicitor to appear and represent him therein. He can only appear by next friend when plaintiff, or guardian ad litem when defendant.

2. The authority of a solicitor or a guardian ad litem or next friend of an infant defendant to represent the infant in the conduct of the cause expires with the minority of the infant; and an agreement by such a solicitor with the solicitor of the opposite party to let the suit sleep, made after the majority of the former infant, and without his authority, will not bind him.

3. A suit in which complainant has taken no steps in six years, during which time all the defendants and their witnesses have died, will be dismissed for want of prosecution.

(Syllabus by the Court.)

Bill by Peter Lang and others against Louis Belloff and others. Heard on motion to dismiss bill for want of prosecution. Motion granted.

James A. Gordon, for the motion. Willard P. Voorhees, opposed.

PITNEY, V. C. The bill was filed on the 27th of February, 1888, and calls for answers under oath. Those answers were filed on the 24th of May, 1888. The bill was founded on a judgment recovered by the complainants against the defendant Louis Belloff on the 26th of December, 1874, and the object of it was to procure a declaration and decree of this court that certain real estate situate in Middlesex county, the title whereof was in the defendant William Belloff, a son of Louis Belloff, was purchased with the funds of said Louis, and held in trust for him, and that the same be devoted to the payment of the complainants' judgment. William Belloff was an infant, a little short of 21 years old, at that time. The premises had been conveyed to William Belloff by Louis Belloff, a brother of the judgment debtor, John Belloff, and he was made a party on that account, and discovery was asked of him. Louis Belloff and John Belloff, and Louis Belloff as guardian ad litem of the infant William Belloff, answered fully, under oath, setting out that the moneys with which the property was purchased were the moneys of the wife of Louis Belloff, one Catharine Belloff, the mother of William, which moneys said Catharine re-

Digitized by Google

ceived from her father, one Conrad Munch, and that the conveyance was intended by her as a gift to her son William. The answer further showed that the title passed through John Belloff for the purpose of convenience in securing part of the purchase money by mortgage. William Belloff attained majority on the 28th of August, 1888, a few months after the filing of the answer, and he died in May, 1894. His mother, Catharine, died in April, 1893. Louis Belloff died in January, 1894. When the title passed to William Belloff, the premises were subject to a mortgage for $1,000, which finally came to be held by Rutgers College; and, later on, William placed a second mortgage for $1,200 upon them to one Ackerman, and then made a conveyance of a one-half interest in them to his sister Mrs. Clickner, subject to the two mortgages, and by his will devised the other one-half to his wife. No proceedings whatever were had under the bill filed by the complainants until a short time ago, when they attempted to revive the suit by bringing in the parties upon whom the title devolved by the conveyances and death already stated, and also by bringing in the administrator of Louis Belloff. The immediate occasion of this action on the part of the complainants was the fact that foreclosure proceedings had been commenced by the holder of the first mortgage, and that the property was about to be sold thereunder, and that there was a prospect of some surplus money. This movement on the part of the complainants was met by a movement on the part of Ackerman, the second mortgagee, and of Mrs. Clickner and the widow of William Belloff, to be made parties, and to dismiss the bill for want of prosecution.

The ground relied upon by the complainants, in answer to this motion, was that the cause had slept in pursuance of a verbal arrangement between counsel. In support of that position, they bring the affidavit of the solicitor who appeared for the defendants, in which he swears that he was retained by Louis Belloff, John Belloff, and also in behalf of William Belloff, to make defense, and accordingly filed the answer; and he says that he had many conversations with complainants' counsel from time to time regarding the suit, and that the time for taking the testimony was many times, by mutual parol agreements between them, deferred, partly because there appeared to be a prospect of a settlement of all the matters in litigation, and partly because neither party was ready to proceed, and that, owing to the minority of William Belloff, money could not be raised on the property by way of mortgage, and it was therefore impossible to arrange any settlement of the suit, even if the parties had agreed to do so and had agreed upon the terms of compromise; that, as a matter of fact, no compromise was ever agreed to; that the matter, by mutual consent and understanding, was allowed to sleep during the minority of the infant William Belloff, and that it was distinctly understood that no advantage should be taken by either party as against the other by reason of the delay in pressing the suit, or motion made on either side on account thereof. It will be seen that this affidavit, which may be dealt with as an admission by the defendants' solicitor, is confined to negotiations pending the minority of William Belloff, which minority expired in the fall of 1888. The solicitor for the defendants was retained by the father and uncle, and not by the infant, as, indeed, he could not be, the well-settled rule being that an infant cannot appoint an attorney or a solicitor; and there is no proof offered before me that he ever was retained or appointed by the infant, and he does not admit any negotiations or agreement for delay after the maturity of the infant. The complainants' solicitor, in his affidavit, goes further, and swears that he was visited by the defendant Louis Belloff, and that talks were had of a settlement, and that a loan should be obtained upon the premises for that purpose, but that no loan could be made on account of the minority of William. He says that there were frequent conferences and meetings between him and the defendants' solicitor up to the time of the death of Louis Belloff, and that it was agreed by the said solicitors that no advantage should be taken one of the other on account of any delay.

Waiving, for the present, the rule of this court that verbal agreements made by counsel not in the presence of the court are not to be considered by the court, and taking the affidavit of the solicitor of the defendants as an admission, and the affidavit of the solicitor of the complainants as true, and the verbal agreement therein stated to be binding, the question remains, upon whom is it binding? There is no pretense of any interviews between the complainants' solicitor and William Belloff; nor is there any pretense that William Belloff, after he became of age, ever employed and retained the original solicitor of the defendants, or that such solicitor had any authority whatever to represent William Belloff, except what he obtained upon his original retainer by the father and guardian. That retainer expired with the majority of William Belloff, and after that he had no further authority to represent him. It is well settled, as before observed, that an infant cannot appoint an attorney or a solicitor, and a retainer by his guardian ad litem expires with his majority. There must be an appointment and retainer after the infant became of age. This leaves the case bare of any consent on the part of William Belloff to the delay of the complainants in prosecuting their suit.

In the absence of the thirtieth rule, I should say, agreeing in that regard with what Vice Chancellor Van Fleet said in Sebring v. Sebring, 43 N. J. Eq. 59, 10 Atl. 193, that the court would "be bound, in the absence of any express regulation on this subject, and simply

Digitized by Google

in the enforcement of a general principle of justice, to dismiss the complainant's bill in any case where it appeared he had been guilty of such extraordinary negligence as has occurred in this case." They have allowed the suit to rest until every witness who knew anything about the facts and circumstances of the case is dead. This is the principal reason why this court declines to aid a party who has been guilty of laches in cases where the statute of limitations does not apply. Besides, in this case the rights of other parties have intervened, to wit, the mortgage of Ackerman. The neglect of the defendants to take advantage of the complainants' delay by moving sooner to dismiss the bill furnishes no excuse to the complainants. That aspect of the case was considered and disposed of by Vice Chancellor Van Fleet in Sebring v. Sebring, supra.

Nor was the movement on the part of the complainants to bring in the administrator of Louis Belloff, and the application by the new defendants to be made parties, which was coincident in time with their motion to dismiss, any such proceeding in the cause as would bring the case within the exception mentioned by Chancellor Runyon in Insurance Co. v. Howell, 24 N. J. Eq. 238. There the defendant had appeared without protest at the examination of witnesses on the part of complainant. Evidence was taken on the part of the complainant, without protest from defendant, long after the delay provided for by the rule, and the case was brought on for final hearing without objection.

I think the complainants' bill must be dismissed, with costs.

VALENTINO v. BIRD.

(Supreme Court of New Jersey. April 10, 1895.)

APPEAL—TRIAL DE NOVO.

The act of March 24, 1892 (Laws 1892, p. 257) impliedly confers upon the court of common pleas power to try the issues involved in a case appealed from any district court, in the same manner as the latter court is empowered to try the same, viz. with a jury, if a jury be demanded, and, if no such demand be made, without a jury.

(Syllabus by the Court.)

Certiorari at the suit of Gabriele Valentino against William H. Bird to review a judgment of the court of common pleas of Essex county.

Argued June term, 1894, before GARRISON and MAGIE, JJ.

James M. Trimble, for prosecutor. Elwood C. Harris, for defendant.

MAGIE, J. The "Act concerning appeals from district courts in this state," approved March 24, 1892 (Laws 1892, p. 257), is plainly designed to enlarge the jurisdiction of the court of common pleas upon such appeals. Before, that court was only empowered to review questions of law raised by a state of the case. It could not render a judgment; only direct what judgment should be entered in the district court. By the act above referred to the enlarged jurisdiction is not conferred by express words, as such jurisdiction is conferred by the justices' court act (Revision, p. 554, § 85). But it has been held in this court to require the common pleas to enter judgment on such appeals. Joy & Seliger Co. v. Blum, 55 N. J. Law, 518, 26 Atl. 861. This decision must have proceeded on the ground that jurisdiction to render such judgment was conferred by implication. The implied power to render judgment must include power to do all that is essential to such judgment in respect to the trial of the matters in dispute. Upon appeals the common pleas do not exercise common-law jurisdiction, but only the statutory jurisdiction conferred. Glover v. Collins, 18 N. J. Law, 232; Schuyler v. Mills, 28 N. J. Law, 137. The power conferred is to try the case before them on such appeal de novo, both on law and fact. The implication is that the case is to be tried as the district court is empowered to try it, and without a jury, if no jury is demanded. The return does not disclose any demand for a trial by jury. There is therefore nothing in the objection that the appeal was tried without a jury. Nor was it error to enter judgment in the common pleas.

It is unnecessary to decide whether, under the act of 1892, the common pleas is empowered to grant a new trial in such an appeal, or whether their action upon an application of that sort is reviewable; for the affidavits on the application in this case disclosed neither surprise nor merits, so as to justify a new trial. The decision in Joy & Seliger Co. v. Blum, ubi supra, renders it necessary to hold that the judgment in the common pleas must supersede the judgment of the district court, which should be therefore set aside and reversed, if variant from the judgment above. This was not done in the case before us. But this error was held amendable under the provisions of the justices' court act (Cheeseman v. Cade, 24 N. J. Law, 632), and might probably be amended here (Jones v. Cook, 54 N. J. Law, 513, 24 Atl. 758). But the established practice in such cases is to remit the record for correction and the entry of the proper judgment in the common pleas. State v. New Jersey Traction Co. (N. J. Sup.) 30 Atl. 472. Let the record be thus remitted for the correction indicated.

ARNAULT v. ARNAULT.

(Prerogative Court of New Jersey. April 12, 1895.)

VALIDITY OF WILL—MISTRESS AS LEGATEE.

1. The existence of influence which arises from unlawful or immoral relations, operating on a testator when his will is made, does not raise a presumption against the instrument, but will be regarded as a significant fact, which calls for a close and suspicious scrutiny.

Digitized by Google

2. The law permits a man to leave all his property, which he may by will dispose of, to his mistress, and to ignore his wife, if he does so with free, sound, and disposing mind, pursuant to the formalities which the law prescribes. (Syllabus by the Court.)

Appeal from orphans' court, Hudson county; Hudspeth, Hoffman, and Kenny, Judges.

On the petition of Elise Strassheim Arnault, the will of Pierre Arnault was admitted to probate, and Helene Arnault appeals. Reversed.

J. S. Parry and Emile Schultze, Jr., for appellant. R. L. Lawrence, for respondent.

McGILL, Ordinary. Pierre Arnault, who had been a successful wine merchant in the city of New York, died at his residence in Jersey City on the 30th day of December, 1891, leaving, him surviving, as the legitimate claimants upon his bounty, a widow and two children by a former wife, from whom, according to the testimony of his widow, he was divorced,—one child, a daughter, Clothide by name, who is now married, and a resident in Switzerland, and the other, a son, named Isaac, who died after his father, leaving a widow; and also those to whom the disputed paper gives his estate,—Elise Strassheim, who lived with him as his wife for the last 11 years of his life, and her daughter by him, Adele, now about 13 years of age. The estate he left consists of some household furniture and his wine business in the city of New York, valued, together, as counsel agreed at the argument, at five or six thousand dollars. The will names Elise Strassheim as "Elise Strassheim Arnault," styles her as Arnault's wife, and bequeaths and devises to her all his property, save $5,000, which she is directed to hold in trust, and pay, with interest at 5 per cent. per annum, to the child Adele when she shall reach the age of 21 years. The proofs afford little insight into the life of Mr. Arnault before his marriage to the respondent. It appears that he had a former wife, the mother of his children Clothide and Isaac, from whom he had separated, and that the two children resided with him in New York when he first met the respondent. In 1870 he advertised for a governess to take charge of these children, and the respondent, who was then a widow with a son, applied for and secured the position at a monthly compensation. He informed her that he had been divorced from his wife, and after she had been in his employ some four or five months engaged to marry her when the divorce from his wife, which she says was not satisfactory to her, should be perfected. Finally she was satisfied that the divorce was had, and the proposed marriage was solemnized. This was in the year 1870. In 1874 the respondent employed Elise Strassheim as a domestic servant, to whom, shortly thereafter, Mr. Arnault commenced to pay marked attention, and changed his conduct towards the respondent from tender consideration to a peevish fault-finding, followed later by a course of abuse and physical brutality. Within a few months the respondent, incensed by the attentions to Elise, dismissed the latter from her employment. Thereafter, according to the testimony of the respondent, Mr. Arnault and Elise sought the society of each other, and Arnault continued to illtreat the respondent until late in the year 1878, when he attempted to procure a divorce from her, alleging as the ground that she illtreated him. In this suit he was defeated in July, 1879, but during the same month, in consideration of an undertaking upon his part to pay the respondent $8 weekly, he secured from her an agreement to their separation. In the meanwhile Elise had gone to Europe. She returned in 1880, and was sought out by Mr. Arnault, or his daughter, and installed as the housekeeper of his residence. While she acted in this capacity he commenced an intimacy with her, which resulted in her pregnancy. The impropriety of her longer remaining in the house with his daughter led him to establish her in apartments in another part of New York City, where he and she lived together as Mr. and Mrs. Strassheim. They continued in this way until 1882, when the daughter married and went away, and then Elise, with her child, Adele, who had been born, was brought back to his residence, where she lived with him as his wife, and became known as Mrs. Arnault. Later they moved to Jersey City, where the same relations were maintained, and they continued together until he died. Thus they lived as man and wife for 11 years. During all that time the respondent, knowing his relations with Elise, without, so far as appears, seeking a reconciliation of her marital relations, accepted the weekly sum he agreed to pay her.

The probate of the will is resisted upon the ground that it is the product of undue influence exerted by Elise Strassheim. In support of this contention some evidence has been offered to show that years before the will was executed Arnault was subject to nervous and epileptic fits, and had suffered three sunstrokes, which so affected him that he became nervous, irritable, and erratic. This evidence is vague, and far from satisfactory. But, whatever its character may be, it is effectually overcome by the evidence upon the part of the respondent which establishes beyond question that, although Arnault was of excitable temperament, he possessed a clear and strong mind, capable of the successful management of an extensive business, until a short time before his death. The latter evidence comes from Arnault's lawyer, his family physician, and his employés and business contemporaries, with whom he continually dealt, and abundantly proves that he was not either mentally or physically an apt subject for that control which must exist to destroy free agency, and

Digitized by Google

constrain the person whose act is brought in question to do that which is against his will, and what he would not have done if left to himself, or, in other words, an apt subject for undue influence. It can scarcely be doubted, after an examination of this case, that Mr. Arnault sincerely loved Elise Strassheim, or that that love had its influence over him. His voluntary life with the woman for 11 years exhibits the potency of that influence. I do not doubt that his love for her and her child produced the will in question, but I fail to find any proof that Elise exerted her influence in any way to cause him to make the will. On the contrary, the evidence is, as hereafter appears, that the will was not, directly or indirectly, her act, but exclusively his own.

Every will is the product of some influence. The influence which arises from legitimate family and social relations comes without suspicion or taint of illegality, and there can be no presumption that it is unlawfully exercised merely from the fact that it appears that when the will was made the testator was surrounded by it, and it operated upon his mind to induce the testamentary disposition. It is only when such influence is shown to have been unduly exerted over the subject of will making, so as to constrain the testator to do that which he would not have done if left to himself, that the law condemns it. Nor does the influence which arises from unlawful or immoral relations raise a presumption against the validity of the will, but, as the law abhors immorality, when the influence which produces a will arises from an immoral relation, its existence, standing as a significant fact, will be closely and suspiciously scrutinized by the courts. Particularly is the necessity for such scrutiny emphasized when the will prefers the influence of a mistress, usually predicated upon sensual charms and meretricious arts, to the just and honorable influence of a lawful wife, attributable to purity, virtue, and affection. However, the law allows a man to leave all the property he may dispose of, by will, to his mistress, and to ignore his wife, if he does so with free, sound, and disposing mind, pursuant to the formalities which the law prescribed. McClure v. McClure, 86 Tenn. 173, 6 S. W. 44; Kessinger v. Kessinger, 37 Ind. 341; Monroe v. Barclay, 17 Ohio St. 302, 316; In re Will of Mondorf, 110 N. Y. 450, 18 N. E. 256; Dean v. Negley, 41 Pa. St. 312; Rudy v. Ulrich, 69 Pa. St. 177; Main v. Ryder, 84 Pa. St. 225.

It is a modifying circumstance in the relation existing between Arnault and Elise Strassheim, which is to be regarded in a suspicious scrutiny of this case, that their life together, at least when the will was made, partook more of the connubial than the meretricious character. She was introduced by him as his wife, and in her conduct assumed the part of a virtuous and affectionate wife. He recognized her child as his, and permitted it to call him, "Papa." That the family relation existed with her and her child is well demonstrated by the language of his announcement of his will to her: "Mamma, here is a piece of paper for you." The will was executed in the office of Theodore Connolly, a member of the New York bar in excellent standing, upon the day on which it bears date, after its subject had apparently been carefully considered by Mr. Arnault at two or three interviews respecting it with Mr. Connolly. He did not tell Mr. Connolly about his relations with Elsie. He instructed that in the will she should be styled, "My wife, Elise Strassheim Arnault"; and, upon Mr. Connolly's suggestion that the word "wife" alone would be sufficient to identify her, he replied: "I know why I want it in that way, and you put it as I want it." Mr. Connolly had then known him as a client 9 or 10 months, and, deeming him to be of sound and clear mind, obeyed him without further suggestion. Elise Strassheim testifies that she did not know anything about the will until after it was executed, and Mr. Arnault brought it home, and gave it to her, with the remark, already quoted: "Mamma, here is a piece of paper for you." She says that then she looked at it sufficiently to see that it was indorsed as his will, and threw it upon the table, saying that she did not want it; her meaning being that she preferred to have him live than to die and leave a will in her favor. She says that he then took it up, and put it in his safe among other papers, where, after his death, she found it. She says, also, that he had repeatedly before then told her that he had no one to look out for but Adele and herself. Under the circumstances of the case, this will does not appear to me to be one that should be characterized as wholly inofficious or unnatural. It is clear that the testator had no affection for the respondent. He tried to rid himself of her by divorce, and, failing in that, procured from her an agreement that she would stay away from him as long as he paid her a weekly sum, and he punctiliously paid her that sum and kept her away until he died. His daughter had married and gone to Europe to live. His son had grown to manhood. His estate was small. In this situation he bestowed the bulk of it upon the bastard child, whom he loved, and who, through his act, must bear reproach as long as she lives, and gave the remainder to her who had sacrificed her virtue to him, and for him had submitted her reputation for morality to an indelible stain. As I have said, I do not find any evidence to establish the exertion of undue influence in the production of this will. On the contrary, the evidence makes it clear that the will was the product of Mr. Arnault's spontaneous act. Observing the formalities which the law prescribed, possessing capacity, and acting free-

Digitized by Google

ty, he had the legal right to make it. Smith v. Smith, 48 N. J. Eq. 566, 590, 25 Atl. 11. The decree of the orphans' court will be reversed.

GENNERT v. WUESTNER.

(Court of Chancery of New Jersey. April 12, 1895.)

SUNDAY CONTRACT—ACCOUNTING.

An executory contract made on Sunday is absolutely void, and incapable of ratification; and any dealings between the parties upon the basis of it will, so far as completed, be treated as the voluntary acts of the parties, which cannot be disturbed, and, so far as not completed, must be dealt with as if no such contract had ever been made.

(Syllabus by the Court.)

Bill by Gottlieb Gennert against Edmund Wuestner for an accounting. Decree for complainant.

J. A. Beecher, for complainant. Carrick & Wortendyke, for defendant.

PITNEY, V. C. This is a bill for an account of—among other things—certain commissions on goods manufactured by the defendant, and by him sold to various parties, the right to which depends upon a written agreement entered into between the parties, and bearing date the 1st of April, 1890. There were other large transactions between the parties, in the way of goods sold and delivered by each to the other. As to these the dispute is wholly one of prices. In answer to the demand for commissions upon sales of the defendant's own goods, the defendant set up in his answer that on or about the 1st of January, 1891, after the agreement had been in practical operation between the parties for nine months, the defendant repudiated and rescinded it on the ground that the complainant had persistently broken it on his part, and that the complainant acquiesced in this rescission, and from thenceforth the agreement, except as to a lease embodied in it of certain lands, was treated by both parties as of no further binding force between them. There was a cross bill combined with the answer, and a reply by the complainant to the cross bill, which need not now be stated at length. At the hearing of the cause the defendant offered evidence tending to show that the agreement in question, although dated on the 1st day of April, which occurred on Tuesday, was in fact executed and delivered on the previous Sunday, and was therefore void. He stated as an excuse why this defense was not set up in his answer that he was not then aware that the agreement was thereby rendered unlawful. The evidence of execution on Sunday was excluded at that time because there was no allegation in the answer to support it, and the complainant had not come prepared to meet it, and I was not satisfied that it was proper to allow such an amendment, under the circumstances. Leave was granted to the parties to be heard upon the question of the propriety of the amendment, and briefs were submitted on that point, upon which I concluded that the amendment should be allowed, and I so announced to the respective counsel. In point of fact, it never was made, but the parties went to hearing on the question of the date of the execution and delivery of the agreement as if the amendment had been made, and testimony was taken on both sides upon that point.

The agreement was prepared in duplicate, from previous instructions therefor, by Mr. H. W. W., of the Jersey City bar, and was executed in his presence. He at the time lived with his father, in the immediate vicinity of the residences of the two parties. All agree that the actual execution of the duplicates took place in the father's house, both parties signing them at one time, and that they were then and there mutually delivered. The question is whether this occurred on Sunday, March 30th, or Tuesday, April 1st.

Mr. H. W. W. swears that he believes that it occurred on Sunday, March 30th, and he has a distinct recollection that it occurred about 11 o'clock a. m. He distinctly recollects that the parties called unexpectedly upon him while he was sitting reading the newspaper after a late breakfast,—a thing which he never did except upon Sunday mornings. Moreover, he finds in his diary and cash book several entries as follows: In the diary, an appointment for a meeting at his father's house with the complainant, Gennert, for Sunday, March 23, at 11 o'clock in the morning. At this time, according to the defendant's theory, the instructions for the agreement were given. Further, an entry in his cash book, under date of March 30th, of $10 for drawing the agreements, which sum he swears that he distinctly recollects was paid at the time the agreements were executed. Further, an appointment in his diary for March 31st, but entered before that date, as follows: "Draw lease 22 & 24 Jackson avenue to Edward Wuestner, $45, 5 years from." A further entry in his diary of an appointment for April 1st: "7:30, Gennert." A lease from Gennert to Wuestner, for five years, for 22 and 24 Jackson avenue, was in fact incorporated into the contract in question, but Mr. W. did prepare a separate lease of the premises upon the same terms, which was handed to complainant, but was never executed. Mr. W. was the first witness sworn, and then left the court, and was not recalled. After him, complainant and defendant and their several sons were sworn.

The defendant, Wuestner, corroborates Mr. W. He says that the verbal bargain between himself and Gennert was made some time previous to April 1st, and Mr. Gennert was to have the writings prepared; that some time during the week previous to Sunday, the 30th of March, Mr. Gennert told him to call at his

Digitized by Google

house on Sunday morning, and go with him to Mr. W.'s house, and execute the papers; that he called at Gennert's house about 10 a. m. on Sunday, and that they went together to W.'s house, and found Mr. W., who produced the type-written agreements; that he (Wuestner) objected to one clause, which was thereupon stricken out, and they were then executed and delivered, and each party paid five dollars to Mr. W.; that Mr. W. remarked that, if Mr. Gennert desired to sell the premises covered by the lease before the expiration of the contract, he would wish to turn over to the purchaser the lease of the premises, and that the long contract in which the lease was incorporated would not be convenient for that purpose, and that he had better have a separate lease; and that it was agreed there should be a separate lease prepared and executed. Wuestner's two sons corroborate him. They were living at home, and they swear that they were informed by their father of his expectation of executing the contract on that Sunday; that their father left home a little before 10 o'clock in the morning to go to Mr. Gennert's for that purpose; that they remained in the house all the forenoon, and had dinner a little later than usual, because of its being Sunday; and that their father came in before dinner time, and produced his copy of the contract duly executed. This evidence, it will be seen, fits in with the testimony of Mr. W., and the entries in his diary, the theory being that instructions for the preparation of the contract were given by Mr. Gennert alone on Sunday, March 23d; that the contract was prepared during the week; that on Sunday, the 30th, the parties went together to Mr. W.'s house; that the contracts were then read over, and the clause which was objectionable to the defendant stricken out, and they were then executed and delivered; a suggestion with regard to the separate lease was made; memorandum was then made in Mr. W.'s diary to prepare such lease on the next day (Monday, the 31st) and to be ready to attend to its execution on April 1st, at 7:30 a. m. Mr. Gennert, on the other hand, swears that he went to Mr. W.'s house on Saturday night, the 29th of March (and denies any previous interview or appointment for the previous Sunday), taking his son with him, and that they found Mr. W.'s father in; that the father declined to attend to his business, and told him to come the next morning, when his son would be in; that the next morning (the 30th) he and the defendant went together to Mr. W.'s house, found the son in, and that they then and there agreed upon the items of the agreement which Mr. W. wrote down from their instructions, and after the memoranda thereof had been read he (the complainant) paid the $10; that Mr. W. said he would have it written out in type, so that they could execute it; that he fixed Tuesday morning, April 1st, for that purpose; that they went together on Tuesday to the house, and executed the contract, and it was there delivered, but whether the contract was executed and delivered in the morning or evening of April 1st he is unable to say; that the unexecuted lease which Mr. W. prepared was made at his suggestion, but that he concluded not to have it executed. He says that the defendant's objection to the clause which was stricken out was made on the 1st of April. This witness declared that he never saw young Mr. W. in the matter until Sunday morning, the 30th of March. Mr. Gennert's son swears that he went with his father on some Saturday evening—but whether that of the 22d or that of the 29th of March he cannot say—to Mr. W.'s house, and saw the elder Mr. W., who told them to come the next morning, and his son would be in; that he saw his father go to Mr. W.'s house the next morning, but did not see the defendant go with him; that his father did not bring home the agreement executed with him the next morning, but he did see it within a week or so.

Taking all this evidence together, I come to the conclusion that the agreement was executed on Sunday, the 30th of March, and delivered on that day. That theory fits in with the evidence of Mr. W. and the entries in his diary; and the evidence of all the witnesses is reconcilable with it, except that of the complainant, Gennert. The difficulty with his evidence is that it fails to account for the appointment entered in Mr. W.'s diary for a meeting on Sunday, March 23d, presumably for the purpose of taking instructions for the agreement. It also fails to account satisfactorily for Wuestner's objection to one of the clauses of the agreement, and Gennert's prompt consent to its being stricken out, which clause, according to Gennert's evidence and theory, Wuestner had agreed to only two days previously. By postponing the date of the call made by himself and son, in the absence of Wuestner, at Mr. W.'s house, on a Saturday evening from Saturday, the 22d, to Saturday, the 29th, he makes Wuestner meet him at Mr. W.'s house on Sunday morning, March 30th, to give the instructions, without any previous appointment therefor. Another small matter indicates the truth of the defendant's theory. Wuestner swears, and Gennert admits, that Wuestner came to his house first, and they went together to Mr. W.'s house. Gennert's son swears that he saw his father go to W.'s house on a Sunday morning, but did not see Mr. Wuestner go with him. That evidence is consistent with the theory that the instructions were given by Gennert to Mr. W. on the previous Sunday (March 23d), in pursuance of an appointment for that purpose entered in Mr. W.'s diary, the trip for that purpose having been seen by the son, while he did not happen to see the parties going together to Mr. W.'s house on March 30th. Again, Mr. W. swears he was not expecting the parties to call on that Sunday morning (March 30th), which is inconsistent with the idea that Gennert had called the previous evening, and had been requested by Mr. W.'s father to call

Digitized by Google

the next morning. If the father had so informed Gennert, it is altogether probable that he, in turn, would have informed his son of the appointment.

It remains to consider the effect of this fact upon the rights of the parties herein involved. The contract in question contained a lease from Gennert to Wuestner of certain premises in Hudson county at a monthly rent of $45, the same to be used for the manufacture of photographic gelatine, dry plates, and films. It further provided for the sale by Gennert to Wuestner, at prices to be agreed upon, of all goods necessary for the manufacture of said plates and films, Gennert to take pay for the same in dry plates. Further, that Wuestner should give Gennert the exclusive wholesale agency for the sale of the goods so to be manufactured by him, and the retail agency for New York and Connecticut. Further, Wuestner agreed to sell Gennert prepared dry plates, in sizes and qualities to suit Gennert, at a discount of 45 per cent. from the list price then in common use. Wuestner further agreed to purchase all his materials from Gennert, and to pay balances on the first day of each month, and to pay Mr. Gennert a fixed commission on all sales made by Wuestner of his product to other parties during the term of the lease and agreement, viz. five years. The law governing this case seems to me to be entirely settled in this state by the cases of Reeves v. Butcher, 31 N. J. Law, 224, and Cannon v. Ryan, 49 N. J. Law, 314, 8 Atl. 293, in the supreme court, and Ryno v. Darby, 20 N. J. Eq. 231, and Nibert v. Baghurst, 47 N. J. Eq. 201, 20 Atl. 252, in this court. The contract is wholly void, and incapable of ratification, and must be entirely ignored, in dealing with the business transactions between the parties, precisely as though no such writing had ever existed. The case is not complicated by any circumstance of payment of money, delivery of goods, or possession of the demised premises having been made on Sunday. I infer from the evidence that the defendant was already in possession of the demised premises under a former arrangement. If this be so, the case falls directly within the ruling of the supreme court in Cannon v. Ryan, supra, where it was held that if a tenant already in possession under a lease at a fixed rent remains in possession after the end of his term, and after notice served upon him, on Sunday, that after the expiration of his term his rent would be increased, he does not thereby become liable to pay the increased rent. In this case, if the defendant was in possession under a fixed rent, such rate of rent will continue, except so far as it has been changed by the voluntary action of the parties. So with regard to goods sold by defendant to complainant. The prices fixed therefor by the agreement must be wholly ignored. If any settlements have been made, of either rents, or goods sold upon accounts stated, such settlements will not be disturbed by the finding of this court that the contract is void, but will stand as the voluntary act of the parties. Neither party will be entitled to call upon the other for any accounting under the contract in question. Complainant cannot have commissions on sales by defendant of his own wares to other parties, and defendant cannot have an account of sales made at retail by complainant in places prohibited by the contract.

The main object of the bill was to reach commissions on sales made by defendant of his own product, provided for under the contract. If the illegality of the contract had been set up in the answer in the first instance, and that issue had been, as it should have been, tried at the start, I am inclined to think that the bill should have been dismissed on the ground that there was no occasion to come to this court. The defendant, however, put himself in his answer on different grounds, and added a cross bill calling on complainant to discover sales made in violation of the contract, which he has done; and it was not until after all of this proceeding had taken place, and the parties had gone to trial, that the defense now established was set up. Under these circumstances, as there are unsettled mutual mercantile accounts between the parties, which, if sufficiently complicated, give this court jurisdiction, I think the bill should be retained, and a reference made to take and settle the account. The evidence already taken on that part of the case will be used before the master.

MUNDY et al. v. STRONG et al.

(Court of Errors and Appeals of New Jersey. March 4, 1893.)

ATTORNEY'S FEES—PAYMENT OF FUNDS TO CLIENT—ENFORCEMENT BY SUMMARY PROCEEDING.

1. In order to justify the exercise of the summary jurisdiction which a court possesses over the attorneys or solicitors practicing before it, their conduct must be dishonest, oppressive, or clearly illegal.

2. The statute regulating fees (Revision, p. 399) does not control the charges which attorneys, solicitors, and counsel may make against their clients, nor do sections 79 and 113 of the chancery act (Revision, pp. 119, 1274).

3. Attorneys and solicitors may lawfully charge their clients reasonable fees for services rendered, without an express contract for a specific sum.

(Syllabus by the Court.)

Appeal from court of chancery; Pitney, Chancellor.

Bill by Ezra F. Mundy and others, executors, against Andrew Schantz and others, to foreclose a mortgage. A petition by complainants for an order requiring Woodbridge Strong & Sons, their attorneys, to turn over funds collected, was granted (80 Atl. 322), and the attorneys appeal. Reversed.

Digitized by Google

Alan H. Strong, for appellants. C. H. Voorhis, for appellees.

DIXON, J. In August, 1893, one of the executors of Benijah Mundy employed Woodbridge Strong & Sons, solicitors in chancery, to foreclose a mortgage upon lands in Middlesex county. The solicitors made the requisite searches, instituted the suit, and carried it on to completion, resulting in a sale of the premises to a second mortgagee for $2,306.41. This amount being paid to the solicitors, they retained the taxed costs, and the further sum of $150, which they claimed as a collection fee, and for their services in the matter, not embraced in the taxed costs. Thereupon another of the executors filed a petition in the suit, praying that the chancellor would order the solicitors to pay over to him said sum of $150, on the ground that they had no right to more than the taxed costs. Such an order having been made, the solicitors appealed to this court.

Attorneys and solicitors are officers of the court, and there is no doubt of the authority of the court to proceed summarily against them for their misconduct. But the behavior which will justify the exercise of this summary jurisdiction must be such as is dishonest or oppressive or clearly illegal. If it appears that there exists between a lawyer and his client a fair dispute, which can be decided only on the settlement of doubtful questions of fact or law, the court should not exercise its summary power, but should leave the parties to their ordinary remedies. Balsbaugh v. Frazier, 19 Pa. St. 95; In re Kennedy, 120 Pa. St. 497, 14 Atl. 397; In re Paschal, 10 Wall. 483; Burns v. Allen, 15 R. I. 32, 23 Atl. 35; Drapers Co. v. Davis, 2 Atk. 295; In re Blake, 3 El. & El. 34. In the present case nothing dishonest or oppressive is suggested, but the petition is based upon the idea that the charge is clearly illegal, because the statute regulating fees, together with sections 79 and 113 of the chancery act, limits the charges which a solicitor may make against his client in a foreclosure suit, or at least no greater charge can be made without an express contract for a specific sum. As to the statute regulating fees, we think the better opinion is that, with respect to attorneys, solicitors, and counsel, who are at liberty to decline an employment to render the services there specified, it merely fixes the costs which can be taxed between party and party. Adams v. Stevens, 26 Wend. 451; Foster v. Jack, 4 Watts, 334; In re Paschal, 10 Wall. 483. If this view had not prevailed in New Jersey, the various cases in which our courts have held that solicitors, attorneys, and counselors might recover by suit against their clients greater compensation than the fee bill awards must have been otherwise decided; for the statute prohibits even the reception, for the services therein mentioned, of more than the fees thereto respectively annexed. Revision, p. 399, § 2. I think it is within the experience of every member of the bar that it has not been deemed illegal to receive from clients for such services fees in excess of those prescribed by the statute.

The distinction between costs taxable between party and party, and those taxable or allowable between attorney and client, is referred to in every text-book on English practice. The former are called costs "de incremento" or "costs of increase," and had their origin in the statute of Gloucester (6 Edw. I.), while the office of attorney did not come into legal existence until a later date under the statute of Westminster II. (13 Edw. I.). The taxation of charges by attorneys against their clients was regulated in England by several acts, the latest of which, before our Revolution, was 2 Geo. II. c. 23, § 23. The same distinction appears, I think, in our practice act (sections 8–10), dealing with costs of increase,—those accruing on any suit,—a bill of which must be filed with the clerk before execution issues; and section 12, which borrows its language from 2 Geo. II. c. 23, § 23, requiring an attorney or solicitor to serve a taxed bill of his fees, charges, and disbursements upon his client before he can maintain a suit for the same. The fees, charges, and disbursements in section 12 cannot be limited to the costs mentioned in the previous sections. Section 79 of the chancery act was evidently not intended to control charges between solicitor and client, for it expressly provides for taxation only "in favor of any party" to the action. It is, moreover, confined to the expenses incurred for searching the title of the mortgaged premises, and hence does not apply to other services. Nor does section 113 of the chancery act affect the case before us, for it merely enables the chancellor to allow for counsel such fee as he may deem just, "instead of the retaining fee now allowed to counsel by statute." As the retaining fee allowed by statute did not determine the charge which a counselor might make against his client, this fee allowed by the chancellor, instead of the statutory fee, cannot have that effect. We find no statute which controls the matter.

With regard to the necessity of an express contract for a specific sum, that applies only to counsel fees for advocacy. Schomp v. Schenck, 40 N. J. Law, 198; Hopper v. Ludlum, 41 N. J. Law, 182; Zabriskie v. Woodruff, 48 N. J. Law, 610, 7 Atl. 336. The claim of an attorney or solicitor is to be determined by its reasonableness, which in English practice might always be settled by taxation, at the instance of either party, on notice to the other (Anderson v. May, 2 Bos. & P. 237; 1 Archb. Prac. 104); and with us must be so settled under section 12 of the practice act, in case a suit is necessary for its recovery, but in other cases is left without statutory regulation. We must, therefore, consider whether the charge made

Digitized by Google

by the appellants was so unreasonable as to be clearly illegal.

It is admitted that in the progress of the foreclosure they rendered various services for which the statutory fee bill makes no allowance, so that, if this bill were treated as a standard of reasonableness so far as it goes, some further compensation would be legitimate. It is also proved that during a quarter of a century there has been in vogue, among the lawyers in New Brunswick (where the appellants and the executor who employed them reside), a schedule of fees which would, if assented to by the client, clearly support the charge made. Whether that schedule was assented to is a matter for inference only, as the evidence now stands. But neither in the petition nor by testimony nor on the argument did the petitioner set up that the charge was exorbitant in amount, his sole contention being that no charge could legally be made. Under these circumstances, we think the case is not one calling for the interposition of the summary power of the court. Let the order appealed from be reversed, and the petition be dismissed.

STATE (McGOVERN et al., Prosecutors) v. BOARD OF PUBLIC WORKS OF CITY OF TRENTON et al.

(Supreme Court of New Jersey. Feb. 25, 1895.)

CONTRACT FOR STREET IMPROVEMENTS—POWER OF BOARD—REVIEW.

1. By section 107 of the charter of the city of Trenton, a contract for street improvements extending in cost to the sum of $200 and over must be awarded to the lowest bidder "who shall give satisfactory proof of his or their ability to furnish the requisite materials and perform the work properly"; and the determination of who is the lowest bidder, with this qualification, rests, not in the exercise of an arbitrary, unlimited discretion of the board, but upon the exercise of a bona fide judgment based upon facts tending reasonably to the support of such determination.

2. There must exist a rational basis of fact to support this determination of the board, and when this exists the court will not weigh disputed evidence and facts in order to review the action of the board in the award of contracts under the section of the charter in question.

(Syllabus by the Court.)

Certiorari, at the suit of Thomas J. McGovern and Joseph Martin, against the board of public works of the city of Trenton and Thomas Craig, to review a certain paving contract. Affirmed.

Argued at November term, 1894, before DIXON, MAGIE, and LIPPINCOTT, JJ.

Carroll Robbins, for prosecutors. John Relistab and Edwin Walker, for defendants.

LIPPINCOTT, J. This writ brings up the order and determination by the board of public works of the city of Trenton, made on the 17th day of August, 1893, awarding to Thomas Craig a contract for paving a portion of Peter's alley, in said city.

Section 107 of the city charter (P. L. 1874, p. 386) provides that "all contracts for doing work and furnishing materials for any improvement, provided under this act extending in amount to two hundred dollars, shall be advertised for ten days in one or more daily newspapers printed and published in said city, and shall at all times be given to the lowest bidder or bidders, who shall give satisfactory proof of his or their ability to furnish the requisite materials and perform the work properly, and offer sufficient security for the faithful performance of the contract in regard to time, quality of material and work to be done." This paving of the alley was an improvement, within the city charter, the probable cost being about $4,000, and the awarding of the contract was regulated and controlled by this section 107 of the city charter. The proceedings show the adoption of an ordinance for this improvement, and the provisions of the city charter were in all other respects complied with. Due advertisement was made for proposals for the contract for the work and the material required, in accordance with the provisions of the charter, and two bids were received. Both were for the paving with the same material, and both in proper form. The bid of Thomas Craig was for $2.35 per square yard, and the other bid was from the prosecutor, for $2.30 per square yard. There was no objection to the bonds offered by the prosecutor. The contract was, by the order and determination of the board, on August 17, 1893, awarded to Craig. The contract was executed on August 30, 1893, and the writ in this case was allowed the following day. After the bids were presented, and before the contract was awarded, the matter was, by the board, referred to the committee on streets of the board of public works, and they on August 17, 1893, reported to the board as follows: "Your committee on streets, to whom was referred the proposals for paving Peter's alley with vitrified brick, respectfully recommend that the bid of Thomas Craig for paving the alley with Canton brick, at $2.35 per yard, be accepted, and a contract made with him in accordance with his proposal. A lower bid for paving with the same material was submitted by Thomas J. McGovern, but your committee are of opinion that Mr. McGovern has not given satisfactory proof of his ability to furnish the requisite materials and perform the work properly, but, on the contrary, he has failed, in the opinion of your committee, to properly perform similar work on a prior contract, and continues to neglect to perform said work." This report was signed by the members of the committee on streets, and presented at the meeting of August 17, 1893. Mr. McGovern, the prosecutor, was heard upon the matter through counsel, upon which the board adopted the report, and awarded the contract to Craig.

Digitized by Google

In the specifications upon which the bids or proposals were made, the board reserved the right to award the contract "to the lowest bidder or bidders who shall give satisfactory proof of his or their ability to furnish materials and perform the work properly, and offer sufficient security for the faithful performance of the contract, in regard to time, quality of material, and work to be done." The reason assigned by the prosecutor for setting aside the contract awarded to Craig is that the contract was not awarded to him as the lowest bidder, within the true intent and meaning of section 107 of the charter, but was awarded to him without authority of law, and in violation of the provisions of the charter; or, in other words, it is contended by the prosecutor that he was the lowest bidder, with satisfactory proof of his ability to furnish the requisite materials and perform the work properly, and therefore the board violated the provision of the charter, in awarding the contract to a higher bidder. The ability of Craig, to whom the contract was awarded, to furnish the requisite materials and perform the work properly, is not questioned, but considerable evidence has been taken in this case upon the question whether the prosecutor was of sufficient ability to furnish the requisite materials and perform the work properly. It is shown that there had been some difficulty between him and the board in relation to the paving of Greenwood avenue, for which the prosecutor had obtained a contract from the board for paving with the same quality of brick as required for the paving of Peter's alley. In the performance of the contract for paving Greenwood avenue, it is shown by the evidence that some material had been rejected which had been furnished, and that the work, to some extent, had not been done to the satisfaction of the board, and that the prosecutor had been compelled, after it was finished, to take out defective brick which had been placed in the paving, and replace it with better brick, and that for these reasons payment to the prosecutor had been delayed. Upon these points there is some variance in the evidence, but the court here does not intend, nor is it necessary, to determine whether or not the prosecutor performed his contract for the work on Greenwood avenue. It is sufficient, for all the purposes of this case, to ascertain that facts did exist before, and within the knowledge of the board, upon which a judgment could be expended upon the question whether the contract had been duly performed, and that there were upon this question facts upon which the board could exercise the judgment permitted to the board, in the determination by them whether the prosecutor, as the lowest bidder, possessed the qualifications which they were entitled to demand.

The question then arises here whether this court, under the evidence, can review the judgment and discretion of this board in the award of the contract to Craig. That he was not the lowest bidder is admitted. The power of the board of public works, in the matter of street improvements, is a specially delegated authority, and their acts are legal only when they are strictly in conformity with its directions. State v. City of Passaic, 41 N. J. Law, 90. And respecting the mode in which contracts by corporations should be made, where the mode of contracting is specially and plainly prescribed and limited, that mode is exclusive, and must be pursued. 1 Dill. Mun. Corp. (4th Ed.) p. 520, § 449 (373), and cases cited. Therefore, if the charter of the city of Trenton provided that contracts of this class, after proper proceedings and due advertisement for proposals, should be awarded to the lowest bidder, the action of the governing board in this matter of awarding the contract to a higher bidder would be set aside as an unauthorized exercise of power. But it is equally true that, unless this mode of entering into this class of contracts be prescribed and limited, valid contracts may be made, within the scope of the general corporative powers, without awarding them to the lowest bidders. The mode of contracting then becomes one of good faith, in the exercise of honest discretion and good judgment, for the best advantage of the public. If the determination as to the mode of contract is a bona fide determination, and exercised in a reasonable manner and with reasonable discretion, it becomes a lawful exercise of corporate power. Now, by section 107 of the city charter of Trenton, there is a direction that contracts of the character in question in this case shall be awarded to the lowest bidder, but to that lowest bidder "who shall give satisfactory proof of his or their ability to furnish the requisite materials and perform the work properly," and therefore this determination of who is the lowest bidder with these essential qualifications rests in the exercise of a bona fide judgment of the authorities who are to award the contract. This determination is not only a grant of power, but it is also a duty imposed upon them to exercise it, presumably for the public good; and, without the exercise of the power and the performance of this duty, the contract which is the result may be said not to be the contract required by the law. They undoubtedly have no right arbitrarily or without sufficient grounds to make a discrimination; but they are entitled to investigate, and from facts and circumstances before them they may determine who is entitled to the contract. In Pennsylvania, where a statute directed that the contract should be awarded to the "lowest responsible bidder," it was held that the statute imposed duties upon the city authorities which are not simply ministerial, but discretionary and deliberative, and courts will not, therefore, interfere to restrain these authorities from awarding a contract to one

Digitized by Google

who is not the lowest bidder, even though their action has been indiscreet, unless it be shown that they have acted corruptly and in bad faith. Findley v. City of Pittsburgh, 82 Pa. St. 351. Under a similar statute in the state of New York, while the court denied that there was any conclusive presumption in favor of the adjudication of the common council that the bid was of the lowest responsible bidder, because, if that was so, then the provisions of the city charter would be of little use, and they could always be effectually disregarded and violated, yet the court concluded that: "It is true that the common council, where there are several bidders, has jurisdiction to determine who is the lowest responsible bidder; but, in order to give its action any legal effect, it must exercise its jurisdiction, and make a determination based on some facts." There must be some fact tending to show that the bid is not that of a responsible bidder. If that fact exists, then the jurisdiction to determine the lowest bidder, if it be exercised in a bona fide manner, is vested in the municipal authority upon whom the power to award the contract is conferred. People v. Gleason, 121 N. Y. 631, 25 N. E. 4; Gunning Gravel Co. v. City of New Orleans (La.) 13 South. 182. The requirement of duty in this case was that the discretion or judgment of the board of works should be exercised in a reasonable and proper manner, based upon some facts tending to uphold their determination who was the lowest bidder, of the satisfactory ability to furnish the requisite materials and perform the work properly. There can be no question of the power of the board of public works of the city of Trenton, under this section of the charter. It has been directly adjudicated in this court that this provision does not require contracts to be awarded to the person who proposes at the lowest price, but that the proper city authorities (formerly the common council, now the board of public works), have power to determine who is the lowest bidder, upon consideration of other circumstances than the mere price proposed. The section in question specifies two qualifications which the lowest bidder must have to be accepted. One qualification is the offer of sufficient security for the faithful performance of the contract in the particulars specified. In this case there is no question as to the offer of sufficient security. But the other qualification is that he shall give satisfactory proof of his ability to furnish the requisite materials and perform the work properly. The board of public works could doubtless determine whether these qualities attached to the bidder. If, acting in good faith, they decided adversely to him, they were not required to award him the contract, although he had proposed the lowest bid or price. Shaw v. Trenton, 49 N. J. Law, 341, 12 Atl. 902.

The only question remaining is whether the board of public works acted in good faith, and in a bona fide manner, in arriving at a determination to reject the prosecutor as the lowest bidder possessing the qualification to furnish the requisite materials and perform the work properly. There is not here, in the case, the slightest intimation or imputation in the evidence, or in the brief of counsel, of any improper or corrupt motive in awarding this contract. Their determination, of record in their official proceedings, was that the prosecutor did not possess the qualifications required in this respect; and not only is this shown as a conclusion, but the reason, of record, is given,—that "he has failed to properly perform similar work on a prior contract, and continues to neglect to perform said work." Undoubtedly, the facts surrounding the performance by the prosecutor of the prior contract awarded him were before the board, and, from the evidence in the case, I conclude that all the members of the board were personally cognizant of the circumstances. There are facts in this evidence which tend strongly to show a defect in the materials supplied for the former work, which resulted in delay and detriment to the city. Some of these facts are admitted, others are disputed. One fact is that after the work was declared completed by him he acknowledged its defective condition, and was at considerable pains to repair its defect, and it was, although paid for, finally left in a very unsatisfactory condition to the public authorities. These were the facts contended for and in dispute, and for the determination of the board, and it can be remarked that they were pertinent to the inquiry whether the prosecutor possessed the qualifications in question, as the lowest bidder, so as to require the contract to be awarded to him, and clearly, under the charter, the determination belonged to the board, and that determination could not be reversed by this court, if it was based upon any facts tending to uphold their determination. In such case the action of the board will not be reversed on the facts, if there is any evidence upon which their finding was based. In this matter there were facts which would uphold their determination. Overseer of Poor of Tewksbury Tp. v. Overseer of Poor of Branchburg Tp., 44 N. J. Law, 595; People v. Gleason, 121 N. Y. 631, 25 N. E. 4. The evidence or facts may be disputed or conflicting, but that would not be sufficient for a reversal. This dispute or conflict was for the board to determine, and the court would not interfere unless this award of the contract was an unreasonable one, or that clear injustice would result. Jelliff v. Newark, 48 N. J. Law, 101, 2 Atl. 627; Hegeman v. City of Passaic, 51 N. J. Law, 109, 16 Atl. 62, Raymond v. Borough of Rutherford, 55 N. J. Law, 449, 27 Atl. 172. If there was a dispute, upon the evidence, upon the question left to the determination of the board, it would not be within the province of this court, upon certiorari, to try that question over again,

Digitized by Google

and determine such disputed questions of facts, and to consider its weight or sufficiency, so as to review the determination of the board, especially where there is any evidence to support it. Craft v. Smith, 35 N. J. Law, 302; Jeffrey v. Owen, 41 N. J. Law, 260; Overseer of Poor of Madison Tp. v. Overseer of Poor of Monroe Tp., 42 N. J. Law, 498; Britton v. McDonald, 43 N. J. Law, 591; Lush v. Foster, 44 N. J. Law, 378; Sloan v. Wills, Id. 584; Roehers v. Remhoff, 55 N. J. Law, 475, 26 Atl. 860. If there was evidence of facts before the board, whether weak or strong, which formed a rational basis for the determination, it cannot be reversed. State v. Board of Police Com'rs of Camden, 56 N. J. Law, 258, 28 Atl. 311. The court, on certiorari, will not weigh the evidence. It is sufficient if there is a legal and substantial basis for the determination, on which the board acted within their authority. Ayers v. Newark, 49 N. J. Law, 170, 6 Atl. 659. The proceedings of the board of public works in this matter, and their determination, and the award of the contract to Craig, must be affirmed, with costs.

PENNSYLVANIA R. CO. v. MIDDLETON.

(Court of Errors and Appeals of New Jersey. March 4, 1895.)

DIRECTING NONSUIT—ACCIDENT AT RAILROAD CROSSING—CONTRIBUTORY NEGLIGENCE.

1. In an action where the gravamen is the negligence of the defendant, on a motion to nonsuit, on the ground of contributory negligence of the plaintiff, or the plaintiff's intestate when death ensues, the contributory negligence must clearly appear, as a conclusion of fact, or by necessary exclusive inference, from the proof which is adduced by the plaintiff.

2. No presumption of negligence in the decedent arises in any such action from the mere occurrence of the accident. The facts and circumstances as a basis for a nonsuit must be of such probative force, in the evidence of the plaintiff, that contributory negligence so conclusively appears as to exclude any other legitimate inference or conclusion. The facts and circumstances, when they are of doubtful import, and difficulty arises as to the solution of the question whether contributory negligence exists or not, are for the consideration and determination of the jury.

3. The conclusion that the decedent was in the exercise of ordinary care and caution, to avoid danger and injury, at the time of the accident, need not be established by any direct proof; but it becomes the subject of circumstantial evidence, and, from the circumstances in evidence by the plaintiff, it must be clearly ascertainable that, by acts of omission or commission, there existed a want of reasonable and ordinary care upon the part of the decedent, before a judgment of nonsuit will be ordered.

(Syllabus by the Court.)

Error to supreme court.

Action by Benjamin F. Middleton, administrator, against the Pennsylvania Railroad Company. There was judgment for plaintiff, and defendant brings error. Affirmed.

S. H. Grey, for plaintiff in error. J. J. Crandall and T. J. Middleton, for defendant in error.

LIPPINCOTT, J. This is an action by the plaintiff, as administrator of Elmer V. Hunter, deceased, against the defendant, to recover damages, for the benefit of the widow and the next of kin, by reason of the death, arising from the alleged negligence of the defendant. At the close of the evidence on the part of the plaintiff, a motion for a nonsuit was made by the defendant, on the ground that the case of the plaintiff showed that the decedent was guilty of contributory negligence, and therefore could not recover. This motion the trial justice refused, and upon this refusal error has been assigned. Therefore, the question is whether the trial justice erred in not granting a nonsuit.

The deceased was killed at a place known as "Main's Railroad Crossing," of a public road called the "New Albany Road," near a station called "Lenola," some distance west of Moorestown, in the county of Burlington, on the 12th day of September, 1893, about 4 o'clock in the morning. He was at this time returning from Philadelphia to his home, a short distance east of the crossing, with a two-horse team, drawing a truck wagon and shelving thereon, with which he had taken, earlier in the day or night, a load of truck to market; and while he was crossing the railroad of the defendant company, on his return from market, an engine, with a tender attached, collided with the wagon, and he was killed. The horses were not killed, but the wagon was destroyed, and he was found dead, beside the track, about 180 feet easterly of the crossing. The morning was quite dark. Some of the witnesses for the plaintiff speak of it as a very dark morning. There were no witnesses who saw the accident, except the engineer, at the very moment. The crossing of the railroad tracks by the public road is not at right angles, but diagonally. Mr. Crider, a witness, who was at the time living on the New Albany road, about 250 yards from the railroad crossing, was lying awake in his bed, and heard the rumbling of the wagon, going past his home towards the railroad crossing. He also heard the engine approaching, and, from where he was in bed, saw the headlight of the locomotive flash upon the windows of his bedroom, and then he heard the crash of the collision. He then aroused some members of his family, and went to the crossing, and found Hunter dead, at the spot to which reference has been made. The engine and tender had come from Camden, and was going to Long Branch, for duty that day, to take a train from Long Branch to Trenton, and was at the time running at the high rate of speed, of about from 40 to 50 miles per hour. The deceased with his team was traveling, in the same, an easterly direction along this road, to his home. The evidence on the part of the plaintiff shows that the public road along which the decedent was driving commences abount 30 feet away from the track, to descend at the rate of about 3 or 4 feet in 50; and at this point the track

Digitized by Google

is somewhere between 3 and 6 feet below the surface of the surrounding land. The station of Lenola was a short distance in a westerly direction from the crossing. At this station there were signal lights, and at other places, in a westerly direction for some distance, there were one or more switch lights, which could be seen in approaching the crossing by the public road, and seen from the crossing; and these lights were about 8 or 9 feet above the surface of the track. It was in evidence, also, that along the track, on the side thereof nearest the public road, there were several telegraph poles, about 20 to 25 feet from the middle of the track. On the same side of the track, in a westerly direction, there were several trees, five in number, which have branches so low as to be within 3 or 4 feet of the ground. There is some evidence, also, that from the scene of the accident a view of the track cannot be had for more than about 40 feet in a westerly direction, from which this train was approaching the crossing; but the angle of the track close at hand, which causes this situation, is not such that it alone would obscure the view of the track by any one approaching the crossing on the road. This seems to be the general situation at the place of this occurrence. The evidence for the plaintiff is that the whistle of the engine was not blown, nor its bell rung, at any time before the engine approached the crossing, or while it was so approaching. Mr Crider testifies to this fact positively and directly. Other witnesses living close to the crossing also testify that the whistle was not blown nor the bell rung. On motion to nonsuit, there was not, as there could not be, any attempt to deny the existence of the negligent default of the engineer and other servants of the defendant company in giving these statutory warnings. Whether such warnings were given or not, the evidence on the part of the plaintiff was quite conclusive as to this neglect; and the motion to nonsuit was made, not because there did not exist affirmative negligence of the servants of the defendant in running the engine over the crossing, presumably causing the collision, but on the ground that the defendant was guilty of negligence contributing to his injury and death; and the only complaint which now can be urged against the determination of the trial justice is that there was error in law in not withdrawing the case from the jury.

While this question requires some examination of the circumstances of the occurrence, yet a discussion of the conclusions and inferences which ought to have been drawn or rejected involves a controversy, which renders it evident that it should not be determined by the trial court. It only requires that attention be confined to a consideration of a few of the leading facts and circumstances to ascertain whether the case, as presented by the plaintiff, was not of the nature which, in the law, was within the exclusive province of the jury to determine. On a motion to nonsuit, in order to withdraw the case from the jury, the contributory negligence must appear clearly, as a conclusion of fact, or by necessary exclusive inference, from the evidence which is adduced by the plaintiff. It must appear in the proof of the plaintiff that the decedent, by some act of omission or commission on his part, contributed to the collision which resulted in his death. Palys v. Railway Co., 30 N. J. Eq. 604; Railroad Co. v. Righter, 42 N. J. Law, 180. This principle has been reiterated in one form or another in all our adjudications. The proof of the occurrence of the accident is not sufficient of itself to establish the negligence of the defendant. It does not give rise to the presumption of negligence. Bahr v. Lombard, 53 N. J. Law, 233, 21 Atl. 190, and 23 Atl. 167. It was not disputed, on the motion to nonsuit, that the testimony of the plaintiff disclosed circumstances, such as the absence of the required statutory signals of warning, from which the negligence of the defendant might be concluded or inferred; and therefore it was required to be submitted to the jury, unless the contributory negligence of the decedent was clearly discoverable or inferable from the other facts and circumstances of the case. In the consideration of these other facts and circumstances, adduced in the evidence of the plaintiff, the trial justice could apply no unfavorable presumption against the decedent. The mere proof of the accident raised no presumption of contributory negligence on his part. From the mere accident there could arise no conclusion or inference of the want of ordinary care or caution in approaching and going over this crossing, but from the accident and its attendant circumstances, taken together, there must have appeared sufficient for the trial court to declare that negligent conduct on his part or want of ordinary care clearly appeared; and without this conclusion, thus arrived at, there existed no legal power to exclude the jury from the consideration of whether contributory negligence existed or not. There was no witness who could at all detail the conduct of the decedent because no one saw the occurrence. This want of proof can give rise to no presumption against him as to the character of his conduct. He was bound to his legal duty which was to exercise reasonable care, and to exercise ordinary caution and circumspection under all the circumstances, in approaching and going across. This legal duty required of him the reasonable and ordinary use of all his senses, and all his physical powers reasonably exerted to avoid danger. He was bound to look and listen before he attempted to cross, and whatever danger he could have discovered by looking and listening he incurred the peril of if he proceeded. These were legal obligations on his part, the neglect of which, if injury arose to him, left him without remedy. The courts of this state have not as yet proceeded so far as to declare that there exists a legal

Digitized by Google

obligation to stop absolutely before entering upon a railroad crossing of this character. Whether any such obligation will be ever established is a question which need not, in view of the circumstances of this case, be discussed. Upon the evidence of the plaintiff, it would have been very difficult for the trial justice to have declared, in order to grant the motion to nonsuit, that the decedent did not stop, look, and listen; for, under the circumstances, all these things may have happened, and the observation to be gained by such conduct may have been obtained, and yet the accident still have happened. The defendant, on this question of contributory negligence, on a motion to nonsuit, had no right to demand positive evidence from the plaintiff that the decedent did stop, look, or listen; for if that were true, in cases where death results, the beneficiaries of the decedent would in a great many instances be entirely remediless, whatever the circumstances proven may have been. The determination of these elements of care and caution depend upon the circumstances of each case, and belong to the jury, unless the trial court finds that they are such that but one result is deducible.

Returning, again, to some consideration of the facts: The decedent was required to exercise ordinary care, under all the circumstances, to avoid danger,—to avoid collision and resulting injury. This requires the exercise of judgment, and whether he exercised good judgment depends upon the circumstances which confronted him, and by which he was surrounded. The decedent, with his team and wagon, approached and went on the crossing upon a walk. The reflection arises that his wagon could not have been making much noise in its movement, and thereby affording much greater opportunity for him to hear the approaching train; but, on the other hand, it might well be said that the engine and tender would make but little noise, as a matter of warning. He had his team to watch, and the engine was running at a great rate of speed. In going towards the track, and just before reaching the crossing, he was bound to encounter a descent of about 3 feet in 30, which might create some difficulty in managing his team, so as to be in absolute control of it. In the direction from which the train was approaching, the signal lights of the station and the switch lights were placed alongside or on the tracks, placed at about the same height as the locomotive headlight, and which could, according to the evidence, be readily mistaken for the signal or switch lights. Along the tracks, and close by the tracks, were a number of telegraph poles and five trees, which by the evidence, to some extent at least, obscured the view of an approaching train, at a distance away on the public road of from 25 to 50 feet. He was driving in nearly the same direction that the train was aproaching, with the train behind him; and, as the wind was blowing in an opposite direction, no sound of the approaching train may ever have reached him; and, the train coming in that direction, it very readily and naturally might be that he would not perceive the headlight at all. That he was awake before and at the time of the accident may be indicated from the fact that a part of a cigar yet warm was picked up at the place of the accident; and, under the evidence, it can be concluded that the decedent was smoking it when the engine collided with the wagon, which was struck in the middle portion thereof. The night, according to the evidence of all the witnesses, at the hour of the accident, was very dark; and, as no whistle was blown or bell rung, as we are bound to believe upon the evidence, it may be a grave question of fact whether he could otherwise be notified of an approaching train. In the darkness of the night, his view would be worth but little to him, save as he might see the headlight, which he may not have been able to distinguish from the signal or switch lights, and therefore, instead of aiding him, they may have confused and embarrassed him. Besides, it is to be remembered that this was not a regular train with a schedule of time, and the decedent cannot, as matter of fact, be held to have expected an approaching train at this hour of the night. He lived close at hand to this crossing, and presumably it may be said that he was aware of the time trains regularly reached this crossing; but this was an engine and tender on a special errand, without schedule time, and not to be expected by any one.

Upon these facts, was it for the trial court to determine or infer that the accident was one to which his own want of ordinary care contributed? It may be that he exercised none of the precautions required of him. It may be that he omitted some precaution required of him, and the omission contributed to the result. It may be, as a logical deduction from these facts and circumstances, that he stopped, looked, and listened, and exercised all the care and caution required in the performance of his legal duty. Now, upon these facts and circumstances, I think it is apparent that it would extend the power of the trial court beyond the line defined by the law to have required it to order a nonsuit. The case is not one without grave difficulty, and considerable doubt upon the question whether the decedent was in culpable default contributing to his death; but, if this difficulty and doubt exist, then so much stronger the reason that the court should not trench upon the province of the jury, to solve the question of fact in controversy. Under the cases, if the mind of the trial justice was in some state of doubt upon the questions whether the decedent exercised that degree of care which his legal duty exacted, then it was a matter within the exclusive power of the jury to determine. Railroad Co. v. Matthews, 36 N. J. Law, 531; Railroad Co. v. Shelton, 55 N. J. Law, 342, 26 Atl. 937.

Digitized by Google

The important question in this case arose on the motion to nonsuit, and it was determined by the trial justice upon the proper application of the principles of law established by the adjudications of this court. I have examined the requests of the defendant, to the trial court, to charge the jury, in connection with the charge as delivered to the jury, upon which error has been assigned, and I can discover no error in the refusals to charge as requested. Besides, the discussion of the assignment of error on the refusal to nonsuit has practically covered the questions raised by the requests to charge. The instructions of the trial justice to the jury upon the whole case seem to be in entire conformity with the law applicable to the facts. I shall therefore vote to affirm the judgment of the supreme court.

DUNHAM v. MARSH.

(Court of Errors and Appeals of New Jersey. March 18, 1895.)

EXECUTORS AND ADMINISTRATORS—EXCEPTIONS TO ACCOUNT.

Any person appearing to be interested in the disposition of the property of a decedent may file exceptions to the account of the executor or administrator of the deceased.

(Syllabus by the Court.)

Appeal from prerogative court; McGill, Ordinary.

Judicial settlement of the account of Daniel H. Dunham, administrator with the will annexed of the estate of Nancy W. Halsted, deceased, to which Albert R. Marsh filed exceptions. From an order of the ordinary (30 Atl. 473), affirming an order of the orphans' court, refusing to strike out exceptions, the administrator appeals. Affirmed.

John A. Miller, for appellant. James E. Howell, for respondent.

DIXON, J. The appellant having presented his final account to the Hudson orphans' court, the respondent, as next of kin of the testatrix, filed exceptions to it. Thereupon the appellant moved to strike out the exceptions, on the ground that the next of kin was not "interested in the settlement of the account." Orphans' Court Act (Revision, p. 775, § 105). On examining the will and codicils of the testatrix, there appears to be at least a fair question whether she did not die intestate as to part of her property. If she did, her next of kin will be entitled to that portion. This question ought not to be decided upon a motion to strike out exceptions to the account. One object of such exceptions is to secure a correct ascertainment of the amount of property remaining for distribution among those who may ultimately be found entitled to it; and therefore every person who can present a claim worth considering upon the final distribution is interested in the settlement of the account, and should be permitted to compel a full and accurate accounting. Williams, Ex'rs, pp. 975, 2057; 7 Am. & Eng. Enc. Law, 421, note. This exceptant certainly had such a claim, and therefore the court rightly maintained his standing as a litigant. The order under review should be affirmed.

INGEBREGTSEN v. NORD DEUTSCHER LLOYD STEAMSHIP CO.

(Court of Errors and Appeals of New Jersey. March 5, 1895.)

DEATH OF EMPLOYE—NEGLIGENCE OF MASTER—FELLOW SERVANT.

1. A master's duty to his servant requires of the former the exercise of reasonable care and skill in furnishing suitable machinery and appliances for carrying on the business in which he employs the servant, and in keeping such machinery and appliances in repair, including the duty of making inspections and tests at proper intervals.

2. If the master selects an agent to perform this duty for him, and the agent fails to exercise reasonable care and skill in its performance, the master is responsible to his servants for the fault. But, if the employé's duty to inspect or repair apparatus is incidental to his duty to use the apparatus in a common employment with fellow servants, then the master is not responsible to the fellow servants for the default of such employé.

3. In the absence of notice to the contrary, a servant is entitled to assume that his master has exercised due care and skill in furnishing proper appliances for the work, and in keeping them safe.

(Syllabus by the Court.)

Error to supreme court.

Action by Anna Ingebregtsen, administratrix, against the Nord Deutscher Lloyd Steamship Company, to recover for the death of plaintiff's husband. Plaintiff had judgment, and defendant brings error. Affirmed.

S. A. Besson, for plaintiff. Mr. Lawrence, for defendant.

DIXON, J. In an action by an administratrix to recover damages resulting from the death of her intestate, it appeared that the deceased was a stevedore in the employ of the defendant, and was killed while unloading one of the defendant's steamships at the dock in Hoboken. The circumstances of his death were as follows: The ship's cargo, consisting of bags of rice weighing about 250 pounds each, was hoisted out of the hold by means of a wire rope $^{15}/_{16}$ of an inch in diameter, called a "hanger," suspended from one of the ship's masts, and having its lower end held over the hatch by another wire rope, called an "outhaul." The lower end of the hanger was formed into a loop by being bent around an iron thimble and spliced upon itself, with hemp lashing, for a foot or two above the thimble. The thimble was shaped like a horse's collar, inverted, except that the upper ends were not quite closed. Into this thimble were hooked the lower end of the outhaul, and also the upper end of the vertical hoisting apparatus, at the lower end of which was a

Digitized by Google

sling to hold the bags of rice. The work of the deceased was to place the bags in the sling, and fasten the sling to the apparatus for hoisting. As several slings were in use, he would frequently be engaged in filling one sling beneath the hatchway while another was ascending; and while he was thus occupied the hanger broke at the open end of the thimble, and the bags fell upon him, inflicting injuries from which he soon died. At the close of the plaintiff's case the defendant moved for a nonsuit on the ground that the testimony did not indicate any negligence of the defendant, and did establish contributory negligence by the deceased, which motion was denied, and an exception sealed.

The plaintiff's evidence tended to prove that the hanger, if in good order, would sustain a weight of about 15 tons, and had on it when it broke less than 1 ton; that it had been in use two or three times a week for about seven years; that before the accident it was rusty, and, at the point of fracture, had been abraded by the ends of the thimble; that these defects were discoverable on removing the lashing by which the splice was made; and that the apparatus was supplied by the defendant, and kept in charge of Gerhard Schau, its storekeeper, whose duty it was to look after all the gear used at the dock, and see that it was in good order. Upon this evidence, we think it became a fair question for the jury whether the accident had not happened because of a defect in the hanger which reasonable inspection would have discovered, and reasonable prudence have remedied. Supposing the jury might decide that question in favor of the plaintiff, the question of law arises whether the defendant had performed its duty, as employer, by delegating to its storekeeper, Schau, the duty of inspection and repair.

The master's duty to his servant requires of the former the exercise of reasonable care and skill in furnishing suitable machinery and appliances for carrying on the business in which he employs the servant, and in keeping such machinery and appliances in repair, including the duty of making inspections and tests at proper intervals. Railroad Co. v. Daniels, 152 U. S. 684, 14 Sup. Ct. 756. So far the authorities are at one. Almost as unanimous are they in the proposition that if the master selects an agent to perform this duty for him, and the agent fails to exercise reasonable care and skill in its performance, the master is responsible for the fault. Railroad Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, and cases there cited; Bailey v. Railroad Co., 139 N. Y. 302, 34 N. E. 918; Hankins v. Railroad Co. (N. Y. App.) 37 N. E. 466; Toy v. Cartridge Co., 159 Mass. 313, 34 N. E. 461. Discrepancies, however, have arisen in the application of the latter rule, because of another rule firmly established,—that the master is not responsible to his servant for the negligence of a fellow servant engaged in a common employment. In determining whether an employé, through whose negligence defects in the machinery have failed of discovery or repair, is a representative of the master in the discharge of the master's duty to the servant, or is a fellow servant of the latter, engaged in a common employment, many incongruous decisions have been rendered. On this topic a rational distinction would seem to be that, when the employé's duty to inspect or repair the apparatus is incidental to his duty to use the apparatus in the common employment, then he is not intrusted with the master's duty to his fellow servant, and the master is not responsible to his fellow servant for his fault, but that, if the master has cast a duty of inspection or repair upon an employé who is not engaged in using the apparatus in a common employment with his fellow servant, then that employé, in that duty, represents the master, and the master is chargeable with his default. This distinction is noticeable in McAndrews v. Burns, 39 N. J. Law, 117; Smith v. Iron Co., 42 N. J. Law, 467; Collyer v. Railroad Co., 49 N. J. Law, 59, 6 Atl. 437; Ross v. Walker (Pa. Sup.) 21 Atl. 137; Moynihan v. Hills Co., 146 Mass. 586, 16 N. E. 574; Daley v. Railroad Co., 147 Mass. 101, 16 N. E. 690, and many other cases. Applying this principle to the case in hand, it is manifest that Schau, the storekeeper, who was charged with the duty of seeing that the apparatus was in good condition before it was delivered to the stevedores for use, but was not himself to be engaged in using it, was in that service the representative of the defendant, and was not serving in a common employment with the deceased. As the evidence tended to show that he had not carefully performed this duty, and that the accident had thence resulted, the plaintiff could not be nonsuited for want of proof of negligence chargeable to the defendant. That the case did not present such indubitable proof of negligence on the part of the deceased as to justify a nonsuit is, I think, too clear for discussion. The nonsuit was rightly refused.

The other exceptions relate to the charge, and to the defendant's requests to charge. These requests were that the court charge the jury that, if the accident was caused by want of sufficient examination of the hanger on the part of Schau, the plaintiff could not recover, and that the defendant's duty was discharged if proper appliances were procured and furnished by it, and it exercised due care in the employment of a fit person to take charge of the examination and repair of the same. These requests rest upon the assumption that, in discharging his duty to examine and repair the hoisting apparatus, Schau was engaged in a common employment with the deceased. For reasons already stated, they should have been refused. But they were substantially complied with by the trial judge. He, however, further charged that it was the duty of the defendant to exercise reasonable care in the inspec-

Digitized by Google

tion of the machinery, and to keep it reasonably safe and secure, and a neglect of this duty, if an injury occurred, would be actionable negligence. The meaning of these portions of the charge, taken together, seems to be that, while the defendant would not be responsible for negligent inspection by Schau, yet if reasonable inspection had not been made by any person, and through want of it the accident had occurred, the defendant would be responsible. Remembering that the master's duty required reasonable inspection to be made by some one, this charge was not injurious to the defendant.

The last exception is against so much of the charge as instructed the jury that, in deciding whether the deceased was guilty of contributory negligence, they should consider him as entitled to assume that his employer had exercised due care in furnishing proper appliances, and in keeping them safe. In this there was no error. Railroad Co. v. Branyan (Ind. App.) 37 N. E. 190.

Counsel for the defendant, in argument, laid stress upon the fact that the trial judge frequently referred in his charge to the master's duty of using proper care to employ competent coservants, although there was no evidence that the defendant had failed in that duty. What was said by the judge on this point was not intrinsically erroneous, and seems to have been induced by the request of the defendant's counsel at the trial. It was not then excepted to, nor was any request made for instructions to the jury that there was no evidence of a breach of that duty. Under these circumstances, the defendant has no substantial grounds of complaint. The judgment should be affirmed.

(March 28, 1895.)

BEASLEY, C. J. (concurring). This suit was brought by the defendant in error, as the administratrix of her late husband, who was in the employ of the plaintiff in error, and who was killed, while so working, by reason, as it was alleged, of the carelessness of such employer. At the trial it appeared that at the time of the accident in question the deceased was engaged in unloading of its cargo of rice a certain vessel belonging to the steamship company, and which work was effected by means of a span erected over the deck of the vessel, in connection with a sling to which the bags of rice were attached, being hoisted from the hold by the use of steam power. The deceased was killed by the falling of a loaded sling, the span having given way. The apparatus thus used for hoisting the cargo was the property of the steamship company, and the deceased and his associates engaged in unloading the vessel were its servants. There was evidence tending to show that the span in question was out of order, and in consequence the accident had occurred. The question in controversy was whether the steamship company was answerable for this imperfection. That the company had provided proper apparatus for the execution of its business neither was nor could be denied. The apparatus that collapsed, together with other of the same kind, and which was new and unused, were at the time of the accident in charge of one Gerhard Schau, who thus describes the situation. He says: "I am in the employ of the North German Lloyd Steamship Company. Have been in their employ thirteen years. Have been on the dock ten years. My duties are to look after all the gear used on the dock,—the blocks and the spans, and such things; to make them and to repair them, and see that they are in good health. If they are in bad order it is my duty to repair them, or to put them aside and get new ones." He had charge of the spans, when not in use, and he selected the ones to be used. He had under his control the particular span that broke, but said that he did not "brace it up" on the ship on the day in question. He was asked "whether he looked after the men," and his answer was, "When any of the firemen are sick, I look after the men." And to the question, "Isn't it very often the case that these spans are put up without your knowing it?" he replied, "Might be once in a while, but very seldom." In the presence of this testimony, which was not in any wise impugned, the trial judge instructed the jury that this man, Schau, was a coemployé with the deceased, and that consequently the negligence of the former was not to be imputed to the company. This legal exposition seems to me plainly correct. These were fellow servants, as they co-operated in a common business under a common master. Under these circumstances, I cannot agree to the idea that the negligence of Schau in the particular in question was the negligence of the master. The company had performed its entire duty, with respect to the apparatus used, by having put into the hands of its agent, Schau, several of these spans in good condition, and the want of care that led to the accident was in their use, and in that function the man Schau was no more the special agent of the company than his associates were. In the use of the apparatus, Schau and the men engaged in working with it were coemployés, and the master was not responsible to the others for an injury occasioned by the negligence of one of them. This was the view taken by the trial judge, and in this respect our opinions are in harmony. After presenting the case to the jury in this aspect, the judicial instruction then was that the only ground on which a verdict for the plaintiff could be legally rested was that the defendant company had been negligent in the selection of the man Schau to fill the station occupied by him, and the finding was in affirmance of the existence of such negligence. After some hesitation, I have concluded that there was enough testimony, in this respect, in the case, to preclude the court from con-

Digitized by Google

cluding, as a matter of law, that the jury erred in putting a liability on the defendant by reason of breach of duty in this particular. I shall vote to affirm the judgment on this ground.

MONTGOMERY v. PHILLIPS et al.

(Court of Errors and Appeals of New Jersey. March 20, 1895.)

INSOLVENT CORPORATIONS—MORTGAGE TO DIRECTORS.

1. A board of directors of an insolvent corporation cannot, by mortgage upon the corporate property, secure one of the directors the payment of an antecedent debt due by the company to such director, or a previous liability incurred by such director for the corporation.

2. A mortgage was made by a solvent company to one of its directors, under an arrangement that such mortgage should be kept from record for the purpose of strengthening the credit of the company, while the directors should test the success of the corporate business at the risk of future creditors, and the mortgage was not recorded until the corporation became insolvent. *Held*, that such mortgage was fraudulent.

(Syllabus by the Court.)

Appeal from court of chancery; Bird, Vice Chancellor.

Bill by John A. Montgomery, receiver of the Capital Cracker Company, against Henry D. Phillips and others. From the decree rendered, plaintiff appeals. Reversed.

John H. Backes, for appellant. William M. Lanning and W. D. Holt, for respondents.

REED, J. On August 14, 1890, the Capital Cracker Company was organized, with an authorized capital stock of $20,000, divided into 200 shares of $100 each. Of this amount of capital stock, $7,500 was subscribed and paid for. The company bought a tract of land, and built a cracker factory upon it. About January 1, 1892, the company was reorganized. The outstanding stock largely changed hands, and its officers were changed. All the outstanding 75 shares of stock, excepting 34 shares, held by Herman H. Shellenberger, one of the original stockholders, was bought up with the money of one Henry D. Phillips. Phillips claims that, of the 41 shares bought with his money, 23 shares were bought for one Sewell. These three persons, Shellenberger, Phillips, and Sewell, held a stockholders' meeting on January 15, 1892, and elected themselves directors, and elected Shellenberger president and manager, and Phillips secretary and treasurer. The company at this time was indebted to different persons in an aggregate sum of $4,300. To pay these liabilities, the company, on January 20th, made a promissory note, payable to the order of Phillips and Shellenberger, for the sum of $4,325, which note, indorsed by the payees, was discounted by the First National Bank. On March 7, 1892, Phillips loaned the company the sum of $650. On March 17th, by resolution of the board of directors, the president was authorized, for the purpose of indemnifying Phillips against his indorsement of the note, to make a mortgage of the real estate of the company to Phillips; and, for the purpose of securing Phillips for the loan of $650, the president was authorized to execute a mortgage upon the personal property of the company to Phillips. On March 18, 1892, the real-estate mortgage was executed. The chattel mortgage was also executed on the same day, but was never recorded, and so does not figure further in the case. On May 9th, following, the company was insolvent. On that day the company assigned its book accounts to the First National Bank, to secure the $4,325 note indorsed by Phillips and Shellenberger. On the same day, the president made a second chattel mortgage to Phillips, to secure the $650 loan. On May 10th, Phillips recorded the real-estate mortgage executed on March 18th. On May 28d, Phillips, under his last chattel mortgage, sold the personal property of the company. On June 7th, the complainant, on the bill filed by certain creditors of the corporation, was appointed receiver of the company as an insolvent corporation. The bill prays that the real-estate mortgage and the second chattel mortgage made to Phillips may be set aside, and that Phillips may be compelled to account for the receipts of the sale of the personal property made under the latter mortgage. It charges that the assignment of the book accounts to the First National Bank was fraudulent, and, in fact, that the books never went from Phillips' possession, but that he has collected the accounts; that the bank has disclaimed any claim to the said books. The prayer of the bill is that Phillips may account for the sums he has so collected. The bill also charges that Phillips employed one Robert Green, and paid him $20 per week, with the understanding that this should be charged up to the company, while Green was to repay $10 each week to Phillips. There is also a prayer that he account for these $10 weekly receipts. I will consider the subjects involved in the litigation in an order inversely to that in which they were just stated.

In respect to the claim that Phillips personally received and held a portion of the wages of Green, charged up to the company, I think the complainant has made no case. Phillips says that Green was not able to do his work, and that he (Phillips) was compelled to get other employés to do a portion of it, and the money was retained on this account, and has, as I understand it, been used for corporation purposes. At least, the misapplication of corporate money is not proved with any degree of certainty.

In respect to the assignment of the book accounts to the bank, I also think that it has not been successfully attacked. The line of assault contained in the bill is not sustained by proof. While the books did technically remain in the hands of Phillips, the undisputed testimony is that the assignment was

Digitized by Google

made to the bank, and the books were submitted to the bank officers; that the bills were collected with the approval of the bank in the name of the solicitor of the bank; the moneys received from them were paid to Phillips, who deposited the money in the bank, to be applied to the payment of the note. While the payment of the money to Phillips has an air of oddity, yet no one is called to contradict the statement that the assignment was presented to the bank, and that the money was subsequently collected for and was paid to the bank, to be applied to the payment of this note. The attack upon the assignment made upon the argument was put upon another ground; namely, that Sewell was not a legal director, and so there was no board existing qualified to make the assignment. But, whether Sewell was or was not a de jure director, he was admittedly a de facto director. In respect to the bank, which was a third party, with no notice of the defect, if any existed, in his eligibility, the assignment was entirely efficacious.

The next attack is upon the chattel mortgage, by color of which Phillips sold the personal property. This mortgage was, as I have already remarked, executed on May 9, 1892. At that time the corporation was insolvent. The mortgage was made to secure the antecedent liability of Phillips as indorser for the benefit of the company. The mooted validity of this mortgage involves the question whether the board of directors of an insolvent corporation can secure one of their own members for an antecedent debt by a mortgage of the property of the company. The question is new in this court. It was held in the case of Wilkinson v. Bauerle, 41 N. J. Eq. 635, 7 Atl. 514, that an insolvent corporation could sell its property to a director if the sale was bona fide, and brought the full value of the property. It was held that the officers of such corporation could not divert the corporate property from the payment of its debts, and it was because such a sale was only a transmutation, and not a diversion of the property, that the sale was sustained. It was also held in Vail v. Jameson, 41 N. J. Eq. 648, 7 Atl. 520, that a mortgage made by an insolvent corporation for the purpose of preferring a creditor was not invalid. The great weight of authority is, however, opposed to the existence of any power in a board of directors of an insolvent company to prefer one of its own members. The weight of authority is in support of the wholesome rule that the directors of an insolvent corporation are trustees of its funds for its creditors. Curran v. State, 15 How. 307; Haywood v. Lumber Co., 64 Wis. 639, 26 N. W. 184; Wilkinson v. Bauerle, 41 N. J. Eq. 635, 7 Atl. 514. The doctrine in respect to the power of trustees to use trust property for their own benefit to the disadvantage of their cestui que trust thus becomes applicable to the dealing of directors with the funds in their hands, after the insolvency of the corporation. If any of such directors are creditors, they stand upon the same footing as any other creditor; but by no act of such director can he obtain a position superior to that of the other creditors for whose benefit he holds the trust assets. Mr. Morawetz remarks that "it is the duty of the directors and other agents of an insolvent corporation to preserve its assets for the benefit of the creditors. The legal ownership of the assets is not altered by its insolvency, and the regular agents of the corporation retain the same powers of management with which they were originally invested. But, upon the insolvency of a corporation, an equitable lien of the creditors attaches upon all the company's assets; and the directors, who only formerly stood in a fiduciary relation to the corporate members, become placed in a fiduciary relation to its creditors. * * * If themselves creditors, they cannot receive any advantage or preference in the payment of their claims at the expense of other creditors." Mor. Pub. Corp. § 579. In Haywood v. Lumber Co., supra, a mortgage had been made by an insolvent company to some of the directors, to secure an antecedent debt. The mortgagee filed a bill to foreclose the mortgage, which suit was defended by the receiver of the corporation. The court, in holding that the mortgage was void, employed this language: "The directors and officers made the mortgage, or directly caused it to be made, to themselves. They occupied a fiduciary relation to the company, its stockholders, and its creditors, and they had no right to use such relation and their official position for their own benefit, and to the injury of others in equal right. In Beach v. Miller, 130 Ill. 162, 22 N. E. 464, the question arose whether an insolvent company could secure an antecedent debt due a director by a sale to him of its property to pay such debt. The court remarked that, so long as a corporation remained solvent, its directors were agents or trustees for the stockholders; but, the moment it became insolvent, its directors occupied a different relation. The assets must then be regarded as a trust fund for the payment of all its creditors, and the directors occupy the position of trustees; and, the fiduciary relation then existing, they may, with propriety, be prohibited from purchasing the trust property." The court was speaking in view of the fact that the purchase was to be paid for by the application of the precedent credit held by the director. In Richards v. Insurance Co., 43 N. H. 263, on a bill filed by the creditors of an insolvent company, it was held that the directors were trustees of the funds for the creditors, and were bound to apply them pro rata, and could not use them to exonerate themselves to the injury of other creditors. All the cases bearing upon this question are collected by Mr. Justice Woods in his opinion in the case of Lippincott v. Carriage Co., 25 Fed. 577–586. He very carefully states

Digitized by Google

the rule to be derived from these cases in these words: "It has been often said by judges, including those of the federal supreme court, that the property of an insolvent company is a trust fund, and that the directors are trustees for the creditors; and, if this were strictly so, it is manifest that no preference whatever should be allowed between creditors standing in the same relation to the fund. These statements are, however, true in a qualified sense, and lead legally, if not necessarily, to the conclusion that in such cases the directors, if they give preferences, must do it unbiased by considerations of personal advantage or gain." I regard this is a salutary rule, grounded upon general equitable principles. This view invalidates the chattel mortgage executed on May 9th to Phillips, as mortgagee.

Lastly, in respect to the real-estate mortgage made to Phillips to secure him for his indorsement: It appears that this mortgage was authorized by the board of directors on March 17th, and was executed on March 18th, and was recorded May 10th. If it was delivered at the time it was executed, it would not be invalidated by the rule just applied to the chattel mortgage of May 9th. The bill states that the company was insolvent on May 9th. Therefore, upon the pleadings, the real-estate mortgage was executed while the company was still solvent. What became of this mortgage after it was executed does not appear. There is no allusion in the pleadings nor in the evidence to the custody of this instrument, from the date of its execution to the time of its registration. Now, I think that some evidence should have been produced to show that the mortgage was actually delivered, and so became an executed contract between the company and Phillips before the day it was recorded. But, aside from this view of the legality of that instrument, I think there is another aspect in which it is defective, when, as now, attacked by the representative of the creditors. The mortgage, as I have already remarked, was kept from record until after the company became insolvent. The bill charges, and the charge is not denied, that all the debts were contracted between the date of the execution and the date of recording the mortgage. Now, it is admitted that the mere failure to record a mortgage is not in itself a conclusive reason for setting it aside for the benefit of subsequent creditors having no specific liens; but that any concealment of an instrument of this kind is a badge of fraud, which may, by reason of the circumstances surrounding the concealment, be sufficient ground for avoiding such an instrument in respect to subsequent creditors, is entirely settled. In Hungerford v. Earle, 2 Vern. 261, it was held that a deed not at first fraudulent may afterwards become so by being concealed or not pursued, by which means creditors are drawn in to lend their money. The failure to record a deed or mortgage when there is no apparent change of possession has been held in a number of cases to be a strong circumstance against the validity of such instrument when it was attacked by the creditors, who become such intervening the time of its execution and the time of its record. Coates v. Gerlach, 44 Pa. St. 43; Gill v. Griffith, 2 Md. Ch. 270; Hilliard v. Cagle, 46 Miss. 309; Neslin v. Wells, Fargo & Co., 104 U. S. 428; Blennerhassett v. Sherman, 105 U. S. 100.

Now, in respect to the circumstances surrounding the execution of the present mortgage, the evidence is very strong that, at the time this instrument was executed, Shellenberger and Phillips held all the outstanding stock of the corporation. The shares ostensibly held by Sewell were bought with Phillips' money; and, although Phillips claims that there was an understanding that Sewell was to repay him, the conduct of both Phillips and Sewell is very persuasive that Phillips was to practically control the stock, and that the transfer of it to Sewell was for the mere purpose of equipping him with the nominal character of stockholder, so that he could be elected to constitute the required third director. Phillips was an active agent in resuscitating the moribund corporation. He and Shellenberger were in fact the corporation. They had made as the corporation, and both individually indorsed, the promissory note by the discount of which the debts of the company, including a debt to Phillips himself, were paid. The real-estate mortgage was made to secure Phillips against his liability upon this note, and incidentally to secure Shellenberger also. The original chattel mortgage was to secure Phillips for the additional advance of $650. The future financial success of the company was, in the light of its past failure, problematical. If it should succeed, there would be no use for the two mortgages; if it should fail, then they were to be resorted to for indemnity. The experiment was to be made at the risk of future creditors. For the purpose of leaving the credit of the company unimpaired, the mortgages were kept from record. When insolvency came, it was too late to record the chattel mortgage, so the real-estate mortgage only was registered. I have no doubt from the testimony that these were the motives which induced the delay. When it is kept in mind that Phillips was the active officer for the corporation who caused the execution of the mortgage, as well as the mortgagee for whose benefit it was made, the whole arrangement was equivalent to an agreement between the parties, mortgagor and mortgagee, to keep the mortgage from record for the purpose of sustaining the credit of the company by concealing its existence. Under these circumstances, I think the mortgage must be regarded as made to hinder and delay creditors, and so held to be fraudulent.

The decree of the court of chancery should be reversed, and a decree made in conformity with the views herein expressed.

Digitized by Google

BOARD OF FINANCE OF JERSEY CITY v. MAYOR, ETC., OF JERSEY CITY et al.

(Court of Errors and Appeals of New Jersey. March 30, 1895.)

MUNICIPAL CORPORATIONS — LIGHTING CONTRACTS —EFFECT OF CURATIVE ACT.

1. The board of street and water commissioners of the city of Jersey City are required to advertise for proposals for contracts for street lighting, where the expenditure is to exceed $500; stating approximately, at least, the amount or extent of the lighting to be done under the contract contemplated.

2. The second section of the act of May 1, 1894 (P. L. 170), does not validate contracts made in disregard of the requirement of such advertisement.

(Syllabus by the Court.)

Error to supreme court.

From a judgment of the supreme court touching the validity of certain contracts for lighting streets in the city of Jersey City, granted to the United Gas Improvement Company, the Jersey City Gaslight Company, the Consumers' Gas Company, the People's Gaslight Company, and others, the board of finance of Jersey City brings error. Reversed in part and affirmed in part.

Charles L. Corbin, for plaintiff in error.
Flavel McGee, for defendants in error.

McGILL, Ch. The writs of error bring up for review five judgments of the supreme court touching the legality of five separate contracts for street lighting in the city of Jersey City,—one contract for electric lighting, another for lighting by oil, and the other three for lighting by gas. The first two named were sustained, as valid, by the supreme court, but the three gas-lighting contracts were set aside because they extended for a longer period than five years, which was the maximum term, limited by law, for such a contract. We concur in the conclusions of the supreme court, upon which the three gas-lighting contracts were set aside. That court did not express an opinion upon the question of the regularity of the advertisements for proposals for the contracts in question.

By the 159th section of the "Act to reorganize the local government of Jersey City," approved March 31, 1871 (P. L. 1871, p. 1160), it is provided that no contract for work or materials, requiring an expenditure of more than $500, shall be entered into by any board or department of the city government, except after due advertisement for six days, at least, in official newspapers. By the twenty-seventh section of a supplement to that act, approved March 24, 1873 (P. L. 1873, p. 407), it is provided that all advertisements for proposals for doing work or furnishing materials shall contain an approximate estimate of the amount of the various kinds of work or materials required. By the fourteenth section of the act approved March 28, 1891 (P. L. 1891, p. 249), which creates, for cities of the first class, boards of street and water commissioners, and defines their powers and duties, the provisions of the charter of Jersey City, above referred to, became applicable to the board of street and water commissioners of Jersey City. We think that, by force of this legislation, the board of street and water commissioners of Jersey City was required to advertise for proposals for contracts for the street lighting in question, and approximately, at least, state the amount or extent of the lighting which each proposed contract would require. That board did advertise for proposals for lighting, and did indicate the several sections of the city to be lighted by the several contracts, but failed to state, approximately or otherwise, either the number of lamps to be lighted, or the length of time for which the proposed contracts were to continue. The advertisements referred to specifications on file in the office of the clerk of that board, but those specifications did not intimate how long the contracts were to run, nor, except in the case of the contract for lighting with oil, how many lamps were to be lighted. It is true that, by going through the districts indicated in the advertisements, it was possible for a bidder to estimate the number of lamps, but that it was not within the meaning of the law that such a deterrent task should be imposed is conspicuous. The express requirement of the statute is that the estimate shall appear in the advertisement. But, be this as it may, as the length of the term to be covered by the proposed contracts was not stated, the value of the contracts remained undisclosed, and incapable of being ascertained. It is apparent that the tendency of the announcement of long contracts would have been to induce competition, because of the encouragement such contracts would offer capital to embark in the enterprise they would present. We think that the advertisements were not in compliance with the requirements of the statute, and that the defect in the proceedings in this respect is fatal to all the contracts.

The attention of the court has been directed to the act of the legislature approved May 1, 1894, entitled "An act relative to the lighting of streets, roads and public places in this state" (P. L. 170), the second section of which provides that any contract theretofore entered into by any city for the lighting of public streets, roads, or public places thereof, "for any period, not exceeding ten years, shall be as valid and effectual as if the same had been entered into and made pursuant to legislative authority for such term," and it is insisted that thereby the contracts in question have been legalized. But it is deemed that that act does not, by its terms, validate any of the contracts against the objection that the proposals for them were not advertised in accordance with the requirements of law. It is noted, in the language of the statute, that the only defect contemplated

Digitized by Google

and waived is in the length of the term of the contract. The provision is that, where a contract has been entered into for less than 10 years, it is to be as valid and effectual as if it had been entered into, pursuant to legislative authority, for its term. As has been seen, the law authorized the contracts only after due advertisement for proposals for them, without which they were not entered into, pursuant to legislative authority, for any term. That fatal noncompliance with the law has not been waived. Taking this view of the meaning of the act of 1894, it is not necessary to our conclusion to pass upon the insistment that the act is within the constitutional inhibition of a special law to regulate the internal affairs of a city, upon the ground that such contracts as those in question are, of necessity, replete with covenants and terms which are applicable only to the contracting parties, of whom a city is one, and consequently their establishment by retrospective enactment must result in a special regulation of internal affairs of that city. I am strongly inclined to the opinion that the proposition is entirely sound. It appears to me that to hold otherwise would open a way whereby the constitutional provision invoked might, with ease, be stripped of its salutary effect. Indeed, I fail now to perceive any process of reason by which a subsequent legislative waiver of a single fatal defect in such a contract can be regarded otherwise than as within the constitutional interdiction. Our conclusion is that all the contracts are invalid, and that the judgments which sustain two of them must be reversed, and that the judgments which set aside the other three must be affirmed.

McGONIGLE v. AGRICULTURAL INS. CO. OF WATERTOWN, N. Y.

(Supreme Court of Pennsylvania. April 8, 1895.)

FIRE INSURANCE POLICY—VIOLATION OF CONDITIONS—AGREEMENT TO ARBITRATE.

Where the terms of a fire insurance policy were violated by an incumbrance, an agreement by defendant, after notice of such violation, to arbitrate the amount of a loss in consideration of plaintiff's waiving part of his claim, is a waiver of such breach.

Appeal from court of common pleas, Susquehanna county.

Action by George McGonigle against the Agricultural Insurance Company of Watertown, N. Y., on a fire insurance policy. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

The following is the charge of the trial judge:

"On the 28th day of October, 1888, George McGonigle effected an insurance upon his dwelling house and household furniture contained therein, and his barn and contents, situated in the township of Herrick, in this county, in the Agricultural Insurance Company of Watertown, N. Y. The policy was countersigned as of that date, and by its terms it was an insurance from 'October 20, 1888, to October 20, 1893, at noon.' The amount specified in the policy was $700 on the dwelling house, $500 on the household furniture therein, $400 on family provisions and wearing apparel therein, $200 on printed books and silver plate therein, $50 on organ therein, and $25 on sewing machine therein. On the 21st day of August, 1892, during the life of this policy, this house and some of its contents were destroyed by fire. The uncontradicted testimony shows that, immediately after the fire, Mr. McGonigle notified the local agent, Elijah Carpenter, of the fire, and that on the 31st day of August, 1892, or about that time, a man by the name of H. D. Cornell, claiming to be the agent and adjuster of the company, came to the house of Mr. McGonigle, some distance from where his house was burned; that at the time they made out what the parties claimed to be proofs of loss, and agreed upon an arbitration as to the actual damages that occurred to McGonigle by reason of the burning of the house. So far the evidence is undisputed. The plaintiff has brought this action, claiming that, at the time this adjuster of the defendant company was there, they made a settlement of the loss which occurred to the personal property and the house. As we recollect the evidence, Mr. McGonigle claimed that the actual loss upon the personal property was upward of $500, as he had made it up in a statement, and that, after giving the items of the loss to the adjuster, the adjuster claimed that the amount was too high, and made up another statement himself, which amounted to $487.33; that there was some controversy between Mr. McGonigle and Mr. Cornell, the adjuster, as to the amount, but that they finally agreed that, if McGonigle would accept the figures of the adjuster upon the personal property, they would go on and appoint appraisers for the real estate, and whatever damage the appraisers found that the plaintiff had suffered by reason of the burning of his house should be added to the amount of the damage to the personal property as fixed by the adjuster, and that the company would immediately pay the amount. The defendant claims that no such agreement was made. Mr. Cornell testifies that all he did was to make a statement of the amount of the different items of the loss on the personal property, and make the arrangements for the arbitration of the amount of the damage to the house; but that he made no agreement whatever by which there was a compromise or settlement of any conflicting claims.

"By the terms of the policy which was issued to the plaintiff in this case, and accepted by him, it was agreed that the entire policy should become void if the property, real or personal, covered by this policy, or any part

Digitized by Google

thereof, be or become incumbered by a mortgage, trust deed, judgment, or otherwise. But the policy also contains a written statement that $1,500 incumbrance is permitted. There is also the following clause at the close of the policy: 'This policy is made and accepted subject to the foregoing stipulations and conditions, and no officer, agent, or representative of this company shall have power to waive any provision or condition of this policy except such as, by the terms of this policy, may be the subject of agreement, indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provision or condition, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting insurance under this policy exist or be claimed by the insured unless so written or attached.' The plaintiff accepted this policy of insurance with all these conditions attached, and by the terms of the policy he is bound by these conditions. It appears in evidence that there was during the time that this policy was in force, and at the time of the fire, a mortgage against this property of upward of $3,000. This mortgage, as it appears by the testimony, was originally a little more than $1,500. In October, 1891, this mortgage was figured up, the interest added, the payments which had been made upon it deducted, and a new mortgage given for the gross amount then due. Taking this testimony that is uncontradicted, there must have been at the time of issuing this policy an incumbrance upon the property of more than the amount allowed in the policy,—allowed by its terms,—which of itself would defeat a recovery upon this policy, and would be a good defense to a suit brought on it. The defendant claims that they have not waived that provision in the policy, and that the agent or adjuster that they sent there had no right or authority to waive it, and that, therefore, there can be no recovery in this case. They claim that, at the time of this alleged settlement, the defendant, through its agent, having ascertained for the first time that this incumbrance existed to an amount more than was allowed by the terms of this policy, thereby rendering it uncollectible, Mr. Cornell expressly notified the plaintiff that he had no authority from the company to waive this provision in the policy, but agreed that he would do what he could to get the company to waive it. On the other hand, the plaintiff claims that, with full knowledge of this incumbrance and its amount, the agent of the company expressly agreed to make this compromise and settlement; that they did make it, and that, by reason of such compromise, the plaintiff deducted a portion of the loss which he claimed to have sustained by reason of the fire.

"As we understand the law and the evidence in this case, it is a question of fact for you to determine, first, whether Mr. Cornell came there as the agent of the defendant company, authorized to settle that loss and arrange the amount that should be paid by the company. If he was so authorized, then he had a right to waive these provisions of the policy in relation to incumbrance by a settlement agreeing upon a specific sum to be paid by the company. If he, having a full knowledge of the stipulations, and having authority to make a settlement of that kind, whereby the plaintiff released some portion of his claim, that agreement would be binding upon the company, and a suit could be instituted and maintained upon that agreement, and a recovery had thereon. But if, at the time when the plaintiff claimed that Mr. Cornell made this agreement with him, he did not in fact make it, but informed the plaintiff that he had no power or authority to make it, then your verdict should be for the defendant. But if, on the other hand, you find that he did have power and authority to make such a settlement, and that he did make it, and that thereby the plaintiff released a portion of his claim, and the agent agreed with him that the company would immediately pay the balance, then the plaintiff would be entitled to recover in this action the amount so agreed upon, with interest upon it from the time it was agreed to be paid. As we view it, this is entirely a question of fact for you, but the burden of proof is upon the plaintiff to establish this contract by the weight of evidence. By the terms of the policy, the plaintiff is entitled only to recover two-thirds of the amount of the actual loss upon the real estate. There was no waiver of that provision in the terms of that written agreement to refer to arbitrators the amount of the damage on the real estate. Therefore, if this was an action upon the policy itself, the plaintiff could only recover two-thirds of the amount of the award of the arbitrators as to the damage upon his real estate. But this is not an action upon the policy. It is an action upon the verbal contract which the plaintiff alleges he made with this defendant company, by the terms of which he claims and alleges that he was to be paid a certain amount for the personal property and the full amount of the award which the appraisers should make on the real estate. If you find that there was such a verbal contract made, you must also find from the evidence what the terms of that contract were. If you find the terms as testified and claimed by the plaintiff, then you could find for the plaintiff the full amount of the award of the arbitrators.

"The defendant's counsel has asked me to instruct you 'that, under all the evidence in this case, your verdict must be for the defendant.' Answer: We refuse to so charge you, and leave the question to you as we have stated."

A. H. Sawyer and Charles L. Hawley, for appellant. McCollum & Smith and L. P. Wedeman, for appellee.

Digitized by Google

PER CURIAM. This suit was brought, not on the policy of insurance issued by defendant company to plaintiff, but upon the agreement, alleged to have been made after the fire, between the company, through its adjuster and agent, H. D. Cornell, and the plaintiff, fixing the amount of loss on the personal property, and appointing appraisers to determine the amount of damage to the real estate, etc. The testimony tended to show that, with full knowledge of all the facts and circumstances, the agreement was made substantially as alleged. The submission to appraisers named therein was not only signed by the parties,—by plaintiff in person and by "H. D. Cornell, for Co.,"—but the appraisers thus chosen proceeded to appraise the damage to the real estate, and awarded therefor the sum of $675. In view of this and other testimony, to which reference might be made, it is very evident that the case depended on questions of fact which were for the exclusive determination of the jury. These questions were fairly submitted in a clear and able charge, to which no just exception can be taken. The result was a verdict in favor of the plaintiff, and it was fully warranted by the law and the evidence.

It is unnecessary to consider the specifications of error in detail. There is nothing in the record that would justify us in sustaining any of them. The case was well and carefully tried, and the judgment should not be disturbed. Judgment affirmed.

CITY OF PHILADELPHIA v. AMERICAN UNION TEL. CO.

(Supreme Court of Pennsylvania. April 8, 1895.)

INTERSTATE COMMERCE—CITY ORDINANCE—TELEGRAPH COMPANIES.

City ordinances imposing an annual charge on the poles and wires of a telegraph company within the city are not regulations of interstate commerce.

Appeal from court of common pleas, Philadelphia county.

Action by city of Philadelphia against the American Union Telegraph Company to recover a tax on defendant's wires. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

The following are the facts in the case: Defendant set up the defense that the ordinances were illegal and void, in that it had paid to the commonwealth of Pennsylvania all taxes upon the value of said poles and wires as included in and represented by its capital stock, and upon the gross receipts derived from the use thereof; and further, that it had accepted the act of congress, approved July 24, 1866, and that the poles and wires in question were principally employed and operated in the transmission of messages between the different states, and were instruments of commerce; that the charge upon the wires and poles in question produced an amount that was more than ten times the cost of regulating and supervising the said poles and wires and issuing licenses therefor, and would produce revenue to the city, and was hence void as an exercise of the police power, and invalid for the reason also that it was a regulation of interstate commerce. The court made the rule for judgment absolute, and judgment was entered for the amount claimed, with interest, less the credit allowed.

These ordinances were before the court in the case of W. U. Tel. Co. v. City of Philadelphia, 22 W. N. C. 39, and there sustained. No point was made as to the lack of power to impose the license fees in question upon the defendant company upon the ground of its being engaged in interstate commerce, nor was any federal question raised, nor did the point arise in the case of Chester v. Telegraph Co., 148 Pa. St. 120, 23 Atl. 1070, for the reason that that company operated entirely within the state of Pennsylvania. The point appears to have been alluded to in the case of Allentown v. Telegraph Co., 148 Pa. St. 117, 23 Atl. 1070, though not referred to in the opinion of the court, and probably not pressed. It was attempted to be raised in the case of City of Chester v. W. U. Tel. Co., 154 Pa. St. 464, 25 Atl. 1134, but not decided by this court by reason of the defective character of the affidavit of defense.

John R. Read, Silas W. Pettit, and H. B. Gill, for appellant. Chester N. Farr, Jr., E. Spencer Miller, Asst. City Sols., and Charles F. Warwick, City Sol., for appellee.

PER CURIAM. We find nothing in the record that would justify us in sustaining either of the assignments of error. There was no error in entering judgment against the defendant company for want of a sufficient affidavit of defense. Judgment affirmed.

GREAT BEND TOWNSHIP POOR DIST. v. AUBURN AND RUSH POOR ASYLUM.

(Supreme Court of Pennsylvania. April 1, 1895.)

PAUPERS—ORDER OF REMOVAL.

An affirmance of an order of removal of a pauper will not be disturbed merely because the two justices who issued the order of relief had not come together and heard the evidence of the pauper's necessitous condition, or because one of the justices was also a director of the poor asylum, to which the order of relief was directed, there being no charge of fraud on the part of the justices.

Appeal from court of quarter sessions, Susquehanna county; D. W. Searle, Judge.

Proceedings by the Auburn and Rush Poor Asylum to have a pauper removed to Great Bend Township poor district. From a decree affirming an order for such removal, defendant poor district appeals. Affirmed.

Digitized by Google

The opinion of the lower court was as follows:

"The evidence in this case shows that some time in the latter part of the month of December, 1888, or the fore part of January, 1889, an order was made by two justices of the peace, directing relief to be furnished to Gertie Miller. This order of relief was directed to the directors of the poor asylum of the poor district composed of the townships of Auburn, Rush, Forest Lake, and Springville. In conformity with this order, the directors furnished relief to the pauper, and upon the 23d day of January, 1889, an order was obtained by said directors from two justices of the peace, removing said pauper to the defendant poor district. From this order of removal this appeal was taken, filed February 18, 1889. The pauper in this case is the wife of one John Miller, a son of W. S. Miller. John Miller, when he married this pauper, was under the age of 21 years, and there is no evidence of his having obtained any legal settlement other than that he derived from his father, W. S. Miller. It is claimed by the plaintiff district that the last legal settlement of said W. S. Miller was in defendant district, and therefore the order of removal should be affirmed. It is claimed by the defendant district: First, that there is no sufficient evidence that said W. S. Miller ever obtained a legal settlement in defendant district; second, that the last legal settlement of W. S. Miller was in the poor district composed of the township of New Milford. The evidence shows that W. S. Miller resided in the township of Great Bend quite a number of years, between 1870 and 1882. The widow of W. S. Miller, who, since his death, has married one David Galusha, testifying that they lived successively in said township in the houses of T. D. Estabrook one year, Esther Skinner one year and little over, Elias Main's over year, another house of Main's over one year, and that each of these places they paid eighteen dollars a year rent. John Taylor, a son-in-law of W. S. Miller, testifies that when he first knew Miller he lived in Estabrook's house; moved from there to Skinner's, early in fall, and staid until next July; paid $1.25 per month rent; moved from there to house of Chamberlin, and stayed until October, and paid $1.50 a month rent; moved from there to another house of Chamberlin's, lived there from October to next May; that he rented these houses of Main, and paid $1.50 per month rent; that he moved from Chamberlin's to Widow Smith's house, and lived there two years; paid the rent to Colwell. While there is some contradiction of the testimony of both the widow of W. S. Miller and of John Taylor, I find as a fact from this evidence that W. S. Miller leased real estate in the township of Great Bend of the yearly value of ten dollars, and dwelt upon the same for one whole year, and paid the rent of same, thereby gaining a settlement in the defendant district. It also appears from the records of the quarter sessions of the peace of Wayne county that one W. S. Miller became a charge upon the poor district of Starrucca borough, and an order of removal was obtained removing the pauper to Great Bend poor district, from which order of removal Great Bend poor district appealed May 4, 1886, and that said appeal was dismissed by agreement filed December 28, 1887; and the evidence shows that under this order of removal Great Bend poor district received this pauper, who was the father of the said John Miller, husband of Gertie Miller, and supported him until his death.

"The defendant district claims that subsequent to this settlement in this district, W. S. Miller, in the spring of 1882—April 1st—removed to New Milford township, upon a place he had purchased by contract from Hon. J. B. McCollum, and remained there until June, 1883. The burden of establishing a settlement in New Milford subsequent to the settlement obtained in Great Bend rests upon the defendant. The evidence upon the length of residence of W. S. Miller in New Milford is very conflicting, but the weight of the evidence is that he moved there in April, 1882, and removed from there the same fall. A few days before W. S. Miller moved into the New Milford poor district, he leased a place from J. B. McCollum, through his agent, F. W. Boyle, but never paid any rent upon the same. Some time during the time he was residing in New Milford, he or his wife had a contract for this same place leased of F. W. Boyle, as agent of Hon. J. B. McCollum, from said Hon. J. B. McCollum, but there is no evidence of the time when Miller obtained this contract from J. B. McCollum. Whether said Miller resided in New Milford six months, as claimed by plaintiff, or one year and two months, as claimed by defendant, there is no sufficient evidence to establish a legal settlement therein. If he went in under this lease, testified to by Boyle,—and there is no evidence but what he did,—he paid no rent. There is no evidence of the time he became seised of the land leased to him by Boyle under the contract given by Boyle, principal McCollum, and consequently no evidence of the time he resided upon this land under this contract. * * * We conclude from all the evidence that Gertie Miller was last legally settled in the township of Great Bend, by reason of her husband, John Miller, having a legal settlement in said township. It is adjudged that the order of removal is hereby affirmed, and that the costs and charges be paid by appellant."

The statement and opinion of the lower court on reargument were as follows:

Statement.

"In this case the evidence establishes beyond a question, and without dispute, that the pauper was within the poor district composed of the townships of Auburn, Rush, Springville, and Forest Lake; that she was about to become a mother, and had no

Digitized by Google

means to care for herself; that, being in this condition, she applied to Jeremiah Stevens, a justice of the peace, was duly sworn, and testified to these facts, making it the duty of two justices to grant an order of relief upon the poor district; that the justice, Mr. Stevens, drew up an order of relief in the form laid down in Binn's Justice, signed it, and procured the signature of another justice of the peace, J. A. Lyman, Esq., to it, by informing Esq. Lyman of the facts as sworn to by the pauper. This order of relief was taken and delivered to the directors of the poor asylum of the poor district, and in obedience to its mandates such relief was furnished the pauper as her condition required. Esq. Stevens, before whom the complaint was made, and who was one of the justices who signed the order of relief, was also one of the directors of the poor asylum. An order of removal was in due form of law made to defendant poor district, which was the place of legal settlement of the pauper. The order of relief appears to have been lost, and evidence of its contents was admitted, and testimony upon which it was granted. Upon the reargument the learned counsel for the defendant raised the following questions: First. There was not sufficient evidence given of the order of relief being lost to admit proof of its contents. Second. The parol proof shows that it was not properly granted, for the reasons (1) that J. Stevens, Esq., one of the justices of the peace who granted the order of relief, was also one of the directors of the poor asylum to whom the order was directed; (2) that the pauper was not examined in the presence of both justices. The counsel for defendant also object that the order of removal appears upon its face to direct a removal by 'the directors of the Auburn and Rush Poor Asylum,' based upon what the evidence declares to have been an order of relief directed to 'Directors of the Poor of Rush and Auburn.'"

Opinion.

"The evidence of the existence of an order of relief, its presentation to the directors of the poor asylum, and their acting under it by taking the pauper and affording the necessary relief is undisputed. There was also sufficient evidence of the loss of this order of relief to justify the admission of parol evidence of its contents. As to the alleged discrepancy in the name of plaintiff, as set forth in the order of removal and in the testimony of one of the witnesses, as to what was the title of the poor district in the order of relief, I regard it as entirely immaterial. The recollection of any one as to the exact wording of any written instrument is almost certain to be defective, and the only question is whether the title of the plaintiff in this order of removal is correct. It is not claimed it is not, and, if it was not correct, it could be amended. The objections to the order of relief rest entirely upon the alleged mistake of the justices who granted it in not listening together to the evidence upon which it was granted, and to the incompetency of one of the justices to grant the order. It is not, and could not be, disputed but what the pauper was, for the time being, chargeable upon the poor district, and that it was the duty of any two justices of the county, to whom the knowledge of the facts was properly brought, to issue an order of relief; and, even if there had not been time for an order of relief to have been obtained, it was the duty of the directors of the poor asylum, under the facts established by the evidence in this case, to relieve the pauper, and, as soon as possible, obtain the order of relief. There is no charge of fraud upon the part of the justices who granted the order of relief, and the fact that the justices did not come together and hear the evidence of the pauper's necessitous condition, or that one of the justices was also a director of the poor asylum, did not vitiate the order of relief. Neither justice had any interest in the granting of the order, and the order of relief, having been granted by two justices, is conclusive of the fact that at that time the pauper therein named was entitled to maintenance as a pauper. Overseers of Laporte Borough v. Overseers of Hillsgrove Tp., 95 Pa. St. 269. The nineteenth section of the act of 1836 provides upon an appeal from an order of removal, 'if there be any defect in form in such order the court shall cause the same to be amended without cost to the party and after such amendment, if the same be necessary, shall proceed to hear and determine the cause upon its truth and merits.' This case, upon its merits, shows: A pauper having a settlement in defendant district becomes for the time chargeable to plaintiff district; an order of relief issues by two justices, directing plaintiff district to furnish relief, which they do, and then, in due form of law, obtain an order of removal to defendant district. To set aside this order of removal upon the technical objections raised to the order of relief in this case would be to dispose of the case against its plain and undisputed truth and merits. We see no reason to change the affirmation of the order of removal in opinion filed March 26, 1894."

Following are the assignments of error:

"The court erred—First. In negativing the defendant's fifth request to find as matter of law, viz.: 'That proof of the existence of an order of relief, or an approval by two justices of the relief and maintenance furnished, when furnished in an emergency prior to the granting the order of removal, is necessary to show that the alleged pauper had become a charge on the appellee district before the order of removal was issued, and that, no such proof having been introduced in this issue, the plaintiff has failed to establish a case against the defendant.' Second. In negativing the defendant's re-

Digitized by Google

quest to find as matter of law, numbered 14, viz.: 'That the evidence of the order of relief fails to sufficiently identify the pauper therein named as one whose settlement is in controversy.' Third. In negativing defendant's request to find as matter of law, numbered 15, viz.: 'That the evidence of search for the alleged order of relief in this case was insufficient to warrant the reception of secondary evidence of its contents.' Fourth. In negativing defendant's request to find as a matter of law, numbered 15, viz.: 'That no order of relief can be legally issued except it be based upon complaint under oath either orally or in writing by the complainant in the presence of both of the two justices of the peace required by the act of assembly.' Fifth. In negativing the defendant's sixteenth request to find as matter of law, viz.: 'That, even if the existence of the alleged order of relief, signed by two justices of the peace, J. O. Lyman and Jeremiah Stevens, be recognized by the court, nevertheless the said Jeremiah Stevens, being at the time of issuing the same also one of the directors of the poor district to whom the said order of relief was directed, he could not legally issue the same to himself, and the said order can have no validity or effect as supporting an order of removal.' Sixth. In negativing defendant's nineteenth request to find as matter of law, viz.: 'That the order of removal and all proceedings under the same should be dismissed at the costs of the plaintiff district.' Seventh. In holding that the mandate of the act of assembly of 4th April, 1864 (P. L. p. 272), requiring that all 'orders of relief,' etc., 'shall be directed to the directors of the asylum for the poor of the,' etc., extended in its provisions to the plaintiff district by the act of 1870 (P. L. p. 393), by the language of the alleged order of relief in this case, as testified to by J. O. Lyman in his depositions, where he says, 'I remember that the order was directed to the directors of the poor of Rush and Auburn.' Eighth. In affirming plaintiff's request of fact No. 17, viz.: 'That an order of relief was taken out in this case in regular form, and duly executed by two justices previous to taking out and serving the order of removal.' Ninth. In affirming plaintiff's request of law No. 5, viz.: 'That orders in poor cases will not be quashed for any defects, but the quarter sessions shall proceed to hear the truth and merits of the case.' Tenth. In affirming the order of removal. Eleventh. In not quashing the order of removal."

McCollum & Smith, for appellant. G. P. & R. B. Little, for appellee.

PER CURIAM. There was no error in affirming the order of removal complained of in this case. The assignments of error are overruled, and the decree is affirmed, on the opinion of the learned president of the court below.

KANE v. MOORE.

(Supreme Court of Pennsylvania. April 1, 1895.)

CONTRACT FOR SERVICES—INTERPRETATION.

Defendant wrote plaintiff: "I will give you $60 cash per month and board, and if you remain with me to the end of the year I'll add $15 per month, making it $75 per month." Plaintiff answered: "I accept your terms. I will work for $60 per month, including board, and at the end of the year you are to pay me $120; or, in other words, at the rate of $75 per month, you keep $15 back each month, and pay me as above stated at the end of the year." May 3, 1892, defendant again wrote: "It is understood that I pay you $60 per month and board from May 1 to January 1, 1893. On January 1, 1893, if in my employ, I am to pay you $15 per month extra for May, June, July, August, September, October, November, and December, 8 months in all, or $120 in full." *Held*, that there was a contract of employment extending till January 1, 1893.

Appeal from court of common pleas, Montgomery county.

Action by Daniel Kane against A. H. Moore for breach of a contract for services. From a judgment for plaintiff, defendant appeals. Affirmed.

The assignments of error were as follows:

"(1) The court erred in holding that under the following letters in evidence, viz.: 'May 2, 1892. Mr. D. Kane: Your note to hand. I am willing to make same arrangement with you that was made with Mr. Russell, viz.: I'll give you $60 cash per month and board and if you remain with me to the end of the year I'll add $15.00 per month, making it $75 per month. I had a talk with your friend Tanner that works for Mr. Grady at Belmont track and he said he thought my offer was a fair one for you, and if he saw you he should advise you to accept it. Reply if satisfactory. Truly, A. H. Moore.' To which Kane replied as follows: 'May 3, 1892. Mr. Moore—Dear Sir: Yours of even date to hand. I except your terms. I will work for 60 per month, including board and at the end of the year you are to pay me $120.00 dollars or in other words at the rate of $75.00 dollars per month, you keep $15.00 dollars back each month and pay me as above stated at the end of the year. I remain yours truly, Dan Kane.' Mr. Moore replied as follows: 'May 3, 1892. Mr. D. Kane—Dear Sir: Yours to hand this p. m. It is understood that I pay you $60 per month and board from May 1st to Jan. 1st, 1893. On Jan. 1st, 1893, if in my employ I am to pay you $15.00 per month extra for May, June, July, August, September, October, November and December, 8 months in all or $120 in full. I hope you will do well. You can dine with Mr. S. and Mr. Sheppard at private table in D. Room. Let me hear from you. A. H. M.' On August 12, 1892, Mr. Moore wrote as follows: 'Aug. 12, 1892. Mr. D. Kane—My Dear Sir: I am under such an expense that I find it necessary to reduce my expenses this fall, should I do so I may not want you after September. In do-

Digitized by Google

ing so it is not that I am displeased but I find that Mr. S. and yourself cannot both be kept busy with what stock I have. I am paying out so much that I feel I should try and save some. So long as you are with me Mr. S. does not have enough to do, and I thought it might be good to have him look constantly after the stock hereafter. I will see you later about the matter. If you can get another place by September, I could spare you at that time. Truly, A. H. Moore.' On October 15th, Mr. Moore wrote as follows: 'Your note to hand this p. m. I notified you some little time ago that Mr. Saunders would be at farm shortly and would train his own material and that I could not possibly employ you longer than Oct. 15. You are mistaken in thinking you have any specified contract with me for any length of time. I engaged your services by the month, and you have been paid at the expiration of each month. Mr. Sheppard will settle with you to Oct. 15. If you do not feel like taking the amount due you, and think you have a contract, and can do better, you have my free consent to use the law for your rights when you feel disposed. After October 15th, you will be off the pay roll. I think I've done my duty towards you and if you think not, try to collect on your contract if you are so fortunate as to have one. I am sorry we cannot close our matter cordially. Truly, A. H. Moore,'—that it was the duty of the court to hold that this was a contract of hiring by the year, and that hence the plaintiff was entitled to recover, unless the defendant could show a legal ground for terminating the contract.

"(2) The court erred in not affirming the defendant's first point, which was as follows: 'That the contract in this case was not from May to January 1, 1893, but only from month to month; and that, unless the plaintiff remained in the employ of the defendant, he was not entitled to recover more than $60 per month for the months he actually served.'

"(3) The court erred in not affirming defendant's second point, which was as follows: 'That under this contract the defendant had the right to discharge the plaintiff at any time before January 1, 1893, and, if not discharged, he had no claim on defendant except for the time of his actual service.'

"(4) The court erred in refusing to affirm the defendant's third point, which was as follows: 'That the plaintiff having been discharged on October 15, 1892, and been tendered the sum due him, he cannot recover more than $30, and this without interest and costs.'

"(5) The court erred in submitting the question of whether the defendant had good and sufficient cause for discharging plaintiff to the jury.

"(6) The court erred in submitting to the jury the question whether the plaintiff had experience sufficient to perform the work he engaged to do, as the plaintiff himself admitted that he had no experience in training youngsters, and that was what he was engaged to do.

"(7) The court erred in charging the jury as follows: 'You will take all this testimony, and, if you find that the plaintiff was incompetent, then the defendant had a perfect right to discharge him, because, as I said, when he entered into the employ of the defendant, there was an implied agreement or covenant that he was competent, and had proper qualifications to do the work that was assigned to him; that he had reasonable skill to do the work that was assigned to him. Mr. Hunsicker: Your honor omitted one important matter. The plaintiff said he had no experience whatever in training youngsters. The Court: You will remember, of course, not only the testimony to which I have called your attention, but any other testimony in the case. You have heard what was said by the plaintiff as to his experience with young stock colts. You will take that into consideration. You have also heard the testimony as to what kind of judgment, training, and skill are necessary to prepare a man to take charge of such stock. The defendant says that the plaintiff was incompetent. You have, however, a right to say that his testimony is contradicted by the written evidence that was given in this case, because he did give a letter to the plaintiff, in which he has said he was not displeased (I think is the word he uses) with him. You will say whether a man would write that kind of a letter if two or three of his valuable colts had been injured to the extent that he says they had been injured, and if he believed the plaintiff was the cause of such injury. Would he say, when he gave him this letter indicating that he had no further service for him, that he was not displeased with him? You have, however, the explanation that the defendant gives of this letter. He says: "It is true, I wrote this letter, but I did it out of kindness to the plaintiff. I knew if I put the truth into the letter that he could not get employment elsewhere." You will say whether that explanation is reasonable, and whether you will believe it. The whole testimony is for you.' "

Charles Hunsicker, for appellant. N. H. Larzelere and M. M. Gibson, for appellee.

PER CURIAM. This contention depends on the contract of hiring, evidenced by letters, which passed between the parties on the subject, copies of which are recited in the first specification. The construction of these letters was, of course, for the court. Taking into consideration all the correspondence bearing on the subject, we think the learned trial judge correctly concluded that the hiring was by the year, as claimed by the plaintiff, and hence he was entitled to recover, unless the defendant could show a good and valid reason for sooner terminating the contract. There is nothing in either of the specifications of error that requires a reversal of the judgment. Judgment affirmed.

Digitized by Google

DALE v. BLUE MOUNTAIN MANUF'G CO.

(Supreme Court of Pennsylvania. April 8, 1895.)

SUMMONS—SERVICE ON CORPORATION—RETURN.

A return that a summons was served on "F., general manager" of defendant corporation, does not show that the summons was served on defendant's "president or other principal officer," within Act June 13, 1836 (P. L. p. 579, § 41), stating the officers of a corporation on which a summons may be served.

Appeal from court of common pleas, Philadelphia county.

Action of assumpsit by Alfred A. Dale against Blue Mountain Manufacturing Company. A judgment entered against defendant by default was set aside, and plaintiff appeals. Affirmed.

The following is the opinion of the trial court:

"This was a rule to set aside the sheriff's return, and strike off the judgment entered against the defendant. The return of the sheriff is: 'Served the Blue Mountain Manufacturing Company, a corporation under the laws of Pennsylvania, by giving, June 22, 1893, a true and attested copy of the within writ to D. B. Fisher, general manager of the said company, and making known to him the contents thereof.' The defendant is a corporation under the laws of the state of Pennsylvania. It did not do any business in this county, nor have any property here. Its principal office, at the time of the issuing of the writ in this case, was at Tamaqua, Pennsylvania. The action was in assumpsit. The service of a writ against the defendant within this county, for such an action, would therefore, under the act of June 13, 1836, § 41 (P. L. p. 579; 1 Brightly, Purd. Dig. p. 427, pl. 122), have to be made upon the 'president or other principal officer, or on the cashier, treasurer, secretary or chief clerk,' of the corporation. The person referred to as the 'president or other principal officer' we understand to mean the chief executive officer of the corporation, though called 'president,' 'chairman,' or by any other title. Under the act of March 17, 1856 (P. L. p. 388; 1 Brightly, Purd. Dig. p. 428, pl. 128), 'when any action is commenced by any person against any corporation in any county in which the property of said corporation was wholly or in part situated, it shall be lawful, if the president, treasurer, secretary or chief clerk do not reside or cannot be found in such county, for the sheriff, or other officer to whom any process may be directed, to serve the same on any manager or director in such county.' The words 'manager or director,' used in this act, and also in the acts of March 21, 1842 (P. L. p. 145), and March 15, 1847 (P. L. p. 361), are synonymous, and mean one of the body of persons appointed, pursuant to the charter or by-laws of the corporation, to manage its affairs, the acts of the individuals not binding the corporation except when acting as a body. The return in the present case shows that the writ was served upon Daniel B. Fisher, 'general manager.' The return does not set out that Daniel B. Fisher, is the 'principal officer' of the corporation, nor does it set out facts which show that a service upon a 'manager' would be good. Even where the property of a corporation is wholly or in part in the county, the only cases, except in suits by the commonwealth, in which the writs can be served upon the 'manager' or 'director,' are where the president, treasurer, secretary, or chief clerk do not reside, or cannot be found, in the county, and the sheriff's return must so show. Gilbough v. Keller, 3 Wkly. Notes Cas. 78; Hunt v. Association, 17 Wkly. Notes Cas. 423; Insurance Co. v. Fuller, 81 Pa. St. 398. We therefore consider that the sheriff's return in this case shows no sufficient service. If the return shows a defective service, it should be set aside. Winrow v. Raymond, 4 Pa. St. 501. There was no appearance for the defendant, and judgment was entered against it for want of an affidavit of defense. As defendant was not in court, such judgment is void, and should be stricken off. Insurance Co. v. Fuller, supra. The rule is therefore made absolute."

Chapman & Chapman, for appellant. James E. Hood, for appellee.

PER CURIAM. In this case the summons was returned by the sheriff: "Served the Blue Mountain Manufacturing Company, a corporation under the laws of Pennsylvania, by giving, June 22, 1893, a true and attested copy of the within writ to D. B. Fisher, general manager of said company, and making known to him the contents thereof." Judgment having been entered against defendant company, for want of an affidavit of defense, a rule was taken to set aside the sheriff's return, and strike off the judgment. That rule was made absolute, and hence this appeal, in which the sole question is whether the sheriff's return shows a sufficient service of the writ. The learned judge rightly held that the service was insufficient, because it was not made on the "president or other principal officer, or on the cashier, treasurer, secretary or chief clerk," of the corporation defendant, as required by the act of June 13, 1836, § 41. As shown by the court below, the words "president or other principal officer" mean the chief executive officer of the corporation, whether called "chairman," "president," or by any other title, and were not intended to include "general manager." The question is so fully and satisfactorily considered by the learned judge of the common pleas that further comment is unnecessary. We affirm the judgment on his opinion.

Digitized by Google

CITY OF CHESTER, to Use of ROSS, v. EYRE et al.

(Supreme Court of Pennsylvania. April 8, 1895.)

MUNICIPAL LIEN — SCIRE FACIAS TO ENFORCE — SUFFICIENCY OF AFFIDAVIT OF DEFENSE.

On scire facias by a city, to the use of a contractor, on a municipal lien, an affidavit of defense which avers that the work was not done by the city nor in pursuance of its authority, and was not done by the street commissioner, but by plaintiff, on his own motion, without direction or authority from the city, the city officials having decided that the work need not be done, negatives any implication of authority from the city to do the work which might arise from the fact that the lien was filed in the name of the city by the city solicitor.

Appeal from court of common pleas, Delaware county.

Scire facias by city of Chester, to the use of Michael Ross, against Martha S. Eyre and others, on a municipal lien. Judgment was rendered in favor of plaintiff, and defendants appeal. Reversed.

O. B. Dickinson, for appellants. A. A. Cochran and George M. Booth, for appellee.

FELL, J. Judgment was entered for want of a sufficient affidavit of defense in a proceeding by scire facias upon a municipal lien for paving. The lien was filed in the name of the city of Chester, to the use of the contractor who did the work. It is stated in the affidavit of defense "that said paving was not done by the city of Chester, nor in pursuance of its authority, but was done, as your deponent believes and expects to be able to prove, by one Michael Ross (the use plaintiff in the above case), on his own motion, and without the authority of the city to do so." And in the supplemental affidavit it is averred "that the work was not done by the street commissioner, but was done by Michael Ross, a private individual, and that he had no direction or authority from the city, but that, on the contrary, the city officials had decided that the work for which said lien was filed need not be done at the time it was done." The right of lien exists only when the work is done by the city. If the work is done for the city, either under a specific contract to do the particular work or under a general employment to do all work required by city ordinances, the contractor may, with the consent of the municipality, use its name in filing a lien to his use. But the right of lien is the right of the municipality, and cannot, even with its consent, be exercised except when the work is done by its direction and for it. There is in the affidavit a distinct denial that the city authorized the work to be done, and this denial negatives any implication of authority springing from it which might arise from the fact that the lien was filed in its name by the city solicitor. If the work was done by the use plaintiff at his own instance, without any authority from or contract with any one, no right of either lien or recovery exists. The averments in the affidavit of defense put the plaintiff to proof of his authority, and were sufficient to prevent judgment and to carry the case to a jury. The judgment is reversed, with a procedendo.

ROMBERGER v. HENRY.

(Supreme Court of Pennsylvania. April 8, 1895.)

MASTER AND SERVANT—JUDGMENT FOR INJURY TO EMPLOYE—CAPIAS AD SATISFACIENDUM.

A judgment against an employer for injuries to an employé from a defective scaffold is not a judgment for damages for the nonperformance of a contract, within Act July 12, 1842, providing that no person shall be imprisoned on civil process in any suit for the recovery of damages for the nonperformance of a contract.

Appeal from court of common pleas, Schuylkill county.

Action by Daniel D. Romberger against Walter J. Henry for personal injuries. Judgment was rendered for plaintiff, and a capias ad satisfaciendum issued against defendant was set aside, and plaintiff appeals. Reversed.

J. W. Moyer, for appellant. Nicholas Heblich, for appellee.

FELL, J. The verdict in this case was rendered in an action in trespass, for damages for negligence upon the part of an employer, in not furnishing his employé with reasonably safe appliances for work. The plaintiff was a carpenter in the employ of the defendant, who was a contractor and builder. He was directed to work at the top of a building, on a scaffold which had been erected by the defendant. Before going upon the scaffold the plaintiff was told by the defendant that it was properly constructed and safe. It broke because of its defective construction. A capias ad satisfaciendum issued upon the judgment was, upon rule, set aside. No reason was given by the court for its action; and the only reason assigned upon the argument in support of the ruling is that the judgment was founded upon an implied contract upon the part of the plaintiff to furnish the defendant with safe means of employment, and that the plaintiff was therefore within the exemption of the act of July 12, 1842. The first section of the act provides: "No person shall be arrested or imprisoned on any civil process issuing out of any court in this commonwealth, in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract, express or implied, or for the recovery of any damages for the nonperformance of any contract," etc. The construction claimed by the appellee cannot be sustained. The recovery of damages was not for the

Digitized by Google

nonperformance of a contract, within the meaning of the act. The action was in trespass, to recover damages for negligence. The negligence alleged and proved was the failure to perform a duty. That duty was to furnish an employé with suitable appliances for work. It arose by implication of law out of the relation of the parties. It was imposed by law, not created by contract. That the relation had its origin in contract is manifestly not to the point. The order of the court of common pleas making absolute the rule to set aside the capias ad satisfaciendum is reversed and set aside, and the record is remitted, with a procedendo.

COMMONWEALTH, to Use of DELAWARE COUNTY TRUST, SAFE-DEPOSIT & TITLE-INSURANCE CO. et al., v. DEGITZ et al.

(Supreme Court of Pennsylvania. April 8, 1895.)

EXECUTORS AND ADMINISTRATORS—BOND—ACTION AGAINST SURETIES—AFFIDAVITS OF DEFENSE—SUFFICIENCY.

In an action on an administrator's bond for failure to pay to the guardian money due his wards, as required by an order of distribution, the sureties each filed an affidavit of defense, which admitted the order of the orphans' court, and alleged that the guardian failed to file a certificate of appointment as such, though required to do so by the practice of such court, until October 3, 1894, "several days after the writ in this case was issued," and therefore the action was prematurely brought; that the award in favor of the wards was on June 9, 1892, and distribution of the fund in the hands of the administrator was duly ordered, but deponent was informed neither by the administrator, nor any one in behalf of the minors, that such fund had not been paid over to their representatives until April 25, 1894, when he received a note from plaintiff's counsel calling his attention to the same; that such administrator was solvent, and able to have paid such money, for nearly two years afterwards, but no steps were taken in behalf of the minors' representatives to compel payment; and that had the distributees used ordinary diligence, or had they called the attention of deponent to the administrator's default within a reasonable time after said award, the claim in suit would have been recovered from such administrator. *Held*, that the affidavits of defense were insufficient.

Appeal from court of common pleas, Philadelphia county.

Action by the commonwealth of Pennsylvania, to the use of the Delaware County Trust, Safe-Deposit & Title-Insurance Company, guardian of William S. McNair and Margaret E. McNair, minors, against Daniel Degitz and Daniel Degitz, Jr., on the bond of William Everham, administrator of the estate of Samuel Everham, deceased, signed by defendants as sureties. From a judgment for plaintiff for want of sufficient affidavits of defense, defendants appeal. Affirmed.

Plaintiff's statement of claim is as follows: "The commonwealth of Pennsylvania brings this action to recover, for the use of the Delaware County Trust, Safe-Deposit and Title-Insurance Company, four hundred and twenty-eight and 90/100 (428.90) dollars, with interest thereon from the 24th day of April, 1894, which amount the use plaintiff herein avers is now justly due and owing it from said defendants, upon the following cause of action: On the 13th day of April, 1891, William Everham was duly appointed, by the register of wills of the county of Philadelphia, administrator of the estate of Samuel Everham, deceased. That on said 13th day of April, 1891, said William Everham and the above-named defendants, Daniel Degitz and Daniel Degitz, Jr., executed and delivered their joint and several bonds to the commonwealth of Pennsylvania in the penal sum of three thousand dollars, conditioned for the faithful performance of the duties of said William Everham as administrator of the said estate in manner and form as is fully set forth in the said bond, a copy of which is hereto attached, and made a part of this statement. That said William Everham proceeded with the administration of said estate, and such proceedings were had therein that on the 31st day of May, 1892, he filed his account of his said administration in the orphans' court of the county of Philadelphia, of April term, 1892 (No. 334), which account was adjudicated by said orphans' court on the 6th day of June, 1892, and the schedule of distribution was that day approved by said court, and filed, and by which the sum of two hundred and fourteen and 45/100 (214.45) dollars was awarded to William S. McNair, and the same sum to Margaret E. McNair, minor children of Catharine McNair, deceased; and it was, among other things, decreed by said court that said William Everham should pay the guardians of each of said minors, when appointed, the said sum of $214.45,—all of which fully appears by the record of said orphans' court, to which reference is hereby made. That said Delaware County Trust, Safe-Deposit and Title-Insurance Company was by the orphans' court of Delaware county, on the 7th day of March, 1892, duly appointed the guardian of each of said minors, William S. McNair and Margaret E. McNair, and qualified as such guardian according to law, and is still acting in that capacity. That on the 24th day of April, 1894, on petition of said guardian, an order was made in said estate by said orphans' court of Philadelphia county, directing the said William Everham, administrator of said estate, to pay to the said Delaware County Trust, Safe-Deposit and Title-Insurance Company, guardian of said minors, William S. McNair and Margaret E. McNair, the said sums of $214.45 each, which was awarded to them by the said adjudication filed, and the order of distribution approved and filed, as aforesaid. That said William Everham neglected and refused to obey said order and to pay said money; whereupon, pursuant to an order of said court, made on the 8th day of August, 1894, and duly entered, an ex-

Digitized by Google

ecution against the said William Everham was on the said 8th day of August, 1894, issued out of said orphans' court, directed to the sheriff of Philadelphia county, returnable to the first Monday of September, 1894, which said execution was returned nulla bona. That all the proceedings in said estate herein referred to fully appear in the record of the proceedings therein in the office of the clerk of the orphans' court of Philadelphia county, to which reference is hereby made for a full and complete account of the same. That said William Everham, administrator of Samuel Everham, deceased, did not faithfully discharge all the duties required of him in his office of administrator, but, on the contrary, has broken the condition of his said bond, in this: that the said William Everham, administrator, as aforesaid, did not deliver and pay the money that came into his hands, as administrator of said estate, unto such person or persons, respectively, as the said orphans' court, by their decree and sentence pursuant to law, did limit and appoint. Wherefore, and by reason of the premises, the said plaintiff has sustained damage in a large amount, to wit, in the sum of $428.90 and interest, and thereby an action has accrued to the plaintiff to demand and have from the said defendants the sum of $428.90; yet the said defendants have not, nor has either of them, though often requested thereto, paid the sum or any part thereof, to the damage of the plaintiff in the said sum of $428.90. Therefore he brings this suit."

Bond: "Know all men by these presents, that we, William Everham, 1111 Parrish street, Daniel Degitz, 1764 Bodine street, and Daniel Degitz, Jr., 1764 Bodine street, are held and firmly bound unto the commonwealth of Pennsylvania in the sum of three thousand dollars, to be paid to the said commonwealth, to which payment well and truly to be made we bind ourselves, jointly and severally, for and in the whole, our heirs, executors, and administrators, and each and every one of them, firmly by these presents. Sealed with our seals. Dated the thirteenth day of April, in the year of our Lord one thousand eight hundred and ninety-one (1891). The condition of this obligation is that if the above-bounden William Everham, administrator of all and singular the goods, chattels, and credits of Samuel Everham, deceased, do immediately publish for creditors, &c., and make or cause to be made, a true and perfect inventory and inventories, according to law, of all and singular the goods, chattels, and credits of the said deceased which have come or shall come to the hands, possession, or knowledge of the said administrator, as aforesaid, or unto the hands or possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the register's office, in the county of Philadelphia, within thirty days from the date hereof, and the same goods, chattels, and credits, and all other the goods, chattels, and credits of the said deceased at the time of his death which at any time after shall come to the hands or possession of the said administrator, as aforesaid, or unto the hands or possession of any other person or persons for him, do well and truly administer, according to law, and further do make or cause to be made a just and true account of said administration within one year of the date hereof or when thereunto legally required, and all the rest and residue of the said goods, chattels, and credits which shall be found remaining upon such administrator's account [the same being first examined and allowed by the orphans' court of the city and county of Philadelphia] shall deliver and pay unto such person or persons, respectively, as the said orphans' court, by their decree and sentence pursuant to law, shall limit and appoint, and shall well and truly comply with the laws of this commonwealth relating to collateral inheritances; and if it shall hereafter appear that any last will and testament was made by the said deceased, and the same shall be proved according to law, if the said administrator, as aforesaid, being thereunto required, do surrender the said letters of administration into the register's office, aforesaid,—then this obligation be void; otherwise to be and remain in full force. [Signed] Wm. Everham. [L. S.] Daniel Degitz. [L. S.] Daniel Degitz, Jr. [L. S.] Signed, sealed, and delivered in the presence of Wm. G. Shields."

The affidavit of defense of Daniel Degitz is as follows: "Daniel Degitz, being duly sworn according to law, deposes and says: That he has a valid and true defense to the whole of the plaintiff's claim, of the following nature and character, to wit: That while it is true that the orphans' court awarded to plaintiff, as guardian, the sum of money set forth in the statement filed, the said plaintiff failed to file a certificate of appointment as such guardian, though required to do so by the practice of said court, until the 3d of October, A. D. 1894, which was several days after the writ in this case issued. The deponent is advised, and therefore suggests to the court, that this action was brought prematurely. The said deponent further says that the decree was had in favor of the wards of the plaintiff on June 9, A. D. 1892, and distribution of the fund in the hands of the administrator was duly ordered; but that deponent was informed neither by the administrator, nor any one in behalf of the minors, that said fund had not been paid over to their representatives until the 25th day of April, 1894, when he received a note from plaintiff's counsel calling his attention to the same; that said administrator was solvent and able to have paid the amount found to have been in his hands for nearly two years afterwards, but that no steps were taken on behalf of the repre-

Digitized by Google

sentatives of the minors to compel payment; that had the distributees used ordinary diligence, or had they called the attention of the deponent to the default of the administrator within a reasonable time after said award, the claim in suit would have been recovered from said administrator. All of which facts are true, and deponent expects to be able to prove the same on the trial of the cause." The other defendant filed a like affidavit of defense.

Adolph Meyer, for appellants. George E. Johnson, for appellee.

PER CURIAM. The only question in this case is whether the learned court erred in entering judgment against defendants for want of a sufficient affidavit of defense. An examination of the statement of claim, in connection with the defendants' affidavits of defense, has satisfied us that the judgment was rightly entered. Judgment affirmed.

KEARNEY v. CENTRAL R. CO. OF NEW JERSEY.

(Supreme Court of Pennsylvania. April 8, 1895.)

LESSEE OF RAILROAD—LIABILITY FOR DAMAGE—IMPROPER CONSTRUCTION.

The lessee of a railroad is not liable for injury to land caused by the overflow of a stream due to the lessor's improper construction of the road and a bridge thereon.

Appeal from court of common pleas, Lackawanna county.

Action by Patrick Kearney against the Central Railroad Company of New Jersey to recover damages to plaintiff's land from the overflow of water from the Lackawanna river, caused by the improper construction of a railroad bridge across such river. From a judgment of compulsory nonsuit, plaintiff appeals. Affirmed.

The specifications of error are as follows:

"First. The court erred in refusing the following offer: 'Counsel for plaintiff offer to prove by the witness on the stand the difference in the market value of said lot prior to the construction of said railroad and since, as affected by its construction, together with the actual damage done to said lot by the washing away of a portion thereof, as being the measure of damages which he is entitled to recover.' Counsel for the defendant objects to the offer as irrelevant. By the Court: 'I will sustain the objection.' Exception noted for plaintiff, at whose request a bill is sealed.

"Second. The court erred in refusing the following offer: 'The counsel for the plaintiff propose to prove by the witness on the stand that he has lived in the vicinity of the plaintiff's lot for some seventeen or eighteen years; that he is well acquainted with the market value of real estate and real property in the vicinity of the plaintiff's lot in question; also to show by the witness what the market value of the property was immediately before the flooding and immediately after the flooding, for the purpose of proving the measure of damages sustained by the plaintiff in this case.' Counsel for the defendant objects to the offer as irrelevant and incompetent. By the Court: 'We will sustain the objection.' Exception noted for plaintiff, at whose request a bill is sealed.

"Third. Court erred in excluding the following question: 'Question by plaintiff's counsel to Owen Sweeney, plaintiff's witness, on the stand: What is the difference in value of the plaintiff's lot in question when taken before this railroad was constructed and since its construction, as affected by the railroad?' The counsel for the defendant objects to the question as being irrelevant. By the Court: 'The objection is sustained.' Exception noted for plaintiff, at whose request a bill is sealed.

"Fourth. Court erred in discharging rule to take off compulsory nonsuit. By Mr. Willard: 'The counsel for the defendant moves for a nonsuit, for the reason that it appears in evidence, and uncontradicted, that this railroad on the west side of this river, and this bridge complained of, were built and are owned by the Wilkes-Barre and Scranton Railway Company, and not by the Central Railroad Company of New Jersey; that the Central Railroad Company of New Jersey, so far as the evidence shows at the present time, never had notice from this plaintiff, or any other party, that this bridge was not properly constructed or the railroad properly located.' By the Court: 'It appears from the pleadings that the plaintiff complains that the defendant company, the Central Railroad of New Jersey, constructed a railroad and built an embankment encroaching upon the bed of the Lackawanna river, and also negligently and unskillfully built a bridge over the Lackawanna river, nearly half a mile below the property of the plaintiff in this case; and by reason of the encroachment of the railroad on the bed of the river, as well as by reason of the defective construction of the bridge, the water flowing in and along the bed of the Lackawanna river, in December, 1888, and in February, 1891, at the time of certain floods or freshets, was dammed back towards the plaintiff's property, and at either or both of the said times actually covered a portion of the plaintiff's lot for a few days, and until the water subsided. It also appears in evidence that the railroad in question and the bridge were built and constructed by the Wilkes-Barre and Scranton Railway Company, and that it was completed some time in 1887, or at least previous to May, 1888, and that at that time, in May, 1888, the railroad was leased by the Wilkes-Barre and Scranton Railway Company to the defendant, the Central Railroad of New Jersey. The evidence in the case discloses the fact, giving the contention of the plaintiff its highest merit, that

Digitized by Google

the freshets which immediately caused the injury to the plaintiff's lot were caused by the encroachment on the bed of the river and by the defective construction of the said bridge; that there does not appear anywhere in the evidence that this condition of things was caused by any act on the part of the defendant in this case. Nor does there appear to be any notice on the part of this plaintiff to the defendant calling their attention to the defects complained of in the evidence, and in the plaintiff's declaration. The court thinks that under all the testimony in the case, and under the law applicable to the same, that the defendant, as the lessee of the Scranton and Wilkes-Barre Railway Company, is not liable in this action, and that the suit should have been brought against the Scranton and Wilkes-Barre Railway Company. For these reasons and whatever other reasons there may appear in the testimony produced on behalf of the plaintiff, the motion for a compulsory nonsuit is granted, and at the same time a rule is granted to show cause why this compulsory nonsuit should not be taken off. After a careful review of this case, we know of no reason why the nonsuit should be taken off. The flooding of plaintiff's land, according to the evidence, was caused by the construction of the railroad in such a manner as to encroach upon the bed of the Lackawanna river, and by the defective construction of the bridge across the river some distance below the plaintiff's land. The railroad and bridge were built by the Wilkes-Barre and Scranton Railway Company, and were completed in the year 1887. In May, 1888, the defendant company became the lessee of the road, connecting it with their main line. There is no claim that the injury to plaintiff's land was caused in any degree whatever by the operation of the road by the lessee. The cause exclusively relates to the original construction of the railroad and bridge. The plaintiff has brought this suit against the wrong company. The rule to take off the nonsuit is discharged, and a new trial refused.'"

Aaron A. Chase, for appellant. Edward N. Willard, Everett Warren, and Henry A. Knapp, for appellee.

PER CURIAM. It is very clear that the injury complained of by plaintiff did not result from the operation of the road by the defendant, who was merely the lessee thereof. If he sustained any actionable injury, it must have resulted from the construction of the bridge, etc., and not from the operation of the railroad merely. The bridge was not built by defendant company, but by another railroad company. The learned trial judge rightly held that there could be no recovery against the defendant. There is nothing in either of the specifications that calls for discussion. They are all dismissed, and the judgment is affirmed.

LUTZ et al. v. FRUTCHEY.

(Supreme Court of Pennsylvania. April 8, 1895.)

GARNISHMENT—WAGES.

The wages of a street-car conductor cannot be garnished under Act April 15, 1845, though the claim is for wages due from such conductor.

Appeal from court of common pleas, Lackawanna county.

Action by G. M. Frutchey against O. E. Lutz for services rendered. The Scranton Traction Company was garnished, and judgment was rendered against it. On certiorari, the judgment was reversed, and plaintiff appeals. Affirmed.

The following is the opinion of H. M. Edwards, J.: "In the case of Baker v. Harding, in our own court, reported in 1 Wilcox, 18[illegible], Judge Hand decided that the act of 188[illegible] providing that no exemption of property shall be allowed upon judgments for fifty dollars or less, obtained for wages for manual labor, does not authorize the attachment for the satisfaction of such judgment of wages, except under the act of 1845. Judge Rice, in Enke v. Stine, 4 Kulp, 56, takes the opposite view, and decides that wages can be attached to satisfy a judgment obtained for wages. It is unnecessary to review the arguments advanced on one side and the other of this question. We adopt the conclusion expressed in the case of Baker v. Harding, above cited."

The act of 1845 provides "that the wages of any laborers, or the salary of any person in public or private employment, shall not be liable to attachment in the hands of the employer."

Chas. W. Dawson, for appellant.

PER CURIAM. It being conceded that the money attached in the hands of the Scranton Traction Company, garnishee, was due Oliver E. Lutz for wages earned by him as a street-car conductor in the employ of said garnishee, the learned judge of the court below rightly held that it was not attachable, even on a judgment based on a claim for wages. There was therefore no error in reversing the proceedings against the garnishee. Neither of the assignments of error is sustained. Judgment affirmed.

CASSIDY v. KNAPP.

(Supreme Court of Pennsylvania. April 8, 1895.)

EQUITY—SUFFICIENCY OF BILL — EQUITY RULES—NOTICE TO APPEAR.

A preliminary injunction granted on a bill which was not indorsed with notice to appear, in conformity with amended equity rules adopted January 15, 1894, will be set aside on appeal.

Appeal from court of common pleas, Philadelphia county.

Digitized by Google

Action by Charles Cassidy against Charles S. Knapp, administrator de bonis non of the estate of Christian Donat, to enjoin defendant from prosecuting a proceeding to obtain possession of land. From a preliminary injunction granted, defendant appeals. Reversed.

The assignments of error are as follows:

"(1) The learned court below erred in not requiring the bill of complaint to be indorsed with the notice to defendant to appear and answer, as prescribed by the amended rules adopted by the supreme court of Pennsylvania, January 15, 1894, to regulate the several courts of common pleas in proceedings in equity, in force since March 5, 1894, and in ignoring said amended rules, and permitting the bill to be indorsed with the notice to appear prescribed by rules rescinded by the supreme court, to wit:

" 'To the Above-Named Defendant: You are hereby notified and required within fourteen days after service hereof on you, exclusive of the day of such service, to cause an appearance to be entered for you in the court of common pleas No. 3 for the city and county of Philadelphia to the within bill of complaint of the within-named complainant, and to observe what the said court shall direct. Carroll R. Williams, Solicitor for Complainant.

" 'Note. If you fail to comply with the above directions, by not entering an appearance in the prothonotary's office within fourteen days, you will be liable to have the bill taken pro confesso, and a decree made against you in your absence.'

"(2) The learned court below erred in granting the preliminary injunction without notice to defendant, upon the single affidavit of the plaintiff himself, which is almost a verbatim copy of the bill of complaint, and does not set forth any additional evidence of the facts alleged in the bill, and is in effect the same as if defendant had merely sworn to the truth of the bill, notwithstanding said affidavit sets forth an alleged contract between the plaintiff and Alexander P. Keyser, the dead executor, whose interest has passed by the act of law to the defendant of record, and concerning which contract said plaintiff was not a competent witness.

"(3) The learned court below erred in ignoring the amended rules of the supreme court adopted January 15, 1894, to regulate the several courts of common pleas in proceedings in equity, and permitting at the hearing upon the motion to dissolve the preliminary injunction an ex parte affidavit to be read and filed by the plaintiff, notwithstanding said rules prescribe that at such a hearing 'the evidence must be taken subject to cross examination, and ex parte affidavits will not be received.'

"(4) The learned court below erred in admitting in evidence at the hearing, against the objection and exception of defendant, the paper writing offered by the plaintiff, purporting to be a certified transcript from the docket and copy of the record of Magistrate John F. Pole, of magistrate's court No. 10, of an action wherein Charles S. Knapp, admr. d. b. n. c. t. a. of Christian Donat, deceased, was alleged to have been plaintiff and Charles Cassidy defendant, the said paper not having been proved or sworn to by said magistrate, and the docket itself not being produced."

Isaac Chism, for appellant. Alfred N. Kein and Carroll R. Williams, for appellee.

FELL, J. The assignments of error relating to the failure of the plaintiff to comply with the amended equity rules adopted January 15, 1894, must be sustained. These rules were formulated and adopted to regulate the practice of equity in the several courts of common pleas in the commonwealth, and went into effect on the first Monday of March, 1894. They were established under the direction and by the authority of an act of the legislature, and have all the force and effect of a positive enactment. All proceedings in equity which are not in conformity with them are irregular and void. The preliminary injunction in this case was based upon a bill which was not in compliance with the rules, and this failure is fatal to the whole proceeding. This being the case, it is unnecessary to consider the remaining assignments. The order of the court of common pleas of September 14, 1894, granting a preliminary injunction, is reversed and set aside, at the cost of the appellee.

DUNGAN v. READ.

(Supreme Court of Pennsylvania. April 8, 1895.)

ACTION FOR TORT—ALLEGATION OF CONTRACT—EFFECT.

In an action by a livery stable keeper for injuries to a horse hired from him by defendant, the mere fact that the statement recites the contract of hire does not render the action one on contract, the statement averring the trespass causing the injuries, and defendant pleading not guilty.

Appeal from court of common pleas, Philadelphia county.

Action of trespass by Frank P. Dungan against Edward C. Read, Jr. Judgment was rendered for plaintiff. Defendant was arrested on a capias ad satisfaciendum, and appeals from an order made on habeas corpus committing him thereunder. Affirmed.

The material part of the statement is as follows: "Heretofore, to wit, on September 16, 1892, the defendant hired and let from the plaintiff, who is a livery stable keeper, a certain horse and carriage belonging to the latter, wherefore it became and was the duty of the defendant to use due care in the use of said horse and carriage, and to return

Digitized by Google

the same to the plaintiff in the same good condition as said property was when let, reasonable wear excepted. The defendant, however, not regarding his said duty, did not use due care, but, on the contrary, used and drove said horse and carriage so carelessly, negligently, and improperly as to break and injure the carriage, and to injure and permanently impair the horse, whereby the plaintiff was put to great expense in curing said horse of its injuries thereby sustained, and in repairing the carriage broken as aforesaid. The plaintiff was thereby damaged and suffered loss in the sum of two hundred dollars, and therefore he brings suit."

Maxwell Stevenson and Wm. W. Wiltbank, for appellant. F. Pierce Buckley, James M. Beck, and William F. Harrity, for appellee.

PER CURIAM. There is nothing in this case that requires discussion. The action is clearly ex delicto. It is true the statement commences by reciting a contract, but that is merely matter of inducement, to show how the defendant acquired possession of the property on which he afterwards committed the trespass complained of. The recital was wholly unnecessary, and may be so treated. The body of the statement contains a distinct averment of the trespass complained of; and, by pleading not guilty thereto, the defendant so recognized it. On that issue the case was tried and judgment entered. It was only when the defendant was confronted with a capias ad satisfaciendum that he alleged the judgment is founded on contract, or represents damages for nonperformance of his contract with plaintiff; and hence, under the act of 1842, abolishing imprisonment for debt, etc., he was exempt from arrest and imprisonment. In that he was mistaken. The injury done by him to plaintiff's property had no necessary connection with their contractual relation. It was the result of a trespass, pure and simple, outside of the contract. There is nothing in the record that would justify us in sustaining either of the specifications of error. Judgment affirmed.

FRACK et al. v. GERBER et al.

(Supreme Court of Pennsylvania. April 8, 1895.)

WITNESS—EVIDENCE TO IMPEACH—HUSBAND'S COMPETENCY.

1. In an action against a firm for goods sold, where the only defendant who answered set up that the goods were sold to his partner, who contributed them to the firm, as her share of the assets, and her husband, who managed the firm's business, testified that the goods were sold to the firm, and not to his wife, it was error to exclude evidence that in a statement of the firm's assets made by the husband the goods were entered as a contribution by the wife to the firm's assets, and that the husband had represented that they were so contributed, as such evidence was admissible on the question of the husband's credibility, though the statements were made in plaintiff's absence.

2. Where, in an action against a firm for goods sold, one of the members (a married woman) defaults, her husband is a competent witness for plaintiff on the trial of issues raised by the other defendant.

Appeal from court of common pleas, Schuylkill county.

Action by Samuel Frack and others, executors, against Mahlon A. Gerber and another, for goods sold and delivered. Judgment was rendered for plaintiffs, and defendant Gerber appeals. Reversed.

G. H. Gerber and J. W. Ryon, for appellant. James F. Minogue and Geo. J. Wadlinger, for appellee.

FELL, J. The suit was to recover the price of goods claimed to have been sold by Daniel Frack to Gerber & Houtz. Judgment was entered against M. C. Houtz for want of an affidavit of defense, and M. A. Gerber defended on the ground that the goods had not been purchased by the partnership, but contributed by his copartner, as a part of her share of the capital. This was the only issue of fact raised. The business had been managed for the firm by A. E. Houtz, the husband of M. C. Houtz, one of the defendants, and the son-in-law of Daniel Frack, whose executors were plaintiffs, and their case rested mainly on his testimony. The partnership had been dissolved by the purchase by M. C. Houtz of her partner's interest, and at the time of the dissolution a statement of the business had been prepared, in which the price of the goods claimed to have been sold was charged to capital stock, and did not appear among the bills payable. There was testimony that this statement had been made up from information derived from A. E. Houtz. The statement was offered in evidence and rejected. We are of opinion that it should have been admitted. The learned judge was right in the view expressed, that a statement made in the absence of the seller, and of which he had no knowledge, could not affect him, but it affected the credibility of the principal witness for the plaintiff. This witness had been the manager in charge of the business, and had testified that the goods had been purchased by the firm. That on another occasion he had represented that the goods were a part of his wife's contribution to the capital went directly to his credibility.

The objection to this witness on the ground that he was called to testify against his wife was not well founded. M. C. Houtz had allowed judgment to be entered against her by default, and the case had proceeded to trial against M. A. Gerber alone. She was not a party to the issue on trial, and a recovery against the other party sued was in her interest, and not against it. Of the numerous assignments of error, the third is the only one that can be sustained; and we regret that a single error in a protracted trial, which was carefully and ably conducted, calls for a reversal. The judgment is reversed, and a venire de novo awarded.

Digitized by Google

HARTLEY v. MILLARD et al.

(Supreme Court of Pennsylvania. April 8, 1895.)

QUESTION FOR JURY — FRAUDULENT CONVEYANCES —RIGHTS OF PURCHASER.

1. It is for the jury to determine whether or not a debtor's secret conveyance was made in fraud of his creditors.

2. The grantee in a secret unrecorded conveyance of his realty by a debtor in fraud of his creditors cannot maintain ejectment against a purchaser at the sale under execution levied to satisfy a judgment on a debt outstanding at the time of the conveyance.

Appeal from court of common pleas, Lackawanna county.

Action of ejectment by Silas Hartley against John P. Hull and Charles Millard. There was judgment for defendants, and plaintiff appeals. Affirmed.

Plaintiff claimed title to the land in controversy by virtue of an instrument in writing in terms as follows: "Articles of agreement made and concluded this 7th day of April, A. D. 1883, between M. J. Robinson of the first part and Silas Hartley, party of the second part. Witnesseth, that the said M. J. Robinson, for and in consideration of the sum of $1,600 in hand paid, doth sell and convey to the said S. Hartley, party of the first part, the following lot of land,"—describing the property, and signed by both parties, though not witnessed or executed under seal. Defendant Millard was made a party by virtue of his tenancy under defendant Hull, executory under the will of William A. Tinker, who claimed as purchaser at a sheriff's sale on execution issued in satisfaction of judgment obtained on a promissory note of the same date as the agreement, executed by Robinson in favor of one Leek, and the property of defendant Hull's decedent as indorsee. The agreement above noted was never recorded, though it was contended by plaintiff and denied by defendant that notice of its existence was given to all bidders at the execution sale. There was evidence that the property was worth $2,500.

The following are the assignments of error:

"First. The court erred in their charge to the jury in saying: 'Then we say to you that Silas Hartley would have a right to recover in this case, provided you are satisfied that this contract of April 7, 1883, was made at the time it purported to be, and provided you do not find that it was made for the purpose of hindering, delaying, and defrauding creditors of M. J. Robinson.'

"Second. The court erred in the answer to the first point of the defendant. The point and answer are as follows: '(1) That if the jury find from all the evidence that Silas Hartley, the plaintiff, took the agreement of M. J. Robinson, dated April 7, 1883, as not a bona fide transaction, but that said paper was made for the purpose of cheating and defrauding creditors, and especially for the purpose of defeating the enforcement and collection of a note given by M. J. Robinson to W. H. Leek, dated April 7, 1883, and judgment entered thereon, the plaintiff cannot recover; and the verdict should be for the defendants. Answer of the Court: This we affirm.'

"Third. The court erred in their answer to the second point of the defendant. The point and answer are as follows: '(2) If the jury find from all the evidence that said paper offered in evidence by the plaintiff, dated April 7, 1883, and upon which the plaintiff claimed title to the land in question, was not made at the date it bears date, but was made subsequently to the entering of said judgment or the giving of said note on which the execution was issued and the land sold at sheriff's sale, and that said paper was dated back to the 7th day of April, 1883, then the judgment was a lien upon the land if entered at the time of the sheriff's sale and the purchaser at the sheriff's sale took title thereto, and the plaintiff cannot recover. Answer of the Court: This we affirm, with this qualification: That asks us to say to you that if this contract was made subsequently to the entering of said judgment or the giving of said note. We said to you that if this contract was made subsequently to the entering of the judgment, then this point we affirm, but if it was made subsequent to the giving of the note, and before the entering of the judgment, then, of course, it would pass title to Silas Hartley, unless you find that it was given for the purpose of hindering, delaying, and defrauding the creditors of M. J. Robinson, especially the creditor Leek.'

"Fourth. The court erred in affirming the third point of the defendant. The point and answer are as follows: '(3) That if the jury find from all the evidence in the case that said paper was not made at the time it bears date, April 7, 1883, but was subsequently made, and an agreement entered into between Silas Hartley and M. J. Robinson for the purpose of hindering, delaying, and defrauding creditors, it was fraudulent transaction and the plaintiff cannot recover. Answer of the Court: This we affirm.'

"Fifth. The court erred in their answer to the fourth point of the defendant. The point and answer are as follows: '(4) If the jury find from the evidence that the agreement dated the 7th of April, 1883, was kept a secret by Silas Hartley and M. J. Robinson, and that M. J. Robinson continued in possession of the farm in question, renting it, collected the rents, paid the taxes, insured the buildings in his own name and as his property, and in all respects managed the property the same as before said paper was given, it is evidence of fraud and collusion between Silas Hartley and M. J. Robinson. And if the jury find from all the evidence that said transaction between Silas Hartley and M. J. Robinson was fraudulent, Silas Hartley obtained no title to the land as against the then

Digitized by Google

existing creditors of M. J. Robinson, and the contract is void as between Hartley and Robinson, and the plaintiff cannot recover. Answer of the Court: This point we cannot fully affirm. We cannot say that such a contract, even if made for the purpose of hindering, delaying, and defrauding creditors, would be void between Hartley and Robinson. On the other hand, such a contract is good and valid between the fraudulent parties, and only void as against creditors and the persons sought to be defrauded. Of course, the fact, if you find it to be the fact, that Robinson continued in possession of the farm, and rented it, and collected the rents, and paid the taxes, and insured the buildings in his own name as his property, are facts to be considered by you on this question of fraud, and you can give them such weight as you think they are entitled to.'

"Sixth. The court erred in their answer to the fifth point of the defendant. The point and answer are as follows: '(5) If the jury find from the evidence that Silas Hartley, the plaintiff, knew at the time he took the agreement of April 7, 1883, that M. J. Robinson was about purchasing Leek's store of goods, and was going in debt for part of the purchase money, and further find that Silas Hartley took said agreement, and kept it a secret in his safe, for the purpose of using it to defeat the collection of the note given by M. J. Robinson to W. H. Leek as part of the purchase price of the goods, it was a fraud upon W. H. Leek and his assignee of the note, and judgment upon which the land in question was sold, and the verdict should be for the defendant. Answer of the Court: Well, this we affirm, if you find the facts as stated. It is contended, however, by the counsel for the plaintiff, that there is no evidence that Silas Hartley knew that Robinson was going to run in debt for any portion of the goods.'

"Seventh. The court erred in their answer to the eighth point of the defendant. The point and answer are as follows: 'If the jury find from all the evidence produced in this case that the pretended purchase of the real estate by Hartley of Robinson was not bona fide, but was intended to be used to hinder and delay creditors, the plaintiff cannot recover, and the verdict should be for the defendant. Answer of the Court: This we affirm, except that we do not say that it is a pretended purchase. It is for you to say whether this was a bona fide transaction on the part of Robinson and Hartley, or whether it was not, under the instructions which we have already given you.'

"Eighth. The court erred in their answer to the first point on the part of the plaintiff. The point and answer are as follows: '(1) If the jury find from the evidence that the contract made between M. J. Robinson and Silas Hartley was executed and delivered on the 7th of April, 1883, as testified to by them, and that notice of the title of Silas Hartley was given at the sheriff's sale, before the property was sold to the defendant Hull, then the plaintiff is entitled to recover. Answer of the Court: This we affirm, with this condition: that you find that Hull had notice at the sheriff's sale of the title of Hartley, the plaintiff.'

"Ninth. The court erred in their answer to the second point of the plaintiff. The point and answer are as follows: 'That the notice required to be given of an unrecorded title is notice at any time before the sale, and it is not necessary that it should be given before the entry of the judgment on which the sale took place. Answer of the Court: This we affirm. The notice must be a notice to the purchaser at the sale, and it is in time if given before the sale.'

"Tenth. The court erred in their answer to the third point of the plaintiff. The point and answer are as follows: '(3) That the evidence of M. J. Robinson is uncontradicted as to the execution and delivery of such contract. Answer of the Court: This we do not affirm. Evidence has been given here in the case, and you are to take it into consideration,—take the whole of it and consider it,—and it is for you to say whether it is uncontradicted or not.'

"Eleventh. The court erred in their answer to the seventh point of the plaintiff. The point and answer are as follows: '(7) That there is not sufficient evidence in this case of fraud between M. J. Robinson and Silas Hartley to be submitted to the jury. Answer of the Court: This we do not affirm. On the other hand, we do submit these facts to you, and it is for you to say whether there was fraud or not between Robinson and Hartley.'

"Twelfth. The court erred in their answer to the eighth point of the plaintiff. The point and answer are as follows: '(8) That the verdict of the jury should be for the plaintiff for the land claimed in the writ. Answer of the Court: This we do not affirm, but we submit the facts to you, and it is for you to say whether your verdict should be for the plaintiff or the defendant, under the instructions which we have given you.'

"Thirteenth. The court erred in admitting the testimony of N. Gardner. The bill is as follows: 'By Mr. Watson: The counsel for the defendants propose to prove by the witness on the stand: That he met Silas Hartley subsequent to the date of the paper put in evidence by the plaintiff (Exhibit A). That he there had a certain conversation with Mr. Hartley, in which he said to Hartley, in substance, "You are covering up the store of Robinson at this present time, and there is nothing to get your pay out of but the farm, and there is the Tinker judgment ahead of you of a thousand dollars." That Hartley replied, "Yes, I know that." "But," says he, "Robinson has always asked twenty-seven hundred dollars for the farm." But Hartley says, "I think he will sell it now;

Digitized by Google

he has put it in Loomis' hands to sell, and I think he will sell it for twenty-four hundred dollars, and, if he does, it will pay the Tinker judgment and me, too." That this conversation arose from the fact that Hartley was at that time letting Robinson have more money. This is to be followed by proof of other acts and declarations by the plaintiff, Hartley, and M. J. Robinson, for the purpose of showing fraud and collusion between M. J. Robinson and Silas Hartley in obtaining the title now set up for the purpose of cheating and defrauding creditors, etc. By Judge Jessup: The counsel for the plaintiff object to the offer as immaterial, irrelevant, and incompetent; that it is not sufficient to overcome the legal title of Hartley, which is undisputed, and which is in evidence, as it is at best a loose declaration, and is not sufficient of itself to be submitted to the jury as any evidence of fraud; that no acts or declarations offered to be proven are set forth, other than the one mentioned; that there is no offer to prove that there were any creditors of M. J. Robinson at the time that the paper of April 7, 1883, was executed, and the thousand dollars was paid by Hartley to Robinson, nor that Hartley knew that Robinson owed any debts, or had any creditors at the time; and therefore it is incompetent to prove any fraud upon the creditors of Robinson who were not creditors at the time when the title was passed from Robinson to Hartley, and the thousand dollars balance of purchase money was paid. By the Court: The objections are overruled. I think it clearly evidence for the defense in support of their theory of the case. Exception noted for plaintiff, at whose request a bill is sealed. By Mr. Watson: Q. Mr. Gardner, go on and state now whether you met Mr. Hartley and Mr. Robinson; where and what was said and done. A. Will I tell the conversation we had?. Q. Go ahead, tell the conversation you heard, and what was done. A. I was drawing some pine lumber for Mr. Tiffany from Hartley's mill, over on what we call "over on the hill," below Glenwood, between Glenwood and Lennoxville. I had started to go over after a load, and we had got down as far as the Methodist church in Lennoxville,—Mr. Hartley with me; he was going over to count the lumber for me,—and Robinson came up from behind and hollered to Hartley, and he got off the wagon, and went back three, four, or five rods perhaps, probably not more than three; and they had some conversation, and I saw him take out his pocketbook, and hand him some money. Q. That is, who did? A. Hartley handed Robinson, and he came on. Probably talked ten or fifteen minutes. He come, got on the wagon again, and we went on, and I says, "Robinson after a little more money?" and he says, "Yes, I let him have a little." He says, "He is settling up that bank business," —the time he had the trouble with the bank in Providence. So I says, "It is kind of a poor place to collect money from, ain't it?" He says, "Oh, I don't know." I says, "You own the store at this time?" and he says, "Yes." "And there is the Tinker judgment against the farm. Where will you get your money from?" And he says, "I think they can sell the farm." He says: "He has put it in Loomis' hands to sell. Now, he has always asked twenty-seven hundred dollars for the farm. I think they can sell it for twenty-four hundred dollars, and, if they can, it will pay the Tinker judgment and me, too." Q. When was this? A. It was the latter part of February or the 1st of March, 1886.'

"Fourteenth. The court erred in the admission of the testimony of Julius Young. The bill is as follows: 'By Mr. Watson: The counsel for the defendants propose to prove by the witness on the stand, in substance, that subsequent to April 7, 1883, M. J. Robinson, one of the parties to the agreement offered in evidence by the plaintiff, claimed to him to own this property in question; that he offered to sell it to the witness as his own property, and that no mention was made that Silas Hartley had any interest therein. By Judge Jessup: Counsel for plaintiff object that any declarations of M. J. Robinson subsequent to the 7th of April cannot affect Silas Hartley, his grantee for a valuable consideration, unless made in his presence with his assent. There is no offer to connect Silas Hartley with the declaration, or that he had any knowledge of the declaration; and that he cannot, therefore, be affected by it, and that the evidence is therefore incompetent and irrelevant. By the Court: It goes to the credibility of M. J. Robinson as a witness. The objections are overruled, and evidence admitted. Exception noted for plaintiff, at whose request a bill is sealed.'

"Fifteenth. The court erred in admitting the testimony of Minerva Tinker. The bill is as follows: 'Counsel for the defendants propose to prove by the witness on the stand that in the year 1887, M. J. Robinson, whose deposition has been put in evidence, and the party to the agreement of April 7, 1883, came to the witness, and claimed that he was the owner of the farm in question, situated in Moscow; told her that the only lien there was against it was this judgment of about nine hundred dollars; that he wanted her to purchase his property in Clifford, Susquehanna county, and, if she would do it, he would allow her on the purchase one-half the judgment against the farm in Moscow as part of the purchase money, provided she would get the lien off that property. By Judge Jessup: Counsel for plaintiff object to the offer, that any declarations of M. J. Robinson are incompetent for the same reasons heretofore urged against the admissions of the declarations of M. J. Robinson, subsequent to April 7, 1883. By the Court: What is the date of these declarations? By Mr. Watson: They are subse-

Digitized by Google

quent to April 7, 1883. They were in 1887. By the Court: The objections are overruled, and evidence admitted. Exception noted for plaintiff, at whose request a bill is sealed.'

"Sixteenth. The court erred in the admission of testimony of Whitman Fenyon. The bill is as follows: 'Q. Did you know M. J. Robinson? A. I did. Q. State whether or not he had a talk with you about this judgment in question, and the farm in Moscow in question. If so, whether or not it was before or after the death of Mr. Tinker, and what was said. A. I think it was two or three months after Mr. Tinker died. By Judge Jessup: Our objection covers this, your honor. By the Court: Yes, sir; we will admit the evidence. (Exception noted for plaintiff, at whose request a bill is sealed.) By Mr. Watson: Q. Now proceed. A. I was going down to Clifford one day, and my daughter says, "I wish you would see Robinson, and see what he is going to do about that judgment." Q. You need not say what your daughter said. Tell what Robinson said. A. About the judgment? I seen Robinson between the house and the store, about half way, on the south side of a small bridge there is there. I spoke to him about the judgment. He says he did not want them to do anything about it yet. He wanted a chance to sell it,—the place in Moscow. Q. Sell his place in Moscow? A. Yes, sir; and by so doing, having a chance to sell it, he would save himself something aside from the judgment. Q. Anything further? A. That is all. I says to him,—we was speaking something. I don't know just how the words was,—I told him they were willing for him to have all he could get aside from the judgment. Q. Did he say anything about what he would get for the place? A. He thought he would get two thousand dollars. I think he said more. Q. For the property? A. Yes, sir. Q. Two thousand dollars or more? A. Yes, sir.'

"Seventeenth. The court erred in the admission of the testimony of M. A. Gardner. The bill is as follows: 'Q. State whether or not you knew M. J. Robinson. A. I did. Q. Did you know him in 1883, in April? A. Yes, sir. Q. State whether or not you insured any property for him in Moscow. A. I insured some property on a farm in Moscow. Q. When did you do that? A. The 27th of April, 1887. Q. How did you insure it? A. I insured it as property of M. J. Robinson. Q. And no other? By Judge Jessup: This is subject to the same objection. By the Court: Yes, sir. The objections are overruled, and evidence admitted. Exception noted for plaintiff, at whose request a bill is sealed. By Mr. Watson: Q. Who instructed you how to insure it? A. Yes, sir. Q. Who did? A. Mr. M. J. Robinson, at his store in Clifford.'

"Eighteenth. The court erred in admitting the testimony of John P. Hull, the defendant. The bill is as follows: 'Q. State whether or not, after you were appointed administrator, whether you saw Mr. Robinson about the payment of this judgment. A. I went to see him at his store in Clifford Corners, and asked him if he could pay this judgment, and he said he was not prepared. By Judge Jessup: The plaintiff's exception covers this. By the Court: Yes, sir; the objections are overruled, and evidence admitted. Exception noted for the plaintiff, at whose request a bill is sealed. By Mr. Watson: Q. Proceed. A. He said he was not prepared to pay it just then, but he said he owned a farm near Moscow, Lackawanna county, and he said, "I think that farm is worth twenty-four hundred dollars;" and he said, "I will make some sacrifice in selling it in order to pay you," and wished me to delay the matter some, and so I did. Q. Did he say anything about anybody else having an interest in it? A. No, sir; he did not. Q. He didn't mention Silas Hartley's name? A. No, sir. Q. When did you say this was? A. This was in '87, soon after Mr. Tinker's death. * * * Q. This conversation was right at his store? A. Yes, sir; I went up there to see him. Q. He had a large stock of goods,—quite a reasonable stock for a country store? A. Fairly, for a country store. * * * Q. Didn't you see before your eyes, in the possession of M. J. Robinson, personal property enough there, in his store, more than enough to satisfy your execution at the time? A. I should judge there was property enough there to satisfy it.'"

W. H. Jessup, Horace E. Hand, and W. H. Jessup, Jr., for appellant. C. B. Gardner and W. W. Watson, for appellees.

PER CURIAM. This case depended on questions of fact which were fairly submitted to the jury with substantially correct and adequate instructions. The result was a verdict for defendants, which necessarily implies a finding of the controlling facts in their favor. The subject of complaint in the first specification is part of the learned judge's charge, wherein he instructed the jury that plaintiff "would have a right to recover in this case provided you are satisfied this contract of April 7, 1883, was made at the time it purports to be, and you do not find that it was made for the purpose of hindering, delaying, and defrauding creditors of M. J. Robinson." Both parties recognized Robinson as the common source of the title in controversy. The questions thus referred to by the court were clearly presented by the testimony, and rightly submitted to the jury. The next six specifications complain of the court's answers to defendants' 1st, 2d, 3d, 4th, 5th, and 8th points for charge. The 8th to the 12th, inclusive, allege error in the answers to plaintiff's 1st, 2d, 3d, 7th, and 8th points; and the last four specifications complain of the admission of the testimony therein referred to. Our examination of the record with special reference to these specifications has not convinced us that any of them should be sustained; nor do we think that either of them requires fur-

Digitized by Google

ther comment. We find no error in the record that would justify a reversal of a judgment entered, as this was, on a verdict which appears to have been warranted by the evidence and approved by the court below. Judgment affirmed.

DURR v. REPLOGLE.

(Supreme Court of Pennsylvania. April 8, 1895.)

CONDITIONAL SALE — RIGHTS OF CREDITORS OF VENDEE—LEVY OF EXECUTION.

An agreement provided that a party thereto, described as the bailor, should deliver to the other party, described as the bailee, on hire, certain chattels for a certain term, the bailee to pay certain sums during the term, and to have the privilege of purchasing the property for a certain amount, but stipulated that, till the payment of such amount, no title was to vest in the bailee. In case of default in the payment of any installment, the bailor was authorized to enter judgment for the amount thereof, or to take possession of the property. *Held*, that where, after default, plaintiff took possession of the goods, his possession was superior to the rights of a creditor of the bailee who levied on the goods on an execution subsequently issued, though the bailor also entered judgment against the bailee for the amount of the installment due.

Appeal from court of common pleas, Lackawanna county.

Frederick Durr entered judgment against Walter D. Frank and another for an installment due by the terms of an agreement, by which the possession of chattels was delivered to defendants, and took possession of the chattels. D. P. Replogle levied on the chattels under an execution against defendant, and on a trial of the right to the property judgment was rendered for plaintiff, and Replogle appeals. Affirmed.

The following is the opinion of the trial court on discharging a rule for judgment non obstante veredicto:

"It is not necessary, in the view which we take of this case, to determine whether the agreement recited in the reserved point created a bailment or only a conditional sale. There are other facts which conclusively dispose of it without a resort to that question. The agreement under which the goods were delivered to Frank and Leader provides that they are to pay $50 at the execution of it, June 12, 1893; $500 on the 24th of August following; and certain other subsequent sums which we do not need to notice. The down payment of $50 was made when the goods were delivered, and $75 more were paid afterwards, on October 26th, but this constitutes the sum and substance of the payments made. The agreement further provides that, if default shall at any time be made in the payment of any of the installments mentioned therein, Mr. Kiefer, who is styled the 'bailor,' shall be at liberty to enter up judgment for the amount of such unpaid installments, or to enter the place where the goods are kept, and take and repossess himself of the same. On the 10th of November at 11 o'clock a. m., Mr. Durr, the plaintiff, who had succeeded to the rights of Mr. Kiefer under the contract, taking advantage of this clause, entered and took possession of the property in dispute, and put the goods into the custody of Mr. Kiefer. That he had the right to do this there can be no reasonable question. The second installment had not been paid, and, so far as Frank & Leader were concerned, their rights under the agreement by reason of such default were liable to this defeasance. Nor at the time had the rights of any other party attached. The first execution of the defendant in this issue was not delivered to the sheriff until a subsequent hour in the day, so that the goods were out of the possession of the defendants in that execution, and their rights therein terminated, before the execution had a chance to obtain a lien thereon. Let us see if this is not so. Whatever effect the agreement in question might have as against execution or attaching creditors of the parties named bailees therein, it was entirely valid as between the immediate parties to it. It was competent, therefore, for them to provide that no title to the property should pass until the whole sum of $2,000, with interest (being the aggregate amount of the installments), had been paid, and a bill of sale delivered; and that, in default of a payment of the installments as they accrued, Mr. Kiefer might reclaim and repossess himself of the property. Moreover, until the rights of third parties had intervened, the contract was enforceable, according to its terms, against the property in the hands of Frank & Leader. However, it might or might not have been afterwards. They had, at the best, but a defeasible title, liable to be overturned upon a breach of the conditions upon which they had obtained it; and, by the action of Mr. Durr before any one had called the matter in question, the property was retaken, and whatever previous right of ownership in it there had been was cut off. It does not matter that this was done the same day that the defendant issued his execution, and but a short time previous thereto. If made in good faith, it was as valid if done at one time as at another, provided it was before the opportunity for a lien to attach had arisen. An ordinary sale of personal property by the defendant in an execution, if made in good faith before the writ comes into the hands of the sheriff, is good, even though it be made at an earlier hour of the same day. This is one reason why the exact time of receiving the writ is indorsed by the sheriff upon it. If this be true of a voluntary transfer, much more must it be of an involuntary one, which is enforced according to the terms of a previously existing contract on which the goods are held. When the defendant's execution issued, the case stood no different from what it would if the plaintiff,

Digitized by Google

owning and having possession of the property, had agreed that the defendants in the execution might purchase and have it upon certain terms. Whatever conditional interest this might be held to give in the property, it is not one that would be available to an execution creditor without previous full compliance with these terms. Sage v. Slentz, 23 Ohio St. 1; Buckwater v. Mower, 22 Vt. 203.

"The entering up of judgment by the plaintiff did not interfere with the right of reclaiming the property which he exercised. While the agreement is in the alternative that the so-called 'bailor' may enter up judgment or reclaim the property, there is nothing to prevent his doing both. The judgment is evidently intended merely as security for the unpaid installments. A default does not make them all presently due, and execution could, therefore, only issue for them as they became payable. The entry of judgment consequently constituted but a step in the direction of collecting the installments. It did not amount to a satisfaction, nor are the parties against whom it was entered brought any nearer to a fulfillment of their side of the contract. Neither did it amount to an affirmance of title in them, because the agreement says no title shall pass until the installments are paid and a bill of sale delivered, and, as far as the parties are concerned, this is binding. The two remedies given by the agreement are not inconsistent with each other, and the partial pursuit of the one does not therefore preclude a resort to the other. The usual rule must prevail that a party can have any number of different remedies so long as he secures but one satisfaction. Having retaken the goods into his own possession, no doubt Mr. Durr could not now collect the judgment; and, if he undertook to enforce it, the court would very quickly interfere. The mere fact, however, that it is left open, amounts to very little. There are many judgments of record that in like manner have served their purpose, and been superseded, and yet stand undisposed of.

"Without regard, therefore, to the question whether the transaction was a sale or a bailment, we are of opinion, upon the facts stated in the point reserved, that the plaintiff is entitled to judgment. The rule for judgment for the defendant non obstante veredicto is consequently discharged, and judgment ordered to be entered on the verdict for the plaintiff."

C. W. Dawson and C. B. Gardner, for appellant. C. Comegys, for appellee.

PER CURIAM. In this issue under the sheriff's interpleader act, the learned president of the common pleas directed a verdict for the plaintiff, subject to the opinion of the court on the question of law arising upon the facts stated in his charge. On the rule for judgment non obstante veredicto, etc., the question of law reserved was considered, and judgment was entered on the verdict in favor of plaintiff. The errors assigned are: Directing the verdict for plaintiff, and afterwards entering judgment thereon in his favor; in not directing a verdict for defendant; and in discharging the rule for judgment non obstante veredicto.

We are satisfied from an examination of the record, etc., that the learned judge's rulings are substantially correct, and that neither of the assignments of error should be sustained. All that can be profitably said on the questions involved will be found in his opinion discharging the rule for judgment non obstante veredicto, etc., sent up with the record. The judgment is affirmed on that opinion. Judgment affirmed.

PILE et al. v. PEDRICK et al.

(Supreme Court of Pennsylvania. April 8, 1895.)

PARTY WALL—COSTS—IN EQUITY.

1. Where one, intending to construct a wall for his building within the line of his lot, by mistake, extends the foundation therefor slightly onto an adjoining lot, the wall does not thereby become a party wall.

2. There was no error in dividing costs, where plaintiff obtained a decree compelling the moving of defendant's foundation wall, which by mistake extended an inch and a fraction on plaintiff's land, though defendant offered to make the wall thereon a partition wall, and give plaintiff the free use of it, provided the windows on the third and fourth floors should remain open till plaintiff desired the use of the wall, and where plaintiff refused to allow defendant to go on his land, so that he might chip off the projecting ends of the foundation.

Appeal from court of common pleas, Philadelphia county.

Suit by Joseph M. Pile and another, trustees, against Daniel Pedrick and another. From the decree, plaintiffs appeal. Affirmed.

Plaintiffs, by their bill, alleged that they were the owners of a certain lot; that defendants were the owners of an adjoining lot; that defendants erected a building on their lot, and, as to a portion of the wall, exercised their right to use a portion of plaintiffs' ground for their party wall; that defendants have placed windows in said wall, and are about to place others there. The prayer was for an injunction restraining defendants from placing windows in the wall, and directing them to remove the windows already placed there, and for further relief. The decree directed defendants to remove so much of the wall as was on plaintiffs' ground, and provided that the costs of the case should be divided.

John Sparhawk, Jr., and Melick & Potter, for appellants. E. H. Hanson and J. M. Pile, for appellees.

Digitized by Google

WILLIAMS, J. The learned judge of the court below was right in holding that the wall in controversy was not a party wall. It was not intended to be. The defendants were building a factory, and, under the advice of their architect, decided to build within their own lines, in order to avoid the danger of injury to others from vibration which might result from the use of their machinery. They called upon the district surveyor to locate their line, and built within it, as so ascertained. Subsequent surveys by city surveyors have determined that the line was not accurately located at first, but was about 1½ inches over on the plaintiffs'. This leaves the ends of the stones used in the foundation wall projecting into the plaintiffs' lands, below the surface, 1⅜ inches. This unintentional intrusion into the plaintiffs' close is the narrow foundation on which this bill in equity rests. The wall resting on the stone foundation is conceded to be within the defendants' line. The defendants offered, nevertheless, to make it a party wall, by agreement, and give to plaintiffs the free use of it, as such, on condition that the windows on the third and fourth floors should remain open until the plaintiffs should desire to use the wall. This offer was declined. The trespass was then to be remedied in one of two ways: It could be treated, with the plaintiffs' consent, as a permanent trespass, and compensated for in damages, or the defendants could be compelled to remove the offending ends of the stones to the other side of the line. The plaintiffs insisted upon the latter course, and the court below has, by its decree, ordered that this should be done. The defendants then sought permission to go on the plaintiffs' side of the line and chip off the projecting ends, offering to pay for all inconvenience or injury the plaintiffs or their tenants might suffer by their so doing. This they refused. Nothing remained but to take down and rebuild the entire wall from the defendants' side, and with their building resting on it. This the decree requires, but in view of the course of the litigation the learned judge divided the costs. This is the chief ground of complaint on this appeal. Costs are not of course, in equity. They may be given or withheld as equity and good conscience require. It often happens that a chancellor is constrained to enforce a legal right under circumstances that involve hardship to the defendant, and in such cases it is, as it should be, common to dispose of the costs upon a consideration of all the circumstances, and the position and conduct of the parties. The costs in this case were within the power of the chancellor. They were disposed of in the exercise of his official discretion, and we see no reason to doubt that they were disposed of properly. The decree is affirmed; the costs of this appeal to be paid by the appellants.

PILE et al. v. PEDRICK et al.

(Supreme Court of Pennsylvania. April 8, 1895.)

BUILDING WALLS—ENCROACHMENT—REMOVAL.

One who, by mistake of the district surveyor in locating the line of his lot, constructs the foundation for a building wall so that it projects for an inch and a fraction, underground, onto an adjoining lot, may be compelled to remove it, so that it shall not encroach.

Appeal from court of common pleas, Philadelphia county.

Suit by J. M. Pile and another, trustees, against Daniel Pedrick and another. From the decree, defendants appeal. Modified and affirmed.

John Sparhawk, Jr., and Melick & Potter, for appellants. E. H. Hanson and J. M. Pile, for appellees.

WILLIAMS, J. This is an appeal from the same decree just considered in Pile v. Pedrick, 31 Atl. 646. It is not denied that the foundation wall on which the appellant has built was located under a mistake made by the district surveyor, and does in fact project slightly into the plaintiffs' land. For one inch and three-eighths, the ends of the stones in the wall are said to project beyond the division line. The defendants have no right, at law or in equity, to occupy land that does not belong to them, and we do not see how the court below could have done otherwise than recognize and act upon this principle. They must remove their wall, so that it shall be upon their land. This the court directed should be done within a reasonable time. To avoid further controversy over this subject, we will so far modify the decree as to permit such removal to be made within one year from the date of filing hereof. In all other respects the decree is affirmed; the appellants to pay all costs made by them upon this appeal.

JONES v. BROWN.

(Supreme Court of Pennsylvania. April 8, 1895.)

SALE—ACTION FOR PRICE — BEFORE MATURITY—RESCISSION OF CONTRACT.

One who sells goods, and takes the purchaser's notes therefor, cannot, before maturity of the notes, sue for the price and interest, and attach therefor, though he alleges that the sale was procured by false representations.

Appeal from court of common pleas, Philadelphia county.

Action by George F. Jones, trading as George F. Jones & Co., against James Brown, Jr. The attachment issued in the case was dissolved, and plaintiff appeals. Affirmed.

The opinion of the court below was as follows:

"The plaintiff brought an action of assumpsit against the defendant to recover the

Digitized by Google

price of certain goods sold and delivered, and for which he had taken the defendant's promissory notes maturing at different dates. Having filed an affidavit that the sale was procured by the defendant by means of false representations of the defendant's circumstances, he commenced his action by an attachment under the act of 1869, in which he claimed the price of the goods sold, or the amount of the promissory notes given for them, with interest. None of the promissory notes sued upon were due at the time of the issuing of the attachment, the suit having been brought before the termination of the day on which the first note fell due. In Taylor v. Jacoby, 2 Pa. St. 495, it was decided that a note is not due for the purpose of commencing suit upon it until the day following the termination of the day on which it is payable. The plaintiff's suit, which was founded upon his contract with the defendant, was therefore prematurely brought. This is, of course, fatal to the plaintiff's case, unless he can take it out of the general rule. This the plaintiff endeavors to do by averring that inasmuch as the sale and the notes were procured by the defendant by means of false representations, made to the plaintiff, he is entitled to consider the price due immediately. He maintains that, the credit having been obtained by the defendant by fraud, he is entitled to sue at once for the price agreed upon in the contract of sale. But this is a fallacious argument. If the goods were obtained by the defendant by means of fraudulent representations, the plaintiff has a right to rescind the sale, in which case he might bring replevin for the goods themselves, or an action of trover, in which he would recover their value in damages. But it is plain that, if he elects to rescind the contract, he cannot bring assumpsit for the price, because the same contract which fixes the price entitles the defendant to the credit which it has agreed he should have. The plaintiff cannot blow hot and cold. He must either stand squarely upon his contract with the defendant, and give him the credit agreed upon, or he must rescind in toto, and treat the contract as no longer in existence, but rescinded on account of the fraud, and if it is rescinded he cannot sue for the contract price (there being no longer any contract in existence), but can bring only replevin for the goods or trover for their value. This is familiar law. Where goods have been delivered to a vendee under a contract of sale procured by his own fraud, he may be sued for the recovery of the goods or their value, though they may have been sold on a credit which has not expired at the time the action is commenced; but in such case the vendee cannot be sued in assumpsit for the price, but the remedy is trover. The fraud entitles the vendor to avoid the sale. If he sues in assumpsit, he affirms the express contract which had been entered into between the parties, and where there is an express contract the law will not imply another. Strutt v. Smith, 1 Cromp., M. & R. 312; Bradbury v. Anderton, Id. 490, 5 Tyrw. 152; Ferguson v. Carrington, 9 Barn. & C. 59; Hogan v. Shee, 2 Esp. 522, 523; Selway v. Fogg, 5 Mees. & W. 86. If there be fraud on the part of the purchaser, in respect to the purchase, the vendor may elect either to affirm the sale and sue for the price, or to treat the sale as void, and follow the goods or proceeds. Lloyd v. Brewster, 4 Paige, 537. All the text writers agree in this, and the cases upon the subject are very numerous. Chit. Cont. 408. Fraud avoids the contract ab initio, even where a credit was stipulated for and given, but in such case a distinction in selecting a remedy at law to defeat the fraud is to be observed. Where A. brings assumpsit for the goods before the time of credit expires, such action is not maintainable, but the vendor might bring trover immediately to recover the value. Id. 679; Ferguson v. Carrington, 9 Barn. & C. 59. By bringing assumpsit, he affirms the contract made between him and the defendant. Id., and Dingley v. Robinson, 5 Greenl. 127. It is hardly necessary to observe that in Pennsylvania, since the practice act of 1887, trespass has taken the place of trover in cases where the vendor rescinds the contract on account of fraud, and seeks to recover the value. Where the vendor rescinds the contract for fraud of the vendee, replevin and trover are the appropriate remedies. Mackinley v. McGregor, 3 Whart. 369; Add. Cont. 148, 149. But if the vendor does not avail himself of the fraud he may treat the contract as subsisting, and sue for the price, provided it is due. White v. Garden, 10 C. B. 919, 20 Law J. C. P. 167; Add. Cont. 149. If the plaintiff elects to treat the contract as a subsisting contract, and sues upon it, he cannot maintain a quantum meruit as for an abandoned contract. Add. Cont. 436. Where one of two parties to a contract is entitled, by reason of fraud, to abandon the contract, and treat it as a nullity, he must make his election to take it as a subsisting contract or as rescinded. Having taken the one course, he cannot afterwards adopt the other. Id. 1074; Goodman v. Pocock, 15 Q. B. 576, 19 Law J. Q. B. 410. A party rescinding cannot sue for a breach of contract. Haynes v. Holliday, 7 Bing. 587, 20 E. C. L. 263. Nor can he recover in indebitatus assumpsit. Keene v. Parsons, 2 Starkie, 506, 3 E. C. L. 507. If one brings assumpsit on the contract, he affirms the contract, and cannot treat it as rescinded. Smith v. Hodson, 2 Smith, Lead. Cas. 129, and notes there; Id. 137, and notes. If he rescinds, he must rescind in toto or not at all. Chandelo v. Lopus, 1 Smith, Lead. Cas. 356, and notes. A party defrauded in a contract has his

Digitized by Google

choice of remedies. He may stand to the bargain or rescind. Campbell v. Fleming, 1 Adol. & E. 40, 2 Kent, Comm. 624. And, where there is an election between consistent and inconsistent remedies, the election is final. Smith v. Hodson, 2 Smith, Lead. Cas. 139. Moreover, where one of the parties elects to rescind, he must place the other party in the same position he was in before the sale. Turnpike Co. v. Com., 2 Watts, 433; Piper v. Sloneker, 2 Grant, Cas. 113; Smith v. Webster, 2 Watts, 478; Morris v. Govett, 4 Phila. 13. If, therefore, the plaintiff in the present case would rescind the contract, he is bound first to restore to the defendant the notes which were given for the price. It is manifest, however, in the present case, that the plaintiff has not elected to rescind, but that his action is brought upon the contract; for he has not only brought assumpsit for the price, but demands also interest upon the notes, and declares in his affidavit that the suit is 'to recover the purchase price for which this suit is now brought.' Standing, therefore, as the plaintiff does, upon his contract of sale, and upon the notes given for the price, it is perfectly clear that the plaintiff's action cannot be maintained, inasmuch as the credit given had not expired when his action was begun. If his allegations of fraud are true, he might have rescinded the contract, and proceeded in replevin or trespass: but as he has waived the alleged tort, and sued in assumpsit, he cannot maintain his action, inasmuch as no part of the debt sued for was due, under the terms of the contract, when he began his suit. An attachment under the act of 1869 will not lie for a debt not yet due. Coates v. White, 15 Phila. 295. Therefore, rule absolute, and attachment dissolved."

Chapman & Chapman, for appellant. Francis S. Cantrell, for appellee.

PER CURIAM. We find nothing in this record that would justify a reversal of the order dissolving the attachment. Neither of the assignments of error requires special notice. They are all dismissed. Judgment affirmed, without prejudice, etc.

WHEELER v. PIERCE et al.

(Supreme Court of Pennsylvania. April 15, 1895.)

MECHANICS' LIENS — REPAIRS AND ADDITIONS — BOILER PLANT—CONSTRUCTION OF STATUTES.

1. A boiler battery, consisting of a stone foundation commenced below the surface of the ground, on which a furnace is erected, having brick walls, with doors and other openings, extending to the top of the boilers, and supporting a brick arch, which, with the top of the upper tier of boilers, forms the only covering the structure has, and above which are steam drums and smokestacks, located in close proximity to another and older boiler battery, the place of which it is designed to take, and to be used in connection with other buildings and apparatus already in use in the manufacture of pig iron, is a new "building," within the meaning of Act June 16, 1836, which provides for a lien for the erection and construction of a building.

2. Act May 18, 1887, establishing a lien for debts contracted for work done or materials furnished for or about the repair, alteration of, or addition to any house or other building, but requiring that notice of a material man's intention to file such lien shall be given, is intended to apply only to such cases as do not fall within Act June 16, 1836, providing for the lien for the erection and construction of a building, or Act April 21, 1856, extending the provisions of the latter to embrace certain designated kinds of machinery, neither of the latter acts requiring that such notice be given.

Appeal from court of common pleas, Mercer county.

Scire facias proceedings upon a mechanic's lien filed by E. A. Wheeler against Jonas J. Pierce and Wallace Pierce, surviving partners of Pierce, Kelly & Co., for work done and materials furnished in the construction of a boiler plant at defendants' iron furnace. The partnership made a general assignment for the benefit of its creditors to defendant Frank Pierce after the boilers were finished. From a judgment for plaintiff the defendant assignee appeals. Affirmed.

In the opinion as rendered by the lower court, the undisputed facts are as follows: "The defendants own a piece of land, containing about eleven acres, situate in the borough of Sharpsville, Mercer county, Pa. About ten years ago, defendants constructed on said land a blast-furnace plant, consisting of stock house, casting house, hot blasts, engine house, two systems of boilers (one on each side of the engine house, near, but not contiguous, to it), offices, shops, and other structures, all of which are located as compactly together as practicable for the manufacture of pig iron, but are not inclosed by the same walls, nor covered by the same roof. After said plant had been completed and operated for a number of years, to wit, between November 5, A. D. 1891, and January 27, A. D. 1892, the plaintiff, at the instance of defendants, erected and constructed on defendants' said land one of 'Wheeler's Patent Improved Boiler Furnaces' and one battery of 'Wheeler's Water-Tube Boilers.' This structure consists of a stone foundation commenced below the surface of the ground, on which the furnace is erected, having brick walls, with doors and other openings to the fire, heating chambers, and other compartments within; the patent boilers being immediately above said furnace, and said brick walls extending to the top of the boilers, and supporting a brick arch, which, with the top of the upper tier of boilers, forms the only covering the structure has. There is thus formed a rectangular structure thirteen and two-tenths feet by sixteen and nine-tenths feet, which is twenty feet high from the top of the stone foundation to the top of the brickwork. But above the brickwork and

Digitized by Google

boilers are the steam drums, and above all are iron stacks about twenty feet in height, making a total height from the top of the foundation to the top of the stacks of about forty feet. The space within the wall is fully occupied by the furnace and boilers. This structure is located in close proximity to one of the old batteries of boilers, the stone foundation of the new structure abutting against the foundation supporting the old boilers. The distance between the walls surrounding the new and the main walls surrounding the old boilers is three and two-tenths feet, but there is a projection from the old wall which is within six inches of the new. The new and the old boilers are both connected to the same pipes for water supply, and for carrying steam to the engines of said furnace, and the old as well as the new do furnish steam for said engines; but the two systems are independent of each other, and the new are designed ultimately to take the place of the old boilers. The new structure was erected as a part of defendants' furnace plant, and was designed to be used in connection with the other buildings, apparatus, and machinery constituting said plant, in the manufacture of pig iron."

E. S. Templeton and Thomas Tanner, for appellant. A. W. Williams, for appellee.

GREEN, J. We agree with the opinion of the learned court below, which contains a full exposition and classification of the decisions applicable to this class of cases, and only add some matters in response to the contention of the appellants. The battery of boilers in question is completely within a structure which is an independent erection, standing on its own stone foundations, and built of brick, in size 13.2 feet by 16.9 feet, and 20 feet high. While the exterior structure is an essential part of the boiler plant itself, forming the sides of the fire chambers, inclosing and sustaining the boilers in position, and sustaining also the steam drums at the top, over the boilers, yet it is a substantial and costly structure, performing the function of a building, as to the boilers, as well as constituting a part of the boiler plant. While its water and steam connections are made with the same pipes with which the water and steam pipes of the old boilers are connected, these connections are independent of the old plant, and can be used without them. It is true, there is no building erected around and over the boiler plant, to protect it from the weather. But upon that subject, in Short v. Miller, 120 Pa. St. 470, 14 Atl. 374, we said (Paxson, J.): "The act of assembly does not designate the character of the buildings to which a mechanic's lien may attach. * * * Nor are we embarrassed with the question whether buildings of any description are essential to an oil refinery. An engine and boiler for any kind of a manufactory do not absolutely require a building to protect them. Both may stand in the open air. Yet no one doubts that if an engine and boiler house are erected to protect them from the weather, a lien will attach for labor and materials used in their construction. Nor have we any doubt that the lien attached to the building in this case." In Short v. Ames, 121 Pa. St. 530, 15 Atl. 607, which was a claim of lien upon an oil refinery, Mr. Justice Clark, delivering the opinion, said: "The act of June 16, 1836, as we said in that case, does not designate the character or kind of a building to which a mechanic's lien will attach. If the structures are of a substantial and permanent character, and may, in any reasonable sense, be known as buildings, they may be incumbered by lien."

The case of Parrish's Appeal, 83 Pa. St. 111, is so similar in its facts to the case at bar that we think it controls the present contention. The property was an old furnace plant which had been in use for a number of years, just as this; and its owners, desiring to increase its power, contracted for a new engine, a new set of boilers, drum heads, and fixtures, and for a boiler stack, all of which were constructed, but by different contractors. We held that these improvements were substantial additions to the old buildings, for permanent purposes, made at a heavy cost, and so connected with the original structure as to be as available and direct as if they had been originally built, and that they were the subjects of mechanics' liens, under the act of 16th June, 1836, and that they could also be sustained under the act of April 21, 1856. In considering the subject of the boilers, Mr. Justice Woodward, delivering the opinion, said: "The foundations of the boilers were seven walls, each sixty-seven feet long, from eighteen inches to two feet thick, and from two to three and a half feet high. Brick walls were built on the stone foundations to the height of six feet, extending nearly to the tops of the boilers, and inclosing them. * * * That such machinery as was furnished here was of a kind for which, in the ordinary case of an erection, a lien could be supported, is well established. A lien was sustained for a copper boiler in a brewhouse in Gray v. Holdship, 17 Serg. & R. 413; an engine by which a sawmill was propelled, in Morgan v. Arthurs, 3 Watts, 140; and for burr millstones in Wademan v. Thorp, 5 Watts, 115. * * * The engine house and boiler house became parts of the furnace the moment they were completed. They were connected with it by blast pipes and flues, and the connection was as available, essential, and direct as if they had been built beside the furnace walls. In the language of the decisions, they were 'additions of material parts' to the original structure. They served, in their actual use, all the purposes that actual additions would have served, and their extent and value were significant enough to give ample notice to purchasers and creditors of the change in the character

Digitized by Google

of the property. The decision of the auditor and the decree of the court below in support of these liens, under the provisions of the act of the 16th of June, 1836, were not only in accordance with the general principles deducible from the cases that have been collected, but vindicated by the very rules which those cases have established." The only difference between the structure in that case and in this is the fact that a frame boiler house was erected over and around it, so as to protect it from the weather; but the decision was not based upon that circumstance, nor could it be, considering the reasons assigned for the ruling.

The contention now made for the appellants, that since the passage of the act of 1887 this kind of construction must be regarded as an addition, alteration, or repair, and therefore as being subject to that act, which requires notice to be given of an intention to file a lien, is not well taken. As was held in Parrish's Appeal, the lien could be sustained under the act of 1856, which gave a lien for machinery, and that act did not require any notice. As between the acts of 1836 and 1887, we think it quite clear that the structure in this case must be regarded as provided for by the act of 1836, in contrast with the act of 1887, for the reason that the act of 1856 is directly applicable to machinery, as such, whereas the act of 1887 provides that the act of 1836 and its supplements shall be held and taken thereafter to apply to work done and materials furnished for or about the repairs, alteration, or additions to any house or building. We think this must be held to apply to such work or materials as are done or furnished for repairs, alterations, or additions which were not reached by the acts of 1836 and 1856. If the remedy under those acts attained, it was without the restraining or qualifying conditions imposed by the act of 1887, and in any given case, if the structures were subject to lien under the former acts, as original erections, but, because of their character, could be embraced by the act of 1887, the remedy would be diminished, rather than expanded, by the application of that act. This act is an enlarging and enabling one, intended to embrace cases not within the purview of the previous legislation; but, if it is extended to cases which were within such purview, the remedy available under the pre-existing legislation would be no longer available in its entirety, and as to all such cases the act of 1887 would become a restraining, instead of an enlarging, act. We think such a result would be inconsistent with the manifest purpose of the act. It is true that in the case of Thomas v. Hinkle, 126 Pa. St. 478, 17 Atl. 670, the opinion seems to warrant the contention of the appellants in this regard. But a careful consideration of that decision shows that it is not applicable here. The case arose under the provisions of the act of August 1, 1868 (P. L. 1168), which was an act giving a right of lien, in the city of Philadelphia only, in all cases of repairs, alterations, and additions, but annexed certain conditions and qualifications as attending the exercise of the right, one of which was a prohibition of lien in the case of a conveyance of the property before the filing of the lien. We held that the act of 1868 was the law in Philadelphia in all cases of repairs, alterations, and additions, and, as this was a clear case of addition under the act, the right of lien was only enforceable in conformity with the act. The reasoning upon which the decision was based was that "if there are two acts, of which one is special and particular, and clearly includes the matter in controversy, whilst the other is general, and would, if standing alone, include it also, and if, reading the general provision side by side with the particular one, the inclusion of that matter in the former would produce a conflict between it and the special provision, it must be taken that the latter was designed as an exception to the general provision." The act of 1868 was special and local, and conferred a lien within the limits of the city of Philadelphia, which had no existence in any other part of the commonwealth. Within that city it was the law in all cases of repairs, alterations, and additions, but outside of the city it was not the law in any such case. Hence the doctrine invoked as a principle of construction was directly applicable. But in the present case there is no such situation. The law of 1887 is just as general as the law of 1836 or the law of 1856. It and they extend to all parts of the commonwealth. As between them, there is no conflict. The act of 1836 extended to all cases of buildings, but was held not to include cases which were merely cases of repairs, alterations, or additions. The law of 1856 embraced all cases of certain designated kinds of machinery. The law of 1887 simply enlarged the subjects of lien generally, by extending them to repairs, alterations, and additions, without taking away from the laws of 1836 and 1856 the right of lien in the cases which they embraced. Either of the former laws would embrace the present structure, and therefore there was a complete remedy under those acts. The right of lien in this case does not depend in any degree upon the act of 1887. It is complete without it, and is therefore not subject to its conditions or qualifications. We are of opinion that the learned court below was correct in the conclusions reached. Judgment affirmed.

PHILADELPHIA TRUST, SAFE-DEPOSIT & INS. CO. et al. v. ISAAC.

(Supreme Court of Pennsylvania. March 25, 1895.)

WILLS—CONSTRUCTION—HEIRS.

The brothers and sisters of testator, who died leaving a widow and brothers and sisters as his next of kin and only heirs at law, take, after the death of his wife, property which

Digitized by Google

he leaves to her with a provision that after her death it shall revert to the "natural heirs of my own blood relatives."

Appeal from court of common pleas, Philadelphia county.

Action by the Philadelphia Trust, Safe-Deposit & Insurance Company, trustee, and others, against William Isaac, for six months' ground rent on certain premises. Judgment for plaintiffs, for want of a sufficient affidavit of defense. Defendant appeals. Affirmed.

The statement of claim alleged that Charles C. Harrison, being seised of a ground rent issuing out of said premises, died, leaving a will wherein he gave his real estate and other property to his wife, and provided that, after the decease of his wife, all such property "shall revert to the natural heirs of my own blood relatives"; that immediately after the decease of his wife, and before his estate should be divided among "the natural heirs of my blood relatives as within specified," certain legacies should be paid, giving "all the balance of my estate * * * to the natural heirs of my blood relatives, as within directed." The statement of claim further alleged that testator left, surviving him, a widow and certain brothers and sisters as his next of kin and only heirs at law; that the widow and certain of the brothers and sisters have died. Plaintiffs are the surviving brothers and sisters, and the executors and trustees of the wills of the deceased brothers and sisters.

The affidavit of defense alleged that the ground rent did not vest in plaintiffs, because they were not "the natural heirs of my own blood relatives," as expressed by testator.

John M. Ridings, for appellant. Charles E. Lex, for appellees.

PER CURIAM. Judgment affirmed.

HAAS v. BERGEN et al.

(Supreme Court of Pennsylvania. April 1, 1895.)

ALLEYS—RIGHTS OF ADJOINING LOT OWNERS—CONSTRUCTION OF DEED.

Where all the land bordering on an alley originally laid out for the use of the premises on the south of it is conveyed to one man, and he conveys land on the south of it by deed describing it as extending "to an alley 3 feet wide, laid out at the distance of 73 feet north of * * *, for the accommodation of this and other lots of ground on the south side of the said alley," the conveyance of the right to use the alley, made in the same deed and in the following language, "together with the free and common use and privilege of the aforesaid 3 feet wide alley, and of a water course therein," is not exclusive; and a lot on the north of the alley having thereafter been conveyed, with the free and common use of the alley, such lot has an equal right to the use of the alley with the lots on the south of the alley.

Appeal from court of common pleas, Philadelphia county.

Suit by Constantine Haas against Bridget Bergen, administratrix of Daniel Bergen, deceased, and another, for injunction. Decree for plaintiff. Defendants appeal. Affirmed.

The report of the master, on which the court entered decree for plaintiff, was as follows:

"The undersigned, the master in the above case, respectfully reports that the bill in equity in the above case has been brought by Constantine Haas, owner of properties Nos. 31, 33, 35, and 37 North Fifteenth street, asking that an injunction be issued to restrain Bridget Bergen, administratrix, and Thomas J. Victory from erecting a fence on his land, and separating a portion of his property from a certain 3 feet wide alley running into Fifteenth street, and partly bounding his property on the south. The bill alleges that the complainant bought property No. 31 North Fifteenth street, and that this property is bounded on the south by said 3 feet wide alley, and that, as owner of said property, he is entitled to the use of the alley, as a passageway and water course; that he has erected an hotel on properties Nos. 31, 33, 35, and 37 North Fifteenth street, and built up a solid wall along the said alley for about the distance of 22½ feet; that his property then recedes from the alley about 4 feet, and continues at that distance for about 19½ feet; his building then returns to the said alley, and the said brick wall is continued to the end of his lot; that in the space of 4 feet by 19½ feet, left by the receding of his property from his line, he has erected a fire escape for the protection of the guests in his hotel; that the defendants have attempted to erect a fence on his property from the point where his wall recedes from the line of the alley to the point where the wall is built out again to the said line; that if this fence is erected it will cause him irreparable injury, by reason of the fact that it will greatly destroy the utility of said fire escape; and that the erection of the said fence will preclude him from enjoying the free and common use and privilege of the said alley, to which he is entitled. He therefore asks (1) that defendants be enjoined from erecting a fence; and (2) that they be enjoined from interfering with the free and common use and privilege of the said 3 feet wide alley. The defendants answer that they are the owners of the property on the south of the alley, which property is called the 'Waverly Hotel,' and that they have the exclusive right to the alley in question, and the complainant is not entitled to use it for any purpose whatever; that they have a perfect right to erect a fence on the property of the complainant, as it is a partition fence, and as the building inspectors had appointed a fence view, and said fence viewers had ordered the complainant to erect a fence, and as he had failed to do so, they (the defendants) had a right to erect it for him, and call upon him to pay the expenses; that the

Digitized by Google

fence had been there for a long time prior to the building of the present hotel by the complainant; and that he had no right to tear it down and use the alley as an outlet for his fire escape.

"In passing upon the questions in this case, your master has not thought it important to consider whether the fence proposed to be erected would interfere with the proper use of the fire escape. A large amount of testimony was produced to show what injury would result by cutting off the outlet of the fire escape, but it was also shown that the complainant could have erected a fire escape on Fifteenth street, and that it was not absolutely necessary that it should be erected in its present position. In the opinion of your master, therefore, it is immaterial what effect the erection of the fence would have. The complainant had no right to create a necessity, and then claim a privilege, by reason of it, which otherwise he would not possess. The question is, simply, have the defendants a right to erect this fence upon the property of the complainant? And the injury that may result cannot be weighed, in determining the answer. Neither has your master thought it advisable to pass upon the arguments which were made, and the testimony which was produced, to show that the fence view was irregular, and therefore not binding upon the complainant. The question here is whether the fence is a partition fence, and whether it is a boundary line between the two properties, which the defendants have a right to erect. The proceedings under our act for the erection of partition fences and for a fence view cannot in any way affect the decision of the question. In the case of Trego v. Pierce, 119 Pa. St. 148, 12 Atl. 864, Judge Paxson says: 'Boundary lines cannot be established in this form of proceeding. The object of the act of assembly in regard to fence views is to provide a summary remedy to keep partition fences from going into dilapidation. Disputed questions as to lines can be settled afterwards.' In considering, then, the right of the defendants to erect this fence, it is first important to determine exactly what their rights are in the alleyway. They claim to have the exclusive right of the alley by virtue of a grant to them of the properties on the south of the alley, to which properties they claim the right to use the alley is confined. They claim that their grantor obtained this exclusive right by virtue of a deed of conveyance from Thomas C. Rockhill and Charles S. Bowker, trustees of Mrs. Wm. D. Lewis, to Charles H. Muirheid. At the time these trustees conveyed to Muirheid, they had received from Mr. William D. Lewis, the husband of their cestui que trust, a conveyance of all the land bordering upon this alley, both to the north and to the south. There is no evidence to show that, during the time the dominant and servient tenements were thus vested in Mr. Lewis and his wife, there was any continuous and apparent easement over this alley that might in any way affect the right to change the character of the servitude upon a reconveyance of portions of the property, or which would in any way prevent the extinguishment of the right in Mr. Lewis by reason of both properties vesting in him; and counsel for defendants, in his brief, admits that 'at this time, the whole tract being in Wm. D. Lewis, it was competent for him to extend this easement to the premises to the north.' Such being the case, in order to discover whether the defendants are right in contending that they have the exclusive right of passage over this alley, it is necessary to examine the terms of the conveyance from the trustees of Mrs. Lewis to Muirheid, through which defendants claim their title.

"The alley was originally laid out for the use of the premises on the south; and, if this indenture conveys the easement in the same form to the grantors of the defendants, their right to the exclusive use would seem to be sustained, as they are now the owners of all the property bordering on the south of the alley. The two references to the alley in the deed from the trustees of Mrs. Wm. D. Lewis to Muirheid, dated December 21, 1850, are as follows: The deed conveys a brick messuage and lot or piece of ground, and describes it as 'extending in length or depth along the east side of Fifteenth street [then Schuylkill Eighth street] to an alley 3 feet wide, laid out at the distance of 73 feet north of Filbert street, leading into and from the said Schuylkill Eighth street, for the accommodation of this and the other lots of ground on the south of the said alley.' When the conveyance of the right to use this alley is made in the same deed, the language is as follows: 'Together with the free and common use and privilege of the aforesaid 3 feet wide alley, and of a water course therein, at all times hereafter, forever.' It is to be observed that there is a marked difference between the way in which the alley is described when it is referred to merely for the purpose of bounding the property and when it is referred to for the purpose of conveying or limiting a right of passage in it. The alley was properly described as formerly laid out for the accommodation of those properties on the south; and it is but reasonable to suppose that, if the grantors wished to convey the exclusive use in that alley to those who bordered on the south, they would certainly have said so when they subsequently made the grant of the easement. It might well be argued that they wished the property on the north of the alley, which they then owned, to have the use of the alley, and purposely avoided an exclusive conveyance of the right when they sold the land on the south of it. This view is supported by the fact that, when they subsequently conveyed the land bordering the alley on the north, they conveyed to the grantee the free and common use, right, liberty, and privilege of this alley,

Digitized by Google

and this property, by subsequent conveyance, became seised in the complainant in this action. In the opinion, therefore, of your master, the defendants have only a right to use this alley as a passageway in common with the other properties bordering on it; and the grantor of the complainant was given an equal right by the trustees of Mrs. Lewis, by deed dated March 11, 1867. It is not necessary, therefore, to pass upon the second point submitted by the complainant,—that, if he had not a right of passage over this alley by deed, he had secured it by prescription, as the alley had been used by the property on the north as a passageway for more than a period of twenty-one years. One witness was called who testified that he had known the alley to be used by 31 North Fifteenth street for thirty-one years. The force of this testimony, the defendants claim, is not sufficient to overcome the denial which they make in their answer to the bill. The master is not sure that such is the case, but as, in his opinion, the right of the complainant to the use of the alley exists by virtue of a conveyance, it is not necessary to determine whether it exists by adverse user.

"Neither does your master think that the defendants are right in their contention that, even if the complainant had secured the right to use this alley, he had lost it by reason of the fact that the right of user was confined to 31 North Fifteenth street, and as he had purchased the three other adjoining properties, and erected upon them a large hotel, he had imposed an additional servitude upon the alley, and in addition, as the complainant had merged the premises to which this right was attached in a large building covering three adjoining lots, it rendered it impossible to use this alley as an appurtenance only of 31 North Fifteenth street, and the easement was therefore extinguished, as the changes rendered its proper use impossible. It is undoubtedly true that it would be illegal to increase the burden of the servitude upon this alley, but there was no testimony submitted before your master to show that the burden was in any way increased. It was shown, on the contrary, that the hotel of the complainant had an alley on the back entering into Cuthbert street, which was used for a passage into the hotel; and the testimony only warrants your master in finding that the use that is likely to be made of the alley entering into Fifteenth street is that in case of fire the guests of the hotel would escape through it. There was no testimony produced to even show that there was a doorway from the hotel into the alley, though a plan which was submitted by the defendants shows that there was a doorway near the fire escape; but this is not enough to sustain the allegation that an additional servitude has been imposed, or that the right cannot be defined. But even if it should be granted that an additional servitude was imposed, or that the right of way had been lost, it would not justify the defendants in vindicating their rights by entering on the complainant's land and erecting a fence.

"It is important, in this connection, to determine the character of the fence which the defendants have tried to erect. It is claimed by them to be a partition fence; but when properties are separated by an alley, whether that alley is three feet wide or twelve feet wide, whether it be a private or a public alley, in the opinion of your master, there cannot be, so long as the alley is in existence, a technical partition fence between the properties so situated. They do not join each other, and the fence on either side of the alley must be erected exclusively on the property of the person upon whose side it is built, and not partly on the land of each owner. The rights of the opposite owners of an alley are similar to that of owners upon a public street. Judge Gordon, in Ellis v. Academy, 120 Pa. St. 606, 15 Atl. 494, quotes the following language of Chief Justice Cockburn: 'The same principle which applies to a public street, and which is the foundation of the doctrine, seems to me to apply with equal force to the case of a private road,'—and then says: 'As the doctrine here stated seems to be reasonable and sound, we cannot understand why we should not adopt it. It seems to be admitted that, were the alley public, its vacation would vest in each of the parties the unincumbered one-half of the fee in severalty; and why this should not apply to a private way, where, just as in the case of a public way, by the grant, it was made appurtenant to the several properties, we cannot understand.' If the alley as a passageway is abandoned (which is not claimed in this case), a claim might be made to the soil, and a partition fence erected in the center; but, as long as the alley is in existence, defendants have but a right of way, and have no interest in the soil, other than the easement over it.

"The defendants base their claim to enter upon the complainant's land and erect a fence upon three grounds: First. That they have an interest in the soil of the alley. They contend this right was given their grantor by the deed from the trustees of Mrs. Lewis, before quoted. This contention is not sustained, in the opinion of your master, for the reasons already given. The deed gives no right to the soil of the alley to the defendants. The lot conveyed is only bounded by it, and an easement only is conveyed over it. It does not seem necessary to determine where the fee now rests, as the alley has not been vacated. Second. The defendants claim that the complainant has no right of way over the alley, and consequently his land should be separated from it by a fence. If it is admitted that the defendants are right in this claim, your master cannot see that for this reason it is incumbent upon the complainant to separate his property by means of either a wall or fence. It is true that a man having an exclusive right to use an alley as a passageway may

Digitized by Google

prevent the opposite owner from using it, and might bring an action in trespass against him, if he did so; but it is not clear that he would be justified in erecting a wall or fence on his opposite neighbor's property to prevent him from being tempted to trespass upon his exclusive right. No evidence is produced showing that the complainant now uses this alley for any purpose. The claim is simply that the land should be separated from this passage by a fence, and that fence should be erected on the land of the complainant. The third reason given by the defendants in support of their claim is that there had formerly been in existence a fence which separated complainant's property from the alley, and the complainant was not justified in tearing it down when he erected his new building, and then not replacing it. Your master is not aware of any rule of law that prevents a man from tearing down a fence erected on his own property, no matter how many years he may have seen fit to maintain it there. Your master therefore respectfully submits that the injunction asked for in this case, to restrain the defendants from erecting a fence on the land of the complainant, should be made perpetual. * * * The exceptions hereto attached have been filed by defendants, and your master has carefully considered them, but does not feel justified in altering his findings. The defendants have not established any right to enter upon the complainant's land and erect a fence. They should therefore be restrained from doing so. They were given only a right over the alley, and they now use it, together with their tenants, as a passageway; and, until this easement is interfered with, they have no right to complain of an uncertainty in the servitude imposed by complainant upon the land. Any loss of rights by the complainant could not invest the ownership of the soil in the defendants; but if it should be necessary, for the purpose of this case, to further consider whether complainant had lost his right by reason of the erection of the hotel, your master feels that other testimony would be required in order to establish the exact use that is now made of the alley by the complainant. If it could be shown that the building which has been erected has confined the 'free and common use, right, liberty, and privilege' of the complainant in the alley merely to the purposes of light and air, and a possible escape in case of fire, it would be a grave question whether the owners of the soil could have a right to complain. A change which limits the easement, instead of leaving it either uncertain or enlarged, could not be regarded as an injury. The defendants' exceptions do not raise any question that the master deems it necessary to notice more particularly; and therefore, in accordance with his report, he annexes a form of decree which he respectfully recommends in the matter:

"Decree: And now, to wit, December 8, 1894, this cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz.: That the injunction heretofore issued in this cause be made perpetual, and that the said defendants, Bridget Bergen, administratrix of the estate of Daniel Bergen, and Thomas J. Victory, be, and they hereby are, perpetually enjoined from erecting, or causing to be erected, a fence on the line of the property of Constantine Haas (being No. 31 North Fifteenth street), and a certain three feet wide alley adjoining said property on the south, or in any way interfering with the rights of the said Constantine Haas by erecting, or causing to be erected, a fence or barrier on the line of the property as aforesaid."

John Dolman, Jr., and John Dolman, for appellants. Max Herzberg, Jacob Singer, and Emanuel Furth, for appellee.

PER CURIAM. Judgment affirmed.

POTTS v. ROSE VALLEY MILLS.

(Supreme Court of Pennsylvania. April 8, 1895.)

CORPORATION — LIABILITY FOR OFFICER'S SALARY — ASSIGNMENT FOR CREDITORS.

1. In an action against a corporation by its treasurer for salary, it appeared that before plaintiff's term of office expired defendant made an assignment for the benefit of its creditors, but subsequently, and after the expiration of plaintiff's term, settled with its creditors, and received a reconveyance of its property. *Held*, that the question whether, between the time of the assignment and the expiration of his term, plaintiff performed services for defendant as its treasurer, or held himself in readiness to perform such services, was for the jury.

2. Where, in such an action, it appeared that, after his term of office expired and before his successor was elected, plaintiff, by direction of a stockholders' meeting, effected a settlement with defendant's creditors, the question of whether, in effecting the settlement, he acted as treasurer of defendant, or performed the services merely to protect his interest as a stockholder, was for the jury.

Appeal from court of common pleas, Delaware county.

Action by Benjamin C. Potts against Rose Valley Mills for salary. Judgment was rendered for defendant, and plaintiff appeals. Reversed.

Isaac Johnson, for appellant. V. Gilpin Robinson, Edward H. Hall, and George E. Darlington, for appellee.

FELL, J. The plaintiff was elected treasurer of the corporation defendant on June 16, 1891. The corporation made an assignment for the benefit of its creditors on March 7, 1892. An adjustment having been agreed upon with its creditors, a reconveyance of the assigned property was made June 6, 1893. The action was to recover salary as treasurer from March 7, 1892, to August 8, 1893. A verdict was directed for the amount due after the reconveyance, and an instruction

Digitized by Google

given that there could be no recovery for the period between the assignment and the reconveyance. The plaintiff's election was for one year from June 16, 1891, and more than three months of the term remained after the assignment was made. The assignment did not release the company from its contract, and if there were duties performed during this period, or if there were none and the plaintiff was ready to perform them, and carry out his contract, he was prima facie entitled to recover. For the balance of the time when the property of the company was in the hands of the assignee the presumption is against the right of the plaintiff to recover. While the corporate existence continued the corporate functions as to the conduct of business were suspended. The plaintiff was not re-elected in 1892, but no one was chosen in his place. He could not recover against the company for services rendered the stockholders, nor could he recover against the company for services rendered upon a quantum meruit, or in the absence of an express agreement. Kilpatrick v. Bridge Co., 49 Pa. St. 118; Martindale v. Wilson-Cass Co., 134 Pa. St. 348, 19 Atl. 680. The action, too, was based wholly upon the agreement to pay his salary as treasurer. On the other hand, there being no election of a treasurer in 1892 because of the failure of the board of directors to meet, he would hold over. At a stockholders' meeting held soon after the assignment, an issue of preferred stock was authorized, and the plaintiff as treasurer was directed to use it in the settlement of claims against the company. In pursuance of this direction, he effected a settlement with all the creditors, and procured a reconveyance of the property, and the company resumed the work for which it was organized. These services pertained to his office, and, if in fact they were rendered by him as treasurer, they were evidence of his continuance in office, and of the consequent right to recover the salary thereof. This question we think should have been submitted to the jury, together with the right to recover for the period between the assignment and the expiration of the year for which he was elected on June 16, 1891. The learned judge properly said, in ruling upon the admission of testimony, that the plaintiff could recover for what he did as treasurer, but the question as to what he did was subsequently withdrawn from the jury. The testimony was not so clear as to justify this. It would have been much clearer, and the presentation of the case much more satisfactory, if the effort to suppress the facts had been less strenuous and persistent. Perhaps three-fourths of the record consists of objections made by counsel, and the witnesses were allowed to play such an unimportant part in the trial that the real question whether the plaintiff was serving the company as treasurer or serving his own interests as a stockholder was left in doubt. The first and second assignments of error are not in compliance with the rules. The third, fourth, and fifth assignments are sustained, and the judgment is reversed, with a venire facias de novo.

DOCK v. SCHLICHTER JUTE CORDAGE CO.

(Supreme Court of Pennsylvania. April 8, 1895.)

CORPORATION—RESOLUTION TO ISSUE STOCK DIVIDEND—RIGHT TO RESCIND.

In an action by a stockholder to compel a business corporation to issue to her a certificate of stock, it appeared that plaintiff, being indebted to defendant, assigned to it a certain number of shares of its stock, retaining other shares, and that defendant's directors passed a resolution that, as the stock assigned by plaintiff represented undivided profits, it should be reissued to the stockholders as a dividend, and fixed the number of shares each stockholder was entitled to. There was no evidence that the stock assigned by plaintiff did not represent undivided profits. *Held*, that the directors could not rescind their resolution so as to deprive plaintiff of her right to a part of such stock on account of the shares retained by her, in the absence of evidence that the business of defendant required that the stock should not be issued as therein provided, though the immediate reason for the resolution was that, if a sale of defendant's business was made, the stockholders might assign all its stock to the purchaser.

Appeal from court of common pleas, Philadelphia county.

Action by Susan V. Dock against the Schlichter Jute Cordage Company to compel defendant to issue to her certain shares of stock. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

The following is the master's report:

"The master to whom the above-entitled litigation was referred by order of court of 28th February, 1894 (a certified copy of which is hereto annexed), respectfully reports: That notice of a meeting for the purpose of the reference was given to the counsel for the parties complainant and defendant, in compliance with which on Monday, 5th March, 1894, and again on Monday, 12th March, 1894, the master was attended by I. Hazleton Mirkil, Esq., and Hon. F. Carroll Brewster, for the complainant, and by A. D. Wiler, Esq., and W. W. Wiltbank, Esq., for the defendant. The testimony of the witnesses and the evidence theretofore exhibited on behalf of each party is made the subject of a separate report by the undersigned as examiner, and which was filed in the cause on the 28th February, 1894.

"In substance, the allegations of the bill are: That the defendant company was duly incorporated for the purpose of manufacturing and trading, and from that to the time of filing the bill has conducted its business in Philadelphia. That at the date of incorporation its capital stock consisted of 5,000 shares, of a par value of $100 each. On the 4th March, 1889, the corporation claimed from the complainant $22,941.67, in payment of which it received from her 277 shares of its

Digitized by Google

capital stock, at a valuation of $25,622, leaving a balance due her. That on the 16th July, 1890, the directors of the company defendant declared a dividend in stock to its shareholders of 277 shares (a copy of the resolution to that end was made an exhibit), and it was alleged that, by reason of the transfer of 277 shares just mentioned (which in the bill is described as a purchase), the number of outstanding shares when the said dividend was declared was 4,723, of which 4,723 shares the claimant at the time the dividend aforesaid was declared was the owner of 1,500, and that she was entitled to receive pursuant to its declaration of dividend eighty-nine shares as her proportion. That the said dividend was payable on demand, and that the complainant has frequently demanded a certificate for the said eighty-nine shares, which the defendant has unjustly refused to issue. The claimant further alleged that since the date of the stock dividend the company defendant has declared cash dividends, and her proportion of these the defendant has also unjustly refused to pay.

"The prayer is (1) for an injunction to restrain the defendant from paying the dividend due to the complainant to any other one; (2) for a decree requiring the defendant to issue to the complainant its certificate for the said eighty-nine shares; (3) for a decree requiring the defendant to pay to the complainant the dividends declared upon the eighty-nine shares of stock since 16th July, 1890; (4) general relief.

"The answer in substance avers: That the defendant is a corporation as alleged, conducting its business in Philadelphia. That the complainant transferred to the defendant 277 shares as alleged, but that no balance is due her, and that all money due her has long since been paid. That the declaration of the stock dividends was made, but that the resolution to that end involved a statement which was untrue, in that the 277 shares did not represent undivided profits, and that such resolution was otherwise illegal and void. That on 16th July, 1890, the complainant owned 1,500 shares of stock, but when the bill was filed she owned none. That the defendant is advised that the board of directors had no power to distribute the 277 shares as a dividend of profits, that it did not claim to do so irrevocably, that the dividend was not payable on demand, and that later it revoked and declared void the order of distribution, and that the complainant is not entitled to demand or recover the eighty-nine shares. The defendant further avers that the transaction relating to the declaration of the dividend was as follows: Some time in June and July, 1890, a sale of the property, plant, and good will of the corporation was negotiated by its officers and determined upon. Pursuant to its terms, the shareholders were to transfer their shares to the purchaser, and, in order that the entire 5,000 shares might pass, the resolution of 16th July, 1890, was adopted. The resolution was passed for no other purpose, and its operation depended upon a consummation of the sale. The negotiation to this end failed, and on 16th March, 1891, the board of directors passed the resolution rescinding and making void that of 16th July, 1890, so that the 277 shares remained unissued in the treasury. That on or about 16th January, 1893, the complainant sold, bargained, and assigned her 1,500 shares, and on or about 4th April, 1893, she assigned and surrendered to her son Herman Dock, all her interest in and to the proportion of the 277 shares now claimed by her. That Herman Dock was a member of the board and present at its meeting 16th July, 1890, and 16th March, 1891, and was a party to the resolutions of those dates. That no dividends have been appropriated to the 277 shares which have not been transferred on the books of the company, and have remained in its treasury, and that the profits of the company have been divided independently of them. To the truth of the answer is the affidavit of the president of the company.

"The facts apparent from the testimony are the following. They are all of those material and legally relevant:

"(1) The defendant, pursuant to the act of assembly approved April 29, 1874, was created a corporation of the second class, under the said Act April 29, 1874, for the purpose of manufacturing, buying, and selling of jute, flax, manilla, and sisal hemp and other goods pertaining to these fibers. Its capital stock at the time of incorporation consisted of 5,000 shares, of the par value of $100 each. Susan V. Dock having become indebted to it for moneys loaned her in the sum of $22,941.67, and being the owner of 277 of its shares, she transferred on 4th March, 1889, these shares to the company, which accepted them in payment of the said indebtedness.

"(2) The company defendant by its board of directors, on the 16th July, 1890, passed a resolution in the following words: 'Whereas, there is now in the treasury of the company 277 shares of its capital stock, representing undivided profits invested in said security; and whereas, it is deemed advisable to divide said stock as a dividend among the stockholders: Therefore be it resolved, that the following distribution of said 277 shares of stock as a dividend be made: Isaac Schlichter, 166 shares; Susan V. Dock, 89 shares; Herman Dock, 17 shares; I. C. Vincent, 2 shares; Edmund Dawes, 3 shares.'

"(3) In June and July of 1890, on behalf of the owners of the capital stock, some of the officers of the company sought to bring about a sale of its entire property, plant, and stock, and to that end, on the 17th of July, 1890, a paper writing was signed by all of the shareholders (excepting Edmund Dawes), by which Joseph E. Hillam was made their agent to sell for the sum of $700,000 (to be paid as is therein set forth). He

Digitized by Google

was, however, restricted from selling the shares of any one unless those of all were sold at the same time. The power of sale thus conferred was to last for six months, and upon the expiration of that time the powers were to end. The sale thus intended was not effected, and on 16th of April, 1891, a somewhat similar paper, reciting that all of the stockholders (naming them) were parties to it, but signed as follows: 'The Schlichter Jute Cordage Co., Isaac Schlichter, Pres.,'—set forth that Leedom Binns was made their attorney to sell the property, plant, and stock of the company for $625,000 (to be paid in the manner therein described). It also provided that the attorney was not to sell the shares of any one unless the whole of the stock was sold at one and the same time, and the authority was to endure for three months from its date. In both paper writings the names of the shareholders and the number of shares held by each was set forth, as follows:

Isaac Schlichter	2,972	shares.
Susan V. Dock	1,589	"
Herman Dock	317	"
Isaac C. Vincent	52	"
Edmund Dawes	58	"
William H. Heisler	10	"
Thomas C. Barr	2	"
	5,000	"

"The intending purchasers or the English banker acting for them required certain examination into the business of the company to be made at his expense, if the statement made to him as to profits, etc., were found to be correct, and at the expense of Mr. Schlichter, if found to be otherwise, the estimated cost of which examination was required to be deposited by Mr. Schlichter. This was not done, and no effort thereafter was made to sell.

"(4) The company defendant, by its board of directors, on 16th March, 1891, passed a resolution in the following words: 'Philadelphia, March 16, 1891. Meeting of board of directors. Present, Isaac Schlichter, president, in the chair, William H. Heisler, and Herman Dock. On motion of William H. Heisler, duly seconded, the action of the board at the special meeting held July 16, 1890, was rescinded and declared void.'

"(5) Between July, 1890, and March, 1891, none of the 277 shares were transferred to any of the shareholders, and no dividends were declared upon them since 4th March, 1889. One of the purposes of the resolution of 16th July, 1890, was so to distribute the 277 shares to shareholders that they, the owners of 4,723 shares, would then be entitled to transfer the entire 5,000 shares into which the capital stock was divided, should a purchaser be found for the plant and shares. The president of the company testified that the 277 shares were considered treasury stock. The secretary of the company testified that they were part of the assets of the company, and not treasury stock, and that they had been bought by the company (as he understood) out of its surplus fund. In January, 1893, Susan V. Dock sold and transferred to Isaac Schlichter her 1,500 shares of stock, and on 3d April, 1893, she transferred her interest in the eighty-seven shares, her alleged stock dividend, to Herman Dock, who, on 1st of September, 1893, retransferred them to Susan V. Dock. On 20th September, 1893, Susan V. Dock made a demand upon the defendant company for a certificate for eighty-seven shares of stock, mentioned in the resolution of 16th July, 1890. It was by the company refused.

"On behalf of the complainant, the master has been requested further to report that Isaac Schlichter's testimony, to the effect that he had no recollection of directing Schroeder to sign, and, in fact, did not direct him to sign, the name of Edmund Dawes to the paper, constituting Jos. G. Hillam attorney of all the stockholders, to effect a sale, as before stated, was distinctly and directly contradicted by the testimony of Herman Dock, who cautioned Isaac Schlichter against causing the name of Dawes to be so written, which was corroborated by the testimony of Dawes that he did not sign the paper; neither knew of the intended sale. In accordance therewith it is reported that the testimony was as has been requested."

"Conclusions from the pleading and evidence. Whether or not the complainant is entitled to the decree prayed depends upon the legal solution of two matters: First. Were the 277 shares, which became the subject of the resolution of 16th July, 1890, obtained by the company through the loan or purchasing power of its profits, or were they otherwise obtained? Second. Was it or was it not in the power of the board of directors to annul the resolution of 16th July, 1890, by that of 16th March, 1891?

"1. In resolving these questions the master has had the aid of the research of opposing counsel, and of the closely-reasoned argument of each in support of his position. The bill is rested upon the right alleged to have been conferred by the resolution of 16th July, 1890. It invited from the defendant its answer in this behalf. The answer avers that these shares did not represent undivided profits; that the directors had no power to declare a stock dividend, and that they only intended to distribute the stock if the contemplated sale of all of it should be effected; that such sale was not made; and that accordingly the directors, by resolution of 16th March, 1891, rescinded that declaring the stock dividend.

"The matter averred relates to, and, indeed, is a part of, that alleged in the bill. It was the right and the duty as well of the defendant to set it up; and hence on this ground, as well as with respect to the test of what would have formed ground for exception, the answer is responsive (Eaton's

Digitized by Google

Appeal, 66 Pa. St. 483, and Burke's Appeal, 99 Pa. St. 350); and therefore its statements prevail, unless overcome by the testimony of two witnesses, or one with corroborating circumstances the equivalent of another, or unless the testimony of the defendant impeaches or otherwise qualifies its answer. Koons v. Bute, 2 Phila. 170; Spencer's Appeal, 80 Pa. St. 317, 331.

"The affidavit to the answer of the defendant company is that of its president, and its allegations are those made presumably from his knowledge. He was examined on behalf of the defendant, and testified, in substance, that the resolution of 16th July, 1890, was passed, and the 277 shares allotted to the shareholders, in order that they might transfer the entire 5,000 shares if Hillam found a purchaser, and this course had been advised by the secretary of the company. The witness was asked to state the circumstances connected with the resolution, and, in addition to the testimony just referred to, he set forth the way in which the company had acquired the 277 shares; but nowhere did he aver, as the answer had done, that they did not represent undivided profits. On the contrary, it might not unfairly be inferred, from his testimony, that the company had made, from time to time, loans of its moneys, the result of its business, to Susan V. Dock; and it was to discharge the indebtedness which thus arose that she transferred to the company the 277 shares. That the moneys for such loans were procured from its business, and were from its earnings, seems manifest from the testimony of Thomas C. Barr, the secretary of the company, and a member of the Philadelphia bar, also called on behalf of the defendant. He distinctly stated that the shares in question were "part of assets of the company," and not "treasury stock"; that he understood they had been bought from the surplus fund of the company; and that he considered himself entitled as a shareholder to his proportion of these shares. It is therefore concluded, from the testimony of both the secretary and of the president of the defendant company, that its answer in respect to the assertion that the 277 shares did not represent undivided profits is so qualified that it loses its potency as a responsive pleading, and the resolution of 16th July, 1890, averring that the shares represent undivided profits, stands uncontradicted; and it is concluded the company obtained these shares in discharge of a debt to it which arose from its loan of earnings to Susan V. Dock. It was urged that the loan of money in this way was ultra vires. This was not shown. The charter did not prohibit it; and, as a business corporation, the power of loaning, though less frequently exercised, may be as needful in the prosecution of its undertaking as that of borrowing. A corporation has the right to acquire stock of its own, where the transaction is not prohibited by statute, —is bona fide et sine malo ingenio. Bank v. Fox, 3 Blatchf. 431, Fed. Cas. No. 2,683; Bank v. Bruce, 17 N. Y. 507; Coleman v. Oil Co., 51 Pa. St. 74; and Clapp v. Peterson, 104 Ill. 26. No statute prohibitory of such dealing is known in Pennsylvania, and no right of creditors or of others than the shareholders has appeared in this case, and as to the latter nothing contrary to good faith.

"It was argued that the purpose and sole purpose of the resolution was that given by the president. That this was a purpose is admitted, but it was not inconsistent with the further purpose, indicated in the preamble to the resolution. Doubtless the intention that the shareholders should transfer all the shares in the event of a sale was the occasion of the resolution, but it was not necessarily its cause. This, judging from the resolution, was that which generally prompts the declaration of a dividend.

"(3) Was or was it not in the power of the board of directors, by the resolution of 16th March, 1891, to rescind that of 16th July, 1890? is the next question for decision. It is to be observed that a dividend of stock is ordinarily made from an increase of the capital authorized by the legislature or by the charter of the company; that the declaration of such is not within the powers of a board of directors, and, to be legally effected, must be by the direct action or subsequent sanction of the shareholders themselves; and in dividends of stock required in this manner, if ill advisedly made by the directors or properly by the shareholders, it is in the power of either to revoke their action, if certificates have not actually issued as required by statute. Terry v. Lock Co., 47 Conn. 141–164. In the case under consideration the dividend was of an entirely different kind. It was of earnings which had the form of stock of the company, just as it might have by investment taken the form of government securities or of real property, and it is to be dealt with accordingly. It was argued for the plaintiff that her right was a vested one, and that after it became so the power of the board over it was at an end; and for the defendant that the loan of money to Susan V. Dock was invalid, and no necessity had been shown which would justify the company's acceptance of stock in discharge of her debt to it, and therefore that it was the duty of the board to undo by its last resolution the irregularity it had committed by its first.

"There are cases readily imaginable where, after a declaration of a dividend, a shareholder would acquire a vested right, within the meaning of the plaintiff's contention, as, for example, those in which, with respect to the shareholder, the company has made an express appropriation of so much of its earnings, or of so many of its shares, and thus separated them from the general property of the company in such manner that

Digitized by Google

they may be said to be clothed with a trust obligation. To illustrate, there would be such a right if the company deposited the moneys to pay the dividends with a banker, and drew its check to the order of each entitled on the fund so deposited, or, in the case of a stock dividend, if the company executed its power of attorney to transfer, and these awaited delivery. But no such or similar step was taken in this case, and it is concluded the plaintiff did not have the vested right claimed. It is believed that, when there has been no such appropriation as that above mentioned, a company, by its board of directors, in a proper case and for cause, may rescind a resolution declaring a dividend; as where owing to destruction of plant by fire immediately following such resolution. If, in the business and honest judgment of the board, the earnings intended to be distributed should be recalled and used for the restoration of the destroyed property, it would be within their power so to deal with them. But, unless some similar thing appear, the declaration of a dividend of earnings is the announcement of an obligation due each shareholder for which proceeding may be had as legal methods indicate, and the burden of manifesting that the debt or obligation is not due after such a declaration is upon the company. Le Roy v. Insurance Co., 2 Edw. Ch. 657–671.

"In the present matter the resolution of 16th July, 1890, was the declaration of an obligation, and no evidence other than the resolution of 16th March, 1891, has been produced in this behalf. But no ground there appears in justification of its purpose. It announced no reason whatever, and not any has appeared. The alleged invalidity of the loans to Susan V. Dock is a matter of evidence. They may or may not have been illegal; in the absence of proof they will not be presumed to have been so. It is true no necessity was shown for receiving the 277 shares in discharge of the indebtedness due the company, but, as it is in the usual course of affairs to accept the best form of property possible in payment of a debt, a fair presumption exists that these shares were of this character, and, if they were, no other necessity is requisite. It would have been eminently fitting for the board to undo by a later resolution an earlier one of irregularity, and the failure of the company to declare any dividend upon the 277 shares is some indication that it was inactive and treasury stock. But this is thought to be overcome by the testimony of the secretary of the company before referred to; and, apart from this indication, there is recalled nothing that manifested an irregularity. On the 16th March, 1891, the directors adopted the rescinding resolution. From this date to that of 3d April, 1893, when Susan V. Dock assigned her shares to her son, no demand was made of a certificate for the eighty-nine shares, the subject of her bill. The delay was a long one, and in a court of equity such a delay, unexplained, generally deters its action. Some excuse may have existed, inasmuch as the defendant made no objection upon this head. The master deems it expedient to do no more than to refer to it; and in like manner no more is done than to allude to the question of jurisdiction, since that was neither raised nor argued. For it may be that the eighty-nine shares are known by each party to be of an uncertain or contingent value, admitting of no just compensation in money; and that the parties deem the resolution of 16th July, 1890, so wanting in definiteness as to time that its obligation could not be enforced at law. From the consideration heretofore given the question, it is finally concluded that the second prayer of the bill should be granted, and that, although no purpose in the defendant has appeared to transfer to any other than the plaintiff, the denial of her right seems to warrant its possibility, and justifies the grant of the first prayer of the bill. With respect to the third prayer, no evidence has been offered, and it is refused. There has been nothing to authorize a departure from the general rule awarding costs in favor of that party who has secured a substantial decree, and accordingly it is recommended that the defendant pay the taxable costs of the case. A decree embodying the conclusions of the master is drafted, and herewith submitted to the court."

Alfred D. Wiler and Wm. W. Wiltbank, for appellant. F. Carroll Brewster, for appellee.

PER CURIAM. The controlling questions in this case have been fully considered, and so satisfactorily disposed of by the learned master that we find it unnecessary to specially notice either of the assignments of error. There is nothing in any of them that requires a reversal or modification of the decree. It is affirmed on the clear, concise, and convincing report of the master. Decree affirmed, and appeal dismissed, with costs to be paid by the appellant.

PENNSYLVANIA STATE AGRICULTURAL SOC., to Use of WILHELM, v. JERMYN.

(Supreme Court of Pennsylvania. April 8, 1895.)

ACCOUNT STATED — MONEY HAD AND RECEIVED — SUFFICIENCY OF AFFIDAVIT OF DEFENSE.

A complaint alleged that plaintiff and another agricultural company agreed to hold a joint fair, the proceeds to be held by defendant, the treasurer of the other company, for both parties, and the net profits to belong one-half to each company; that the proceeds were received by defendant; and that, after an account was stated with defendant as to the amount in his hands belonging to plaintiff, defendant received other moneys from the fair to plaintiff's use;

Digitized by Google

but that defendant refused to pay anything to plaintiff. The affidavit of defense alleged that defendant had a complete defense to plaintiff's claim, and that defendant's term of office had expired, and another person was elected in his place, to whom he transferred all moneys in his hands as treasurer; that defendant was not a party to any agreement between plaintiff and the other company, and knew of no contract between them, and had received no money for plaintiff; that, by reason of misrepresentations by plaintiff to the other company, such company had a good defense to any claim made by plaintiff to the proceeds of the fair; and that no settlement was ever made between the companies as to the proceeds of the fair. *Held*, that the affidavit was sufficient.

Appeal from court of common pleas, Lackawanna county.

Action by the Pennsylvania State Agricultural Society, to use of J. Schall Wilhelm, against Edmund B. Jermyn, on an account stated. Judgment was rendered for defendant, and plaintiff appeals.

The pleadings are as follows:

"The claim or demand of the plaintiff in the above-stated case is as follows, to wit: The plaintiff, a corporation of the commonwealth of Pennsylvania, and the Lackawanna County Agricultural Society, likewise a corporation of Pennsylvania, entered into an agreement in writing to hold a joint fair and agricultural exhibition in the city of Scranton in the month of September, 1892. This agreement was dated the 11th day of July, A. D. 1892, and a copy of the same is on file among the records of this suit, to which reference is hereby made for the full particulars thereof. According to the provisions of said agreement, the proceeds of said agricultural exhibition and fair were to be received and held by the treasurer of the Lackawanna County Society, as the representative of both parties thereto; and at the conclusion of the fair the net proceeds thereof, after deducting and paying the expenses thereof, which were specifically provided for by said agreement, were to belong one-half to each of the parties thereto, to wit, the Pennsylvania State Agricultural Society, the plaintiff, and the Lackawanna County Agricultural Society. In accordance with said agreement, the plaintiff and the said Lackawanna County Agricultural Society held said joint fair and agricultural exhibition in the city of Scranton in the county of Lackawanna upon sundry days during the month of September, A. D. 1892, which was called and known as the 'Pennsylvania State and Lackawanna County Agricultural Fair,' and the proceeds thereof were received by the defendant, then the treasurer of the Lackawanna County Agricultural Society, acting in this behalf for both parties thereto, as above recited. At the close of said fair and agricultural exhibition, an account of the moneys received and paid out for the same was stated by the parties, a copy of which is hereunto attached, by which it was determined that there was then accrued in the hands of said defendant, as the custodian of the funds of the fair for both parties thereto, all expenses being paid, the sum of three thousand four hundred and twenty-seven dollars and seventy-seven cents, one-half of which belonged to the plaintiff, and the other half to the Lackawanna County Agricultural Society. Said defendant, as the receiver and custodian of the funds of said joint fair and agricultural exhibition, acted for and on behalf of both the parties thereto, to wit, the plaintiff and the Lackawanna County Agricultural Society, as aforesaid; and said funds were received by him to the sole use of these parties, one-half to each, according to the terms of said agreement. The plaintiff therefore complains and says that the defendant hath received and hath in his custody and possession the sum of $1,713.98, being one-half the accrued proceeds of said joint fair and agricultural exhibition, the sole property of the plaintiff which he hath received to his use; that, although often requested, he hath refused, and still doth refuse, to pay the same to the plaintiff.

"The plaintiff further complains, and says that, subsequent to the making of the statement of account above recited, the defendant, as the receiver and custodian of the funds of the joint fair and agricultural exhibition, as above set forth, received divers other large sums of money, to wit, the sum of one thousand dollars, the further accrued proceeds of said joint fair and agricultural exhibition, which was received by him likewise to the use of the plaintiff and the Lackawanna County Agricultural Society, as above set forth, one-half of which he received to the sole use of the plaintiff; and the plaintiff saith that, although often requested so to do, the defendant hath refused, and still doth refuse, to pay the same to the plaintiff, or either of said sums of money, both of which he unlawfully withholds from the plaintiff, to the damage of the plaintiff in the sum of five thousand dollars, wherefore he brings this suit."

"E. B. Jermyn, being duly sworn according to law, saith that he is defendant in above-stated case; that he has a just, full, and complete defense to the whole of plaintiff's claim, the nature and character of which is as follows: First. He is advised by counsel, verily believes, and so suggests, that the complainants have not stated such a case as demands an affidavit of defense. In said statement filed, it is stated: 'At the close of said fair and agricultural exhibition, an account of the moneys received and paid out for the same was stated by the parties [to wit, the Pennsylvania State Agricultural Society and the Lackawanna County Agricultural Society], a copy of which is hereunto attached, by which it was determined,' etc. That the copy of the paper attached and alleged to be a settlement is a mass of names and figures, partly in ink and partly in lead pencil, with neither debit or credit, with computations on face of said paper, in lead pencil, and is meaningless. That the only places where the two societies are referred to on said statement are as fol-

Digitized by Google

lows: Order No. 318, State Society, $1,713.98; order No. 319, County Society, $1,713.89,—which shows an unequal distribution, and not an equal distribution; and that the same order, No. 318,—State Society, $1,713.98,—is not the one-half of $3,427.77, which is stated by the declaration or statement was the net proceeds of said fair, but in excess of the one-half. Second. He is further advised by counsel, verily believes, and so suggests, that plaintiff, by his statement, shows that it is alleged that he has in his hands, and received subsequently to the time of the alleged settlement, additional sums, which it is not alleged were ever divided by the parties, to wit, the Pennsylvania State Agricultural Society and the Lackawanna County Agricultural Society; thus averring that there never has been a division of the funds alleged to be in his hands. Answering further, he says: Third. I was during the year 1892 the treasurer of the Lackawanna County Agricultural Society. My term of office extended from the 1st day of April, 1892, until the 31st day of March, 1893, when I was succeeded by William Robinson, and to whom I transferred all the moneys of the society, and all moneys received by me as treasurer of the society. Fourth. I was treasurer of the Lackawanna County Agricultural Society during all the time covered by the plaintiff's statement. I received during this time, from all sources, $15,278.12, and paid out up to the close of my term of office, on vouchers of the Lackawanna County Agricultural Society, $15,105.24, and turned over to my successor, at the expiration of my office, $172.80. A detailed statement of the various items of receipt, showing source of receipt, and also of disbursement, is hereto appended, and made part hereof. I received no other moneys during the time specified, as treasurer or through my office of treasurer of the Lackawanna Agricultural Society, than set forth in said statement. Fifth. I am not a party to the agreement entered into between the Lackawanna County Agricultural Society and the Pennsylvania State Agricultural Society, the basis of the suit in this case, and, to the best of my recollection, never saw the contract or any copy thereof until after suit brought. I know in a general way that a contract was in existence between the two societies, but was not advised of its details. Neither was I advised nor did I consent to take upon myself new or additional duties. And I further suggest, as matter of law, that a proper construction of said contract does not call upon me to act in any other manner than I had theretofore acted as treasurer of the Lackawanna Society. During the time covered by complainant's statement I acted as treasurer of the Lackawanna Society in the same manner as I had theretofore acted, received moneys that the said Lackawanna Society should receive, and paid the same out on orders signed by its president and secretary. Sixth. I am advised by counsel, verily believe, and so suggest, that, under no construction of the contract, am I empowered to settle an account between the two contracting parties, to wit, the Lackawanna Society and the State Society, and I know of no settlement of accounts between the two said societies. At one time I was presented with an order importing to be drawn by the secretary of the Lackawanna Society, in favor of the Pennsylvania State Society, for a sum in the neighborhood of seventeen hundred dollars, which I refused to accept, for two reasons: First, the order was only signed by the secretary of the Lackawanna Society, and not by the secretary and president; and, second, because, at the time of the presentation, I did not have the amount called for by said order in my hands. The rules of the Lackawanna Society authorized me to pay out the funds of the society only on the joint order of the president and secretary of said society. I am unable to give the exact amount or date of the order, as the same was retained by the Pennsylvania Society, and is, I presume, still in their possession. Seventh. I am advised by the officers of the Lackawanna Society that they have a defense to the plaintiff's claim, the character and nature of which is as follows: That, as an inducement to the making of the agreement, the basis of complainant's action, the Pennsylvania Society undertook not to hold any other fair in the state of Pennsylvania during the year 1892, and further undertook to exhibit certain articles of machinery at said fair, or that they would cause them to be exhibited; but that, in violation of this agreement, they advertised to be held other fairs in the state of Pennsylvania during the year 1892, and such advertisements were out during the time of the fair at Scranton,—to hold another fair at Allentown. This advertisement detracted from the attendance and interest of the fair at Scranton. Neither did the said State Society cause the machinery to be exhibited at Scranton. I cannot give the details of said agreement, because I was not a party thereto, but I have been so advised, and verily believe the information to be true. Eighth. There has no action or suit at law been brought by the State Society against the Agricultural Society to determine the amount, if any, due the State Society, under whom the plaintiff in this action claims, from the Lackawanna Society; and I am not advised or have any knowledge of any settlement between the two societies other than that herein stated. Ninth. I did not receive any funds as the joint treasurer of the two societies, nor does the agreement, the basis of the action in this case, provide that they should be so secured and held, but, on the contrary, provides that the receipts should be held by the Lackawanna Society, by its treasurer, and that, after the due adjustment of accounts, the Lackawanna Society should pay over the amount to the said State Society, and the funds received by me were received and held as treasurer of the Lackawanna Society."

Digitized by Google

F. L. Hitchcock, Thos. F. Wells, and C. H. Bergner, for appellant. J. Alton Davis, for appellee.

PER CURIAM. The only question in this case is whether the affidavit of defense is sufficient to carry the case to the jury. The court below held that it was, and in that, we think, there was no error. There is nothing in the case that requires further comment. Appeal dismissed, at plaintiff's costs, but without prejudice, etc.

BERKS COUNTY v. READING CITY PASS. RY. CO. et al.

(Supreme Court of Pennsylvania. April 8, 1895.)

STREET RAILWAYS—CONSTRUCTION ON COUNTY BRIDGE—PERMISSION.

The proper local and municipal authorities, within whose jurisdiction is a county bridge forming part of a highway, having given their consent to its occupancy by a street railway, the county commissioners cannot arbitrarily refuse the use thereof, but, if it is insufficient to support the increased use, they should say so, and determine what should be done to strengthen it.

On motion to modify decree. For former opinion, see 31 Atl. 474.

WILLIAMS, J. We were at first inclined to refuse this application, and to look upon the ill-considered reply of the county commissioners to the letter of the defendants, asking them to determine what ought to be done in order to render the county bridge in question sufficiently strong to justify its use by their tracks, as the hasty expressing of a litigant, that the sober second thought would qualify in a proper manner. The answer now filed in this court shows that our confidence was not well founded, and leads us all to conclude that some modification of our decree should now be made. This bridge, as we said in the opinion disposing of the appeal in this case, is a part of the highway for purposes of passage. The county owns it, not as a house or a farm is ordinarily held, for the benefit of the owner, but for the convenience and comfort of the traveling public. Because of the cost of its original construction, and of its maintenance, the burden of such construction and maintenance is lifted from the local subdivision of the county in which it is situated, and placed on the county at large. The county thus becomes liable for its proper construction and its safety as a part of the highway. In consequence of the duty so cast upon the county, it is clothed with the powers necessary to enable it to regulate the public use of the bridge so far as its own protection and the safety of those using it may require. The county cannot close it against the public, as an owner might shut up his house. It is bound to keep it open and in good repair. The proper local and municipal authorities within whose jurisdiction this part of the highway is located have given their consent to its occupancy by the defendant's railway, as we understand the facts. The question, then, arises, can the county, which is a trustee for the public, and not an owner in its own right, arbitrarily refuse the use of the bridge for purposes which the proper local authorities have regularly authorized? There can be but one answer to this question. The control of the county relates to the structure, not to the highway. If the structure is insufficient to support the increased and lawfully authorized use of the highway of which it is a part, it is the duty of the county commissioners to say so, and to determine what ought to be done to strengthen and prepare the structure to meet the demands that will be made upon it. They may also, within any reasonable limits, regulate the manner of its use, and provide for its repair and a proper compensation by way of rental. Beyond this their power of control cannot be exercised to defeat the purposes of the local authorities who control the highway. The line that divides the respective provinces of the county and the municipality, so far as this subject is concerned, is easy to trace and hard to mistake. We shall amend our decree by adding the following paragraph to the end thereof:

And now, 8th April, 1895, it is further ordered, adjudged, and decreed that the record be remitted to the court below, with direction to appoint, on the petition of the defendants, a competent engineer to examine the bridge described in the bill, and report in writing to the said court its general condition, and the extent of the repairs or supports that may be necessary to prepare it to support safely the defendants' street railway and its traffic in addition to the ordinary public travel. After the report of the engineer has been made, the defendants may apply to the court for the dissolution of the injunction, so far as to permit them to enter upon the bridge with their employés, and, under the general supervision of the county commissioners, make the changes and repairs found by the court on the report of the engineer to be necessary. When these are completed, and that fact is made to appear to the satisfaction of the court below, the injunction heretofore directed will be dissolved, upon the giving by the defendants of a bond in the sum of $5,000, with surety to be approved by the court, conditioned that the defendants will faithfully observe and abide by the terms and conditions relating to the manner of the use of said bridge by them, the repairs thereof, and the payment of rent therefor, which may have been or may thereafter be agreed upon by the parties, or, in the absence of an agreement, may be determined upon by the court. The costs of this motion to be paid by the county of Berks.

Digitized by Google

GRIFFIN et al. v. MULLEY et al.

(Supreme Court of Pennsylvania. April 8, 1895.)

ADVERSE POSSESSION—DEFINITION—EXPLANATION TO JURY.

There is no error in affirming the point: "To constitute a possession such as will bar the title of her legal owner, four elements must coexist: It must be (1) hostile or adverse; (2) actual; (3) visible, notorious, exclusive; and (4) continuous,"—with the simple statement by the court to the jury that it has already told them that is the law, without further explanation, where the court has already, in its charge, explained the terms "notorious," "continuous," "exclusive," and "hostile."

Appeal from court of common pleas, Lackawanna county.

Ejectment by Sarah Griffin and others against Ambrose Mulley and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Defendants' first four assignments of error were to the admission and exclusion of evidence; the fourteenth was that the charge, as a whole, was misleading and inadequate; and the remaining assignments were to parts of the charge, as hereinafter shown inclosed in brackets. The charge was as follows:

"This is an action of ejectment brought by the heirs of Aaron Griffin, deceased, against the widow and heirs of Nathaniel Fitch, deceased, and certain other parties, to recover possession of a lot of ground in the city of Scranton. Both parties claim title to this lot of ground through one Edmund Griffin, who was at one time the undisputed owner of the premises, and the plaintiffs trace their title in the following way: Edmund Griffin made a deed to his mother, Elizabeth Griffin. While the property was in the possession of Elizabeth Griffin, it was sold away from her by the sheriff, and was purchased by Thomas Woodbridge, who received a deed for the same. Thomas Woodbridge assigned his deed to David Wigton. David Wigton, in turn, was sold out by the sheriff, and at that sale Aaron Griffin became the purchaser. Aaron Griffin died in 1883, leaving the present plaintiffs as his heirs. This chain of title is complete, and, if there were nothing else in the case except this, it would be your duty, without leaving the box, to return a verdict in favor of the plaintiffs for the property described in the writ. Against this showing, however, on the part of the plaintiffs, the defendants set up a title by what is known to the lawyers as 'adverse possession.' Adverse possession, continued for a period of 21 years, divests the title of the owner of the property against whom the possession has been taken. Therefore, no matter how straight, no matter how strong, the title of the present plaintiffs, if the defendants, in opposition to that title, have established a title by adverse possession, the title of the plaintiffs must yield to the title by adverse possession. I will illustrate it in its simplest form: Suppose that Edmund Griffin, through whom both parties claim title, instead of parting with his title to the land in controversy, had continued to hold it to the present day, and suppose Nathaniel Benjamin had, more than 21 years prior to the bringing of this action, entered into possession of the land, and that he had continued that possession uninterruptedly, in an open, notorious, and hostile manner, to the exclusion of Edmund Griffin, for a period of 21 years prior to the bringing of this action. Such possession would have divested the title of Edmund Griffin. The same result would follow if the possession begun by Benjamin had been continued in the same manner by his successors in the title. [The requirement that the possession which will divest the title should be open and notorious is for the purpose of giving the holder of the title notice of his danger. It is also necessary that the possession should be continuous, uninterrupted. If the possession, at any time during the running of the twenty-one years, was abandoned for a single day, or a singe hour, if it was abandoned, that would break the continuous possession, and would prevent a recovery under a claim of title by adverse possession. The possession must also be exclusive of the owner of the title to the property. If the party in possession has a concurrent possession with the owner, he could not acquire title to the property by reason of an adverse possession. The possession must also be what is called, in the law, 'hostile possession.' By 'hostile possession' is not what, probably, a layman might consider it to be,—that the person entering into possession should enter armed cap-a-pie, or that he should defend the continuity of his possession by planting artillery all along his lines. That is not the kind of hostility that the law contemplates. Entering and exercising acts of dominion thereunder is hostile. Leasing, conveying, improving, are the highest acts of ownership, and the exercising of these acts strongly characterizes the possession with exclusiveness and hostility.]

"I have thus briefly gone over the elements that go to constitute adverse possession, such as is necessary to divest title to real estate. I have already said to you that the possession must be continued uninterruptedly for a period of twenty-one years prior to the bringing of the suit. This action was brought on the 21st of March, I believe, of 1890. In order to recover under a claim of title by adverse possession, the defendants must satisfy you by the weight of the evidence, because the burden is upon the defendants to show that their title is good. They must satisfy you by the weight of the evidence that at least as early as the 21st of March, 1869, their alleged adverse possession began. They claim that it did begin as early as the 21st of March, 1869, and prior to that. Their claim is that there was a house on this property that was burned down either in April or May, 1868. There doesn't seem to be any serious dispute about

Digitized by Google

that date, or that the house was burned down at that time. Now, the defendants claim that, shortly after the burning down of this house, Mr. Benjamin, who had become the purchaser of the property under a sheriff's deed, I believe, and under an execution against Edmund Griffin,—they claim that Benjamin entered into possession of this property shortly after the burning down of this house, in 1868,—April or May. [There are no witnesses who testified as to the date, or the exact date, on which Benjamin entered into possession of the premises, if you find that he did enter into possession of the premises. I think the most that the witnesses say is that it was shortly after the fire. What that means, it will be for you to determine; and you must determine from the evidence when it was that Benjamin entered into possession, if you can do so. If you cannot do so, why then that is the misfortune of the defendants, because the burden, as I have already said, is upon them to show that the possession was begun prior to the 21st of March, 1869. Now, that fact and all the other facts are for your consideration; and it is for you to determine from the evidence when it was that Benjamin entered into possession, if he entered into possession at all, and, if he did enter into possession, whether that possession was continued by him and by his successors in title for twenty-one years, down to the time of the bringing of this action of ejectment. If you find these facts in favor of the defendants, then the defendants would be entitled to your verdict.] [If, however, the defendants have failed to satisfy you by the weight of the evidence when it was that Benjamin entered into possession, so that you are unable to say from the evidence whether it was before or after the 21st of March, 1869, then the defendants could not claim a verdict at your hands.

"By Mr. Price: There are a number of witnesses that testified that it was the same season of the fire, and, several of them, within a month or three months. By the Court: That may be. I do not pretend to remember the evidence. By Mr. Ammerman: Some said the next season. By the Court: That will be for the jury. You have heard the testimony, and you will remember how it is.]

"What more I have to say to you in reference to the law, I have to say in answer to a number of points that have been submitted by counsel upon both sides.

"The plaintiffs have submitted the following points: (1) That if the title of E. N. Willard to Harold Leach, assignee of A. Griffin, were the only defense offered by the defendants, the verdict must be for the plaintiffs. Answer of the Court: That point I affirm. (2) That if the title of Edmund Griffin, by the sheriff, to N. W. Benjamin, and the title of N. W. Benjamin, through his assignee, W. W. Winton, to N. Fitch, were the only defense offered by the defendants, the verdict must be for the plaintiffs. Answer of the Court: I affirm that point. [(3) To constitute a possession such as will bar the title of the legal owner, four elements must coexist: It must be (1) hostile or adverse; (2) actual; (3) visible, notorious, exclusive; and (4) continuous. Answer of the Court: I have already said to you that is the law, and I affirm that point.] (4) The burden of proof is upon him who sets up an adverse possession as a defense in an action of ejectment. Answer of the Court: I affirm that point. (5) Adverse possession is not to be made out by inference, but by clear and positive proof. Answer of the Court: I affirm that point. (6) The interruption of an adverse possession, if it be for a single day, will interrupt the running of the statute of limitations. Answer of the Court: That is true, if the interruption was the result of an abandonment of the possession. (7) If the jury believe from the evidence that the use of the land described in the writ, by the defendants, for a portion of the 21 years, during the time which they claim to have held adversely, was merely for casting bottles, tin cans, boxes, and rubbish upon it, it cannot be regarded as an adverse possession of such lands for such time. Answer of the Court: I am not prepared to affirm that point. It does not make any difference what use is made of the land by a party who is trying to establish title by adverse possession, if the possession is open, notorious, exclusive, and hostile, and has the other elements that I have mentioned. It does not make any difference whether it was maintained in the way mentioned in this point, or in any other way, if it was such as to give the owner of the title notice that there was an adverse possession.

"The defendants have submitted a number of points: [(1) That, under all the evidence in this case, the verdict must be for the defendants. Answer of the Court: That point is refused.] [(2) That the oath and schedules contained in the record, In re Aaron Griffin, bankruptcy, in the district court of the United States for the Western district of Pennsylvania, is an estoppel, as against the plaintiffs' claim in this case, and the verdict of the jury must be for the defendants. Answer of the Court: I cannot affirm that point.] (3) A trust cannot be presumed executed, so as to let others take the estate who are entitled to it after the execution of the trust, until the expiration of twenty years, unless there is some evidence leading or tending to prove a settlement of the trust, or some evidence tending to prove that said parties are entitled to the property. Answer of the Court: That point is affirmed. (4) The policy of the law is to require a person who holds a claim against real property to pursue the claim within twenty-one years, and a claim against real estate, which has not been pursued within twenty-one years, is invalid, if the defendant has held adverse-

Digitized by Google

ly during that period. Answer of the Court: I affirm that point. (5) Adverse possession for twenty-one years is a good and valid defense to title proved by plaintiff. The statute of limitation fixes the period, and is an excellent safeguard to landed possessions, and highly beneficial to the community, and should be liberally construed. It is essential to the peace of society, and to be so construed as to secure certainty of title. Answer of the Court: I don't know that I can find any fault with the sentiment expressed in this point, although I think it is somewhat unusual to put it in the form of a point. I will affirm the point. (6) A person who has a deed of record for certain property, in which the boundaries are defined, and who occupies a portion of the land described in the deed, has possession, presumptively, in accordance with the boundaries set forth in the deed. Answer of the Court: I affirm that point. [(7) If the jury believe that N. W. Benjamin went upon the land in suit in 1868, or any time prior to the 20th of March, 1869, and exercised acts of ownership, such as repairing of fences, clearing up the lot, and using a portion of it as a garden; that he was followed in 1870, or about that time, in possession, by N. Fitch, who leased and exercised acts of ownership by gardening a portion of said land; and that such occupancy and use has been continued by persons entering under said N. Fitch, until the bringing of this suit,—the verdict of the jury must be for the defendants. Answer of the Court: That is true, if the possession of Benjamin and Fitch, and their successors, was of the character that I have described to you as adverse possession.] (8) Adverse possession may be proved by acts of ownership, such as building of buildings or any structures, leasing, gardening, and fencing; and if such acts of ownership, or any of them, are continued for a period of twenty-one years, the persons so occupying, or those following them with a conveyance of the possession or the title of the predecessors, —a valid conveyance of the possession or the title of the predecessors,—a valid conveyance is presumed to have been obtained for the land. Answer of the Court: That is true. If the party has obtained a good title by adverse possession, it is as good a title as it would be if he had valid conveyance for the property. [(9) There is no direct contradiction of the defendants' evidence relating to Benjamin's use and occupation of the property in dispute. Answer of the Court: I cannot affirm that point. Whether or not that testimony is contradicted is a question of fact, for you, and I submit it to you.] [(10) When Aaron Griffin purchased the land in dispute, he had notice of the claim of N. W. Benjamin to it. Answer of the Court: I cannot affirm that point, but submit the question to you, whether he had such notice.] (11) It was the duty of Aaron Griffin to put all his property on his schedules, and it is to be presumed that he did so. Now, I say to you, gentlemen, again, that the evidence is for you. The case is one of very considerable importance. It has been tried on both sides with a great deal of care, and it ought to receive your most serious and candid consideration. The points to which your attention should be directed will be, first, when was it that N. W. Benjamin first entered into possession of this property? If you find that that was after the 21st of March, 1869, then you need inquire no further, because then the defendants would not have made out a title by adverse possession. If, however, you find—and it is entirely for you to find, from the evidence—that Benjamin entered into possession before the 21st of March, 1869, then you will inquire, in the second place, whether he and his successors in title continued that possession, open and notoriously and adversely and continuously, for twenty-one years prior to the bringing of this action of ejectment. If they did, then the defendants would be entitled to your verdict.

"If you return a verdict in favor of the plaintiffs, your verdict will be in favor of the plaintiffs for the property described in the writ. If you find a verdict in favor of the defendants, you will simply say that you find a verdict in favor of the defendants, without more.

"In this case there were three summonses issued; that is, the defendants were brought into court on three different writs. I have instructed you with reference to one of these writs, which is dated March 21, 1890, and under that writ Mr. Mulley was the only person who was summoned to appear in court. Then, as far as his title is concerned, you would calculate twenty-one years back from March 21, 1890. Now, the summons under which Mr. Benjamin and the Fitch heirs were served is dated July 12, 1890, and you would count back from July 12, 1890,—twenty-one years,—so far as they are concerned. The summons under which Mr. Mulley, as executor, and Fenner and Chappel, who were also defendants in that case, were summoned, is dated 8th April, 1893; and in their cases you will count twenty-one years back from that date,—that is, from the 8th of April, 1893."

H. M. Hannah and S. B. Price, for appellants. Lemuel Ammerman, J. Alton Davis, and Jno. B. Collings, for appellees.

PER CURIAM. We are not convinced that either of the fourteen assignments of error should be sustained. The case depended on questions of fact which were properly submitted to the jury, and were by them determined in favor of the plaintiffs. There is nothing in either of the specifications of error that requires extended comment. Judgment affirmed.

Digitized by Google

MAY v. CARBONDALE TRACTION CO.

(Supreme Court of Pennsylvania. April 8, 1895.)

STREET-CAR COMPANY—CHANGING GRADE OF STREET—MEASURE OF DAMAGES.

In an action by an abutting landowner against a street-railway company for damages for changing the grade of a street in front of his land, the measure of damages is the difference in value of the premises before and after the change was made.

Appeal from court of common pleas, Lackawanna county.

Action by William May against the Carbondale Traction Company for damages sustained by changing the grade of a street. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

The following is the charge of the trial judge:

"The only question for you to dispose of is, what damage has the plaintiff sustained under the evidence? and as there is very little to say to you upon this case I will charge you now instead of waiting until after dinner. The evidence shows that the Carbondale Traction Company, the defendant in this case, some time in the summer of 1892, cut down the street in front of the plaintiff's property, in the city of Carbondale, some five or six feet. You yourselves have been upon the ground, and have seen what condition the property has been left in with regard to the street, and that will assist you, I hope, materially in disposing of the question of what damages, if any, the plaintiff has sustained. The evidence upon whether the plaintiff has experienced damage or not is undisputed. Even the single witness produced by the defendant, Mr. Rogers, says that there has been some damage, although he does not signify how much; but all the rest of the testimony is uniform that it has been a damage to the property to cut down the street in that way. Now, then, it is for you to say how much; what has the plaintiff experienced in damages to his property? As this is a permanent damage to the property, estimates have been received as to what the value of the property was before this was done, and what its value is now, as well as the damage that has been experienced from the change; that is, all the parties have been asked these various questions,—what was the value before this was changed, and what is the value after, and what they estimated to be the damage? If any benefit has accrued to the property especially from making this change, of course that has to be taken into consideration, and I might say to you generally, touching upon your experience in such matters, that the proper grading of a street, putting it even, smooth, regular grade, may benefit a property to some degree. If it benefits as much any property as the damage, then there is no damage at all, because the one meets and cancels the other; but where there is an excess of damage over the benefit, then the difference between the two would be what we might call the real—the actual—damage to the property, and that is what you are to arrive at from the evidence here. You are to allow to the plaintiff just what damage he has actually experienced. He himself says that he has been damaged $1,400. He says that his property was worth about $2,500 before this change was made, and it is now worth only from $1,000 to $1,100. Thomas Killian, another witness, says that the property before this change was worth $2,700, and he says it is not now worth more than $400. He would make the damage $2,300, according to those figures, but he really makes a very wide estimate, and says that the damage to the family and to all was worth $5,000. That is a wide statement, and really does much to overthrow the value of his testimony. He does not correspond with any of the other witnesses, and therefore you will take his testimony with due allowance. P. J. McDonough fixes the value at from $900 to $1,100. He does not give any estimate of what it was worth before or after, but simply gives that estimate of damage. Mr. James Pidgeon, the city assessor, whose testimony from his position and his knowledge of properties naturally would be considered by you as of considerable moment, says that the property before the change was made was worth $1,900, and afterwards $950, and that the damage to the property has been from $950 to $1,000. John Duffy says the value of the property was worth about $2,000 before the change, and that now he wouldn't give half as much as that; that would make the damage about $1,000, according to his estimate. James Bryden fixes it at $1,100, and Michael Boland $1,000. John Collins has given a little different testimony from the rest, based upon an estimate which he made for the plaintiff of what it would cost, as I recall his testimony, to cut down the property so that it would stand with relation to the present grade of the street just the way it stood before the grade was lowered, making all the changes necessary and consequent upon that, changing the foundation walls of the different improvements upon the property, making a stone retaining wall in front of it, and fixing stone steps, and this he figures out at $1,360; that is what his estimate of the damage to the property is, to put it in as good shape as it was before the change was made. Now, these are the various estimates given by the different witnesses on this side. It is for you, considering them all, and from whatever knowledge you have gained by your view of the property, to decide and determine by your verdict what will be a just compensation to the plaintiff for the damages he has experienced by this change in the grade of the street in front of his property. That is the question you are to dispose of, and it

Digitized by Google

is now submitted with these instructions into your hands. The defendant's counsel ask the court to instruct the jury that under all the evidence the verdict should be in favor of the defendant, which point is refused."

James E. Burr and S. B. Price, for appellant. Everett Warren and I. H. Burns, for appellee.

PER CURIAM. One of the provisions of the ordinance giving defendant company permission to construct its road on certain streets in the city of Carbondale, etc., is, in substance, that all damages done by grading in connection with the construction of the road should be paid by the company. The manifest purpose of this was to relieve the city from payment of such damages. In the contract between the city and the company, the latter agrees, among other things, "to perform and observe all the conditions, requirements, and provisions fully set forth in said ordinance," which was made part thereof. The testimony tended to show that in constructing its road the defendant company cut down Brooklyn street about six feet in front of plaintiff's property, and thereby damaged the same, etc. This action was brought to recover the damage thus sustained. The case depended largely on questions of fact, all of which were for the exclusive consideration of the jury; and to them they were fairly submitted by the learned trial judge, with instructions which appear to be appropriate and free from any substantial error. It is unnecessary to consider the specifications in detail. There is nothing in any of them that would justify a reversal of the judgment. Judgment affirmed.

EVERLY et al. v. HARRISON.

(Supreme Court of Pennsylvania. April 8, 1895.)

EXECUTION SALE—TITLE OF PURCHASER — FRAUD —RESULTING TRUST.

Plaintiffs' intestate having given defendant money enough to pay a judgment against her, with instructions to do so, and he having undertaken to do so, but, instead thereof, having permitted her land to be sold on execution, and having bid it in himself, and applied that money on the purchase price, his action was a fraud on her, and he took no title, though, because of the sale, he had to pay more than he received from her; and plaintiffs would not, before bringing ejectment, have to tender the excess paid by him.

Appeal from court of common pleas, Wayne county.

Ejectment by Anna Everly and others against John W. Harrison. Judgment for plaintiffs. Defendant appeals. Affirmed.

Plaintiffs claimed the land as the heirs of Caroline Paul. Defendant claimed under a deed executed to him by Caroline Paul September 23, 1891; also, under a purchase at execution sale, October 1, 1892, on a judgment of Jacob Everly against Caroline Paul, dated April, 1891. Plaintiffs claimed that Caroline Paul, at the time of executing said deed, was insane, and that at the time of the sale she directed defendant, and he promised, to go and pay off the judgment and stop the sale,—he then having money belonging to her sufficient for the purpose, which she had intrusted to him for safekeeping,—but that he permitted the sale to go on, and purchased the property in his own name, with her money.

The first and second assignments of error were as follows: "First. The court erred in admitting the following offer: 'Mr. Kimble: I now offer the record of the court of common pleas of Wayne county (No. 207, May term, 1893). In the Matter of the Lunacy of Caroline Paul, of Paupack Township, July 10, 1893. Julius Paul, Son of Caroline Paul, of Paupack Township. We propose to prove by this record that Caroline Paul, after the inquisition of July 10, 1893, was regularly confined, after being declared by such inquisition to be a lunatic, and the finding of the commission that she had been a lunatic for more than two years at the time the inquisition was taken, and at the time of the conveyance of this property to John W. Harrison was a lunatic, and setting forth what her property was. Mr. Smith: We object to that offer, that it is immaterial and irrelevant, on the ground that the lunacy is not dated back to the date of the judgment upon which the sheriff's sale was had, upon which the defendant purchased the property, and by which he holds title to it. (Objection overruled. Defendant excepts. Bill sealed for defendant.)' Second. Also, in refusing to allow the following motion: 'Mr. Smith. I move to strike this record out. We move that the whole record in the lunacy proceedings be stricken out, upon the ground that, as the record stands, it is still under a traverse, and decides nothing; that the appearance of an attorney for the alleged lunatic, withdrawing the traverse, is illegal and void, as the record stands, and nothing is decided by the record; that no fact is determined. The Court: That may be a question for consideration hereafter. The defendant has an exception to the admission of it. (Motion refused. Defendant excepts. Bill sealed for defendant.)' "

The third, fourth, and fifth assignments of error were to parts of the charge, as hereinafter shown, inclosed in brackets. The charge was as follows:

"The issue which you have been sworn to try is an action of ejectment brought by Anna Everly, in her own right, and R. M. Stocker, as guardian of Julius Paul and Augustus C. Paul and Emile Paul, vs. John W. Harrison, to recover possession of 71 acres and 120 perches of land in the township of Paupack, in this county, the title to which these parties claim is in them. The parties, at the beginning of the suit, admitted, for

Digitized by Google

the purpose of expediting matters, that the title to the land in controversy, which is described in the writ of ejectment, was in Caroline Paul prior to a conveyance made by her to the defendant, John W. Harrison, September 23, 1891, and that both parties—the plaintiff and the defendant—claim under Caroline Paul. They also admitted that Caroline Paul is now dead, and that the parties substituted as plaintiffs on the record are her children. It is in evidence before you, also, that Anna Everly and Julius Paul and Augustus C. Paul and Emile Paul are all the children of Caroline Paul, deceased. This admission made upon the part of the counsel in the case puts the title of the land, as far as this case is concerned, in September, 1891, in Caroline Paul, the mother of these children. And, by her death,—the date of which I do not remember, but which has been given in evidence before you,—whatever title she had at the time of her death would descend and vest in the plaintiffs in this case. This same admission also mentions a conveyance by Caroline Paul to the defendant, John W. Harrison, on September 23, 1891. In addition to that, the plaintiffs themselves put in evidence a deed from Caroline Paul, of that date, to the defendant, of the land described in this ejectment. They also give in evidence an inquisition in lunacy, and the finding of the inquisition, dated August 1, 1893, which found Caroline Paul a lunatic, and that she had been a lunatic for more than two years previous to that date, with lucid intervals. The plaintiffs further gave in evidence a judgment entered in this court by Jacob Everly vs. Caroline Paul (No. 17, October term, 1891) for $85, and an execution issued upon the same, and levy and vend. ex. issued, and the land described in this writ of ejectment sold upon this judgment October 1, 1892, and purchased by the defendant, J. W. Harrison, he having bid at the sheriff's sale the sum of $800. The first deed that was given in evidence, of Mrs. Paul to John W. Harrison,—I think the consideration of the deed was mentioned as $2,000. It is claimed on the part of the plaintiffs in this case that, at the time Mrs. Paul executed this deed to John W. Harrison, she was not of sound mind, and that for that reason that deed is void, and conveyed no title to Mr. Harrison. They claim, also, that he gave no consideration for the same. The plaintiffs claim, further, that, prior to the sheriff's sale upon this judgment against Mrs. Paul, she gave to the defendant $200, and requested him to pay this judgment against her, which he agreed to do, but that, instead of paying the judgment, he allowed the property to be sold by the sheriff upon the execution issued upon the judgment, and bid it in himself, and took the deed in his own name, and that he used the money which Mrs. Paul had given to him for the purpose of paying the judgment in paying a portion of the bid; that Mrs. Paul receipted, herself, for a portion of the bid, without having received any money for the same, and that the remainder of the bid he borrowed the money from Mr. McCarty to pay, and that he afterward received money in payment of that from property sold from the farm, and that, by reason of his course of conduct in relation to the $200 which he had received from Mrs. Paul, that he committed a fraud upon her, in allowing it to go to sale and purchasing it; and that, therefore, no title passed to him, but that the title still remained in Mrs. Paul.

"As to the first question, of the deed given by Mrs. Paul to John W. Harrison, the presumption is that everybody is sane, and of sound mind, until the contrary is established by evidence. An inquisition of lunacy, duly found, such as has been given in evidence before you, is substantive evidence of the insanity, from which you can find that Mrs. Paul was insane at the time mentioned in the return to the inquisition, namely, for two years prior to August 1, 1893, which would be prior to the deed made by her to John W. Harrison. But it is not conclusive evidence. It does not conclude anybody, but it is simply evidence submitted to you; and you, from all the evidence in the case, must pass upon the question of the insanity of Mrs. Paul. If she was insane at the time she made that deed, then no title passed to John W. Harrison by it. But if she was sane at the time she made that deed, and understood what she was about, then that deed would convey her title to John W. Harrison. And, having passed upon that question, if you should find her to be of sound mind at that time, that would end this case, and your verdict should be for the defendant. If you find that she was insane at that time, then that fact would make that deed void, and he would acquire no title to the land by reason of that conveyance, and the next step in your inquiry would be to pass on to the sheriff's sale.

"There has been considerable evidence in relation to declarations of the parties, and different circumstances given in evidence; and you will take it all, and weigh it carefully, and determine from it whether, in the first place, Mrs. Paul gave to him the money for the purpose of paying that judgment. [If she did; if she gave him the money, with instructions to pay that judgment, and he agreed to do it, or, whether he agreed to do it or not, if she gave him the money to pay the judgment with, and he came here, and did not perform the service that he was told to perform, but, in lieu of that, allowed the property to be sold at sheriff's sale, and bid it in himself, and applied that money to the payment of the purchase money,—that would be a fraud upon Mrs. Paul, and no title would pass to him by virtue of it, even if he paid some portion of his own money with it, the amount of money being paid to the sheriff being over the amount of money received.] It has been given in evidence before you that a portion of the purchase money that was

Digitized by Google

paid by Harrison to the sheriff—some $23—was paid to apply upon a debt of Harrison's, and not upon a debt of Mrs. Paul's; and therefore, if she gave him enough money to pay the judgment that was against her, and stop the sale, and if, in the place of doing that, he allowed the sale to go on, and bid it in himself, that would be a fraud upon her, and no title would pass to him by reason of such sale. If, on the other hand, you find that Mrs. Paul did not furnish the money at all, and that he went of his own volition, and attended the sale, and bid it off, and paid his money for it, in that case the title would pass to him by that sheriff's sale; and your verdict, in this case, should be for the defendant. But if, on the other hand, you should find, as I said before, that the money was Mrs. Paul's that was given to him and placed in his possession, it does not make any difference how long prior to the sheriff's sale it was placed in his possession, if before the sheriff's sale it was in his possession by her act, and she directed him to apply it for that purpose, by spending it himself, and afterwards allowing the sale to go on, and bidding it off and paying his own money, he could not even then hold it, but it would be a fraud upon Mrs. Paul, just the same as though he had retained the identical money in his pocket all the while, and paid it to the sheriff. The fact that he had her money in his pocket, and did not apply that money, but applied some of his own money, would not make any difference. It is the fraudulent purpose with which he does the act that makes the fraud; and if he received the money from her sufficient to pay that judgment, and, instead of paying it, allowed it to go to sale, and bid it off, and the judgment upon which it was sold was less than the money that he had in his hands to pay, that would be such a fraud upon her as would defeat the sale, as between him and her, and would not pass any title to him, and, if you find that to be the fact, your verdict should be for the plaintiff, for the land described in the writ.

"As I said before, the law presumes every person to be sane, and the burden of proof rested upon the plaintiff to show that Mrs. Paul was insane. Having shown by an inquisition, and you being satisfied, that she was insane generally, from the evidence given, then, if she was insane generally, in order to make the title to that property passing from her to him by deed, it could be made good by affirmative proof that at the time of the execution of the deed she had a lucid interval. If a person transacts business during a lucid interval, and it can be shown that they were lucid at the time they transacted it, then the business would be good. But, if the jury should find that she was insane generally, then the burden of proof would rest upon the party transacting the business or receiving the deed to show that at the time of the execution of the paper she had a lucid interval.

"The counsel for the defendant have submitted certain points in writing, requesting us to instruct you as follows: [First. That this is an equitable ejectment. Therefore, the plaintiff's testimony must be such as would warrant a chancellor in decreeing a conveyance of the land by the defendant to the plaintiff. That the testimony is not sufficient to warrant such a decree, and therefore the verdict must be for the defendant. Answer. This point is refused.] [Second. That, although the defendant should be deemed and held to be a trustee, the testimony on the part of the plaintiff showing that the defendant paid to the sheriff $212 as purchase money for the property in question, in the absence of the payment of this sum, or a tender of payment before suit, there can be no recovery in this action. Answer. That is refused.]

"You will now take this case, and dispose of it under the testimony that has been submitted to you, and the instructions of the court, as you shall deem to be right between these parties. If you find for the plaintiff you will say, 'We find for the plaintiff for the land described in the writ of ejectment.' If you find for the defendant, you will simply say, 'We find for the defendant.'

"Plaintiff excepts to the above charge before verdict. Bill sealed for plaintiff. Defendant excepts to the above charge before verdict. Bill sealed for defendant."

C. Smith and Chas. McCarty, for appellant. F. P. Kimble, for appellees.

PER CURIAM. This case appears to have been carefully and correctly tried. We find nothing in the record that would justify us in sustaining any of the five specifications of error. There is nothing in either of them that requires discussion. Judgment affirmed.

GOODMAN v. DELAWARE & H. CANAL CO.

(Supreme Court of Pennsylvania. April 8, 1895.)

NEGLIGENCE—CONFLICTING TESTIMONY—DIRECTING VERDICT.

There being a conflict of testimony as to circumstances under which a collision occurred between trains, on one of which plaintiff was employed, so that, if part of it was believed, it could be found that the accident occurred, without fault of plaintiff, through the negligence of defendant railroad, with or without the concurring negligence of a fellow servant, the case was properly left to the jury.

Appeal from court of common pleas, Wayne county.

Action by Edward Goodman against the Delaware & Hudson Canal Company for injuries received in defendant's employ. Judgment for plaintiff. Defendant appeals. Affirmed.

The assignments of error were to parts of the charge as hereinafter shown therein. The charge was as follows:

Digitized by Google

"The issue which you have been sworn to try is one wherein Edward Goodman is plaintiff, and the Delaware & Hudson Canal Company is defendant. It is an action brought by the plaintiff to recover from the defendant damages to compensate him for injuries which he alleges he received from the defendant while in their employ, and through their negligence. It appears: That the defendant company own and use and operate a railroad from Carbondale, in Lackawanna county, I think, to Wilkesbarre, in Luzerne county. It is a double-track railroad at or near Carbondale. That on the 24th day of August, 1887, the plaintiff in this case, Edward Goodman, was employed by the defendant company as a fireman upon the road. That he was at work upon that day at his duties as fireman, upon an engine known and described as 'Engine No. 35,' of which Robert Von Storch on that day was the engineer; and the engine and train were under the control of a conductor by the name of Meyers. That they, in their employment on this train and engine, had drawn a train of cars from somewhere south on the road, Mill creek, I think, to Carbondale, and left it; and that engine No. 35 was attached to a caboose at Carbondale, and, under the direction of the conductor, started to run back to Green Ridge, which is near Scranton. After they started from the point where they were located, upon a switch at Carbondale, at a point somewhere near or a short distance above the railroad station at Carbondale, this engine and train collided with a train of empty passenger cars, as I understand it, which was either backing up the track upon which this engine 35 was running, or was standing upon the track upon which it was running. That at this collision engine No. 35 was somewhat injured. Among other things, some of the flues to the boiler were detached, and the escaping steam from the boiler or flues badly burned this plaintiff. He claims that for this injury that he received by these burns, at that time, this company is responsible, and he bases his claim upon the negligence of the company in two particulars: First, in not having the engine upon which he was at work in necessary order and repair that it was the duty of the company to place it in, in order to protect its employés in the duties to which they were assigned; and secondly, that the company were negligent in placing upon this track, upon which he claims the train upon which he was had the right of way, a train of cars, and backing them up; that that was the act of the company, and, being the act of the company, it was their negligence in placing it there without giving the person in charge of this train, drawn by engine No. 35, notice of its position. There are some legal principles which govern and apply, we think, to the issues raised by this case, which we will give you.

"It is a rule of law that the master who employs labor or servants is not responsible for any injury received by an employé caused by the negligence of a coemployé or fellow servant. When one enters upon the service of another, he takes upon himself all the known dangers and ordinary risks of the employment in which he is engaged; and the negligent acts of his fellow servants, in the general course of his employment, are ordinary risks attending that employment. To constitute fellow servants, the employés need not be at the same time employed in the same particular work or in the same grade. It is sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purposes. There are some duties which the master owes to the servant from which he cannot relieve himself except by performance; and, when the master delegates these duties to an agent, such agent stands in the place of the master, and the master is responsible for the acts of the agent. Where the master places the entire charge of a distinct branch of his business in the hands of an agent or a subordinate, he is liable for the negligent acts of such subordinate. The master owes to the servant the providing of suitable machinery, tools, and appliances with which to do his work, and the employment of competent fellow servants, or the refusal to employ incompetent servants, when their incompetency is known or could have been discovered by the employment of ordinary care. In the running of railroads, it is the duty of the company to furnish their employés with rules and regulations, for the running of trains, which are ordinarily safe. The company must furnish them with time-tables for the running of trains, which will enable them to perform the duties of their employment with ordinary safety. In case of delays or of trains running on special time or a special schedule or any other time than that specified in the regular time-table or schedule, it is the duty of the company to direct the trains by such orders as will conduct them to their destinations, avoiding ordinary and known dangers and risks. The company has the right to vary the time of running trains, or running extra or special or irregular trains; but, when it does so, it becomes its duty to bring this change to the knowledge of its employés, who are to change or modify their action on account of such variation. Whomsoever the company gives the power to make such changes, or variation in its changes, to, and to bring notice to the employés, does so in the company's place and stead, inasmuch as it is the company's place to see it done punctually. The act of the person delegated to do that which it is the company's duty to do is the act of the company itself; and, if the person so delegated performs the duty carelessly and negligently, it is the negligence of the company. All that is required of the company is due care and diligence in giving notice of the change. If they make use of the

Digitized by Google

usual appliances for giving notice of the running of the irregular trains, or of the presence upon the tracks of the road of irregular trains, or obstructions placed there by the act of the company, they have done all that is required of them. If, through the fault of the telegraph operator, conductor, or other employé, the orders and notices do not reach those for whom they are intended, and injury results, this is not the negligence of the company. The duty of the company is performed when they take the usual methods, through their delegated agents, to promulgate through orders change of time, or the presence upon the tracks of irregular trains, to those whom it affects. If, through the negligence of those whose duty it was to act as messenger, in conveying orders to those for whom they are intended, the orders are not delivered or not understood, it is the negligence of a fellow servant, for which the company is not responsible.

"It appears that one of the termini of the railroad of the defendant was at Carbondale, and that it had at that place a large number of switches on the sides of its main track. These switches and the main track, on the sides of which the switches were placed, are designated by the witnesses and by the company as a yard, and called the 'Carbondale Yard.' And it appears from the evidence in this case that the company had established rules governing the running of its trains through the Carbondale yard which were different in their character, very materially, from the rules which they had established governing the running of trains outside the limits of this yard. The exact point where this accident occurred is in dispute, under the evidence in this case, as is also what were the exact limits of the yard known as the 'Carbondale Yard' at the time of this accident. So that it is a fact to be ascertained by this jury whether this collision occurred within the limits of the yard, or outside of the limits of the yard. As the rules and regulations, as I said before, of the company, were different inside the yard from what they were out, this becomes a material fact for the determination of the jury.

"It is claimed on the part of the plaintiff—and he has brought witnesses who, he claims, establish this fact—that the limits of the Carbondale yard, the southern limits of the Carbondale yard, at the time of this accident, were north of the depot, at the point where there is what is called a 'cross-over switch' from the northern-bound track to the southern bound track, which is very near the point of the switch from which engine No. 35, with its caboose, emerged onto the main track of the road, at the time it started on the southbound track of the defendant's road, on the day of the accident, at the time of the collision. On the part of the company it is claimed—and they have produced witnesses to establish it—that the southern terminus of the Carbondale yard was south of the station at Carbondale, where what is called the 'cross-over switch' from the northern to the southern bound track, south of the depot, is placed. It is admitted, under all the evidence in the case, that this collision occurred between these two points; and if the evidence on the part of the plaintiff is believed, and be adopted by the jury, or if they find from the evidence that the southern limits of the yard were at the crossing above the station, then this collision would have occurred outside the limits of the Carbondale yard, and the rules which govern the running of the trains would be the rules established for the running of trains outside of the yard. If, upon the other hand, you should find that the southern limits of the Carbondale yard were south of the station, at the cross-over switch, then the collision occurred within the limits of the yard, and the running of trains within those limits would be governed by the rules of the yard which were in operation at that time.

"It appears from the evidence in this case that at the time the conductor of this train, drawn by engine 35, reported at Carbondale, he had no right to leave there until he had received orders from the company to leave with his train; and it also appears that he was not running a train upon the regular time-tables of the road, under their schedules, but was running what was called an 'irregular train,' or a train under orders from the company, and taking its time, and running from the direction of the company; and that the orders that were given by the train dispatcher, Mr. Lawrence, at the station at Carbondale, to the conductor of this train, were to 'wild-cat' the train back to Green Ridge. Now, this term 'wild-cat,' of course, outside of the evidence of railroad men, we would not know what it was; and we have a definition given to the meaning of this order by the witnesses in this case, and I think they all agree as to what it is. They agree that the order to wild-cat gave to the train the right to run upon the track to its destination, looking out and avoiding all trains running on schedule time,—for all regular trains. There have been no printed rules or written rules given in evidence, as promulgated by the company to its employés; but there has been evidence of the establishment of rules in the Carbondale yard for the running of trains. The witnesses have testified that inside of the Carbondale yard all trains were to protect themselves. This is another term of railroading as applied to trains. I am unable to remember any evidence given in the case which defines what is meant by the term 'to protect themselves,' other than the usual meaning that we would apply to the language. It has been given in evidence that it is a rule of the company that all trains running in the yard shall run under what is called 'control,'—run 'under control'; and what the term 'under control' means has been given by the witnesses, and they agree

Digitized by Google

upon it that it means that the engineer running the train shall have it under such control, running it so slowly, that he can stop the train in going half the distance he can see upon the track; so that if there were an obstruction upon the track, or a train approaching, both being under control, each of them could stop their train before they got half the distance, and before there would be any collision. It also appears that in the yard, this main track, the north and south bound tracks in the yard, passing through it, that the rule in relation to running under control does not apply to regular trains—schedule trains—running there; and it is the duty of all irregular trains, or of trains on switches or in the yard, to look out and keep out of the way of all trains running upon schedule time upon the tracks in the yard, as well as outside. There is a rule established for the running of irregular trains outside the limits of the yard, which is, as I said before, different from the rules established for the running of trains in the yard, and I think there is no dispute in relation to this rule,—that in running irregular trains, or 'wild-cat trains,' as they are called, as this was, outside the limits of the yard, they were allowed to run at the rate of 12 miles an hour, but to run by stations 'cautiously.'

"It is claimed by the plaintiff in this case that the order to wild-cat from Carbondale to Green Ridge gave him the right, or the train upon which he was the right, upon leaving the limits of the Carbondale yard, to run at this rate of speed of 12 miles an hour, observing the rule to run cautiously by stations; and, unless he was notified of some obstruction placed upon the track, he had the right to suppose the track was clear of all except trains running upon schedule time. Now, it appears that upon that day there was a train running either towards Carbondale to meet this train drawn by engine No. 35, or standing upon the track in front of the station at Carbondale, upon which No. 35 was running, a train of cars. It also is undisputed that this train of cars was not a regular train of cars, or a train of cars running upon the time or schedule of trains given to the employés of the road. It is claimed by the plaintiff, as I said before, that this train was placed there by the company, and that the persons in charge of the train drawn by engine No. 35 had no notice of its being placed there, and therefore, when they ran out of the yard limits, they had no reason to expect its presence upon the track; that its presence there was an act of negligence of some one; and the plaintiff claims that that negligence was the negligence of the company, and that, therefore, under the law governing such cases, for any injuries caused by that negligence, even to an employé of the company, the company would be responsible. Now, if the placing of that train upon the track upon which it was the duty or the right of this train, drawn by engine No. 35, to pass, without giving any notice to the persons in charge of the train drawn by engine No. 35, was the act of the conductor of the train, or the engineer, or any party not having the right to put it there without orders from the company, it would be the act of a fellow servant with this fireman who was injured, and for any injuries resulting from it he could not recover. But, if the putting it on the track was done under the direction of the person who had the right to change the running time of trains, to order extras, and to change the time of all irregular trains, then it would be the act of the company; and in such case it would be the duty of the company, under these general principles of law, which I have read to you, to give notice to those who would be affected by its being placed upon the track or by its running north upon the track at the point of such obstruction, provided, as I said before, it was outside of the limits of the yard.

"It is claimed that this train was placed there by the orders of S. A. McMullen, and, at the time he placed it there, that he was the train master of that division of the defendant's railroad, and that, as such train master, he had the full right to change the time of the running of this train, to place any train he chose upon the track, at any time he chose; and if you should find that is a fact, that he was such officer, with those powers, and that he placed this train upon the track under his orders, then that act, he having these powers, would be the act of the company, and it would be in effect a change of schedule of time; and if the parties in charge of the train drawn by engine No. 85 had the right of way over that track, by orders from the company through its train dispatcher, then it became the duty of the company, through its agent, when they placed this obstruction upon the track, or ran this train back upon the track, to give notice to the parties in charge of the train drawn by engine No. 35 of such obstruction being placed upon the track. If they failed to give that notice, by any of the usual means which railroad men are in the habit of employing to notify trains that there are obstructions upon the track, or by any other process which brings home to them notice, then that would be negligence on the part of the defendant; and if such negligence caused the accident in this case, or the result of these injuries sustained by the plaintiff, he would be entitled to recover from the defendant compensation for such injuries. I think the evidence is undisputed in this case that S. A. McMullen was the train master of the road of this division. My impression is that he testifies to it himself, as well as the witnesses for the plaintiff, and that Mr. Lawrence was the train dispatcher at Carbondale at the time of the accident, and that the train dispatcher was under the orders of the train master, Mr. McMullen. There-

Digitized by Google

fore, any orders given by Mr. Lawrence in relation to the running of trains there, he being a subordinate of McMullen, the train master, would be the orders of the master. Mr. Lawrence has testified in regard to the duties relatively of the train master and the train dispatcher; that while the train master, McMullen, had power and authority to change the running of trains, and to make different schedules, and that all the engineers and trainmen were bound to obey his orders, that when he, through the train dispatcher, Lawrence, had given an order to a train to move, that he had no right to revoke or change that order to that train, except through Lawrence himself, by giving orders to him to have it revoked or so changed.

"As I said before, if the place where this accident occurred was within the yard limits, a different rule applied as to the running of trains in the yard, except schedule trains; and that rule was that each train, as I said before, must protect itself, and each engine and train must be running under such control as to allow the engineer to stop it while it was running half the distance he could see. The adoption of this rule is necessary for the protection of the trainmen and employés of the company in the yard, where there is constant shifting backward and forward of trains, which, without it, would be liable to collide and cause accidents. But the train master of the road, having full power and control over the running of all trains in the yard, as well as out, had the right to change this rule, or to vary it, or to run trains through that yard different from the rule established by himself, because the same power that makes a rule can alter it. And if he makes an alteration, in the running of a train through the yard, of the schedule, and the running of the train is simply the alteration of a schedule, if such alteration of the running is calculated to increase the risks of the persons in the yard, it is his duty to promulgate that order there to the parties. Therefore, if he was running a train in the yard at a higher rate of speed than prescribed in this rule, if the train, in other words, was running in the Carbondale yard, upon the track upon which this train drawn by engine No. 35 had to leave, and was leaving in obedience to the orders to wild-cat it to Green Ridge, at such a rate of speed as he could not stop a train within half the distance that he could see, it was the act of McMullen in doing that, then whether it was in the yard or whether it was out of the yard would make no difference as to the liability of the company for the act of its agent in changing this rule, without notice was given of it to the parties having charge of the train drawn by engine No. 35; and the company would be responsible for any accident or any injuries sustained by the plaintiff which were the result of that accident.

"The defendant claims in this case, as I said before, that the collision occurred within the yard limits, and that, therefore, the act of placing a train in front of the station at Carbondale, or of running it up that track, was not a negligent act of the company, and that they are not responsible for any injury occasioned by this accident. They also claim that this accident was caused by the negligence of those in charge of engine No. 35. They claim that the 'excursion train,' as it is called, with which this train drawn by engine No. 35 collided, was at the time of the accident standing still upon the track in front of the station, and that the engineer of the train drawn by engine No. 35 was not only running beyond control, or not at such speed as it had the right to run within the limits of the yard, but was running beyond the rate of speed which it had the right to run even outside the limits of the yard, and that the accident was caused solely by the negligence of the persons in charge of train No. 35. If the facts claimed by the defendant in relation to the status of this excursion train are correct, there was no negligence on the part of the company in placing it there, and the plaintiff in this action could have no right of recovery in this case. If it was within the limits of the yard, whether placed there by the train master or by the conductor, and standing still, or running backward up the track at such a rate of speed as is defined by the words 'under control,' and it was running within the rules of the yard, and there was no negligence upon the part of the company in so doing, then the plaintiff could not recover, if it was within the yard limits. But if, as I said before, it was outside of the limits of the yard, and placed there by the act of the company, and either standing still or in motion, without such notice as the persons in charge of train drawn by engine No. 35 had a right, under the law that I have given you, to expect to receive, or the attempting to give such notice by giving orders to some messenger of the company to give the notice, and the accident was caused by this, without any contributory negligence on the part of the plaintiff in this case, then the plaintiff would be entitled to recover.

"In all cases where a party has received injury in an accident of this character, if the negligence of the party receiving the injury contributed to that injury in any degree he cannot recover for it. The law places upon every person the duty to use ordinary care in the performance of any duties, or in his actions towards his fellow men; and if the injuries that he has received are the result, in any degree, of his neglect to use that care which an ordinarily prudent man would under like circumstances, then he is equally guilty with the other parties contributing to the accident, and he cannot recover. But if the negligence of the company was the cause of the accident, and the plaintiff was without negligence on his own part, and the neg-

Digitized by Google

ligence of the company, conjoined with the negligence of other fellow servants of the plaintiff, caused the injury, caused the accident from which the injury arose, then, in that case, the plaintiff could recover, because of the injury being partially caused by the act of the company itself, without fault of the plaintiff. If you should find, under the evidence in this case, and under the instructions which we have given to you as applicable to that evidence, that this injury was caused by the negligence of the company, without fault, or without any negligence on the part of the plaintiff, then he would be entitled to recover from the company damages to compensate him for the injury which he has received.

"In passing upon the question of compensation, the jury should allow, in estimating damages, not only for the direct expenses incurred by the plaintiff by reason of the injury, but also for the privation and inconvenience he is subjected to, and for the pain and suffering he has already endured, bodily and mentally, and which he is likely to experience, as well as for the pecuniary loss he has sustained, and is likely to sustain during the remainder of his life, from his disabled condition, caused by the accident. It is incumbent upon the person injured to use such reasonable efforts as are in his power to mitigate the consequences of the injury. If, by the exercise of ordinary care and the use of reasonable means, he could have prevented the injury from becoming permanent, he cannot recover for the suffering and loss of capacity to labor caused by his own negligence to use such means. The fact that the plaintiff, at the time of receiving the injury, was suffering from constitutional weakness, the result of disease, which increased the effect of the injury received, does not affect the measure of damages.

"The counsel for the defendant has submitted several points, upon which he requests us to charge, which we will now answer. They are as follows: 'First. The burden rests upon the plaintiff to show that the company neglected some duty which it owed to him before he can recover in this case.' Answer: This point is affirmed. The burden of proof rests upon the plaintiff to show the neglect of duty on the part of the defendant,—some duty which the defendant owed to him. 'Second. The plaintiff has not shown that the company was guilty of any negligent act charged against it in the declaration in this case as a ground of action; therefore he cannot recover.' Answer: This point is refused. [First specification of error.] 'Third. The plaintiff has not shown that the neglect, by the defendant, of any duty legally imposed upon it was the proximate cause of plaintiff's injuries; therefore he cannot recover.' Answer: This point is refused. [Second specification of error.] 'Fourth. The defects, if there were any, in engine No. 35, not being the proximate cause of plaintiff's injuries, he is not entitled to recover damages on account of such defects.' Answer: This point is affirmed. 'Fifth. The testimony of plaintiff and his witnesses being that engine No. 35 was at the time of the accident reasonably safe for all ordinary and proper uses, the defendant, as to such engine, had fulfilled its entire duty.' Answer: This point is also affirmed. The plaintiff himself and all his witnesses, as I remember, testified that this engine was safe for the ordinary use of an engine upon the business to which it was intrusted by the company, and to which it was set. Therefore, having furnished the plaintiff with machinery ordinarily safe for the use in which they were directed to use it, that is the extent of their responsibility or of their duty. 'Sixth. The company's train master, S. A. McMullen, in directing the movements of the excursion train about the Carbondale yard and depot, before she had received her train orders, was acting as a coemployé with the plaintiff.' Answer: This point is refused. The evidence, as I remember it in this case, leaves it as a question of fact for you whether he was. If he was merely directing the movements of a train which was upon schedule time, he might be acting in the capacity of a conductor, and therefore, in that case, would be a coemployé, and the company would not be responsible for his act in that position or his acts done in that capacity. But if, in putting the train upon the track in that place, he was assuming the duties of his office of train master of putting a train—an irregular train—upon the track, not upon schedule time, when orders had been issued by his subordinate giving him the right of way over that same track, then he was exercising the duties of his office as train master, and his acts were the acts of the company; and that is for you to find as a fact. [Third specification of error.] 'Seventh. If the jury believe it was the plaintiff's duty to have been in the cab of the locomotive while passing down the south-bound track across Dundaff street and towards the depot, and that, if he had been there, he might, by sighting the extra train or by other means, have avoided the collision, and escaped injury, he was guilty of contributory negligence, and cannot recover in this case.' Answer: That point is affirmed. 'Eighth. If the plaintiff, subsequent to the accident, aggravated his injuries by indulgence in intoxicating drinks, contrary to the orders of his physician, he was guilty of contributory negligence; and, if he is entitled to recover anything in this case, he is entitled to recover only for such pain, inconvenience, expense, and loss of time as accrued to him between the time of the injury and the time when he began to violate such orders or so aggravate such injuries.' Answer: That is affirmed. 'Ninth. It was the duty of the plaintiff to show that the risk to which he was subjected at the time of the accident, and which re-

Digitized by Google

sulted in his injuries, was an unusual and extraordinary risk, so far as the defendant was concerned. He has not done so, and is not entitled to recover in this case.' Answer: This is refused, as it would require us to take the case entirely away from the jury. [Fourth specification of error.] 'Tenth. If the jury believe that Von Storch, the engineer of 35, ran his engine down the south-bound track at a dangerous rate of speed, and that his negligence in this respect was the cause of the accident, then Von Storch is responsible, and not the company, and the plaintiff cannot recover damages in this case.' Answer: That is affirmed. 'Eleventh. Under all the evidence in this case, the verdict of the jury must be for the defendant.' Answer: That is refused. [Fifth specification of error.]

"Gentlemen of the jury, you have heard all the witnesses in this case; you have noticed their appearance upon the stand; and it is for you to determine what credence you will give to each of them, or to the evidence given by each of them. Where the witnesses have given evidence which is contradictory in its nature it is your duty to reconcile such contradictions with the intent of the witnesses to tell the truth, if it is possible from the evidence given; but where it is impossible to do so, and you are forced, in order to find the facts material in the case, to determine what witnesses tell the truth and what witnesses do not, it is for you to determine who is telling the truth, and who is telling the falsehood. You will take this case, under the evidence which has been submitted to you, and under the instructions which we have given you, and return such verdict as, under your oaths and these instructions, you deem is just and right between these parties."

Homer Greene, for appellant. A. T. Searle and F. P. Kimble, for appellee.

PER CURIAM. To have directed a verdict for the defendant company, as requested in its eleventh point, would have been manifest error. The testimony tending to prove that defendant's negligence was the proximate cause of plaintiff's injury was quite sufficient to not only carry the case to the jury, but to justify them in finding as they did. The case was carefully and ably tried. There appears to be nothing whatever in the record to justify a reversal of the judgment. Judgment affirmed.

FIRTH et al. v. HAMILL.

(Supreme Court of Pennsylvania. April 8, 1895.)

GENERAL LIEN—CONTRACT.

Where plaintiff, for several years, dyed and finished clothes for defendant as it sent them to him, and notice that he received goods only on condition that they were subject to a general lien, not only for the dyeing and finishing thereof, but also for the balance of any former amount due, was printed on most of the slips on which dyeing orders were written by defendant, on the delivery slips signed by it or its employés, and on all bills and monthly statements mailed to it, such condition will, in the absence of any denial that the notice was received and read by defendant's officers and employés, be held to be part of the contract for dyeing.

Appeal from court of common pleas, Philadelphia county.

Action by Thomas Firth and others against Hugh J. Hamill, assignee of the Deelmore Manufacturing Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

The report of the referee (Henry P. Brown) is as follows:

"Pleadings.

"The proceeding is an amicable action in assumpsit. An agreement was entered into between the parties on the 12th day of October, 1893, reciting that whereas, at the time of the assignment of the Deelmore Manufacturing Company, there were in the hands of the plaintiffs six hundred and thirty-one pieces of goods, sent to them by the Deelmore Manufacturing Company to be dyed or finished, on which goods the plaintiffs claim to have a lien for the sum of $5,777.15 due to them by the Deelmore Manufacturing Company; and whereas, the assignee of the Deelmore Manufacturing Company claimed that said goods were subject only to a lien for the work and labor expended on those specific goods; and whereas, pending the settlement of this question by an amicable arrangement between the said assignee and the plaintiffs, one hundred and forty-eight pieces of said goods had been delivered to the Deelmore Manufacturing Company, and one hundred and forty-eight pieces of other goods substituted in their place, to be subject to the same lien as the goods taken away were subject to; and whereas, the assignee of the Deelmore Manufacturing Company desired to sell the six hundred and thirty-one pieces of goods then in the hands of the plaintiffs: It was agreed: (1) That at the time of the sale at auction of the other goods of the Deelmore Manufacturing Company the six hundred and thirty-one pieces then in the hands of the plaintiffs should be sold by the same auctioneer. (2) Out of the proceeds of the said six hundred and thirty-one pieces there should be paid to plaintiffs the sum of $645.55, being the amount due them for work and labor done on those specific goods sold, or the goods for which such goods were substituted as aforesaid. (3) After such payment there should be paid out of the remaining proceeds of such six hundred and thirty-one pieces $5,777.15 to the Equitable Trust Company, as stakeholders, to await the determination of the claim of the plaintiffs for a lien on the said goods for the entire balance due them by the Deelmore Manufacturing Company at the time of the assignment. (4) A case should be

Digitized by Google

submitted to the court to determine the question. In the event of counsel not being able to agree upon a case stated, an amicable action should be brought, and referred to the undersigned, as referee, under the act of 1874. In pursuance of said agreement it was stipulated that an amicable action in assumpsit should be entered in court of common pleas No. 4, of Philadelphia, at the suit of Thomas Firth, Joseph R. Foster, and John H. Foster, trading as Firth & Foster Brothers, plaintiffs, vs. Hugh J. Hamill, assignee of the Deelmore Manufacturing Company, defendant, with the same effect as if a summons in assumpsit had been issued at the suit of the said plaintiffs against the defendant, returnable to the first Monday of December, 1893, and had been duly returned 'Served,' and as if a statement of demand had been duly filed and served on the defendant, setting forth the agreement, a copy of which was annexed, alleging that the defendant had promised to pay to the plaintiffs the said sum of $5,777.15 if the said plaintiffs had a lien on the goods mentioned within the agreement for the entire balance due plaintiffs by the Deelmore Manufacturing Company at the time of the assignment; and alleging further that the said plaintiffs had such a lien, but that defendant refused to pay the said sum of money, and that the sum was justly due, and also with the same effect as if the defendant had filed to this statement a plea of nonassumpsit, and as if issue had thereupon been joined upon said parties, plaintiffs and defendant. It was agreed before the referee, between counsel for the several parties in interest, that the evidence taken, so far as applicable, should be considered as relating to the above case, as well as to a claim made by the said plaintiffs for a similar lien upon certain goods received by them from Chittick & Son, in which all the right, title, and interest of the said Chittick & Son had been sold at sheriff's sale, and purchased by the National Bank of Germantown, and the question of the validity and amount of the lien having also been referred, by agreement between the parties, to the undersigned for determination, and the evidence in both cases having been taken before him at the same time. The plaintiffs claim that they have a lien on the goods of the Deelmore Manufacturing Company in their hands at the time of the assignment for the general balance due to them for dyeing and finishing for the said company. The defendant contends: First, that the plaintiffs have no such lien, but that the goods are subject only to a lien for the work and labor (dyeing and finishing) done on the specific goods in their hands at the time of the assignment. Second, that, even though the plaintiffs have a lien as claimed by them, the defendant is entitled to have the amount due the plaintiffs reduced by the amount of damage sustained by the injury to the defendant's cloth, which the defendant claims was due to the negligence of the plaintiffs.

"Facts.

"The referee finds the following facts: The plaintiffs are engaged in the business of dyeing and finishing; their works being one of the largest dyeing establishments in Philadelphia, and known as the Providence Dye Works. They had for more than fifteen years past a uniform condition as to lien, on which condition alone they received goods to be dyed and finished. This condition was printed on all their invoices, monthly statements, delivery books, and memoranda. The words are: 'Notice. All goods received only upon condition that they are subject to a general lien, not only for the dyeing and finishing thereof, but also for the balance of any former account due.' They furnished the Deelmore Manufacturing Company, as well as all their other customers, memorandum blanks to be filled by the customers with descriptions of the goods to be dyed or finished. These blanks contained the printed notice. They sent bills to the Deelmore Manufacturing Company for the work done the day after the goods were delivered to the company. They sent also a monthly statement at the end of each month. The bills and statements were sent by mail, and contained the printed statement of notice of lien. This course was pursued during the whole course of their business with the Deelmore Manufacturing Company, which covered a period of about three or four years. Goods were received by the plaintiffs from the Deelmore Manufacturing Company, and the yarns from the spinners, or commission houses for the spinners, and the receipts given for the yarn that came from the spinners were upon the blanks of the persons from whom they received them, and these blanks did not contain the printed notice. No work, however, was done upon them until it was ordered to be done by the Deelmore Manufacturing Company. The goods were not placed in the plaintiffs' possession for any other purpose than for dyeing and finishing. There was due to the plaintiffs the sum of $645.55 for work done on part of the specific goods in their possession at the time of the assignment. This sum was subsequently paid by the defendant. The amount due the plaintiffs at the time of the assignment on general account was $5,777.15. When the plaintiffs received yarn from the spinner or commission merchants, they generally sent for it, being informed by the defendant when and where to send for it. The goods sent directly from the Deelmore Manufacturing Company were collected by the driver for the plaintiffs, and receipted for by him at the place of business of the company. The driver took the goods to the plaintiffs, and sometimes brought with them an order from the company for dyeing and finishing. Sometimes the plaintiffs received notices

Digitized by Google

from the Deelmore Manufacturing Company to call for the goods, and sometimes the driver received goods when he delivered others that had been dyed and finished. When orders for dyeing and finishing were not handed to the driver, they were subsequently sent by the Deelmore Company, and as a general rule these orders were on the blanks furnished by the plaintiffs containing the notice, and sometimes on order slips or letter heads of the Deelmore Manufacturing Company which did not contain the notice. These orders identified the goods, and indicated how they were to be dyed and finished. When the goods were received from the commission houses or from the company, no work was done on them until the company sent the order for dyeing. The plaintiffs were not paid at the time of delivery of dyed or finished goods, but sent monthly statements to the company which contained the notice. That the plaintiffs had no special contract with the Deelmore Company for each separate lot of goods. They sent a bill for each lot of goods, after being delivered, and at the end of the month sent a statement of the same, and the company paid so much on account. The account had been a running one for about three years. After the failure the plaintiffs were paid by the assignee for all the goods that they then had on hand on which work was done. The Deelmore Manufacturing Company failed on July 16, 1893. On that day the plaintiffs had in their possession, that came from the Deelmore Company, six hundred and thirty-one pieces of goods, of which three hundred and thirty-two pieces were in the gray, and the balance in various stages or process of being dyed. Twenty-three of the three hundred and thirty-two pieces were afterwards finished by order of the assignee, and were exchanged for other goods in the gray. The remaining three hundred and nine pieces were on hand at the time of the sale and formed lot 488 on the printed handbill. They were sold for $1,172.76. The gray goods substituted for the twenty-three pieces which were finished before the assignment, together with other gray goods substituted after the assignment for goods finished before the assignment, were sold at the sale. They formed lots 437, 486, and sixteen pieces of lot 485. For the dyeing of the two hundred and ninety-eight pieces which they were working upon they have since been paid by the assignee. The assignee paid as well for that which was done on those goods subsequent to the failure as for that which was done prior to the failure. The plaintiffs had not received from the Deelmore Company orders to dye any of the three hundred and thirty-two pieces in the gray. At the time of the assignment of the Deelmore Company, and ever since, the plaintiffs have claimed a lien on all of the goods of the Deelmore Company in their possession for the entire amount of the general balance due them, and refused to deliver the goods except upon payment of that balance. The assignee made a request for all of the goods, without distinction, which was met by this general refusal. The Deelmore Manufacturing Company presented to the plaintiffs a claim for $416.67 for damaged goods. The evidence does not show that the damage was caused by the negligence of the plaintiffs. The evidence, and the letters of Mr. Prichard and Mr. Beck offered in evidence, show that this question was settled between the parties prior to the execution of the agreement to sell the goods.

"Counsel for the defendant has requested the referee to find: First. That there was no agreement between the plaintiffs and the Deelmore Manufacturing Company for the general lien on the first lot of goods which was delivered to them to be dyed or finished. The referee cannot find as requested. There was no evidence offered to prove that the order to dye the first lot of goods was not sent to the plaintiffs on the order furnished by them which contained the printed notice, and the evidence of the plaintiffs established the fact that such orders were in use by them for fifteen years. In the view of the case taken by the referee, the fact is immaterial, as it is not claimed that any of the goods first delivered were in the possession of the plaintiffs at the time of the assignment, or form part of the goods in controversy. Second. That there was no agreement between the plaintiffs and the Deelmore Manufacturing Company for a general lien or any subsequent delivery of goods to be dyed or finished. The referee cannot find as requested. Third. That there was no difference between the terms on which the first lot of goods were delivered to the plaintiffs to be dyed or finished and any subsequent lot. The referee cannot find as requested. Fourth. That there was no agreement between the parties for a general lien for unpaid balances due the plaintiffs on the goods out of which the fund in this case arose. The referee cannot answer as requested. Fifth. Should the referee find from the evidence that there was an agreement between the parties for a general lien on all goods for unpaid balances due the plaintiffs, then he is required to find who were the parties to the agreement, when and where was it made, what was the consideration to support it, what was the date of the delivery of the first lot of goods under it, and were they delivered to be dyed or finished. The referee finds that the parties to the agreement were the plaintiffs and the Deelmore Manufacturing Company; that it was made when and where the Deelmore Company sent goods to the plaintiffs to be dyed and finished, with the knowledge that the plaintiffs received the goods subject to the conditions stated in the printed notice; that the consideration was the work and labor to be performed on the goods; that the date of the delivery of

Digitized by Google

the first lot of goods was three or four years ago; and that they were delivered to be dyed.

"Counsel for the defendant also requested the referee to answer the following points: First. That there is no sufficient evidence in this cause of an agreement between the plaintiffs and the Deelmore Manufacturing Company that the plaintiffs should have a general lien upon the goods out of which the fund in this case arose, for any balance due the plaintiffs for work done on other goods of the Deelmore Manufacturing Company. The referee cannot answer as requested. There is sufficient evidence in the cause of such an agreement. Second. That under all the evidence in this cause the finding and award should be for the defendant. The referee cannot answer as requested. Third. Assuming, for the purpose of this point, that the plaintiffs are entitled to a general lien for the balance due on any former account, then the defendant is entitled to have the amount due the plaintiffs reduced by the amount of damage sustained by the injury to Deelmore Manufacturing Company's cloth, should the referee be of opinion that under the evidence such injury was due to the negligence of the plaintiffs. The referee is not of opinion that the evidence shows that the injury was due to the negligence of the plaintiffs. Even if he were of such opinion, the question was settled between the parties prior to the execution of the agreement to sell the goods. Therefore he cannot answer as requested.

"Law.

"It is contended that, irrespective of any question of special contract, the plaintiffs in this case were entitled to a lien on the goods in their possession for the general balance due; that this is not a case of separate and independent bailments under separate and independent contracts, but that, on the contrary, the plaintiffs had general prices for dyeing the goods of the Deelmore Manufacturing Company, who from time to time sent goods to be dyed and finished under the general contract, and that under such circumstances, at common law, the plaintiffs would have a lien. In support of this proposition certain authorities were cited by counsel for the plaintiffs,—among others, the following: Chase v. Westmore, 5 Maule & S. 180; Steinman v. Wilkins, 7 Watts & S. 466; Hoover v. Epler, 52 Pa. St. 523; Young v. Kimball, 23 Pa. St. 193; Yearsley v. Gray, 140 Pa. St. 238, 21 Atl. 318; Cross v. Knickerbocker, 8 Phila. 496; Jones, Liens (2d Ed.) 732; Holderman v. Manier, 104 Ind. 121, 3 N. E. 811. In the view of the case taken by the referee, it is immaterial whether, under the law in Pennsylvania, there was such a lien irrespective of a special contract. That a general lien may be created by contract between the parties is a proposition that is not disputed; and this may be either by express agreement, or by notice from the dyer that he will receive the goods only upon condition that he shall have a lien upon them for the balance due, provided it be shown that the owner received the notice prior to intrusting his property with the dyer. In 2 Kent, Comm. 637, cited in Overt. Liens, p. 5, § 7, the following proposition is laid down: 'This general lien may also be created by express agreement, as where one or more persons give notice that they will not receive any property for the purpose of their trade or business except on condition that they shall have a lien upon it, not only in respect to the charges arising on the particular goods, but for the general balance of their account. All persons who afterwards deal with them, with the knowledge of such notice, will be deemed to have acceded to that agreement.' At page 52, § 45, it is said: 'A general lien, therefore, must be shown to have its existence through a proven custom of the trade, or it may be shown by a notice of such claim brought home to the bailor prior to his making a deposit of goods. Any further bailment will be presumed made by assent on the part of the bailor. This applies to all cases where the bailee is not compellable by law to receive the bailment.' In the case of Kirkman v. Shawcross, 6 Term R. 14, a meeting of the dyers of Manchester was held, at which certain resolutions were adopted; that the said dyers gave public notice that they would not receive goods except on condition that such goods should be subject to a lien for the general balance of account. These resolutions were signed by the plaintiffs, and were advertised in the Manchester newspapers, and this advertisement was seen by the defendant. It was held that the plaintiffs had a general lien on the defendant's goods for the balance of his general account. Lord Kenyon, C. J., said: 'This case seems perfectly clear, whether it be considered on the grounds of honesty or public policy, since the only question is whether a party who has entered into an agreement which is neither contra bonus mores nor forbidden by any law shall or shall not be bound by it. The defendant in this case is a bleacher in the county of Lancashire, and one of the great body of persons there, who, having found that losses to a considerable amount were incurred by them from their not being entitled to retain goods put into their hands for a general balance, came to an agreement (for it was in their option either to work for this or that person, as they chose, which is a point to be remembered in the sequel) that they would not receive the goods of any person who would not consent that they should be retained for a general balance that might happen to be due to them. This agreement was promulgated all around the neighboring country, and it is stated as a fact in the case that it came to the knowledge of the bankrupt. Then the bankrupt, knowing it, must be taken to have sent his goods to the defendant on the terms specified in this agree-

Digitized by Google

ment, and his assignees must be bound by it.' To the same effect, Cumpston v. Haigh, 2 Scott, 684. In Symonds v. Pain, 6 Hurl. & N. 709, the master of a steam tug, of which the defendants were owners, was employed by the plaintiff to tow his smack out of a harbor. In so doing the smack was stranded, through the alleged negligence of the master. The plaintiff had on previous occasions hired the defendants' steam tug, and, on paying the charge, had received a receipt, upon the back of which was printed a notice that the defendant would not be answerable for damage occasioned by any supposed negligence of their servants. Held, that it was a question for the jury whether the contract was made on the terms printed on the back of the receipt. The plaintiff testified that he had no recollection of having read the notice. The plaintiff was nonsuited, and on motion to take off the nonsuit, per Bramwell, B.: 'Here the document given to the plaintiff was not the contract, but a receipt, and it may be that he never looked at the terms, for no man is under any obligation to read a printed notice on the back of a receipt. Suppose a tradesman sends a customer a circular which the latter throws into the fire without reading it, but afterwards goes to the tradesman's shop and purchases some goods. Could the tradesman say, "You have had my circular and know my terms of dealing, and the purchase was made on those terms?" He certainly could not, as there was no obligation to read the circular. It was a matter of fact for the jury whether the plaintiff could have received them without those terms being brought to his knowledge.' Per Pollock, C. B.: 'I doubt whether the evidence fully justified the view I took at the trial; but had it gone further, and shown that these notices were stuck up on the wharves, or otherwise made public, I should have thought the matter clear. If the notice had been on the face of a document by which the defendants undertook to perform the service, there could have been no doubt.' The cause was again tried, when defendants proved that they had caused bills to be posted about the quay and public houses at Yarmouth frequented by fishermen, containing a notice similar to that printed on the back of the receipts. The learned judge left it to the jury to say whether the contract was made on those terms. In Wright v. Trainer, 1 Wkly. Notes Cas. 198, it was held 'that rules posted in a factory, and known to the employés, form part of their contract with the employers.' Even though it appear in evidence that the customer did not read the notice, it is a question for the court and jury to decide, whether, in view of all the circumstances, he ought to have read it. Watkins v. Rymill, 10 Q. B. Div. 178. In Pennsylvania R. Co. v. American Oil Works, 126 Pa. St. 485, 17 Atl. 671, it was said by the court: 'As between the carrier and the consignee, who is owner, we see no reason why this lien may not be extended by a contract to cover the general balance due by the consignee for the carriage of other goods. There would be no injustice or oppression in asking the consignee to pay what he honestly owed before allowing him to remove the goods from the possession of his creditor, whether that creditor was a natural or an artificial person.'

"It is urged by the defendant that the onus of making out and establishing the right to the general lien lies upon the party claiming it; that it is to be regarded with jealousy by the courts, and required the strongest proof. The question is, did the defendant know that the plaintiffs would receive goods only upon the condition that they were subject to the general lien, prior to sending the goods in question to be dyed, or should the defendant have known it, in view of the opportunity offered for such knowledge? The evidence shows that the notice of this general condition was printed on most of the slips on which dyeing orders were written by the Deelmore Manufacturing Company, on the delivery slips signed by the company or its employés, and on all bills and monthly statements mailed to the company. These papers were in use during the whole course of dealing with the defendant, covering a period of three or four years. In the absence of any denial that the notice or condition was received and read by the officers or employés of the defendant company, the presumption is that it was received and read. No evidence was offered by the defendant to rebut this presumption. The transactions between the parties were many and frequent, and no effort was made by the defendant to show that the officers and employés of the company did not receive and read the notice, or that they were not aware of the condition upon which the plaintiffs received the goods; and the conclusion is irresistible that they sent the goods in question with knowledge of the condition upon which alone they would be received, and under this state of facts the contract has the same force and effect as if it had been formally signed by the parties. The referee is of the opinion that the defendant did know of the stipulation for a general lien, and that the goods in question were sent to the plaintiffs under the terms of the notice, and that the plaintiffs have a lien upon them for the general balance due. He therefore reports that there is due to the plaintiffs the sum of $5,777.15."

M. Hampton Todd, for appellant. Frank P. Prichard, for appellees.

PER CURIAM. The questions involved in this case are clearly stated and correctly disposed of by the learned referee. We find nothing in the record that would justify us in sustaining any of the specifications of error, nor do we think that either of them requires special notice. The judgment of the

Digitized by Google

court below, dismissing appellant's exceptions, and confirming the finding of the referee in favor of plaintiffs, is affirmed on the referee's report.

In re ENGLES' ESTATE.

Appeal of COMMONWEALTH TITLE INSURANCE & TRUST CO.

(Supreme Court of Pennsylvania. April 15, 1895.)

WILLS—CONTINGENT LEGACY—INTEREST.

1. Under a will directing the trustee, on the death of a life tenant, to pay out of the residuary estate a certain amount to each of two nephews of testatrix when they should, respectively, reach majority, and, in case either should die under that age, then to pay his legacy to the survivor, and giving to other persons the remaining portion of the income and principal of the residuary estate, the legacy of a nephew does not vest on the death of the life tenant, but is contingent on his reaching majority.

2. A legacy bears interest only from the time it is payable.

Appeal from orphans' court, Philadelphia county.

Accounting by the Philadelphia Trust, Safe-Deposit & Insurance Company, trustee and executor of the will of Charlotte S. Engles, deceased. From a decree allowing to Thomas B. Whitney, a legatee under the will, interest on his legacy only from the time the legacy was payable, his guardian, the Commonwealth Title Insurance & Trust Company, appeals. Affirmed.

The opinion of the court below was as follows:

"The cases which decide that a vested gift may be implied from a mere direction to pay—and they are few in number—have all of them been characterized by some peculiarity in the context of the will, or in the circumstances under which it was written. Where the direction to pay is simply for convenience in the settlement of the estate, the gift will be held to be vested. In re Bennett's Trust, 3 Kay & J. 280; Strother v. Dutton, 1 De Gex & J. 675. Where the payment is deferred for reasons personal to the legatee, it will be held to be contingent. Hanson v. Graham, 6 Ves. 239; Locke v. Lamb, L. R. 4 Eq. 372. Mr. Hawkins, in his Treatise on Wills (page 226), says: 'A bequest to A. at twenty-one, and a bequest to A. payable at twenty-one, do not much differ in expression, yet one is a vested, the other a contingent, gift.' In the one, time is of the essence of the gift, and in the other, it is independent of the gift. Where there is a clear gift, it is immaterial whether the direction to pay at a given age precedes or follows it. The vesting will not be postponed, because the time of payment has nothing to do with the substantive character of the gift. In re Bartholomew, 1 Macn. & G. 354; Shrimpton v. Shrimpton, 31 Beav. 425.

"These principles have a direct and easy application to the case in hand. The testatrix directed the trustee, on the death of the life tenant, to pay out of the residuary estate $3,500 to her nephew, William W. Whitney, and $2,000 each to his sons, Thomas and Frank, when the sons should, respectively, attain the age of nineteen years, and, if either should die under that age, then to pay his legacy to the survivor, etc. After other bequests of income, the remaining income of the residuary estate was given to a niece of testatrix for life, with a disposition over the principal at her death. The life tenant died in 1889, and Thomas B. Whitney, one of the legatees, is nineteen. He claims interest on his legacy from the date of death of the life tenant. In every view which can be taken of it, this legacy was contingent. There was no express gift, and the direction to pay was descriptive of the legatee, because conditioned on his attaining a given age. The testatrix, moreover, did not stand in loco parentis to him, and her bequest to him was not intended for maintenance. There was also a gift over of the entire residuary estate. How could interest run upon a legacy from the death of the life tenant, when the legatee was not yet ascertained, and when all of the estate which had not vested was given to the residuary legatee? The cases cited in the adjudication disclosed in each instance either a distinct gift to the legatee, or what was equivalent thereto. In Laporte v. Bishop, 23 Pa. St. 152, the testator directed the executors to 'take charge' of the legacy, and he spoke of it as the 'sum bequeathed' to the nephew. In Schwartz's Appeal, 119 Pa. St. 337, 13 Atl. 212, the executor and trustee was ordered to hold and invest the residue, and to pay certain sums thereout to testator's children, except John, as they attained certain ages, and the residue was given in equal shares to the same children. The share of John was to be paid when he should satisfy the executor that he had amassed by his own exertions a certain sum. John was of age when the testator died. The supreme court held that the contingency in his case related only to the time of payment, and that meanwhile the principal was to be invested for his use, and intimated that the provision that the share of a child dying under twenty-one should go to the survivors, made the remaining gifts contingent. In Estate of Yost, 134 Pa. St. 426, 19 Atl. 692, interest was allowed upon the express ground that the gift was independent of the direction in regard to time of payment; and Williams, J., added, 'If the gift had been conditional upon the legatee's reaching a given age, it would have been contingent,' citing Moore v. Smith, 9 Watts, 403, to which may be added Bowman's Appeal, 34 Pa. St. 19; Seibert's Appeal, 13 Pa. St. 501. The direction in the present instance to the executors, to hold the residue, was for the benefit of the several life tenants and the ultimate residuary legatees; and it differed

Digitized by Google

from that in Laporte v. Bishop, where the direction was to hold and take charge of the legacy, and from that in Schwartz's Appeal, where it was to hold and invest. Even, however, if we should hold that the legacy vested at the death of the tenant for life, we should be confronted with the rule which obtains in legacies, as in matters generally of indebtedness, that interest begins to run only from the date at which they are payable. In Leech's Appeal, 44 Pa. St. 140, the legacy to a grandchild was to be paid upon her arrival at the age of twenty-one, and it was held that interest began only when she reached her majority. Kerr v. Bosler, 62 Pa. St. 183, and Dewart's Appeal, 70 Pa. St. 403, may be quoted to the same effect. We think that the legatee was not entitled to interest upon his legacy from the death of the life tenant, and we therefore sustain the exceptions."

Frank T. Lloyd, for appellant. William W. Porter, Frederick J. Geiger, and George Q. Horwitz, for appellee.

PER CURIAM. We find no error in this record. All that need be said on the questions whether the legacy was vested or contingent, and whether the legatee was entitled to interest from the death of the life tenant, etc., will be found in the clear and concise opinion of the learned judge of the court below, and on it the decree is affirmed and appeal dismissed, with costs to be paid by appellant.

In re KNIGHT'S ESTATE.

Appeal of BOND et al.

(Supreme Court of Pennsylvania. April 15, 1895.)

TESTAMENTARY CAPACITY—EVIDENCE—SUBMISSION OF ISSUE.

Submission of an issue as to testamentary capacity is properly refused where the testimony shows, as to testator, lack only of cleanliness, and certain peculiarities, insufficient to show mental incapacity.

Appeal from orphans' court, Philadelphia county.

The will of William E. Knight, in favor of James Bond, was admitted to probate. From the decision of the register of wills, so admitting the will, William A. Bond appealed; and with this appeal was heard the appeal of George H. Harmstead, guardian of Emily G. Addy, under petition for leave to intervene. From the decree of the orphans' court dismissing their appeals, they again appeal. Affirmed.

The report of the auditing judge (Penrose) was as follows:

"The decedent died June 9, 1892. The paper offered as his will was executed January 21, 1887. It was admitted to probate by the register of wills September 28, 1892. The petition for appeal was presented to the court October 15, 1892. The petition by the guardian of Emily G. Addy for leave to intervene was presented April 15, 1893. The petition for the appeal alleges (1) that at the time of his death the decedent was the owner of both real and personal estate; (2) that at the time of the execution of said alleged will he was not of sound disposing mind, memory, or understanding, or capable of making a valid will; (3) that 'said writing was procured by undue influence exercised by James Bond and others to induce him to make said instrument'; (4) 'that the said William E. Knight left surviving him no widow, no father, no mother, nor brothers or sisters, or other heirs and next of kin known to' the petitioner, who is a devisee and legatee under a will prior in date to that so admitted to probate by the register. The issues asked for are (1) whether the said William E. Knight was at the time of the alleged execution of said instrument of sound disposing mind, memory, and understanding, and of sufficient legal capacity to make a valid will and testament; (2) whether the said William E. Knight was induced to make said paper writing by undue influence of the said James Bond or others.

"The petition by the guardian of Emily Gertrude Addy for leave to intervene alleges that she is a grandchild of Samuel Addy, a brother of the decedent, who was known by the name of Knight, instead of Addy, 'from the fact that his mother was named Mary Knight, * * * the lawful wife of George Addy, who was the father of said Samuel Addy and said William E. Knight,' and that, at the time of the alleged execution of the paper admitted to probate, William E. Knight was not of sound mind, etc., capable of making a will, and that such incapacity had existed for twenty-three years and upwards. It further averred that Emily Gertrude Addy 'is one of the heirs of the said Samuel Addy, her grandfather, who was the only brother of the said William E. Knight, deceased, and is therefore an heir, and one of the next of kin, of the said William E. Knight, deceased, and entitled to a share of the estate.' The answer of the proponent to the original petition denies the allegations of want of testamentary capacity and of undue influence, and also avers that the appellant has no interest such as entitles him to an appeal, inasmuch as the will under which he claims was executed in November, 1870, while there was a subsequent will executed in July, 1883, in which he 'was not named nor interested.' The answer to the petition to intervene denies that the decedent was a brother of Samuel Addy, or that Emily Gertrude Addy is an heir, or one of his next of kin. It avers that he was at all times not only capable of making a will, but that he was 'a man of unusual intelligence, and so successful in his business that he kept the respect and confidence of those who dealt with him, and maintained from it a competent livelihood.'

Digitized by Google

t asks that the right to intervene be withheld until the petitioner shall satisfy the court that his ward is of kin to the decedent.

"Dr. James Bond, the father of James Bond and William A. Bond, the proponent and the original contestant, was a druggist. He lived with his mother in a house of which he was the owner, at the southeast corner of Tenth and Locust streets, in this city. He had built this house many years before, and one or more of the lower rooms were occupied as his store or place of business. The decedent, whose mother was a sister of Mrs. Bond, was born in England, but came to this country when very young, and became a member of the family of his aunt. He was sent to school for some time, and afterwards was taken by Dr. Bond into the drug store, and thoroughly instructed in that business. Dr. Bond, who married late in life, died in 18—, leaving a widow and three children,—James, William A., and Kate Bond,—minors, of whom James, the eldest, was then about —— years of age. It does not appear from the evidence when Dr. Bond moved from the house at Tenth and Locust streets, but at some time, either while he lived, or immediately after his death, Dr. Knight, as the decedent was always called, became the proprietor of the business, and acquired the exclusive occupancy of the house; paying, as rent, and for the right to use various proprietary medicines, $50 a week. He seemed to have looked upon Dr. Bond as his benefactor, and always attributed his success in business, and his prosperity, to him. In November, 1870, while Dr. Bond's children were still in their minority, he executed a will giving his property to them in equal shares. It is under this will that William A. Bond claims the right to contest the will now in controversy. In July, 1883, Dr. Knight executed a second will, by which he gave his estate to the mother of his former beneficiaries, who in the meantime had become the wife of M. J. Mitcheson, Esq. In January, 1887, Mr. Mitcheson being then dead, he executed the present will; the reasons which induced his change of intention being set forth in the testimony of Mr. Mellors, by whom the will was drawn. For sixty-five years of his life, Dr. Knight lived in the house at Tenth and Locust streets, where he carried on his business, and where he died. Though he became an American citizen, he seems to have retained many of the ideas and peculiarities of an Englishman of the class to which he belonged. He was old-fashioned in his notions and in his habits. In his early life he was not allowed to associate with persons of his own age, or to mingle with society, and his devotion was to his business. As a natural consequence, when among strangers he was very shy, awkward, and ill at ease, though in his house, where he had spent his whole life, he was playful and unrestrained, especially when surrounded, as he generally was, by persons much younger than himself. He cared little or nothing for his personal appearance. His dress was adapted more to comfort than to elegance, and was made to fit very loosely because of a physical trouble (hernia) which caused him great suffering. He was not at all particular about keeping either his face or hands clean, and their condition, as well as that of his clothing, indicated in a striking way the nature of his daily avocation. He was very kind to the poor and to those requiring assistance, and few who applied to him representing that they were distressed went away empty-handed, though his gifts of this character were never extravagant. He was a bachelor, and after Dr. Bond removed from the house a Mrs. Lowry came, with her family, to reside with him, and remained until her death, in 1886, and in the fall of that year Mrs. Atwood (or Mrs. Addy, as she then was) took her place; bringing with her her mother and her daughter, Emily Gertrude Addy (on whose behalf the petition to intervene has been filed), then a child of about nine years of age. Mrs. Atwood testified that Mr. Addy, her first husband, was a nephew of Dr. Knight, that he was lost at sea in 1883, and that after she became a widow Dr. Knight showed great interest in, and provided for, her. She was then boarding with her sister, Mrs. Clara Collins, at whose house Dr. Knight called soon after hearing of the death of Mr. Addy. Mrs. Collins saw him then for the first time. Mrs. Addy, with her daughter and mother, remained with Dr. Knight at his house, Tenth and Locust streets, until his death, in June, 1892. During the first part of this period, Dr. Knight provided everything required for the family, and paid all expenses. Afterwards she became the wife of Albert F. Atwood, who also became an inmate of the household. How much he contributed in the way of support does not appear. It was probably not much, as he was an invalid for two or three years after his marriage.

"Of the twenty witnesses examined on behalf of the contestants, two were the contestants themselves; nine were relatives of Emily G. Addy, or directly interested in having the will set aside; one was a physician who met Dr. Knight on a single occasion several years after the execution of the will; two had been in his employ, one as errand boy and the other as assistant in the store; another had sold shoes to him; two others had dealt with him in business; and the others were neighbors, one of whom (Andrew Gillespie) testified strongly in favor of his capacity, and the others said nothing that in the least impugned it. In view of the fixed and incontrovertible fact that, during all the time it is sought to have it believed that Dr. Knight was incapable of taking care of himself and disposing of his property, he was actually carrying on a business requiring the possession of

Digitized by Google

the very qualities of mind which are alleged to have been wanting, it is difficult to treat with seriousness the testimony offered by the contestants. He started life, it would seem, without a dollar, and by his business ability, his industry, his frugality, and his sound judgment as to investments, acquired the estate (estimated at $45,000 to $50,000) which has induced this contest. He gave personal attention to his business almost to the day of his death, and during all of the time covered by the testimony he took care, not only of himself, but of many of those who now assert his imbecility. The witnesses, whose knowledge was derived from seeing him in his own house, speak of his ill-fitting clothes; his dirty hands and face; his habit of helping himself at table, and eating with his fingers; his indistinctness of speech; his inability to 'carry on a connected, intelligent conversation'; his fondness for repeating the same story, though without point, and often vulgar or obscene in its character; his laughing at his own jokes; his willingness to sleep in a dirty, cluttered-up, little room adjoining his shop; his purchase of old bottles, etc. His sufferings from hernia sufficiently account for the 'bagginess' of his clothing, if it is necessary to account for it, and for his habit, referred to by some of the witnesses, of allowing his trousers to be unbuttoned (though concealed by his shop apron) while in the house. His indistinctness of speech, if it existed, was the result of loss of teeth. His willingness to put up with the dirt and discomfort of the place in which he slept was probably because, having begun it when a lad in the employ of Dr. Bond, he had kept it up from habit, and without realizing a condition apparent to other persons, and because, perhaps, it was easier for him, when called upon by customers during the night, to attend in the store than if he had slept in the upper and more remote part of the house. His alleged inability to carry on a connected conversation may have arisen from want of congeniality with those who assert the fact, or possibly from their own deficiencies in this respect; and so on with the other peculiarities referred to in the testimony. As to his dirty appearance and his habit of repeating his jokes, it is not many years since a popular witticism, very often repeated by men whose soundness of intellect was never questioned, attributed any unusual muddiness in the waters of the Schuylkill to the ablutions of a most eminent citizen (also a druggist), distinguished no less for his ability and public spiritedness than for his contempt for the effeminacy which regarded personal cleanliness as any part of one's social duty.

"To all the witnesses who spoke of any peculiarity on the part of Dr. Knight, the following questions were put: 'From your actual knowledge of Dr. Knight, do you consider him fit or unfit to make a will?' 'From your actual knowledge of Mr. Knight, as you have testified here to-day, do you consider him fit or unfit to make a will?' 'From your observation of Mr. Knight for the time you have known him, what is your opinion as to whether he was of sane or unsound mind?' and 'Do you consider him of sane mind; competent to make a will, to take care of himself and property?' These questions will be found fully set forth in the testimony of Thomas W. McClennan, a clerk or salesman in a shoe store, whose reason for any opinion he might have upon the subject was based largely upon the fact that in summer Dr. Knight bought woolen-lined shoes, several sizes too large, which he never laced up, while in the spring he would 'buy light colored shoes, with rubber at the side, such as you might term a Romeo, and put them on and wear them, and go out in the street, and come back again, and give us candy, buying maple sugar on the street, two or three cents apiece, and come in and give them to us.' This witness was also one of those who testified that Dr. Knight 'was not able to carry on a sustained, connected conversation.' The questions were objected to, and, as the objection was sustained, we do not know what the answer would have been, though it may be assumed that it would have been very decidedly in favor of the contestants. But it appeared from the testimony of every one of these witnesses, in spite of any opinion so asserted, that Dr. Knight's memory was wholly unimpaired, that he did take care of himself and his property, and that he was of extremely accurate business habits. It is true, they said that he kept no books of account; at least, that they saw none. Yet he always remembered what his securities were, where they were kept, when they fell due, and where to go to collect them. He has his box in the Fidelity Company, and always attended in person to looking after its contents. He sometimes paid small bills in small installments, taking the money as it came into the store; but he always remembered to pay them, never forgot what part had been paid, and never offered to pay a second time after payment in full. This last statement is not quite correct. There was one occasion—only one—when he did offer to pay a second time. A sister of Mrs. Atwood, Mrs. Collins, for a year or more, about three years before his death, did his washing (for it seems he did have washing done, notwithstanding what the witnesses, many of them relations or connections of the laundress, say to the contrary), and once, when he had paid her for a week's wash, he afterwards offered payment a second time to her husband. The bill, it is probable, was not a very large one. One of the reasons stated by Mrs. Collins for her opinion as to the testamentary capacity of Dr. Knight, and his ability to take care of himself, was that when he called at her house, soon after the death of Mrs. Atwood's first husband, to see her (Mrs. Atwood), he made a second visit, in the course of a short time, bringing with him, for her, 'a second-hand picture and soup ladle'; but, as Mrs. Atwood, one of the witnesses most relied on by the

Digitized by Google

ntestants, makes no reference to this occurnce, it is fair to assume that the incongruity the gift was less real than apparent. The cture appears to have had some merit, as it still preserved, after a lapse of ten or relve years. There was no evidence whatver of undue influence, and Mrs. Atwood, hose testimony shows that Dr. Knight's emory was unimpaired almost to the day his death, shows very strikingly the oundlessness of the assertion that he was sily persuaded to dispose of his property. month or two before he died, she says put the question to him as to how much was worth, and I never knew until that me, and he said about $45,000.' She often oke to him about making a will, and urged e claims of her daughter, Emily Gertrude ddy, and of herself. The daughter appears have been still more importunate. Her nt, Mrs. Braker, who testified in her behalf, ys: 'Gerty used to say, "Now, uncle, I think ou are awful mean not to have those papers ed." There was a life insurance she alays understood she was to have,—the doc-r's life insurance. He would say, "Hush, ush! I will have that all right."' It is rident that all of this was long after the will ow in controversy, and it is evident, also, at no doubt was entertained at that time pon the subject of the testator's competency dispose of his property. It is proper to noce that, although Mr. William A. Bond was alled to testify in his own favor, he gave no ntimation of an opinion adverse to the capacity of Dr. Knight to make a will, nor, ough he had known him ever since he as born, did he state, nor was he asked to tate, a single instance of irrationality, or inbility to take care of himself and his property.

"It is scarcely necessary to refer to the evidence in support of the will. Many witnesses f the highest respectability and intelligence ore testimony as to the intellectual ability f Dr. Knight. Many of them were his neighors and life-long acquaintances, who had hown their confidence in the most practical anner by dealing at his store, and having rescriptions for themselves and their families ompounded by him in preference to his assistants. Among these witnesses were Major . Lewis Good, a member of the board of ealth; Mr. Peter P. Breen, formerly acting reasurer of the mint; Coroner Ashbridge; Ir. John L. P. Wilson; Mr. Thomas S. 'rofton; Mr. Paul J. Henon; Dr. S. K. 'rease; Mr. Charles Watson, a salesman in he employ of Robert Shoemaker & Co.; and thers.—whose dealings with him, in the way f business, had been carried on for many 'ears. The will was drawn by Joseph Melors, Esq., in his office, from instructions then iven to him by Dr. Knight in person. There vas no interference or suggestion by any hird person. The language of the will was ubstantially that used by the testator himelf, the reasons which induced it being then stated by him to Mr. Mellors. It was carefully read by him, and deliberately executed in the presence of witnesses; and all of this occurred more than five years before his death, when he was not over sixty-eight years old, and when both his physical and mental condition was entirely unimpaired. Upon the evidence offered, no verdict against this will would be possible, and the issues asked for must therefore be refused. It is proper to add that the only evidence of relationship on the part of Emily Gertrude Addy to the testator is found in the testimony of her mother, Mrs. Atwood, from whose cross-examination it is apparent that the alleged relationship is at least the subject of very serious doubt; but in the view taken of the evidence with regard to testamentary capacity, especially as there are two wills between the one admitted to probate and any possible right under the intestate law, the question of relationship becomes wholly unimportant."

The opinion of the court below, per the presiding justice, overruling exceptions to the action of the auditing judge in dismissing the appeals from the register of wills, was as follows:

"Testator executed the will in contest January 21, 1887. On June 9, 1892, five years and almost five months afterwards, he died in the house where, during sixty-five years of his life, he resided and carried on business. It is now alleged he was of unsound mind, and did not possess sufficient testamentary capacity to enable him intelligently to dispose of his estate, and, further, that the execution of his will was procured by undue and improper influence exercised by the sole legatee. A vast amount of testimony was submitted both by the contestants and on behalf of the proponent, and after a careful review of all that has been laid before us, and full consideration of the exhaustive arguments of counsel, we can reach no other conclusion than that expressed by the judge upon the hearing of the appeal, when, in his finding, he says: 'In view of the fixed and incontrovertible fact that, during all the time it is sought to have it believed that Dr. Knight was incapable of taking care of himself and disposing of his property, he was actually carrying on a business requiring the possession of the very qualities of mind which are alleged to have been wanting, it is difficult to treat with seriousness the testimony offered by the contestants. He started life, it would seem, without a dollar, and by his business ability, his industry, his frugality, and his sound judgment as to investments, acquired the estate (estimated at $45,000 to $50,000) which has induced this contest. He gave personal attention to his business almost to the day of his death, and during all of the time covered by the testimony he took care, not only of himself, but of many of those who now assert his imbecility.' What is here said is fully sustained by the testimony, and satisfactorily disposes of the

Digitized by Google

alleged unsoundness of mind of the testator. And so with the charge that undue influence had been exercised by the legatee, whereby testator was deprived of the free and uncontrolled disposition of his property. But of this we are unable to discover the slightest evidence. Neither undue influence employed by the legatee to obtain the bequest is shown, nor any artifice, deception, or persuasion practiced by him. The entire testimony is clear and satisfactory, beyond a reasonable doubt, that the testator, although eccentric, peculiar, and slovenly in his conduct, conversation, personal habits, and attire, was possessed of full testamentary capacity, and, in the disposition of his estate, exercised his free, untrammeled will. And as said by the supreme court in the very recent case of In re Pensyl's Estate, 157 Pa. St. 465, 27 Atl. 669, 'Viewing the testimony in its most favorable light, there is nothing in it that would warrant any jury in rendering a verdict against the validity of the will.' The exceptions are therefore dismissed, and the decree dismissing the appeal affirmed."

William Gorman and H. C. Terry, for appellant. J. P. Townsend and E. Hunn Hanson, for appellee.

PER CURIAM. This case came into the orphans' court on appeal from the decision of the register of wills admitting to probate the paper alleged to be the last will of William E. Knight, deceased, and was regularly proceeded in before one of the judges of that court, who, upon consideration of the testimony introduced by the parties, came to the conclusion that there was practically no evidence of undue influence, and that the testimony relied on to prove want of testamentary capacity was quite insufficient to justify an issue. He therefore dismissed the appeals, and ordered the record to be remitted to the register of wills. Exceptions to this action of the auditing judge having been filed, and duly considered by the court in banc, the same were dismissed, and the decree was affirmed.

From a careful consideration of the testimony in connection with the clear and convincing report of the auditing judge and the opinion of the court below, we are satisfied there was no error in refusing to award either of the issues. Nor do we think there is anything in either of the 27 specifications of error that requires discussion. All the questions that are worthy of consideration have been sufficiently noticed in the report and opinion above referred to. The learned auditing judge's rulings on questions of evidence are substantially correct; and as to the effect of the testimony, as an entirety, we fully concur in the conclusion announced by the learned president of the court below, wherein he says: "The entire testimony is clear and satisfactory, beyond a doubt, that the testator, although eccentric, peculiar, and slovenly in his conduct, conversation, personal habits, and attire, was possessed of full testamentary capacity, and, in the disposition of his estate, exercised his free, untrammeled will." As we said in Re Pensyl's Estate, 157 Pa. St. 465, 27 Atl. 669, viewing the testimony in its most favorable light there is nothing in it that would warrant any jury in rendering a verdict against the validity of the will. The controlling questions have been so fully considered by the court below that further comment is unnecessary. Decree affirmed, and appeal dismissed with costs to be paid by appellants.

Appeal of FASSETT et al.

(Supreme Court of Pennsylvania. April 15, 1895.)

GIFT—OF MONEY DUE—CONDITION.

1. A gift of money due the donor from the donee, by giving a receipt therefor, is valid though no money is actually paid, and though there is no surrender of the recognizance, which binds the donee for the payment, not merely of such money, but of sums to become due in the future.

2. Testimony of a donor, who gave money due from a donee by giving him a receipt therefor, that "I signed his receipt, but I never received any money, but I supposed he would pay me when he got able," and that "he said, if I needed it, and he got able, he would pay me, notwithstanding I had given him this receipt," does not show that the gift was on a condition.

Appeal from court of common pleas, Wyoming county.

Under a judgment in favor of John B. Fassett and Mary J. Fassett, in an action by them against H. C. Frost, certain real estate of H. C. Frost was sold, and from the decree distributing the fund derived therefrom said John B. Fassett and Mary J. Fassett appealed. Reversed.

The land formerly belonged to Jason Frost, and after his death it was taken by his son H. C. Frost, in partition proceedings, charged with a certain sum, the interest on which was to be paid annually to Mary Frost, widow of Jason Frost. The fund, besides being claimed by the Fassetts under their judgment, was claimed by N. H. Davis & Co. and Sholer & Clark, under assignment by the widow of the arrearages of her annual charge, which, they claim, has not been paid or satisfied. To defeat this claim the Fassetts proved that the widow gave H. C. Frost a receipt for all arrearages down to and including the year 1888 and contended that this was a discharge or relinquishment thereof pro tanto. The decree appealed from gave no effect to the receipt.

Chas. E. Terry and E. J. Jorden, for appellants. Wm. Maxwell, Charles M. Lee, and James W. Platt, for appellees.

GREEN, J. The auditor found, upon abundant testimony, "that Mary Frost gave to her son, Henry C. Frost, a written receipt

Digitized by Google

for all arrearages of dower due her up to April 20, 1888." It is beyond all question that by this action the widow intended to give, and did give, to her son, absolutely and without any condition, all the arrearages of dower which were due her to the date mentioned. A title by gift is just as good as a title by deed, and cannot be revoked after the gift is completed. In this case the donor has never revoked the gift, or attempted to do so; and it is not in the power of any other person to do so for her, nor could she do so herself, after it was completed. The subject of the gift here was money due to the donor from the donee. If the money due had actually been paid by the donee to the donor, and the receipt given, and then the donor had handed back the money to the donee, no possible question could have arisen as to the effect of the transaction. But the handing of the money back and forth was entirely unnecessary, and therefore the giving of a receipt was just as efficacious to extinguish the title of the donor to the money as if its bodily transmission from the one to the other, and back again, had actually taken place. The question arises only between the donor and donee. No rights of creditors of the donor are involved, because there were none. As to any subsequent assignees, they could not take what the donor could not give them, and they could only take what she had to give; that is, moneys due for dower after April 20, 1888. These considerations are quite sufficient to dispose of the case.

Some attempt is made to affect the quality of the gift by an effort to clothe it with a condition, but it is altogether futile. It is argued that because no money was actually paid, and the recognizance was not surrendered, there was no good legal gift. As to the surrender of the recognizance, it was neither feasible nor essential to the gift. Further payments in the future would become due under it, and it could not be surrendered by the widow, even if she had so desired. As to the payment of money for the receipt, if that were necessary, there could be no such thing as a gift of money due to the donor. If it had to be purchased and paid for, it would not be a gift at all.

The effort to prove a condition is equally untenable. The argument is founded upon the testimony of the widow. She says, "I signed his receipt, but I never received any money, but I supposed he would pay me when he got able." Of course, her supposition on this subject is only a supposition, and not a condition of the gift, in the least possible sense. Again she testified, "He said, if I needed it, and he got able, he would pay me, notwithstanding I had given him this receipt." As it has not yet been proved that her son has ever been able to pay this money back, or that his mother needed it, this remark of the son would be utterly ineffectual to defeat the gift, even if it had amounted to a condition of the gift. But it never had any such quality. It was not exacted by the mother as a term of the gift, nor could it be pretended to be of any higher dignity than a mere casual remark of the son. It had nothing to do with the gift. The numerous authorities cited in the argument for the appellees are altogether wide of the mark. They are not relevant to the question at stake here. The subject of the gift was moneys due to the donor for arrearages of dower due to her by the donee. She gave them to him in the only way in which such a gift could be made, viz. by a receipt in full to a certain date. That act was absolute, unqualified, completed by a delivery of the receipt to the donee, never questioned by the donor, and completely efficacious to convey her title to the arrearages due. That is all that is necessary to make a complete and perfect gift of such a subject-matter. The assignments of error are all sustained. The decree of the court below is reversed, at the cost of the appellees, and the record is remitted, with instructions to distribute the fund in accordance with this opinion.

YINGST v. LEBANON & A. ST. RY. CO.

(Supreme Court of Pennsylvania. April 15, 1895.)

ELECTRIC STREET CAR—SCARING HORSES—NEGLIGENCE—EXCESSIVE SPEED—EVIDENCE.

1. Defendant street-railway company cannot be held liable for damages caused by the scaring of plaintiff's horse by defendant's electric car, on the ground that it was caused by excessive speed of the car, on the testimony of plaintiff that the car was moving "fast," "pretty fast," "at full headway," and "swiftly," and of defendant's witnesses that it was going at a moderate rate of speed, one of them saying that it was five miles an hour.

2. Negligence is not shown by the fact that an electric car was not stopped before it reached a horse which was frightened thereby, it not having shown signs of fright till the car was within 20 or 30 feet of it.

Appeal from court of common pleas, Lebanon county.

Action by Mary Yingst against the Lebanon & Annville Street-Railway Company for personal injuries. Judgment for plaintiff. Defendant appeals. Reversed.

Grant Weidman, for appellant. J. M. Funck, Thomas H. Capp, and Geo. B. Schock, for appellee.

GREEN, J. The plaintiff's injury resulted from the upsetting of a wagon in which she was riding, occasioned exclusively by the fright of the horse drawing the wagon. The horse took fright upon seeing an approaching street car on the defendant's track, and, turning suddenly away from the road, the wheel of the wagon struck a stone or other obstacle, and this caused the overthrow of the vehicle. There was no collision of any kind. The wagon was not on the track, but was being

Digitized by Google

drawn upon the highway on which the defendant's track was laid. The only ground upon which the claim of the plaintiff for damages was asserted in the statement of cause of action, and alleged on the trial, was negligence in running the car at too great speed, and in not regarding signals given by the driver of the wagon. As the right of the defendant company to run its cars on their tracks is fully equal to the right of the plaintiff to ride in a wagon on the street, the mere fact that the horse took fright at the sight of the car confers no right of action whatever against the defendant. Hazel v. Railway Co., 132 Pa. St. 96, 18 Atl. 1116; Piollet v. Simmers, 106 Pa. St. 95; Railway Co. v. Taylor, 104 Pa. St. 306. It is only for an abuse of the right to the injury of another that the company is responsible. In this case it is alleged that the car was running at an excessive rate of speed, and that this was such an abuse of the right of passage as to amount to culpable negligence, which caused the fright of the horse, and thereby occasioned the injury to the plaintiff. The case, therefore, centers upon this proposition of fact: Does the evidence sustain this charge? To make out such an allegation, it is necessary to know what is the standard of legitimate speed for an electric car on such a street, and, next, was that standard exceeded in this case. The plaintiff, not being a passenger, is subject to the burden of proof, and must establish the truth of her allegations by affirmative testimony, failing in which she fails in her suit. Upon this subject, having read every particle of the testimony with patient attention, we are bound to say that the plaintiff has furnished no proof whatever, either as to what is the lawful rate of speed at which an electric car may run over such a street or any street, or as to whether the rate at which this car ran at the time of the accident was in excess of lawful speed. Her whole testimony as to the fact of the accident consisted of the evidence given by herself and two other witnesses, Witters and Doody. Not one of them was even asked the question whether the speed of the car was greater than was allowable for an electric car to run, or whether they had any knowledge upon that subject. No experts in such matters were called to testify as to what would be a reasonably prudent rate of speed for such a car over such a street, and, in short, no evidence whatever was given upon that subject. Nor was any evidence given for the plaintiff as to the actual rate of speed at which this car was run, and therefore the plaintiff did not furnish any proof which could guide the jury in considering whether the defendant was guilty of any negligence in this regard.

As electric cars may lawfully be run upon the streets, and may certainly maintain a fair rate of speed, it is not possible to establish an allegation of negligence in respect of speed without testimony showing a standard, and further testimony showing a breach of the standard, and no jury can have liberty to deal with such a question unless there is practical evidence in the case upon these subjects. In this case there was none. All that the plaintiff said in her testimony in this connection was as follows: "Then the car came at full headway. Then, when the horse saw that, he could not get backward. Then he made a sudden turn, and threw us out." On cross-examination she was asked: "Q. Did the horse do anything then? A. He looked around, but the car was too quick in passing, and he hadn't time to do anything. They were running fast. They went pretty fast past us." Again she said: "Then, as we came to the railroad, or crossed the railroad, they came swiftly past us; and then the boy put up his hands that they should stop, and said they should stop." This was all of her testimony on the subject of speed, and the vice of it is its utter inadequacy. Electric cars have a lawful right to go "fast," to go with "speed." The fact that they can do so is one of the great reasons of their being. When a witness says, therefore, in a given case, that the car ran swiftly or with speed, he says nothing to the purpose when the inquiry is as to negligence in the rate of travel. Such testimony is altogether too uncertain for judicial action, and most especially so when there was no collision, but only the fright of a passing horse. In this case it is, at best, only the thought of the witness, and that witness the plaintiff, as to what is speed and what is swiftness. In her own case she might well think that any rate of movement would be speed or swiftness, in order that she might recover; whereas other witnesses might well think that the same rate of movement was neither speed nor swiftness. The difficulty is that no means of contrast is afforded by such testimony, by which to distinguish between the rate of speed which is usual or customary or reasonably prudent and that which is not so. Now, as to this witness, she was examined on this very subject. On cross-examination she was asked: "Q. What is the regular speed of a street car? Do you know how fast they run?" And she answered: "A. I cannot tell you that. That is something I cannot tell you." "Q. You know nothing about that street, do you? A. I don't know how far they run. Q. Nor how fast they run, do you? A. I know nothing about them except that I seen them go." She added she often saw them run. And now it is necessary to say that there is absolutely no other testimony in the case than the foregoing on behalf of the plaintiff on the subject of the speed of the car.

Two other witnesses were called and testified for the plaintiff as to the facts of the accident. Neither of them said one word in regard to the speed of the car. They were not asked a single question upon that subject and, of course, they gave no testimony in relation to it. On the question of the speed of the car, therefore, the case hangs alone

Digitized by Google

upon the above two or three fugitive expressions of the plaintiff, and these admittedly not founded upon any knowledge as to what was the regular rate of speed of a street car. But, although the two witnesses called by her said nothing as to the rate of speed of the car, they did testify to some other facts which completely destroy the theory of the plaintiff on this subject, and also as to any negligence of the defendant being the cause of the fright of the horse. The plaintiff's witness Witters, who said he stood about 30 feet away from the place of the accident at the time it occurred, and saw it all, testified that he approached the place on foot, walking in the same direction in which the car was moving, but in front of the car. The wagon was coming towards him, and he saw it as it crossed the Cornwall road, after he had crossed the Cornwall and Lebanon road. The two roads were not far apart, about a square and a half, and the witness was walking from the Cornwall and Lebanon crossing towards the Cornwall crossing. He was asked: "Q. Had you crossed the Cornwall and Lebanon road already? A. Yes. Q. Where was the car? A. The car was coming along behind me. They stopped there to let somebody on or off at the gas house somewhere. Q. Behind you? A. Yes, behind me. Q. At that time you saw these people crossing the Cornwall road, was the wagon crossing the Cornwall railroad? A. Yes. Q. Then you walked on. Did the car go ahead of you then? A. No; he could not, because he had stopped there. I don't know who got on or off. I didn't pay no attention to that. Q. Did the car pass you? A. No; not till I got up to that accident,—after the accident happened." After saying that his best judgment was that the distance between the two railroads was about a square and a half, he was asked: "Q. You walked there about that distance, and the car hadn't caught up with you yet? A. No; not until I got there. We pretty near both came there together where I stood." Thus, it appears that the speed of the car was scarcely more than that of the witness while walking along the road; and, in the face of this testimony given by the plaintiff's witness, it is quite preposterous to contend that the car was running at improper speed.

In addition, however, to this fact, both of the plaintiff's witnesses testified to another fact which is in entire hostility with any theory of negligence on the part of the motorman, either for disregarding signals or for running at too great speed. The witness Witters testified that the horse did not commence shying until he was close to the cars, only 20 or 30 feet away. He was asked: "Q. Where did the horse first shy, that you saw? A. When he got, may be, twenty or thirty feet away from the car. Q. Then, he didn't shy all the way coming down the hill? A. No; not till the car got close to him." The other witness, Doody, was asked: "Q. Now, tell us, as near as you can, about how far the car and the team were apart when you saw the horse rear? A. It was right close to the team when the horse began to rear up." He further said that 20 or 30 feet was what he called close. As a matter of course, if the horse began to shy at no greater distance than 20 or 30 feet from the car, there was no opportunity to stop the car before reaching the horse. The momentum of the car would carry it at least that distance before it could be stopped. In point of fact, the car did stop at about that distance. To say judicially that a failure to cause an instantaneous stoppage of the car in such circumstances is negligence would be a mere travesty of justice. No matter how many signals or calls to stop were made by the driver of the wagon, in such a state of the testimony they would utterly fail to establish the charge of negligence. The motorman was not responsible for the fright of the horse at sight of the car. He was not bound in advance to take precautions against a fright of which he had no knowledge; at least until he saw some evidence of the fright. As the plaintiff's own witnesses concur in saying that, when the horse first shied, he was only 20 or 30 feet from the car, there was no opportunity to stop the car sooner than he did, and he was guilty of no negligence for not doing so.

The foregoing is the case of the plaintiff on the testimony adduced by herself, and it failed utterly to establish any negligence on the part of the defendant. It was the plain duty of the learned court below to grant the compulsory nonsuit which was asked for by the defendant's counsel at the close of the plaintiff's testimony. This was not done, and the trial of the case was proceeded with. It is only necessary to take a brief view of the testimony adduced of the defendant. The motorman testified that the horse made no attempt at shying until he was by the side of the car; that he did not see the boy in the wagon wave his hand, and that he did not yell at all; also, that he stopped the car as soon as he saw the horse shying. H. S. Berry, the conductor, said he saw the accident; that "Shiffler's team came along going east as we were going west; and, when we were pretty near,—when we were past,—why, the horse ran around and upset." He also said he saw no signs of the horse becoming unruly until after the car passed, and that he heard nobody call out, "Stop." J. I. Greeley, a disinterested witness, riding in the car, said: "I was sitting on the side when the team came along, and the horse and wagon as they came towards the car; the horse was prancing a little, and the car was slacked down, and, after the horse was past, he ran around across the sidewalk over in the meadow; and the wagon struck a stone or whatever was lying there, and that upset the wagon." He was asked: "Q. Did you see the horse? A. Yes. Q. When did you first see him? A. When he came up

Digitized by Google

over the railroad. When he came down approaching the car. Q. When did he commence to jump? A. He didn't prance much. You can't say that he jumped much when he passed the car. Q. When did he turn around? A. After he passed the car. Q. Did you hear any hollering of anybody to stop? A. I did not." After saying that he was watching the team coming, and sat facing them, and that the horse shied only a little until he passed the car, he was asked: "Q. You saw they were going slow? A. Yes; not full speed, nothing like it, because the car was slackened down considerably. Q. Was there any evidence of the horse being unmanageable that you noticed? A. No, sir; not when he passed the car. Q. Was there before he came to the car? A. No, sir; he acted just like a great many other horses." On cross-examination he said: "I was sitting that way [indicating], and I couldn't help but see just exactly what was going on; but there was not sufficient about the prancing to pay particular attention to it." He repeated that he was looking directly at the horse, and could not help seeing him, and that the horse was not excited to any extent. Jacob Schmidt, another disinterested witness, riding on the car, said he noticed the horse and wagon approaching the car, and added: "I observed the horse. He was within my vision for a period of ten seconds, possibly, until the team got directly opposite the car. Q. How did the horse behave until he got opposite the car? A. I saw nothing unusual. I saw the horse prick up his ears, and saw him drive along at a moderate rate of speed, the way most horses would as they pass a car, until, as nearly as I can tell, he got directly opposite the car. Q. Did you notice anything peculiar about the horse up to that time? A. Well, nothing that I could say was peculiar; no, sir. Q. Well, what occurred then? A. Well, without any previous warning, I saw the horse wheel around shortly, a very short turn; and, as I found afterwards, one of the front wheels had caught on a stone of considerable size, and the wagon just turned right over on its side. Q. Was the car moving fast or slowly? A. I should judge at a moderate rate of speed. * * * Q. Was there anything unusual in the behavior of the horse? A. I saw nothing unusual in the behavior of the horse. * * * Q. Up to that time, what was the rate of speed? A. A moderate rate of speed. I could not tell the rate."

This review of the testimony has been rendered necessary because the court was asked to direct a verdict for the defendant, under all the evidence, and also to charge the jury, in answer to the defendant's second point, that there was no proof that the car was run at an excessive and improper rate of speed, and therefore the jury should find for the defendant. We are clearly of opinion that the second point should have been affirmed without qualification, and also the fifth point, asking for a general instruction, under all the evidence, to find for the defendant.

The question of excessive speed was the one upon which the plaintiff's case depended entirely; yet not a single witness, not even the plaintiff herself, gave any evidence that the speed was excessive. She merely said the car was moving "fast," "pretty fast," "at full headway"; and once she said "swiftly." But that is not enough. In order to create liability on this ground, the evidence should show, and it should show clearly, either that the car was moving at an unusual rate of speed, or at a rate which was not reasonably prudent, or at a definite rate in miles per hour which would of itself show it was excessive, or at a rate greater than was allowed by the municipal ordinances, if there were any. But not a word of any testimony of this kind is in the case anywhere. The plaintiff is the only witness on her side who says a word as to the speed of the car. Her two witnesses say nothing about it, and the case stands upon the entirely inadequate and interested testimony of the plaintiff, on the one side, and the disinterested testimony of four witnesses, upon the other side, all of whom say that the car was going at a moderate rate of speed; one of them, the motorman, fixing it at five miles an hour. As to the action of the horse, the great weight of the testimony is that nothing occurred until the horse and the car were very near together, and when, according to the testimony of the plaintiff's witnesses, so near that the car could not have been stopped sooner than it was. It is to be regretted that cases so entirely destitute of real merit as this one is should be permitted to go to the jury at all. We think the cause of justice would be much better subserved if the judges of the common pleas would in all proper cases, where the testimony is manifestly insufficient, adjudge it themselves, instead of submitting it to the jury. The assignments of error are all sustained. Judgment reversed.

NATHANSON v. SPITZ et al.

(Supreme Court of Rhode Island. April 17, 1895.)

ACTION AGAINST JOINT DEFENDANTS—SERVICE ON ONE DEFENDANT—RECOVERY OF JUDGMENT — PARTNERSHIP.

1. Judiciary Act, c. 13, § 18, providing that no judgment, without complete satisfaction, against a part only of the defendants in an action upon a joint contract shall be a bar to a future action against such defendants as were not served in the first action, impliedly allows an action against partners, who both reside out of the state, to proceed against one of them upon whom the writ is served while temporarily in the state.

2. The liability of a firm for its debts is joint, and all the partners must be joined in an action thereon.

Action by Max Nathanson against Jacob Spitz and another. Demurrer to a plea of abatement sustained, and plea overruled.

Digitized by Google

J. J. Hahn, for plaintiff. Charles F. Stearns, for defendants.

TILLINGHAST, J. At the time of the suing out of the plaintiff's writ in this case, the defendants, Samuel Adams and Jacob Spitz, were copartners in business, under the firm name of Adams & Spitz, at Boston, in the state of Massachusetts, where they both resided. The writ was served by arresting the defendant Spitz while temporarily in this state, and by sending an attested copy of said writ by mail to the defendant Adams, at Boston. The defendant Spitz entered a special appearance for himself, and filed a plea in abatement, on the ground that there had been no legal service upon the defendant Adams, the other joint obligor in the contract sued on, to which plea the plaintiff demurred. The only question raised, therefore, by the pleadings, is as to the sufficiency of said service. The substance of the contention of counsel who appears for said Spitz in support of his plea in abatement is: First, that the liability of partners on a firm obligation is, during the lives of the partners, joint, and not joint and several, and hence that the partners must sue and be sued jointly; and, second, that, in regard to service of process, the common law makes no distinction between partners and other joint obligors, and hence that they all must be served with process before judgment can be obtained against any of them, even though some are nonresidents.

As to the first point: It is doubtless true that, independently of any statute, the liability of a partnership for the debts thereof is a joint and indivisible liability, and hence that all of the partners must be joined in a suit for the recovery of such debts. Dicey, Parties (Truman's Notes) p. 285, rule 56; Bates, Partn. (Library Ed.) § 1049, and cases cited; Pearce v. Cooke, 13 R. I. 184; Page v. Brandt, 18 Ill. 37; Kent v. Holliday, 17 Md. 387; Bell v. Donohoe, 17 Fed. 710.

As to the second point: At common law, when one of several joint defendants was out of the jurisdiction of the court, so that it was impossible to obtain service upon him, the plaintiff might institute proceedings of outlawry against such nonresident defendant; and, after judgment of outlawry had been obtained against him, the plaintiff could proceed to recover a separate judgment against the defendants served with process. 2 Cooley's Bl. bk. 3, pp. 281, 282; Edwards v. Carter, 1 Strange, 473; Tidd, Prac. *423; 1 Chit. Pl. (Library Ed.) *49. The proceeding of outlawry in civil cases, however, is unknown in the United States; and, if there are any cases of outlawry in criminal cases even, they are very rare. In England, also, it has long been obsolete in civil proceedings, and was formally abolished by the civil procedure acts (Repeal Act, 1879; 42 & 43 Vict. c. 59). In criminal proceedings even, it is but little used, but is formally kept alive by 33 & 34 Vict. c. 23. In Hall v. Lanning, 91 U. S. 168, Mr. Justice Bradley, in delivering the opinion of the court, said: "In most of the states legislative acts have been passed, called 'Joint Debtor Acts,' which, as a substitute for outlawry, provide that if process be issued against several joint debtors or partners, and served on one or more of them, and if the others cannot be found, the plaintiff may proceed against those served, and, if successful, have judgment against all. Various effects and consequences are attributed to such judgments in the states in which they are rendered. They are generally held to bind the common property of the joint debtors, as well as the separate property of those served with process, when such property is situated in the state, but not the separate property of those not served; and, while they are binding personally on the former, they are regarded as either not personally binding at all or only prima facie binding on the latter." In this state, while there is no statute which in express terms goes to this extent, although by section 17, c. 13, of the judiciary act, partnership debts become joint and several on the decease of one of the partners (Pearce v. Cooke, 13 R. I. 184), yet there is a statute which practically accomplishes the same result. We refer to section 18 of chapter 13 of the judiciary act, which provides as follows: "No judgment, without complete satisfaction, rendered against a part only of the defendants in any action upon a joint contract, shall be a bar to any future action on said contract, for any unsatisfied balance due, against such of the defendants upon whom, or whose estate the writ in the original action shall not have been served." It is clearly to be implied from this statute that service on a part only of the defendants, in an action upon a joint contract, is sufficient to give the court jurisdiction. And it is, doubtless, by reason of the existence of said statute, which appears in substantially the same form as early as the Revision of 1844, that the settled practice in this state, in cases like the one now before us, has been to serve the writ upon such of the defendants as are within the jurisdiction thereof, and to proceed only against them for the breach of such contract. See Winslow v. Brown, 7 R. I. 95. Moreover, we see no reason why the return of non est inventus made by the sheriff in this case as to the defendant Samuel Adams may not properly be treated as equivalent to the common-law process of outlawry. The writ was properly sued out against both of the defendants, and the return thereon shows that the plaintiff has done all that he could to bring them both into court; and, having succeeded as to one of them, it would seem that he ought to be allowed to proceed to obtain a judgment

Digitized by Google

against him. See Dillman v. Schultz, 5 Serg. & R. 36; Tappan v. Bruen, 5 Mass. 193. But, however this may be, we are clearly of the opinion that, under the statute above quoted and the uniform practice in this state, the case at bar may properly proceed against the defendant Spitz, upon whom only the writ was served. The demurrer is therefore sustained, and the plea in abatement overruled.

EMSLEY v. YOUNG.

(Supreme Court of Rhode Island. April 13, 1895.)

APPOINTMENT OF ADMINISTRATOR—REVIEW ON APPEAL.

1. The appointment of an administrator de bonis non with the will annexed, under Pub. St. c. 184, § 22, which provides that in case of death of a testator before the settlement of the devised estate the court shall appoint as administrator such person as it "sees fit," is the exercise of a judiciary discretion, and is subject to review upon appeal, under Judiciary Act, c. 28, § 1, allowing appeals from probate courts.

2. The appointment of one as administrator de bonis non, who was in no way interested in the property, over a competent and qualified applicant, who was one of the legatees, was improper.

Appeal from probate court.

Appeal by Robert Emsley from a decree of the court of probate of Glocester appointing David Young administrator de bonis non with the will annexed on the estate of David Young, deceased. Reversed.

Richard E. Lyman, for appellant. Clarence A. Aldrich, for appellee.

MATTESON, C. J. This is an appeal from the decree of the court of probate of Glocester appointing the appellee administrator de bonis non with the will annexed on the estate of David Young, deceased. The testator bequeathed all his estate to his widow, Almira Young, and appointed her executrix of his will, which was duly admitted to probate, and letters testamentary on which were issued to the widow as executrix. She died in August, 1894, leaving a last will and testament, duly admitted to probate, by which, after devising her real estate and bequeathing certain pecuniary and specific legacies, she gave to the appellant, Emsley, and one Charles Edwin Brown, the residue of her estate, and appointed Emsley executor, to whom letters testamentary were duly issued. Subsequently it was ascertained that $400 of the personal estate which had belonged to David Young, deposited in his name in the People's Savings Bank in Providence, and bequeathed to the said Almira by his will, had not been withdrawn by her. Thereupon Emsley, as executor of her will, presented his application in writing to the court of probate of Glocester for the appointment of himself or some other suitable person as administrator de bonis non with the will annexed on the estate of David Young. The application was referred for consideration to October 13, 1894, on which date the appellee presented his application to the court in writing to be appointed such administrator. The court continued the applications for hearing to November 10, 1894, and on that date appointed the appellee. Pub. St. R. I. c. 184, § 22, provides that: "In case of the decease of any person who while living, and at the time of his decease, was the executor of the last will and testament of any person previously deceased and whose estate had not been fully administered upon by such deceased executor, the court of probate in the town in which such will was proved and recorded shall proceed and grant letters of administration with the will annexed, to such person as the court shall see fit." It is contended on the part of the appellant that in granting administration the primary object is the interest of the estate, and hence, though the language of the statute is that the court shall proceed to grant letters of administration "to such person as the court shall see fit," the court, in the exercise of its discretion, should grant the administration to some person who is interested in the estate, if competent, rather than to a stranger, because a person interested will be more likely to administer the estate to the advantage of all concerned. On the other hand, it is contended for the appellee that the statute confers on the court of probate power to grant the administration to such person as it shall see fit, and that, having exercised its authority, its action cannot be reviewed. We do not take this view of the statute. An appeal lies from the action of the court below to this court. Judiciary Act, c. 28, § 1. If the authority of the court below is exclusive, so that we have no power to review its action, an appeal would be an idle ceremony. We think that the authority conferred on the court of probate is not an absolute authority or discretion, but rather a judicial discretion, to be exercised in view of the circumstances of the case; that the statute contemplates that the person to be appointed shall be not only competent to perform the duty, but also suitable in view of his situation or relation to the estate. The appeal from the decree of the court below vacated the appointment of the appellee, so that the matter comes before us as the supreme court of probate for our action as though the decree below had not been made. It is true that it is and has been the practice of this court to confirm the appointments of courts of probate, unless shown to be unsuitable. Knowles v. Lester (Declarations, etc., No. 3,259, April term, 1889) 16 R. I. 542, 18 Atl. 159. But we are of the opinion that the appointment of the appellee, who was in no wise interested in the property to be administered, was unsuitable. It is not claimed that the appellant is not fully competent to perform the duty of administration, and, if so, he was the most suitable, if not the

Digitized by Google

only suitable, person for appointment, since he was the executor of the will of Mrs. Young, to whose estate the property not administered belonged, and was, moreover, one of the residuary legatees in her will, and as such entitled individually to one-half of such property. The court below, in the exercise of its discretion, should have been governed by these facts. The appellee, although the next of kin of David Young, deceased, so far as appears, has no interest whatever in the property to be administered, and therefore, as to such property, is a mere intermeddler. In Mowry v. Latham (R. I. Declarations, etc., No. 3,784, Oct. term, 1890) 23 Atl. 13, we held that, though the appointment of an administrator on an intestate estate, made on the application of a person not interested in the estate as next of kin or creditor of the deceased, was valid, unless appealed from or reversed, such applications are not to be encouraged, especially when the applicant is a mere intermeddler; and that the court might properly refuse to entertain, or, on motion of any person interested in the estate, dismiss, such an application. A decree may be entered for the appointment of the appellant as administrator de bonis non with the will annexed on the estate of David Young, deceased.

McTWIGGAN et al. v. HUNTER, Tax Collector, et al.

(Supreme Court of Rhode Island. April 13, 1895.)

COLLECTION OF TAXES—ANSWER—EQUITY—PLEADING.

1. In an action to enforce the collection of taxes on town property, an answer alleging that the property was "duly exempted from taxation by said town," without setting out the ground of such exemption, was defective.

2. An answer to which the oath has been waived, being given, by Judiciary Act, c. 20, § 19, the effect of a pleading in an action at law, is consequently subject to the same exceptions for insufficiency as any other pleading.

Suit by George F. Hunter and another against W. H. McTwiggan and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Bassett & Mitchell, for complainants. Edward P. Allen and Cooke & Angell, for respondents.

MATTESON, C. J. We think that the allegations of the answer in relation to the notice given by the assessors of the time and place of their meeting for the making of the assessment are sufficient. The first exception to the answer is overruled.

The complainants' second exception to the answer is because the respondents have not stated in it in what manner and form the property of the Grosvenordale Company was exempted from taxation by the town of East Providence, but aver merely that the property of the company was "duly exempted from taxation by said town." The ground of exception is that this averment is not a statement of fact, but a conclusion of law. We think that this view is correct. The answer should set forth the action of the town on which it is claimed the exemption rests, so that the complainants may have notice of such action, and an opportunity to prepare themselves by evidence or otherwise to meet it on the hearing of the bill. The second exception is sustained.

The point is taken by the respondents that exceptions will not lie to an answer for insufficiency when the oath to it has been waived. We do not think that the point is tenable. It is true that it has been held in a number of cases that exceptions for insufficiency will not lie to an answer the oath to which has been waived, because such an answer is not evidence for the respondent. Sheppard v. Akers, 1 Tenn. Ch. 326; Smith v. Insurance Co., 2 Tenn. Ch. 599; McCormick v. Chamberlain, 11 Paige, 543; Bank v. Geary, 5 Pet. 99; Patterson v. Gaines, 6 How. 588. The judiciary act (chapter 20, § 19), however, provides that in such a case the answer shall have the effect given to a plea in an action at law. If it is to have the effect of a plea at law, we can see no reason why it should not be required to conform to the rules of pleading. The complainant, by waiving his right to an answer under oath, does not waive his right to have an answer to every material allegation of his bill. To be a sufficient answer, it must not state conclusions of law, but the facts from which such conclusions result; and it must also fully answer all the material allegations of the bill, confessing and avoiding or directly traversing them. Kelley v. Ryder, Index NN, 72, 28 Atl. 807. The objections to the view that exceptions will not lie to an answer to which the oath has been waived are well stated in Reed v. Insurance Co., 36 N. J. Eq. 396, as follows: "It is quite obvious that the doctrine under consideration disregards the right of the complainant to such answer as the defendant may make in his favor to the statement of the bill. He has a right to the respondent's answer on every material point, though he waives oath, for he is spared the necessity of proof as to all matters admitted by the defendant. The latter is bound by his admissions in the answer, though put in without oath. Symmes v. Strong, 28 N. J. Eq. 131; Bartlett v. Gale, 4 Paige, 503. The complainant may avail himself of any allegations therein that tend to establish his case. The complainant's object in waiving oath is merely to deprive the defendant of the advantage of his answer as evidence for himself. Moreover, as a pleading, the answer may be utterly insufficient, as presenting no defense whatever. It is absurd to say that it must nevertheless stand as a defense because oath was waived. And if it be doubtful whether the matter set up by the answer constitute a defense, may

Digitized by Google

not the complainant try it before the court, to ascertain whether, if it can be sustained by proof, it is a defense or not? Further, on the doctrine under consideration, what control can the court have over the formation of the issue? Is it entirely at the pleasure of the defendant what the issue shall be? Manifestly the proposition cannot be maintained that exceptions or objections for insufficiency cannot be filed to an answer, oath to which is waived."

COGGESHALL, City Treasurer, v. HOME FOR FRIENDLESS CHILDREN.

(Supreme Court of Rhode Island. Sept. 28, 1894.)

DESCENT UNDER WILL—CHARITABLE BEQUEST—VALIDITY.

1. A will, when proved, relates back, as a special law of descent governing the property therein disposed of, to the date of testator's death.

2. A charitable corporation, whose charter limits the amount of property it can hold at one time, can only take so much of a devise of real and personal property, subject to a life estate, as would, with the property owned at the time of the testator's death, make up the maximum amount it could then have held; and the fact that the life tenant was given discretionary power to change the investment is immaterial.

3. An amendment to the charter, after testator's death, increasing the amount of property the corporation can hold, will not enable it to take the residue of the legacy.

Suit by John S. Coggeshall, city treasurer, against the Home for Friendless Children.

Wm. P. Sheffield, Jr., City Sol., for complainant. Francis B. Peckham, for respondent.

PER CURIAM. We are of the opinion that Wood v. Hammond, 16 R. I. 115–121, 17 Atl. 324, and 18 Atl. 198, is decisive of the present case. The will of Frank Hammett was proved November 15, 1876. When proved, it related back to the death of the testator, on May 26, 1876, and became operative from that date as a special law of descent for the estate disposed of by it, and the rights of all persons designated in it as devisees or legatees are to be regarded as determined by it at that date. Under its provisions, the Home for Friendless Children took, subject to the life estate of Joseph Hammett and the payment of a pecuniary legacy to Stephen Gould of $500, a vested remainder in the real and personal estate to the amount, in addition to the property it then held, that it was capable of holding property, under the limitation in its charter, to wit, to such an amount as would carry its property to the amount of $25,000, and the city treasurer of Newport took a vested remainder in the excess, in trust, to be transferred and credited to the poor fund for aged persons.

As the rights of devisees and legatees are to be determined as of the date when the will became operative,—that is, at the death of the testator, on May 26, 1876,—the subsequent amendment to the charter of the Home for Friendless Children of February 11, 1877, by which its capacity to hold property was enlarged to the sum of $200,000, does not affect the question.

Nor, in our opinion, is the question affected by the fact, relied on by the respondent, that a power to vary the investment in his discretion was conferred on the life tenant; for, while the exercise of that power would have divested the devisees and legatees of their title to such portions of the estate as were sold, they would have been entitled to the same interest in the proceeds of sale or in the property in which those proceeds might have been reinvested.

We are of the opinion that the value of the remainder in the residuary estate of the testator is to be ascertained as of the date of his death to such an amount as may be necessary to raise the value of the property then held by the Home for Friendless Children as of the same date to the amount of $25,000; that the Home for Friendless Children is entitled to retain such amount, and should assign, transfer, and convey the excess of said residuary estate above such amount to the complainant, in trust, to be transferred and credited to the Newport poor fund for aged persons.

ELLIOTT v. NEWPORT ST. RY. CO.

(Supreme Court of Rhode Island. Oct. 27, 1894.)

STREET-RAILWAY COMPANY — INJURY TO PASSENGER—PROXIMITY OF TROLLEY POLES—CONTRIBUTORY NEGLIGENCE — FAILURE TO HEAR WARNING—EXCESSIVE DAMAGES.

1. Since a person, riding on a footboard of an electric street car, is not required to anticipate danger from the close proximity to the track of trolley poles, his failure to listen for warnings by the conductor to watch out for such poles does not render him guilty of contributory negligence.

2. On an issue as to whether plaintiff, who was riding on the footboard of a street car, heard the warnings given by the conductor to watch out for a trolley pole, by which he was struck, it appeared that the conductor, each time he gave the warning, was on the opposite side of the car from plaintiff; and plaintiff, who was accompanied by a young lady, testified that he did not hear them, and several other witnesses, who occupied positions as favorable as plaintiff's for hearing such warnings, also testified that they did not hear them. *Held*, that a finding that plaintiff did not hear the warnings would not be disturbed.

3. A verdict for $6,950 for the loss of the front part of a foot by a man, 23 years of age, who had theretofore been earning $65 per month, and who was prevented by the injury from working at all for 14 months, will not be reversed as excessive.

Action by William Elliott against the Newport Street-Railway Company for personal injuries. There was a judgment for plaintiff.

Digitized by Google

and defendant petitions for a new trial. Denied.

Pat. J. Galvis and Chas. Acton Ives, for plaintiff. Danus Baker, David Baker, and Wm. C. Baker, for defendant.

MATTESON, C. J. The principal question raised by the defendant's exceptions and petition for new trial, on the ground that the verdict is against the evidence, is as to the degree of care required of a passenger riding on the footboard of a car. It is contended by the defendant that the plaintiff was guilty of contributory negligence, because, if he had been paying attention, he could have heard the warnings given to "look out for the poles." This contention rests on the assumption that it was the duty of the plaintiff, though he did not know of the dangerous proximity of the poles to the track, to have anticipated some possible danger, and therefore to have been sufficiently alert to have heard the calls. We think that this is too strict a rule to be applied to the plaintiff. In our former opinion we stated the rule which seemed to us applicable as follows: "A passenger who rides on the footboard of a car takes on himself the duty of looking out for and protecting himself against the usual and obvious perils of riding there, such, for instance, as injury from passing vehicles, or of being thrown off by the swaying or jolting of the car; assuming, of course, proper management of the car and proper construction and condition of the road. We do not think, however, that the danger of being hit by a trolley pole is such a peril as a passenger whom the railway company has undertaken to carry on the footboard of its car is bound to anticipate and be on the lookout for, unless, indeed, it appears that the passenger had knowledge of the close proximity of the track to the trolley pole. He has a right to assume that the railway company has performed its duty in so constructing its road that its passengers, even on the footboards of its cars, riding there by its permission, shall not be exposed to injury by the unsafe construction of its road." Index NN, 26, 29, 30, 28 Atl. 338. The charge of the court, taken as a whole, fairly and correctly stated this rule to the jury.

If the plaintiff was under no duty to listen for a warning, he is not to be charged with contributory negligence unless the warning was actually heard by him, or unless it be shown that he had knowledge of the danger of being struck by the pole. His testimony was that no warning was given to his knowledge, which was equivalent to a denial that he heard the warning. He also testified that he was unacquainted with the location of the poles, never having ridden on that part of the defendant's road prior to the accident, and being familiar with the street only by having casually driven through it. The conductor of the motor car, when he first called out, "Look out for the poles!" while the car was stopped at Touro street, stood on the opposite side of the car from that on which the plaintiff was about to get on the car, and, when he repeated the calls after the car had started, stood on the footboard on the opposite side of the car from the plaintiff. The brakeman and conductor of the tow car also gave similar warnings. The plaintiff was accompanied by a young lady, and the attention which he bestowed upon her may have prevented him from hearing the warnings given by the defendant's employés; or he may have been prevented from hearing the warnings by the noise and confusion in the street and the noise of the cars after they had started. Other witnesses, who occupied positions as favorable for hearing the calls as that occupied by the plaintiff, testified that they, too, did not hear the calls. The question whether the plaintiff heard the warnings, as also that of his knowledge concerning the location of the poles near to the track, was for the jury. The plaintiff's credibility and that of the witnesses whose testimony tended to corroborate him was for the jury. They found for the plaintiff, and it is not sufficiently clear that they made a mistake to justify us in setting aside their verdict as against the evidence.

The plaintiff, who at the time of the accident was 23 years of age, was severely injured. Besides the breaking of two or three bones in his left foot, he suffered the loss of the front part of his right foot, which was amputated at the instep. At the time of the accident, he was earning $45 a month, besides his board, which he estimated at $20 a month more. He was prevented by his injuries from pursuing any occupation for upwards of 14 months, while his wounds were healing, during which he also experienced much pain. By the accident he has been permanently disabled, and debarred from engaging in any pursuit which will require him to stand any considerable portion of the time. In view of these considerations, we cannot say that the verdict for $6,950 is so clearly excessive as to lead us to believe that it was not a proper and honest exercise of the judgment of the jury.

Defendant's petition for a new trial denied and dismissed, with costs, and case remitted to the common pleas division, with direction to enter judgment on the verdict.

STINESS, J., nonconcurs.

REVELL et al. v. MAYOR, ETC., OF CITY OF ANNAPOLIS.

(Court of Appeals of Maryland. March 26, 1895.)

CONSTITUTIONAL LAW—MUNICIPAL BONDS—LEGISLATIVE POWER TO COMPEL ISSUANCE.

1. The provisions of Act 1894, c. 620, directing the authorities of a city to issue bonds to

Digitized by Google

city of Annapolis and Anne Arundel county, of which the city is a part. There is nothing in the record to show that the apportionment is in any manner unequal or unjust to the city. If any objection is to be made to the act on this ground, it would seem that the taxpayers of Anne Arundel county are the persons to make the objection, for the reason that they are required to pay two-thirds of the cost of the building, while the city of Annapolis, which is specially and directly interested in the improvement, is required to pay but one-third of the expenditure. The apportionment, however, was, as we have said, a matter within the discretion and power of the legislature. This was decided in Commissioners of Talbot Co. v. Commissioners of Queen Anne's Co., 50 Md. 245, and also by the supreme court in Mobile Co. v. Kimball, 102 U. S. 691.

In closing his argument, the counsel for the appellees suggested that the act was invalid because it was in conflict with the fourteenth amendment of the federal constitution, which forbids the taking of "property without due process of law." If invalid on this ground, it is invalid under the constitution of this state, which provides the same safeguards for the protection of life, liberty, and property, and which has been the fundamental law of this state from the beginning of the government. It is a sufficient answer to this objection to say that the act in question, which requires the city authorities to issue bonds to raise money to pay the cost of a public school building, is a lawful exercise of legislative power, and, this being so, taxes levied to pay such bonds are not open to the objection of taking property without due process of law. Nor can we agree that the act is in conflict with section 33, art. 3, of the constitution, which declares that the general assembly shall pass no special law for any case for which provision has been made by an existing general law. The general law provides, it is true, that the school commissioners of Anne Arundel county shall have the control and supervision of the public schools in said county, with power to build, repair, and furnish schoolhouses. But it does not authorize the commissioners to borrow money upon bonds to be indorsed by the county commissioners for such purposes, nor does it provide for the apportionment of the cost of a public school building to be erected in the city of Annapolis between the county and the city. This could only be done by special act, and, this being so, the special act is not in conflict with the constitution, which forbids the passing of a special act for any purpose for which provision has been made by an existing general law. It follows from what we have said that the judgment sustaining the demurrer in this case must be overruled. Judgment reversed.

FROSTBURG MIN. CO. v. CUMBERLAND & P. R. CO.

(Court of Appeals of Maryland. March 26, 1895.)

CORPORATIONS—EXTENSION OF FRANCHISE—REPEAL OF STATUTE.

1. Act April 5, 1878, c. 409, entitled "An act to extend an act entitled 'An act to incorporate the Withers Mining Company,' passed at the December session 1847, chapt. 306," and providing that said act and a subsequent act amendatory thereof "be and the same are hereby continued in full force and effect" for 50 years, and declaring, after giving the company a new name, "that the company by such name shall succeed to all the rights, powers, liabilities and obligations of the" company as previously named, did not create a new corporation.

2. Act 1876, c. 64, requiring the C. & P. R. Co. to "furnish reasonable facilities" for "receiving and forwarding all coals that may be offered for transportation" thereover, not being inconsistent with Act 1849, c. 469, § 21, limiting the right to make connection with said railroad to corporations thereafter to be incorporated, does not repeal said section.

Appeal from circuit court, Allegany county.

Suit by the Frostburg Mining Company against the Cumberland & Pennsylvania Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, FOWLER, McSHERRY, PAGE, ROBERTS, and BRISCOE, JJ.

Benj. A. Richmond and D. Jas. Blackiston, for appellant. Robert H. Gordon, for appellee.

ROBINSON, C. J. The question in this appeal is whether the appellant, a coal-mining company, has the right to make connection by means of a switch with the appellee's railroad, which runs by or near the property of the appellant. The appellee was chartered by Act 1849, c. 469, with power to build a railroad from Cumberland to the Pennsylvania line. By section 21 of its charter, privilege to make connection with the appellee's road was reserved to any corporation which might "be hereafter incorporated, * * * provided that in making such connection no injury shall be done to the works of the company." This privilege, it will be observed, is expressly limited to corporations chartered after the act of 1849, incorporating the appellee. The appellant was chartered by Act 1847, c. 306, for the purpose of manufacturing iron and mining coal, and was authorized to build a railroad from its property to the Chesapeake & Ohio Canal, at Cumberland. Having been chartered prior to 1849, the appellant, it is clear, is not entitled to the privilege of making connection with the appellee's road, for the reason that this privilege was, by section 21 of the appellee's charter, reserved to corporations thereafter incorporated; that is, to corporations chartered since 1849. The contention, however, is that the appellant was chartered for a period of 80 years,

Digitized by Google

and that its charter expired March 8, 1878, and that by Act 1878, c. 409, passed April 5, 1878, a new corporation was created. So the question comes to this: Whether the act of 1878 is to be construed as creating a new corporation, or as continuing or reviving the old company. "To ascertain," says Mr. Justice Story, "whether a charter creates a new corporation, or merely continues the existence of the old one, we must look to its terms, and give them a construction consistent with the legislative intent and the intent of the corporators" (Bellows v. Hallowell, 2 Mason, 44, Fed. Cas. No. 1,279); that is to say, whether the object of the act is to prolong or revive the existence of a corporation which has expired or is about to expire, and not to change the identity of the company or to form a new one, or whether the object is to create a new corporation, with a new capital, and with no intention to continue the obligations of the old company as against the company thus created. What, then, was the object of the act of 1878? Its title declares it to be "An act to extend an act entitled 'An act to incorporate the Withers Mining Company,' passed at the December session 1847, chapt. 306," for the period of 30 years. And the enacting clause (section 1) provides "that the act entitled 'An act to incorporate the Withers Mining Company,' and passed at December session eighteen hundred and forty-seven, chapter three hundred and six, and the act to alter and amend said original act of incorporation, passed at January session eighteen hundred and seventy, chapter two hundred and twenty-seven, be and the same are hereby continued in full force and effect for the period of thirty years." Not only does the title declare it to be the object of the act to extend the charter of the appellant for a period of 30 years, but the enacting clause provides in express terms that the charter be and the same is "hereby continued in full force and effect for the period of thirty years" from the 8th March, 1878. It is clear, then, that the legislature meant merely to revive and extend the charter of the appellant, and did not mean to create a new and distinct corporation; and it is equally clear that this act was so understood and accepted by the corporators themselves. In pursuance of its provisions, a meeting of the stockholders was held at Frostburg on the 6th May, 1878, and the company was organized by electing all the officers of the old company; and although the name of the company was subsequently changed from the Withers Company to the Thomas Mining Company, and then again to the Frostburg Mining Company, the legal title to the property still stands in the name of the Withers Company. And, in making these changes in the name of the company, the legislature was careful to provide that the company by such name shall succeed to all the rights, powers, liabilities, and obligations of the said Withers Mining Company. It is clear, therefore, that the object of the act of 1878 was merely to revive and extend the charter of the Withers Company for a period of 30 years, and by no fair rule of construction can it be said to have created a new corporation.

But then, again, it is contended that section 21 of the appellee's charter, which restricts the privilege of making connection with its road to corporations chartered after 1849, is repealed by Act 1876, c. 64. This act, in the first place, prescribes the rates to be charged by the appellee for the transportation of coal over its road, and then it provides that it shall be the duty of the appellee "to provide and furnish reasonable facilities and all cars, including gondolas, where required for local trade, and other vehicles and motive power for receiving and forwarding all coals that may be offered for transportation over said railway." And the argument is that the duty of furnishing reasonable facilities for receiving and forwarding coal that may be offered for transportation necessarily imposes on the appellee the obligation of permitting all persons and corporations having coal for transportation to make connection by means of a switch with its road. To such a construction we cannot agree. The whole object of the act was to fix the rates to be charged by the appellee for the transportation of coal, and, having fixed these rates, it makes it the duty of the appellee to furnish the means for forwarding and delivering the same. And reasonable facilities, as thus used, means that the appellee shall furnish the cars, motive power, and other conveniences necessary for such purposes. It would be a strained construction to hold that these words in themselves repeal section 21 of the appellee's charter, and impose upon it the obligation of permitting all persons and corporations having coal for transportation to make connections with its road. Such a construction is neither warranted by the natural import of the words "reasonable facilities" nor the subject-matter in connection with which they are used. It might just as well be said that the legislature meant to impose upon the appellee the duty of making stations at such places on its road as the shippers of coal might deem convenient to themselves, without regard to the business or interests of the appellee. These precise words are used in the statute 17 & 18 Vict. c. 31, passed in 1854, and which provides "that every railway company * * * shall according to their respective powers afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways." And in construing this statute in Southeastern Ry. Co. v. Railway Commissioners, 6 Q. B. Div. 586, the lord chancellor said: "What, then, are the obligations imposed upon railway companies by this statute? * * * First, a positive obligation to 'afford, according to their respective powers, all reasonable facilities for

Digitized by Google

the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively. * * *' 'Traffic,' according to the interpretation clause (section 1), includes 'passengers and their luggage and goods, animals, and other things conveyed by any railway company.' 'Railway' includes 'every station of or belonging to such railway used for the purposes of public traffic.' * * * With respect to stations, there is no obligation to establish them at any particular places or place unless the company thinks fit to do so." Brett, L. J.: "It follows that the defendants had jurisdiction only to hear and determine and order in respect of facilities to be afforded upon or from the railway or the stations used by the company for the purposes of public traffic." And in Great Western Ry. Co. v. Railway Commissioners, 7 Q. B. Div. 182, where the complaint was that the company had charged rates in excess of those authorized by law, Cotton, L. J., said: "The complaint is simply that the charges made by the railway company for a great many of their journeys are beyond those which their special act of parliament or the general acts allow them to charge, and in that sense, and in that sense only, are excessive. Now, the only question we have to determine is whether this comes within the words of the second section of the railway and canal traffic act of 1854, on a reasonable interpretation of those words. They are that the company shall afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon their railway. Can this excessive charge be said to be a refusal of reasonable facilities? Now, what I think comes within those words, 'afford all reasonable facilities,' is the providing proper accommodation in the stations and in the carriages for the receiving and forwarding passengers, and for getting them in and out of their carriages, and the like." The latest case in which the meaning of the words "reasonable facilities" has been considered is Dorlaston Local Board v. London & N. W. Ry. Co. (Q. B. Div. and Prob. Div.) volume 2, Queen's Bench, decided July 9, 1894. In that case the railway company discontinued the use of a station, and pulled it down, and an application was made to the railway commissioners for an order requiring the railway company to afford reasonable facilities for receiving, forwarding, and delivering passenger traffic on this branch line, and to reopen the station, the use of which had been discontinued. Lord Esher, M. R., said "that the commissioners had no power to prevent a railway company from absolutely pulling down a station if they think they ought, or if they choose to do it, any more than they can order a railway company to build a new station." And, besides, there is nothing in the act of 1876 by which it can be fairly inferred that the legislature meant to repeal section 21 of the appellee's charter, which limited the right to make connection with its road to corporations thereafter to be incorporated. Section 1 of that act prescribes the rates to be charged by the appellee for the transportation of coal, and, having thus prescribed the rates, the next section makes it the duty of the appellee to furnish all reasonable facilities for the receiving and forwarding of all coal that may be offered for transportation. These are the only amendments made to the appellee's charter. Not one word is said about amending or repealing section 21, by which the privilege of making connection with its road is limited to corporations thereafter to be incorporated. It can hardly be necessary to say that the repeal of a prior existing act of the legislature by implication is never favored in law, and it is only when the two acts are repugnant and plainly inconsistent with each other that the rule applies. If the two acts can by a fair and reasonable construction stand together, there is no ground on which it can be held that the later act operates as a repeal of the former act. In this case there is no inconsistency whatever between the provisions of the act of 1876 and section 21 of the appellee's charter. On the contrary, the act deals with other matters in no manner affecting the provisions of that section. And, this being so, the doctrine of repeal by implication has no application. For these reasons, the injunction prayed was properly refused, and the order of the court below will therefore be affirmed. Order affirmed.

KEILEY v. TURNER et al.

(Court of Appeals of Maryland. March 27, 1895.)

PARTNERSHIP—COMPENSATION OF MEMBERS—CONSTRUCTION OF ARTICLES—ACCOUNTING.

1. Articles of partnership provided that one partner should receive $450 per month as salary, the second $300, and the third nothing. The first and third partners agreed that the latter should draw, and have charged to him on the partnership books, $150 per month of the former's salary. *Held* that, in settling the firm accounts, the former is entitled to but $300 per month as against the firm assets, his recourse for the balance being against the third partner.

2. Articles of partnership prescribed three years for the continuance of the firm, and provided salaries for the members. The partnership continued after that time without new articles, and the partners subsequently ceased to make entries of salaries on the firm's books. *Held* that, in settling the firm accounts, the members are not entitled to salaries after the last entry thereof.

3. Where, on the dissolution of a firm, one member appropriated the firm stock with the other's consent, in settling the firm accounts he should be charged with the value of the stock at the time it was appropriated.

4. A provision in partnership articles that the salaries of the members shall not be considered as losses sustained by the business, entitles a partner to his salary unconditionally.

5. Where a partner left the monthly installments of his salary in the hands of the firm, to be used for its benefit, in settling the partnership accounts he is entitled to interest

Digitized by Google

on the several installments from the time each became payable to him.

Appeal from circuit court of Baltimore city.

Suit by John D. Keiley against Joshua J. Turner and another. From a decree for defendants, plaintiff appeals. Modified.

Argued before ROBINSON, C. J., BRISCOE, McSHERRY, FOWLER, BOYD, and BRYAN, JJ.

Charles Marshall, Wm. L. Marlbury, H. I. Bowdoin, and Edgar H. Gans, for appellant. Atty. Gen. Poe and Wm. A. Fisher, for appellees.

BRYAN, J. This suit was instituted by the appellant for the purpose of obtaining a settlement of the partnership business of J. J. Turner & Co. The firm was composed of Joshua J. Turner, his son-in-law, John D. Keiley, and his son, Joseph J. Turner, Jr. The record is a very large one, and is filled with elaborate examinations and cross-examinations of witnesses, and with long and minute statements relating to the matters in controversy, made up from the books and papers of the partnership and from other sources. We were informed at the argument by the counsel on both sides that the subjects of dispute were few in number. But to make a just and intelligent disposition of these questions required a careful and attentive examination of the whole record, so as to understand the respective rights and duties of the partners, and the nature, extent, and character of their dealings with each other. We will state so much of the proceedings in the cause as may be necessary to explain the grounds of the opinion which we have formed in regard to this controversy. The bill of complaint alleges that on the 19th day of March, 1878, a copartnership was formed between the complainant, John D. Keiley, and Joshua J. Turner and Joseph J. Turner, Jr., under the name and style of J. J. Turner & Co., and that the business of the copartnership was to deal in fertilizers and agricultural goods of every description. A paper called a "Copy of the Articles of Copartnership" was filed with the bill, marked "Complainant's Exhibit No. 1," and it was alleged that three copies of the articles of agreement were executed and signed by all the partners, which were identical in every respect except in the provisions relating to the salaries of the partners. These provisions will be noticed hereafter. The paper filed with the bill states that, during the continuance of the partnership, Keiley's salary should be $450 a month, and that the salary of Turner, Jr., should be $300 a month during the same period. No salary was allotted to Turner, Sr. In his answer, Turner, Jr., says: "That whilst there were three copies of said articles, as stated in said bill, prepared, yet, as he remembers, only one of them was signed by the parties, of which complainant possessed himself, and is the Exhibit No. 1 so filed with said bill." And Turner, Sr., says in his answer: "That the partnership stated in said bill was entered into, and that the articles filed as Exhibit No. 1 constitutes the agreement therefor then made, and that, although three copies thereof may have been written, yet, as he remembers, only one of them was signed, and that is the one filed with said bill." We think it very evident that the draftsman of the bill inadvertently designated his exhibit as a "copy" when he intended to charge that it was an original paper, as it really is. The provisions relating to the salaries above mentioned as being different in the different copies of the articles of partnership are thus alleged in the bill of complaint: After stating that the matter was discussed in the Turner family, it is said: "It was suggested that the difference between the sum to be allowed said Joseph J. Turner, Jr., as above proposed, would cause jealousy and ill feeling on the part of the latter; and it was urged that the matter should be so arranged that the difference should not be known to said Joseph J. Turner, Jr., and accordingly it was arranged that Mr. Joshua J. Turner should be allowed $150 per month on the books, and your orator and Joseph J. Turner, Jr., $300 each per month, the allowance to said Joshua J. Turner, however, to be for the use and benefit of your orator. In the preparation of the articles which were signed after the partnership had begun, the amounts to be paid as salary to each partner were left blank on the three drafts; but, at the time the articles were read and approved and executed, the amounts to be allowed to each partner were stated as being $300 each per month to your orator and Joseph J. Turner, Jr., and $150 to said Joshua J. Turner, as above agreed upon; but the two drafts of said agreement that were retained by your orator and said Joshua J. Turner had inserted in them the amount of $450 per month to your orator, and $300 to Joseph J. Turner, Jr.,—the actual amounts to be paid under the agreement aforesaid between your orator and said Joshua J. Turner. Thus, it came about that said Joshua J. Turner was credited on the books of the firm with $150 per month, which he was to pay to your orator as part of his salary. And settlements were had between him and said Joshua J. Turner on the basis of said agreement, your orator having received some payments on account of said allowance of $150 per month from said Joshua J. Turner in other ways, and some in money drawn from the firm, and charged to said Joshua J. Turner, as agreed, but a large sum yet remaining due him on this account. Your orator does not claim that, in stating the partnership account prayed for, salaries shall be allowed on any other or different basis than the agreement among the members of the firm,—that is to say, $300 each per month to him and said Jo-

Digitized by Google

seph J. Turner, Jr., and $150 per month to said Joshua J. Turner; but he claims that, as between himself and said Joshua J. Turner, the amount credited to the latter for salary shall be treated as credited to and due to your orator under the agreement aforesaid." Responding to this statement, Turner, Jr., in his answer, says that all previous negotiations in regard to salaries were merged in the articles of copartnership, and that, as to the arrangement therein provided as to the payment of salaries, his only knowledge is as therein contained, and he is prepared to abide thereby; but as to any subarrangements between said Kelley and his father as to any division of his salary, he knows nothing, is not a party thereto, nor in any manner connected therewith. And Turner, Sr., in his answer, says: "That, however, the matter of salary was arranged at the time, and this defendant, in his then state of health, not attaching any great importance thereto, by reason of the relationship of the parties, he did agree to the alterations of the articles as stated, and entries were made for the purpose of family peace, as stated." The articles provided that the partnership should continue for three years. It is alleged, however, in the bill, that it was continued until the 31st of December, 1882, when it was finally dissolved. The complainant alleges that, upon a settlement of the partnership affairs, it will be found that a large sum of money is due to him. The prayer of the bill is for an account, and for the payment of the balance due. After answers by the Turners and the taking of testimony, an account was decreed, and several different accounts were stated by the auditor. In the meantime, Joshua J. Turner had died, and the safe-deposit and trust company had been appointed his executor. After hearing, the court below ratified statement No. 2 of account E, which showed a balance due by Kelley, and it decreed the payment of this balance to the executor of Joshua J. Turner. Kelley has appealed to this court.

The amount of salary due to Kelley gives rise to one of the principal questions in the case. It will be observed that complainant's Exhibit No. 1, fixes his salary at $450 a month. Both of the answers admit that this agreement was signed by all the partners, and they do not admit or allege that any other one was signed, and there is no evidence that any other was signed. This agreement, therefore, according to the ordinary course of practice, is established as the contract between the parties. The answer of Turner, Jr., states that his only knowledge on the subject of salaries is what is contained in this exhibit, and that he is prepared to abide by it, and he disclaims any knowledge of what is styled "subarrangements" between Kelley and Turner, Sr., as to any division of his salary. The answer of Turner, Sr., distinctly states that "he did agree to the alterations of the articles as stated, and entries were made for the purpose of family peace as stated." We see, therefore, that there is a perfect agreement as to Kelley's salary at $450 a month; and, as to the very peculiar method of stating a portion of it on the books to the credit of the elder Turner for Kelley's benefit, all knowledge of an agreement to that effect is denied by the younger Turner, while it is admitted by the elder. A majority of the court are of opinion that Kelley is entitled only to a salary of $300 a month as against the assets of the firm, and that, if he is entitled to the additional amount, $150, his recourse is entirely against the estate of Turner, Sr. After the 1st day of August, 1881, there were no entries of salaries on the books of the firm. This omission was with the knowledge and consent of all the parties. There was evidence which the appellant's counsel argued sufficiently and satisfactorily explained this omission. But the majority of the court think otherwise, and hold that Kelley is not entitled to any salary after this date. The writer of this opinion is constrained to hold a different view on both of these questions; but, as the court's judgment has been pronounced, any discussion of them would tend to no result, and would be superfluous.

By the articles of partnership, it appears that the elder Turner contributed all of its capital, and that it consisted of stock in trade, merchandise, land, and buildings suitable for carrying on the business. This capital was valued at $112,249.78; and it was agreed that he should be paid interest on this sum half-yearly at the rate of 6 per cent. per annum, and that this payment of interest should be considered an expense of the business, and so charged on the books. There seems to be no dispute about the amount due him except in one particular. In the settlement of the accounts, he took into his possession the stock and merchandise of the firm which remained on hand, and he charged himself with it at a valuation fixed by himself and the younger Turner. Kelley knew that he had taken possession of this merchandise, and did not object to it. But the question is about the value of it. As Kelley assented to the appropriation of it, he is entitled to its value at the time. He would not be entitled to any increase in value, neither is he to lose by any depreciation. We see nothing in the record which can justly give any ground for a question of fraud in the transaction. It is simply a question of amounts and value. The parties differ very materially on these questions, but this is a very usual occurrence in lawsuits. The principal item is a quantity of ammoniated phosphate. Turner, Sr., is charged with 510 tons as belonging to the firm, while Kelley contends that he ought to be charged with 626 tons and a fraction. The question is not entirely clear upon the evidence, but, after a careful consideration of it, our best judgment is that the firm owned

Digitized by Google

510 tons, and that the remainder of the ammoniated phosphate which Turner had in his possession was his individual property. The valuation presents a question of considerable difficulty. A good deal of testimony was taken on the subject, and calculations were made by the plaintiff's counsel to show the average value of the phosphate during the preceding year. This would give an approximation more or less accurate. We have, however, an estimate of value more satisfactory. It is a valuation made by Turner himself. He shipped all of this merchandise to New Orleans in his own name, and insured it in his own name. The amount of phosphate was estimated at 620½ tons, and it was insured for $24,000. It is shown by the testimony of Willson, the marine insurance agent, who effected the insurance, that it is usual to add 10 per cent. to the invoice cost in insuring cargoes. So that we may assume that the amount insured was the value of the phosphate, with 10 per cent. added. A very simple calculation will show the value to be placed on the whole mass of 620½ tons, and the proportion of value to be assigned to 510 tons is equally easy of ascertainment. This amount will be charged to Turner as the fair price of the phosphate at the time he took it into his possession as his individual property. A loss was sustained on the shipment to New Orleans, which was caused in great measure by the failure of the purchasers of the phosphate to pay for it. With this loss Kelley has no concern.

The interest on Turner's capital was credited to him down to December 30, 1882. It appears that he did not draw his interest semiannually as it accrued, but let it remain as part of the capital of the firm, and that he was allowed interest on these successive contributions of capital, which was computed from the several times at which the interest became due. It was stipulated in the articles of partnership that the salaries and the interest on Turner's capital should be paid out of the funds of the partnership. It was further stipulated that the profits should be equally divided between the partners, and that the losses should be borne in the same proportion, and that the salaries should not be considered as losses sustained by the business. The meaning of this latter provision is very evident. The salaries were to be paid at all events, and were not to be diminished on account of any losses which might occur. It was urged by the appellant's counsel at the argument that this rule was violated in the preparation of the balance sheet filed and marked "Defendant's Exhibit, Examiner F. A. L., No. 2." As the books from which this balance sheet was made up have not been shown to us, we have not the means of deciding on the merits of this suggestion. The record shows us that Kelley allowed large portions of his salary to remain in the hands of the firm. These sums were used for its benefit, and were contributions on his part to its capital. He ought to be paid interest on these amounts; not on the ground that payment was withheld by the firm, but for the reason that he furnished money which was used in the transaction of its business. Payments of salary were due monthly, and, from the time they became due, interest is properly chargeable for his benefit; that is to say, each month's salary is to bear interest severally as it became due, in the same manner as interest was allowed Turner on the half-yearly installments which were payable to him.

We have stated our views on the questions which the counsel informed us at the argument were the matters of difference between them. The result is that statement No. 2 of auditor's account E is rejected and set aside, and the decree of the court below is reversed, and the cause remanded, to the end that an account may be stated in accordance with this opinion, and a decree passed for the payment of the sum thus ascertained to be due. Decree affirmed in part and reversed in part; the costs in this court to be equally divided and the costs below to be paid by the appellees.

COCHRANE v. MAYOR, ETC., OF CITY OF FROSTBURGH.

(Court of Appeals of Maryland. March 26, 1895.)

ACTION AGAINST TOWN—CATTLE RUNNING AT LARGE—INJURIES TO PEDESTRIAN.

1. A clause in the charter of a town authorizing the mayor and council to pass and enforce all ordinances "necessary for the peace, good order, health and safety of the town" authorizes an ordinance prohibiting domestic animals from running at large within the town limits.

2. Domestic animals running at large within the streets of a town, in such numbers and under such circumstances as to be a source of discomfort and danger to the inhabitants, are a nuisance which it is the duty of the municipal authorities to abate.

3. A petition in an action against a town alleged that large numbers of domestic animals were allowed to run at large within the streets of the town; that the municipal authorities, having knowledge of such fact, had neglected and refused to pass an ordinance abating such nuisance, although having power under the charter to pass and enforce ordinances for the "comfort, good order, health and safety of the inhabitants," and to prevent and remove nuisances; and that plaintiff, while walking on one of the streets, using due care and caution, was attacked and seriously injured by one of such animals. *Held*, that the petition was good against a general demurrer.

Appeal from circuit court, Allegany county.

Action by Jennie Cochrane against the mayor and council of Frostburgh. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, PAGE, ROBERTS, and BOYD, JJ.

Benj. A. Richmond and Robt. R. Henderson, for appellant. David W. Sloan and A. A. Doub, for appellee.

Digitized by Google

BOYD, J. The appellant sued the appellee for injuries sustained by her by being horned, tossed, thrown down, and trampled upon by a cow which attacked her while she was walking along a lane or street of Frostburgh. The defendant demurred to the declaration, and the demurrer was sustained by the court below, and judgment entered for the defendant. From that judgment this appeal was taken, and we are therefore to inquire into the legal sufficiency of the declaration, and determine whether the facts therein stated, which are admitted by the demurrer, give the plaintiff a right of action.

It is alleged that the defendant was by its charter vested with control over all the streets, lanes, and alleys of Frostburgh, and with full power to provide by the passage and enforcement of ordinances for the comfort, good order, health, and safety of all the inhabitants of said town residing within the limits and passing along and over its streets, lanes, and alleys, and with power to prevent and remove all nuisances in said town, and to shield and protect said inhabitants therefrom; that the said town is laid off into streets and alleys, contains between four and five thousand inhabitants, and is compactly built, so that there is a great deal of travel and walking on said streets and alleys. It is further averred that large numbers of horses, cows, hogs, and horned cattle were turned loose and permitted to run at large upon the streets, unattended, during the day and night, by means of which "said stock, and particularly said cows (they being armed with dangerous horns and equipped with annoying bells), became a common nuisance, and a source of great annoyance and danger to persons passing along said streets and alleys, and particularly so as to women and children, who were attacked and frightened by said stock, whereby the safety and comfort of the inhabitants and the good order of said town were destroyed, and whereby the same became, and, at the time of the grievances hereinafter set out, was, a common and notorious nuisance, and a constant source of dangerous discomfort to the inhabitants of said town." It is then charged that by reason of the powers contained in the charter it became the duty of the defendant to pass and enforce ordinances to abate and prevent said nuisance, and to prevent said animals from running at large, and require their owners to keep them off the streets, unless attended by some person in charge thereof; but that the defendant, unmindful of its duty, negligently and wrongfully failed and refused to pass any such ordinances for the preventing and abating said nuisance, and negligently, willfully, and wrongfully, refused to take any steps whatever to prevent said stock and troublesome and dangerous animals from running at large on said streets, and that, while said nuisance still continued, plaintiff was walking on a street or lane of said city, using due care and caution, and was attacked by one of the said cows and horned cattle so by the said defendant negligently and wrongfully allowed and permitted to be at large upon the said streets, and was violently horned, tossed, thrown, and trampled upon, etc. The injuries sustained by plaintiff are then set out in detail, showing that both of her arms were broken, her side torn, and that she was otherwise seriously and permanently injured.

If the defendant can be held responsible in any case to one lawfully using its streets for injuries inflicted by a cow running at large, the allegations in this declaration are certainly sufficient to entitle the plaintiff to recover, if she can sustain them by competent proof. In determining whether the defendant is so liable, we will consider: (1) Has the mayor and city council of Frostburgh power, under its charter, to prevent stock from running at large within the corporate limits? (2) If it has such power, what are the consequences of its neglect or failure to do so?

Article 1, § 144, of the Code of Public Local Laws authorizes the mayor and city council of Frostburgh to pass such ordinances, not contrary to law, as they may deem beneficial to the town; gives the power to remove nuisances and obstructions upon the streets, lanes, and alleys, and to ordain and enforce all ordinances, rules, and regulations necessary for the peace, good order, health, and safety of the town, and of the people and property therein; and authorizes them to impose fines, forfeitures, or imprisonment for the violation of any ordinances of the town. These powers are, in substance, the same as those of the charter of the city of Cumberland, which were passed upon in the case of Taylor v. Mayor, etc., 64 Md. 68, 20 Atl. 1027. This court there held that the defendant was authorized and required under its charter to prevent persons from coasting on the streets, if it could do so by ordinary and reasonable care and diligence, and declared such use of the streets to be a nuisance. There was no special authority given in the charter of Cumberland to prevent coasting on the streets, but the power of the city to do so was not only not questioned, but was expressly recognized, in that case. If a municipality can without express powers in its charter prohibit the use of its streets for coasting, why should it not have the power to prohibit the use of them by horses, cows, hogs, and horned animals "during both the night and in daytime, and at all times and on Sundays," as it is alleged in the declaration, especially when the cows are "armed with dangerous horns and equipped with annoying bells"? It is difficult to imagine a condition of things more calculated to injuriously affect, if not destroy, "the peace, good order, health, and safety of the town, and of the people and property therein," than that described in the declaration. It is true that the decisions are

Digitized by Google

not uniform as to whether what is called "the general welfare clause," usually contained in charters, authorizes municipal corporations to restrain domestic animals from running at large, but many of them so hold. See 15 Am. & Eng. Enc. Law, 1188, and note, where a number of them will be found collected together. There can be no good reason assigned why it should not, unless there be some statute law or some other provision of the charter inconsistent with such construction. In those cases in which it is held that municipal corporations cannot without special authority pass and enforce ordinances of this character it will generally be found, upon examination of them, that it is by reason of some statute or other special cause that would not apply to the case under consideration. For example, in the case of Collins v. Hatch, 18 Ohio, 523, so much relied on by the learned counsel for the appellee, the court said that an ordinance to restrain horses, cattle, swine, etc., from running at large could not be adopted under the general welfare clause, as it would be in contravention of the general laws of that state, which allowed such animals to run at large. Is it to be said that the owners of horses, cows, and other animals can turn them loose in the public streets of a town such as described in the declaration, and the authorities have no means to prevent it unless the legislature has given them express power? It is not necessary to determine whether domestic animals can be impounded and forfeited without express authority being given in the charter, but, with powers as broad as those in the charter of defendant, there would seem to be no valid reason why it could not pass and enforce ordinances prohibiting stock from running at large, and imposing penalties for the violation of them. If the owners of cows and horses tied them along the public streets of Frostburgh so as to interfere with the free passage of people having the right to use the streets, it could not be successfully contended that the authorities were without remedy. Why, then, should they be permitted to turn them loose, thereby not only obstructing the free and proper use of the streets, but permitting them to wander over the sidewalks, to frighten and possibly injure women and children? It was contended by the appellee that it is customary in this state to grant special powers to such municipal corporations as desired to prevent stock from running at large, and hence, when it is omitted from a charter, the presumption is that it was not intended by the legislature that such power should be exercised. We do not think that such a conclusion can properly be drawn. Various reasons might be given for such omission. Some of those municipalities may have been so disturbed by animals running at large that they wanted to emphasize that power to restrain them, or they may have thought it safest to include such powers, to avoid any question. In the brief for appellee certain towns are named which have the power expressly granted them to prevent cattle from running at large, and it is stated that Hagerstown, Frederick, and others have no such power conferred on them. It would seem to be a most unreasonable construction to place upon the action of the legislature to say that, inasmuch as it has granted this express power to some towns of the state, but has omitted it in the charters of Hagerstown and Frederick, therefore these two cities, which are among the largest in the state, were intended by the legislature to be prohibited from exercising such powers. There may be no such provision in the charter of Baltimore city, yet it would scarcely be claimed that it could not prohibit stock from running at large under the general powers vested in it. The object of such a provision as the general welfare clause is to cover those cases not specifically designated. It would be impossible to enumerate in detail in a charter of ordinary length all the powers that a corporation could exercise. The very effort to name them all might exclude some that were omitted, but would have been authorized under the general welfare clause, if an attempt had not been made to itemize them. We think it clear that the defendant has the power under its charter to pass and enforce ordinances to prevent stock from running at large within its limits, and that the condition of affairs described in the declaration is a nuisance of such character as should be abated, for the peace, good order, and safety of the people and property of the town.

It becomes necessary, therefore, to consider the second inquiry above suggested, namely, what are the consequences of the neglect or failure of the defendant to exercise its powers? We have been referred to a number of authorities outside of this state to the effect that a municipality is not liable for the injuries sustained by reason of its failure to abate a nuisance, although it has power to do so. But that is no longer an open question in this state. It was said in Marriott's Case, 9 Md. 174, that, when a statute conferred a power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative, and the words "power and authority" in such case may be construed "duty and obligation." It was there held that the city of Baltimore was required to pass ordinances sufficient to reach the exigencies of the case, and was bound to see that they were enforced. Mason, J., in delivering the opinion in that case, said: "The people of Baltimore, in accepting the privileges and advantages conferred by their charter, took them subject to the burthens and restrictions which were made to accompany them under the same charter. One of those burthens was the obligation to keep the city free from nuisances. A disregard of

Digitized by Google

the obligations thus imposed would be attended with the same consequences which would result to the individual at common law were he to disregard his obligations to the community in these particulars. As the duty is the same in a corporation as an individual, so are the consequences the same for its disregard." On page 175 the court quotes with approval from the case of Pittsburgh v. Grier, 22 Pa. St. 65, that "it is no matter whether that duty [removing a nuisance] remains unperformed because it had no ordinances on the subject, or because, having ordinances, it neglected to enforce them. The responsibilities of a corporation are the same in either case." In Taylor's Case, supra, it was held that the corporation was under an obligation to exercise for the public good the powers conferred on it by its charter to prevent nuisances, and to protect persons and property. So, whatever may be the law elsewhere, it is well settled in this state that a corporation having such powers must exercise them, and is ordinarily liable for its failure to do so to any person who has received special damage therefrom, who is not himself in fault. Of course, as was said in Taylor's Case, if it use ordinary and reasonable care and diligence to prevent the nuisance, its duty is discharged, and it is relieved from responsibility, and a vigorous effort to enforce its ordinance on the subject would fulfill its duty in this respect.

The declaration alleges that defendant "negligently and wrongfully failed and refused to pass any such ordinances for preventing and abating said nuisance, and negligently, willfully, and wrongfully refused to take any steps whatever to prevent said stock and troublesome and dangerous animals from running at large on said streets." Now, if it be true, as is alleged in the declaration, and admitted by the demurrer, that women and children had been attacked and frightened by these animals thus running at large in the streets, it would seem clear it was the duty of the defendant to take some steps to prevent it. It was certainly its duty to prevent such a condition of affairs as is described in the declaration. But the main difficulty in this case is to determine how far the defendant is responsible for such an injury as that complained of by plaintiff. It is well settled that the owner of a domestic animal is ordinarily not responsible for injuries inflicted by it unless it is of a ferocious or vicious disposition, accustomed to bite or attack mankind, and he knows that it has such disposition or vicious propensity. "The gist of the action is the keeping of the animal after knowledge of its mischievous propensities," and it is incumbent upon the owner to see that no injury is done by it. There is another class of cases in which owners have been held liable, without proving knowledge by them, on the ground that the animals were wrongfully in the places where they did the mischief. It has, for example, been held that the owner of a horse who permits it to go at large in the streets of a populous city is answerable for a personal injury done by it to an individual, without proof that he knows the horse is vicious. The owner had no right to turn the horse loose in the streets. Goodman v. Gay, 15 Pa. St. 188; Decker v. Gammman, 44 Me. 322; Dickson v. McCoy, 39 N. Y. 400; Barnes v. Chapin, 4 Allen, 444. This last case places the liability on the ground that the owner was in fault in permitting his mare to go at large on the highway without a keeper. See, also, Mosier v. Beale, 43 Fed. 35?, in which it was held that in an action for personal injury caused by defendant's cow it was not necessary to allege scienter when it was alleged that the injury was committed while the cow was negligently permitted by defendant to trespass on plaintiff's premises. In the case now under consideration, if the owner of the cow negligently or willfully permitted her to go at large on the streets of Frostburgh, he was in fault, and was liable for injuries done by her to persons lawfully using the streets. Let us, therefore, apply these principles and determine how far the defendant is liable. We have already said that the defendant had the power, and it was its duty, to prevent such a condition of affairs as the declaration alleges existed at the time of the injury. Of course, the ringing of cow bells frightening women and children, and other things alleged which were annoying and injurious to the public at large, do not give the plaintiff a right of action, as she can only recover, if at all, for special injuries sustained by her. Those special injuries were not sustained by the ringing of cow bells, etc., but by the attack of this particular cow. These other matters are relevant, however, to our inquiry, because they are of such character as must likely have brought this nuisance to the attention of the authorities, and hence reflect upon their duty to abate the nuisance. In Taylor's Case it would not have been contended that if the sled which struck him had been the only one coasting on the streets of Cumberland the defendant would have been liable. It was because coasting had been carried on to such an extent that the city authorities were called upon to stop it as a nuisance and something dangerous to those lawfully using the streets. So, in this case, if horses, cows, hogs, and horned cattle were permitted by the town authorities to run at large, as alleged in the declaration, they were called upon to put a stop to it. If, however, this cow that injured the plaintiff was on the street without any fault of the owner, then no blame can attach to the defendant, and it would not be liable; for it would not do to hold a municipal corporation to a stricter liability for injuries done by domestic animals than the owners themselves would be held to. Nor would the defendant be liable unless it could have prevented this cow from running at large by the use of ordinary care and

Digitized by Google

diligence. If the cow was at such place and for such short time that it could not have been discovered by the defendant's officers, by the use of reasonable care and diligence, before it attacked plaintiff, then the defendant would not be liable, unless the cow's running at large can be attributed to the failure of defendant to pass and enforce ordinances to prevent stock from running at large. Of course, if the plaintiff is shown to be in fault, another defense would arise. Whether or not the plaintiff can prove such facts as will entitle her to recover can only be determined at a trial of the case; but we think the allegations in the declaration are sufficient to require the defendant to plead, and therefore the demurrer should have been overruled. For these reasons, we must reverse the judgment. Judgment reversed and new trial awarded.

FISHER et al. v. BOYCE et al.

(Court of Appeals of Maryland. March 26, 1895.)

CONTEST OF WILL — TRANSFER OF ISSUES TO LAW COURT — ESTOPPEL.

1. The orphans' court cannot transmit to a court of law issues assailing as fraudulent parts of a will and codicil in order to carve out of the residuary clause and out of the codicil only such parts, not in themselves distinct and severable from the other parts, as conflict with the interests of the petitioners.

2. Where the heirs, by their answer to the bill of complaint of the executors asking the court to construe a will, admitted the due execution, publication, and probate of the will and codicil, and claimed a beneficiary interest under the will, and the record fails to show that since then any facts previously unknown have come to their knowledge showing that certain objectionable parts were made through fraud and undue influence, they are estopped to deny its validity.

Appeal from orphans' court, Baltimore county.

Petition of James Boyce, Jr., and others to the orphans' court, alleging that part of the will of James Boyce is in some respects a true will and in some not. William A. Fisher and others, executors, appealed from an order of that court. Order reversed, and petition dismissed.

Argued before ROBINSON, C. J., and BRISCOE, McSHERRY, FOWLER, and ROBERTS, JJ.

John P. Poe, Edgar H. Gans, and B. Howard Haman, for appellants. Charles Marshall, T. W. Blakistone, and George Blakistone, for appellees.

ROBERTS, J. This appeal is taken from an order of the orphans' court of Baltimore county transmitting issues to a court of law caveating the will of James Boyce, late of said county. Two questions are presented by this appeal: First, had the orphans' court, under the circumstances of this case, any authority to order the transmission of the particular issues prayed for? and, second, were not the appellees, by their antecedent conduct, estopped from contesting the validity of the will in controversy? It is not contended by the appellants that the orphans' court had no authority to send to a court of law for trial issues which contest the validity, either of the will and codicil in their entirety, or separate and distinct provisions thereof. But it is contended that there is no authority in law justifying the orphans' court in transmitting to a court of law an issue or issues which assail as fraudulent and void certain parts of a will and codicil which are not in themselves distinct and severable from the other parts. The particulars of this controversy are that James Boyce, late of Baltimore county, deceased, departed this life, leaving a last will and testament in writing, dated the 9th of July, 1891, and also a codicil thereto, dated the 27th of July, 1891, both of which were on the 6th of September, 1891, duly admitted to probate in the orphans' court of Baltimore county, and letters testamentary thereon granted to the appellants, who duly qualified as such. On the 8th of January, 1892, the appellants filed in the circuit court for Baltimore city their bill of complaint against all the parties interested in the settlement of said estate under the provisions of said will and codicil, asking said court to construe the meaning and effect of all the provisions of said will and codicil, and assume the administration and settlement of said entire estate, both real and personal. The bill was answered, and, among others, by James Boyce, a son, and Catharine Harrison, a daughter, of the testator, who are the appellees in this record. In their respective answers the appellees severally and unqualifiedly admit the due execution, publication, and probate of said will and codicil. On the 26th of March, 1892, the court, by its decree, assumed jurisdiction of the trust, and took charge of the administration and settlement of the same. On the 31st of March, 1892, the said Catharine Harrison, by her husband, as next friend, filed her petition in the same cause, claiming that she was entitled under said will to the income on the one-sixth of the residue of said estate after paying certain legacies in said will provided, and praying a monthly allowance, under the provisions of said will, for maintenance, pending the settlement of said estate. In the answer to said petition it was claimed that the petitioner had received a large sum of money from her father during his lifetime, amounting to not less than $38,000; that the debts, incumbrances, and legacies would consume the greater part of the estate; and that her income, if any, from said residue, was then incapable of ascertainment. The petition and answer were heard on the proofs offered, and the petition dismissed. On March 12, 1894, the appellees filed their petition in the orphans' court of Baltimore county, in which they allege that

Digitized by Google

"the paper writing dated the 9th of July, 1891, is in some particulars the true last will and testament of the said James Boyce, and the paper writing dated the 27th of July, 1891, is in some respects a true codicil to said will," but that certain provisions of both said will and of said codicil were procured to be executed by said testator by undue influence and fraud. To a proper understanding of this controversy it will be necessary to quote here in its entirety the residuary clause of said testator's will, which mainly constitutes the contention in this case, and is as follows: "It is my will that all the rest, residue, and remainder of my estate, real and personal, situate in the state of Maryland and in other states, shall be divided by my executors into six parts [and all the sums which have been charged by me, or by my authority, on any of my books of account or memoranda, against any of my children, or which may appear on memoranda made by me, and not yet entered into my books of account, shall be treated as parts of my estate, and the charges against each child shall be divided and treated as parts of the share of my estate set apart to such child, or to trustees to her and her issue], it being my purpose, as far as practicable, thereby to promote equality in the benefits which my children have derived and shall derive from my estate." That which is included within brackets is the part of said clause which it is claimed by the appellees is fraudulent and void, as having been procured by the practice of undue influence upon the testator in the execution of the same. It is also contended that the last line of the codicil, which reads, "and I confirm my last will and testament in other respects," was procured to be executed by the testator by the practice upon him of fraud.

We come now to the consideration of the first question arising on the appeal. Until the decision in the case of Griffith v. Diffenderffer, 50 Md. 466, the practice had never been sanctioned in this state of allowing issues transmitted to a court of law to be so framed as to contest the validity of certain parts of a will without assailing the entire will. However, before the decision in this state, the same practice had long prevailed in the English courts, notably in Rhodes v. Rhodes, L. R. 7 App. Cas. 198; Goods of Duane, 2 Swab. & Tr. 590; 1 Jarm. Wills, 413. While the practice has been thus sanctioned, the doctrine of the cases is such that we are constrained to think it should be kept within well-defined restrictions. It doubtless may be in some instances the means by which good results may be accomplished in the detection of fraudulent impositions, but yet, if not properly guarded, it is quite well calculated to destroy the harmony of a testator's dispositions, and cause his will to directly misinterpret his just intentions. The question to be considered and disposed of on this appeal has not received the approval of any of the English or American courts, so far as we are informed, nor do we think it ought to receive the approval of this court. From the facts already stated it is apparent that the caveat filed in the orphans' court of Baltimore county does not seek to strike down the entire will of the testator, but is an effort to carve out of the residuary clause of the will only such parts thereof as conflict with the interests of the appellees. It is clearly manifest that the testator, by the use of the language against which the caveat is filed, sought to promote equality in the final disposition of his estate. This language does not present a proposition distinct and severable, but it is so interwoven with the general scope and purpose of the leading provisions of the will that to eviscerate from the residuary clause the suggestive language contained therein would be subversive of the objects which the testator has sought to make effective. On this point the observations of Sir James Hannen in Harter v. Harter, L. R. 3 Prob. & Div. 21, may be referred to: "Such a mode of dealing with wills would lead to the most dangerous consequences, for it would convert the court of probate into a court of construction of a very peculiar kind, whose duty it would be to shape the will into conformity with the supposed intentions of the testator. In very many of the cases which come before the courts of law and equity as to the proper construction of wills, the intention of the deceased is supposed to be seen, but the question is whether the language used expresses the intention. If the process now sought to be applied to this will were to be adopted, the court of probate will in future be asked first to ascertain by extrinsic evidence what the testator's intention was, and then to expunge such words or phrases as, being removed, will leave a residuum, carrying out the intention of the testator in the particular case, though different in form, and possibly in legal effect, from that which the testator or his advisers intended." The caveat to the codicil would seem to follow as the natural concomitant of the assault on the objectionable features of the residuary clause, as the language of the codicil is in direct terms a republication of the will. In what we have said we have dealt sufficiently with the subject as not to require further comment.

With respect to the question of estoppel, which is the second question raised by the appeal, we think, in the present state of the record, the appellees have by their conduct denied themselves the right to institute these proceedings. "A party cannot, either in the course of litigation or in dealings in pais, occupy inconsistent positions; and where one has an election between several inconsistent courses of action he will be confined to that which he first adopts. Any decisive act of the party, done with knowledge of his rights and the facts, determines his election and works an estoppel. * * * It is an old rule of equity that one who has taken a beneficial in-

Digitized by Google

terest under a will is thereby held to have confirmed and ratified every other part of the will, and he will not be permitted to set up any right or claim of his own, however legal and well-founded it may otherwise have been, which would defeat or in any way prevent the full operation of the will." Bigelow, Estop. 562. If, however, a party has acted in ignorance of the true state of facts, he will not, on discovering the truth, be bound by his previous conduct, based upon a state of case essentially different from that which had controlled or influenced his prior action. In the case under consideration the record does not show that the appellees, since the will and codicil were admitted to probate, have obtained knowledge of facts previously unknown to them; in fact have, before the institution of these proceedings, ascertained that the testator was, by fraud or undue influence, induced to execute said papers as testamentary dispositions of his property. It is a maxim in a court of equity not to permit the same person to hold under and against a will. Herbert v. Wren, 7 Cranch, 378. We think this rule should not, in its application, be limited to courts of equity, as it is equally appropriate to the jurisdiction and practice of courts of law. If the appellees claim under the will of their father, they must give it effect as far as they can, and they will then be estopped from denying its validity and genuineness. Waters' Appeal, 35 Pa. St. 523; Thrower v. Wood, 53 Ga. 458. This rule does not, of course, apply in cases, as hereinbefore explained, where the party objecting to the will has previously assented thereto without knowledge of the circumstances attending the execution of the will. It follows from these views that the order of the orphans' court of Baltimore county must be reversed, and the petition of the appellees be dismissed. Order reversed and petition dismissed, with costs.

SHAW et al. v. DEVECMON et al.

(Court of Appeals of Maryland. March 27, 1895.)

TRUSTEE OF LAND—LIABILITY FOR UNAUTHORIZED ACTS.

The estate of one who held land in trust for a widow and her children, and without their consent expended rents and profits in purchasing an outstanding title to the land, is liable for the amount so expended.

Appeal from circuit court, Allegany county.

Action by Althea M. Devecmon and others against Alexander Shaw and Christian Devries, executors of John S. Combs, deceased, and others, for an accounting of rents and profits. Judgment for plaintiffs, and defendants appeal. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

David W. Sloan, D. Jas. Blackiston, and Benj. A. Richmond, for appellants. J. S. Devecmon, for appellees.

BRYAN, J. This is an appeal from the circuit court for Allegany county, sitting in equity. The proceedings appear to have been somewhat irregular; but, as no question has been made on this ground, we find it unnecessary to consider it. It is admitted that there is but one point in controversy, and therefore we shall proceed to examine it without making a detailed statement of the other matters appearing in the record. It is shown in the evidence that in August, 1862, Thomas Devecmon, at a public sale for taxes, purchased a tract of land called "Harker Place," and another tract called "Sugar Hill," both lying in Allegany county, and other tracts of land in said county; and that, he having died before receiving a deed for the same, the collector, after his death, conveyed the land to his widow and children, the children then being infants under the age of 21 years; and that John S. Combs, who was the uncle of the infant Devecmons, took possession of the tracts called "Harker Place" and "Sugar Hill," and managed them for the benefit of the widow and children, accounting to them for the rents and profits. In the year 1868, Benjamin E. Green, who alleged that he was the owner of these tracts at the time of the tax sale, brought an action of ejectment to recover them, and obtained a judgment by default against the casual ejector, but he made no attempt to take possession of the land. In July, 1884, these tracts were sold under a decree in equity against Green, and were purchased by Combs, who took the deed in his own name. He charged the price of the property, which was $816, to the Devecmons, on his books. There is no doubt that it was his intention that they should have the benefit of the purchase; and it is perfectly evident that all his dealings with them were marked with strict integrity, and by a benevolent desire to promote their pecuniary interests. The circumstances were such that it was a matter of prudence to extinguish Green's title, if it could be done, on reasonable terms. The Devecmons claimed under a tax title, and such a title was very precarious before the changes made by the act of 1874. It was necessary for the party setting it up to prove that every requirement of the law had been observed, and that the sale was regular in every particular. Very often there were mistakes and omissions in the proceedings; and, even where they were perfectly regular, it was difficult to prove the facts after the lapse of many years. The Devecmon title accrued more than 20 years before the purchase by Combs, and they had held possession under it all that time. But the statute of limitations had not given any additional security to it, because, at the time of the tax sale, the owner was absent from

Digitized by Google

the state, and he does not appear to have returned until 1866, about 18 years before the purchase by Combs. The judgment in ejectment did not determine any question of title. It merely gave Green the right to obtain possession; but, as no execution was issued on it within 12 years from the time of its rendition or afterwards, it was barred, and of no effect. We lay no stress on the right of possession acquired by this judgment as an obstacle to the running of limitations, because, with or without the judgment, the entry of Green was not barred when Combs bought the property. But, however prudent it may have been for the Devecmons to acquire Green's title, Combs had no right to buy it with their money without their consent. They were all of age at the time, and he might have consulted them. There is no evidence in the record that he did so. There is a letter from him to J. Semmes Devecmon in which he speaks of having paid for the property. But this is a slender foundation for an inference that the family had agreed that their money should be invested in the purchase. In point of fact he never conveyed the title to them, and never tendered a conveyance of it, but retained it in his own name. They probably all knew that he had made the purchase. Five of them sold to him their interest in the land. The deeds show that they conveyed to him "all their right, title, and interest" in it. Their interest was such as was derived from the tax sale, and he had the title of the original owner. There is nothing in the deeds to show that it was understood by either grantors or grantee that the Devecmons had agreed that their money should be applied to the purchase of Green's title. If this were the understanding, it would have been very easy and very natural to insert the statement in the deeds. But it is not in our power to interpolate it. Combs died in October, 1885, and Alexander Shaw and Christian Devries became his executors. Among the proceedings, there is a prayer that they should account with the widow and heirs of Thomas Devecmon for the rents and profits of Harker Place and Sugar Hill, and that they should be charged with the price of the property above mentioned, purchased by Combs. This is the only question presented to us by this record. The court below decreed that they should account, and should be charged with this sum. We are of the same opinion; but, although we hold that the price paid for the title of Green must not be charged to the Devecmons, yet we must observe that this title belonged to Mr. Combs, and that at his death it descended to his heirs at law.

The decree must be affirmed, but a majority of the court think that the appellants ought to be allowed to apply for a decree remanding the case for further proof in regard to the purchase of the property by Combs, and its binding effect upon the Devecmons, if they should elect to do so within 30 days from this date, and it is so ordered. Decree affirmed, with leave to the appellants to move to remand the case for further testimony, if they elect to do so within 30 days.

CROCKETT et al. v. DAVIS et al.

(Court of Appeals of Maryland. March 27, 1895.)

WILLS — CONTEST — TESTAMENTARY CAPACITY — OPINION EVIDENCE — SUFFICIENCY OF EVIDENCE.

1. A physician who has attended testatrix professionally for several years can give an opinion as to her mental capacity at the time of making the will, without stating the facts on which his opinion is based.

2. In a will contest, testimony of a physician that he had attended testatrix for several years, and that her mind had become weakened by disease and worry prior to the execution of the will, and testimony of relatives that, prior to its execution, she was weak and nervous, and made contradictory statements, and that they considered her a mental wreck, is sufficient to take the case to the jury on the question of her mental capacity.

Appeal from superior court of Baltimore city.

Proceeding by Samana Crockett and others against Harry B. Davis, individually and as executor of the will of Catharine Davis, deceased, and others, to contest the will. Judgment for defendants, and plaintiffs appeal. Reversed.

Argued before ROBINSON, C. J., and McSHERRY, FOWLER, BRISCOE, ROBERTS, and BOYD, JJ.

John F. Gontrum, Saml. Register, and S. S. Field, for appellants. Bernard Carter and D. Meredith Reese, for appellees.

BOYD, J. Upon a caveat to a will of Catharine Davis issues were framed by the orphans' court of Baltimore city, and sent to the superior court for trial. They presented the following questions: (1) As to the formal execution of the will; (2) as to her knowledge of its contents; (3) whether it was procured by undue influence exercised and practiced upon her; (4) whether it was executed by her when she was of sound and disposing mind, and capable of executing a valid deed or contract. Four daughters of Catharine Davis by her former marriage, and the husbands of those who were married, were made the plaintiffs, and her children by her second marriage, together with the husband of a married daughter, were made defendants. At the trial the defendants produced the will, and examined the two subscribing witnesses for the purpose of proving the execution of it. The plaintiffs then called a number of witnesses to show undue influence and want of testamentary capacity on the part of Mrs. Davis. At the conclusion of the plaintiffs' case, the defendants offered three prayers, which were granted by the court, instructing

Digitized by Google

the jury to find for the defendants on all four issues. From these rulings this appeal was taken.

The first prayer referred to the first and second issues, and as there can be no doubt about the correctness of the rulings of the court below in reference to them, excepting so far as the second issue may be affected by the questions raised by the third and fourth, we will proceed at once to the consideration of the other two prayers. By the third the jury was instructed that no sufficient evidence had been offered to show that the will was procured by undue influence, and therefore their verdict must be for the defendants on the third issue; and the fourth instructed them that no sufficient evidence had been offered to show that Catharine Davis was not of sound and disposing mind, capable of executing a valid deed and contract, at the time she executed the will, and therefore their verdict must be for the defendants on the fourth issue.

We will first consider the fourth prayer, as that involves the foundation of all valid wills, —testamentary capacity. The burden was on the caveators to overcome the presumption of law that Mrs. Davis was of sufficient mental capacity to make a will. They having undertaken this, it is incumbent on us to examine the record to see whether the evidence offered by them was legally sufficient to fairly support a verdict if the jury found for them. As has often been said by this court, if the facts proved are such that a rational mind might, in reason and fairness, from them draw the conclusion sought, it is the duty of the court to submit the case to the jury. In the case of Hiss v. Weik (decided by this court, but not yet officially reported) 28 Atl. 400, the question was stated thus: "Was the evidence offered by the caveators, assuming it all to be true (as must be done when weighing its legal sufficiency upon a prayer of this character), so utterly inconclusive or devoid of probative force as not to enable an ordinarily intelligent mind to draw a rational conclusion therefrom in support of the proposition sought to be maintained by it?" Cases often arise in which plaintiffs have so signally failed to sufficiently prove some material fact upon which their right to recover depends that there can be no doubt about the duty of the court to determine the question without leaving it to the jury, as the court is the exclusive judge of the legal sufficiency of the evidence. But the difficulty sometimes is, particularly in cases of this character, to distinguish between the weight of evidence and its legal sufficiency. The trial judge may differ from the jury as to the former, and may think they should have found differently, or, if sitting as a juror or in some case where he is authorized to determine the facts, he may reach a different conclusion from what a jury might have done. In this case the plaintiffs may not have offered such evidence as would convince the learned judge below that Mrs. Davis was not capable of making the will in controversy, but the question is whether there was not sufficient evidence to require him to submit it to the jury, under the principle of law governing such cases, established by this court. The evidence shows that Mrs. Davis was married twice,—the first time to a Mr. Jenkins. The female plaintiffs are the surviving children of that marriage. Mr. Jenkins died in 1861, and his widow married Thomas D. Davis in 1862. Shortly before the death of Mr. Jenkins, the property accumulated by his wife was lost through some of his financial troubles. She was an industrious, hard-working woman, and it was not long before she commenced to recover from her losses, and to acquire more property. Mr. Davis was at the time of their marriage receiving a salary of $150 per month, and continued to do so for about 18 months, when he lost his place by reason of the establishment with which he was connected suspending work. He was out of his regular employment for about eight years, during which time his wife worked hard to support the family. She was assisted by those of her children of her first marriage who were still at home, and there is testimony tending to show that Mr. Davis did very little towards supporting the family or accumulating any property during that time. He died on April 25, 1890, and at the time of his death there was considerable property in his name, a part of which he left to his children by his former marriage, and the rest to his wife. She also received some twelve or fifteen thousand dollars from insurance on his life. She died on February 9, 1892, leaving about seventeen thousand dollars of personal (including leasehold) property, and six houses and lots in fee, situated in Canton, worth probably eight or ten thousand dollars, as stated by the judge below. How much of this property she received from her husband is not shown, but it is evident that a considerable part of it came through his will and insurance on his life. The record does not show what amount of property she had on August 13, 1890, the date of the execution of her will. She left to her three children (Davis' children) all of the above-mentioned property, excepting four pieces of leasehold property valued at $3,200, personal chattels valued at $908, and cash on hand amounting to $2,653.44. Her children by Mr. Jenkins are not mentioned in the will, but, as there was no residuary clause in it or other disposition made excepting as to those properties specifically devised to the three Davis children, the Jenkins children would be entitled to their shares in the residuum. The evidence shows conclusively that her relations with the Jenkins children were of the most pleasant character, and no good reason has been assigned why they were not mentioned in the will, excepting the contention by the appellees that it was because most of the property came from Mr. Davis, and hence she may have felt under obliga-

Digitized by Google

tions to leave it to his children. But the evidence does certainly tend to show that, whatever may have been the facts as to how the property was held when Mr. Davis died, his wife was entitled to the credit of being largely instrumental in acquiring it, and that she paid at least some of the life insurance premiums. If it be conceded, then, that most of the property stood in his name when he died, that fact of itself could not wholly account for the omission of the Jenkins children from their mother's will. Of course, it is not sufficient to avoid a will to show that a testator has left his estate to some children to the exclusion of others, without any apparently valid reasons for it, as the testator may have had what to him, at least, seemed to be sufficient reasons, but which are not disclosed by the testimony. But, in passing upon questions of this kind, it is proper to consider all the circumstances and surroundings of the parties that could throw any light upon the subject. In this case we cannot say there is no evidence of an unreasonable inequality in the disposition of the estate of Mrs. Davis, because, if it be true that the property she was possessed of at the time of her death was acquired by her labor and skill, and particularly if the caveators, or some of them, materially helped her to do so, it would seem unreasonable, without some explanation, for her to make such a bountiful provision for three of her children, and not even name the other four in her will. But we must pass on to the main questions in the case.

The caveators produced as a witness, in addition to the daughters and some intimate friends of the testatrix, a practicing physician, who was her son-in-law, and knew her socially and professionally for a number of years. He testified that during a period of time mentioned by him, which included the date of the will, Mrs. Davis was not of sound and disposing mind, capable of executing a valid deed of contract. It is well settled in this state that a physician can testify as to the mental capacity of the testator without first stating the facts and circumstances on which his opinion was formed. That is because he is presumed to have become, from special study and experience, familiar with the symptoms of mental diseases, and therefore qualified to assist the court and jury in reaching a correct conclusion. It is clear that the opinion of a medical expert on that subject is ordinarily not only some evidence, but generally very important evidence to go to the jury, particularly if he was well acquainted with the testator and attended him professionally. But it is contended by the learned counsel for the appellees that, admitting this to be true, yet if the medical expert gives the reasons upon which his opinion is founded, and they are such as men of ordinary knowledge can weigh, and are in the judgment of the court such as no rational inference can be deduced therefrom that the testator was wanting in the required mental capacity, his opinion does not afford evidence legally sufficient to show such want of capacity. As we understand this proposition of law, we are not prepared to dispute it. Merely because a witness is an expert does not require the court to be bound by his opinion if it is founded on such reasons as are clear absurdities. If, for example, a physician were to testify that, in his opinion, a testator was not of sound and disposing mind, capable of executing a valid deed or contract, and would in his further examination say that the only reason he had for such opinion was that the testator used patent medicines, or was a member of some religious or political faith other than his own, such opinion would be based on a foundation so clearly repugnant to right reason that a court would not hesitate to instruct the jury that it was not sufficient to support a verdict. But we do not think the testimony of Dr. Pritchard comes within the rule sought to be established by the appellees. His evidence was in some respects contradictory, but that was clearly for the jury, and not for the court, to pass upon. He testified, in substance, that, after the death of Mr. Davis, a caveat to his will was filed by his children by a former marriage, and that this affected Mrs. Davis' mind. The caveat was filed in the latter part of May, 1890; the will executed August 13, 1890; and she went to Saratoga for her health on August 14, 1890. He swore that, in his opinion, she was not of sound and disposing mind, capable of executing a valid deed or contract, between the filing of the caveat and her going to Saratoga. He said she came to see him every few days, consulted him about what she was to do, and he found her very much excited. He also said: "She was nothing as she had formerly been. She could be very easily persuaded. Now, that is my opinion,—that she could be very easily persuaded to do probably absurd things, if any one would try to do so. She was forgetful at times, not every day. Some days she would say things, and the next time you would see her she would contradict it entirely." Again he said: "On days she would have a few lucid moments. You can see that in a lunatic asylum." He further said: "Well, she was complaining of her head and headache, and then she would be saying so many funny things, and contradicting them at other times again, and saying that she never had mentioned them." His evidence also showed that Mrs. Davis had been in bad health for some time; that she had chronic gastritis; and that "this disease itself does weaken the mind, and it does not require so much excitement then to upset it." He testified to a number of other things that, in his opinion, affected the condition of her mind; and when asked on cross-examination, "Was there anything else that she said?" he replied, "Well, I can't remember just now all that she did say." Without going into further particulars about his testimony, it

Digitized by Google

is sufficient to say that it showed that he knew the testatrix well, had frequent conversations with her, and opportunities to observe her mental condition, and he expressed the opinion above stated. We do not think that the reasons given by him, especially as he says that he cannot recall all that she said, are "so utterly inconclusive or devoid of probative force" as to justify the court in withholding his testimony from the jury. It may be true that the judge would have been fully justified in finding for the appellees on this testimony if the case had been tried before him, but that is not the test. It is almost impossible for a witness to recall upon the witness stand every word or act of a person about whose mental condition he is testifying. It is still more difficult to convey to others all the impressions made on one's mind when coming in frequent contact with a person alleged to be affected with some mental trouble. As was said in Townshend v. Townshend, 7 Gill, 28, in speaking of the admissibility of the testimony of a nonprofessional witness: "The impression made upon the mind of a witness by the conduct, manners, bearing, conversation, appearance, and acts of the testator in various business transactions for a long series of years is not mere opinion; it is knowledge." In the case of Insurance Co. v. Lathrop, 111 U. S. 612, 4 Sup. Ct. 533, the court, in deciding that an opinion of a nonprofessional witness as to the mental condition of a party can be given, in connection with a statement of the facts and circumstances within his personal knowledge, said: "If he may not so testify, but must give the supposed silly and incoherent language, state the degrees and all the accompanying circumstances of highly-excited emotions, and specifically set forth the freaks or acts regarded as irrational, and this without the least intimation of any opinion he has formed of their character, where are such witnesses to be found? Can it be supposed that those not having a special interest in the subject shall have so charged their memory with these matters, as distinct, independent facts, as to be able to present them in their entirety and simplicity to the jury? Or, if such a witness be found, can he conceal from the jury the impression which has been made upon his mind, and, when this is collected, can it be doubted but that his judgment has been influenced by many, very many, circumstances which he has not communicated, which he cannot communicate, and of which he himself is not aware?" Is not this equally true as to the evidence of professional men? Their naked opinions, without giving the facts and circumstances upon which they are founded, are admissible, as we have already said, because they are supposed to have been familiar with symptoms of mental disease, by study and experience. The appearance of the unfortunate one may enter largely into the reasons which lead the physician to a conclusion. A busy physician certainly ought not to be expected to recall and state all the facts and circumstances upon which his opinion is founded, even though his patient be his mother-in-law. Mrs. Crockett said her mother was never the same after the caveat was filed; that "she was more like she was half crazy than anything else"; "my mother was both broke in body and mind"; that her mother went to Saratoga "for her health and her mind also,"—and used other similar expressions. Mrs. White, an intimate friend, who went with Mrs. Davis to Saratoga, said: "She was changed. She was melancholy, and she was very weak and nervous." Miss Dinsmore said that she "considered that both mentally and physically she was a wreck," although she afterwards qualified it somewhat. A number of other similar expressions were used by the witnesses, which are unnecessary to quote. We are satisfied from an examination of the whole record that there was sufficient evidence on the question of mental capacity to entitle the caveators to have the jury pass upon it, and therefore there was error in granting the fourth prayer.

We do not deem it necessary to go into any extended discussion of the third prayer. It is sufficient to say that in many respects there is a marked difference between this case and that of Hiss v. Weik, relied on by the appellants. The testimony in that case shows that Bishop Ames' will was made on the 7th of April, 1879, and that he died on the 25th of the same month. Mrs. Hiss received a large portion of his estate, to the exclusion of an insane son and that son's dependent daughter, and very little was left to an invalid daughter. Three days before the will was made, the testator conveyed to Mrs. Hiss, for the nominal consideration of $5 and natural love and affection, real estate in Baltimore city valued at $40,000. The evidence shows that she had said that she had great influence over her father; that he would do anything that she would ask him to do. There were many things in that case which, taken together, gave some evidence of undue influence, and therefore this court thought the court below was right in submitting the case to the jury. In this case Mrs. Davis lived nearly 18 months after she made the will. Although she was constantly with the caveatees, she never told them she had any desire to change her will, or even that she had made one. There is no evidence that any of the caveatees knew she had. Much of the evidence of the plaintiffs is to the effect that the caveatees did not treat Mrs. Davis very kindly. If that be true, it was certainly not the kind of treatment that would likely exert an undue influence over her for their own benefit. If the jury believed that the property in controversy had belonged to Mr. Davis, then that would be some explanation of Mrs. Davis leaving it to his and her children, to the exclusion of the others. There is no evidence in this record.

Digitized by Google

to show that in point of fact there was any influence exerted or attempted over the testatrix by the caveatees, or any of them, prior to or at the time of the execution of her will; and we do not think that the facts of this case are parallel with those in Hiss v. Weik, or that the decision in that case necessarily controls this. Without deeming it necessary to prolong this opinion further, it sufficeth to say that we do not feel justified in reversing the rulings of the court below on the question of undue influence; but without meaning to intimate that the evidence does establish the fact that Mrs. Davis was not mentally capable of making a will on August 13, 1890, we are of the opinion that the evidence of Dr. Pritchard, especially when taken in connection with the other testimony, was of such character as to entitle the appellants to have it submitted to the consideration of the jury. We think, therefore, there was error in the refusal of the court below to do so. Rulings reversed, and new trial awarded.

STATE ex rel. BALTIMORE & O. TEL. CO. OF BALTIMORE CITY v. DELAWARE & A. TELEGRAPH & TELEPHONE CO.

(Superior Court of Delaware. Sept., 1885.)

FOREIGN CORPORATION—INTERSTATE COMITY—DISCRIMINATION—CITIZENS OF OTHER STATES.

1. The usage of interstate comity will not warrant the issuance of a writ of mandamus to compel a domestic corporation to aid a foreign corporation, whose operations are expressly limited by charter to the state where it was created, to conduct its business in Delaware.

2. A corporation is not a citizen, within the provision of the United States constitution, securing to a citizen of any state the rights, privileges, and immunities guarantied to the citizens of the several states.

Application by the Baltimore & Ohio Telegraph Company of Baltimore City for a rule to show cause why a writ of mandamus should not issue to compel the Delaware & Atlantic Telegraph & Telephone Company to aid relator in operating lines in the state of Delaware. Rule discharged.

Levi C. Bird, for relator. Edward G. Bradford, for respondent.

COMEGYS, C. J. In this case we are asked to decide, upon a rule to show cause, the question whether the plaintiff in the rule is entitled to ask for it; and, if he be, whether he has shown such facts as, if true, would justify the court in granting it. Apparently no more important subject has arisen, for a long time, for decision in this state than that which the papers and argument present, of the right of a foreign corporation to ask for a mandamus to facilitate in this state the exercise of the powers conferred upon it in the state of its creation. Its importance is greatly magnified because of a question which, but for the sufficiency for the purpose of decision of others presented, we should be bound to consider and pass upon. The case before us does not, however, require that we should go into that subject at any length, and therefore we will pass it.

The difficulty in dealing with the application to make the rule absolute is that of seeing upon what it can be based. As we conceive, none has been shown to us. Supposing, for the mere sake of the argument, however, that a foreign corporation can have any existence or capacity in this state to be recognized by its courts, without legislative enactment, how can it be claimed that the plaintiff in this case has such, seeing that its operations are expressly confined to the territorial limits of Maryland, whose creation the corporation is? Cases have been presented which decide that where, by the terms of the act of incorporation, or the general law of a state, a corporate body has power to act generally everywhere, the states, by comity,—that is, gracious favor, extended also by other states to their creations,—will allow it to exercise, to a reasonable extent, its powers within them. That is to say, they will allow it to seek redress in their courts for breaches of contract, for example. But this is, obviously, ex gratia merely. It cannot, in any sense, be claimed as a right. The states are independent, and can open their courts or not to foreigners or foreign (that is, as applied to them) corporations. These latter, being mere artificial bodies, and not personal in a sense to entitle them to be treated, in a question such as this, as citizens of another state, the usage of comity which prevails does not necessarily or appropriately exist for them. It is by the comity of a country, its courtesy to another country, that a citizen or subject of the latter is allowed to use its juridical process. It is true that, so far as citizens of any state of the United States are concerned, there is secured to them, by the federal constitution, the same rights, privileges, and immunities which citizens, as such, enjoy in their respective states. This is by virtue of and to consolidate their nationality; but the provision is not for corporate bodies, which are citizens in no sense except for redress of grievances in the courts of the Union. In them they are such by judicial construction. Were corporate bodies entitled to the same recognition as citizens, then all constitutional restraint upon their creation would be nugatory. The provision of our own constitution which requires a vote of two-thirds of each branch of the legislature to pass a corporate act could be rendered a dead letter by the courts, if comity could clothe a foreign creation with corporate functions here. This is conclusive of the view that in this state, at least, to give a foreign corporation the right to demand a mandamus to enable it to use its foreign franchises, something more is needed to insure compliance than the mere invocation of comity.

But the invoked action of comity would be

Digitized by Google

misapplied in a case like that before us,—of a corporation expressly limited, by its own charter, to the transaction of business within the limits of the state of Maryland. It is conceivable that a corporate body unrestricted to state territory, and created to pursue a business which might be followed anywhere, should, where there is no constitutional or legal impediment in the way, be recognized by a state, and allowed to act in it by courtesy; but where one is expressly, as in this case, confined to the jurisdiction of its birth in its operations, it is not conceivable that it should be allowed to act beyond it. In the nature of its being, it cannot project itself, by any mere recognition of a court, into another jurisdiction, and act there, for it would have nothing to show in justification. To adopt it in any way in another state would be in fact a want of comity on the part of such state,—as clothing it with a function which was withheld from it by the act which created it. Without going any further into the subject, we give as our judgment that the motion in this case ought to practical, and we therefore order that the rule be discharged.

CARTER v. WILDS et al., Court Commissioners.

(Superior Court of Delaware. Oct., 1887.)

COUNTIES—LIABILITY FOR TORT.

An action of tort cannot be maintained against commissioners of the levy court of a county.

Action by John F. Carter against David S. Wilds and others, commissioners of the levy court of Kent county, for damages for the breaking down of a bridge on a public road. Defendants move for a nonsuit. Granted.

John R. Nicholson, for plaintiff. George P. Fisher and E. T. Cooper, for defendants.

THE COURT sustained the motion, and granted a nonsuit; COMEGYS, C. J., stating that the overwhelming weight of authority seemed to be in favor of the proposition that no action of tort will lie against such a public division of the state as the county or such a body as the levy court. The case cited from 2 Wall. 501 (Coroner v. Levy Court), was an action of assumpsit on a contract between the parties.

FORD v. CLEWELL.

(Superior Court of Delaware. Feb., 1890.)

LANDLORD AND TENANT—LIEN FOR RENT—PRIORITY OVER CHATTEL MORTGAGE.

The landlord's lien for rent (Rev. Code, c. 120, § 60) is superior to that of a chattel mortgage executed before the beginning of the tenancy, and before the goods were taken onto the demised premises. Comegys, C. J., dissenting.

Scire facias upon a mortgage by Thomas Ford against Charles H. Clewell. After sale, the New Castle County Mutual Insurance Company had the money paid into court, claiming a lien for rent superior to that of the mortgage, and petitioned to take out sufficient to satisfy the rent.

Alexander B. Cooper, for petitioner. J. H. Rodney, for mortgagee.

The COURT held the lien of the landlord for rent to be superior to the lien of the chattel mortgage.

COMEGYS, C. J. (dissenting). The question presented by the record in this case is, is the lien of a chattel mortgage upon the goods and chattels mentioned in it superior to the claim of the lessor of the mortgagor, where they were taken by the mortgagor on premises demised to him by the lessor, and of which he took possession after the delivery and record of the mortgage, and which goods and chattels were, during the tenancy, sold, in enforcement of the lien, by the sheriff under an execution of levari facias? In other words, was the mortgagee's lien suspended or displaced by the act of taking the goods and chattels mortgaged upon the demised premises, so as to allow the lessor to have a year's rent out of them, in preference to the mortgage? This question has not before arisen in our courts, and we are therefore without any precedent of our own to guide us to a solution of it. On behalf of the lessor, several cases have been cited to us where it has been passed upon directly or indirectly elsewhere, and they were decided in favor of the claim made by the lessor, as in this case. But the decisions were based upon the ground that the lessor's right is superior, because, as said by the courts passing upon the question, it is a lien created by statute, while that of the mortgagee is by contract between the parties. I am entirely unable to see any difference between the respective rights, for that of the landlord is created by statute as well as that of the mortgagee under the chattel mortgage. By common law a landlord had no lien upon the goods and chattels of his tenant, nor has any been given him by statute in this state. But he has always had a right of seizure and sale by distress for rent due, and by the statute of 8 Anne, c. 14, § 1, "no goods or chattels being in or upon any messuage, lands, or tenements leased for life or lives, term of years, at will or otherwise" were "liable to be taken by virtue of any execution on any pretence whatever," unless the party at whose suit the execution was sued out should, before the removal of the goods from off the premises, pay to the landlord or his bailiff such sum as was due for rent at the time of the taking, provided the arrears did not amount to more than one year's rent; and, in case the arrears exceeded a year's rent, then the party executing, paying the landlord or his bailiff one year's rent, might proceed

Digitized by Google

to execute his judgment, as he could have done before the passing of the act. When that was done, the sheriff was to "thereupon proceed to levy and pay to the plaintiff as well the money so paid for rent as the execution money." The landlord had no remedy or right as against the execution creditor for rent, until 8 Anne gave it to him as above shown. He had nothing like a lien on his tenant's goods; but, after the statute, could not, as he could have been before its passage, defeated of his right of distress without the payment of his rent due, not exceeding a year's rent. While there is also in this state no lien upon a tenant's goods in favor of his landlord, yet the latter is better off than in England, for his accruing rent is placed by our statute in the same state as to preference over executions levied after the demise became in force as if it were due at the time of the levy. Section 60, c. 120, Rev. Code, p. 715. There is no hint in the statute of Anne, or the chapter of our Code cited, that a landlord has any lien at all on his tenant's goods for rent due or accruing. This review places us in a better situation than we were in by the argument to correctly view and decide the question before us. We perceive that a landlord has no lien on the goods of his tenant by virtue of the tenancy. But, if the terms of the statute with respect to chattel mortgages have been complied with (as it is admitted they were in this case), the mortgagee acquires a lien for three years on the property mortgaged, which he may enforce by scire facias and process of execution as mortgagees of land may of real estate. The law is that, if personal property, upon which there is a lien, by act of the parties be sold by process in execution of a judgment, such lien has first right to the proceeds, or the sale may be made subject to it, if the lien holder prefers to allow his lien to remain, and the buyer is willing to take his title subject to it. The lien holder may refuse to give up possession of the goods until his lien is discharged by payment. Under the law with respect to chattel mortgages, the mortgagee risks nothing of his right as lien holder by allowing his mortgagor to retain possession of the goods pledged. We have, then, a case where, after the creation of the lien, the goods and chattels mortgaged are taken by the mortgagor to premises rented by him, and, while there, are sold by the lien creditor to enforce his lien. If there be anything to distinguish it in principle from that of an execution creditor whose process was levied before the defendant's goods went upon demised premises, I confess I am unable to see it. The lien of a mortgage of goods is, in my judgment, equally meritorious with that of a creditor by execution, the mortgage being a lien of equal validity with a previously levied fi. fa. Legally speaking, the mortgagee is the owner, subject to the mortgagor's equity, and his right is at least as much entitled to favor as that given to the latter's execution. And certainly a landlord's right to distrain, with its incidents, clothes him with no authority which prevents the lien of a chattel mortgage from continuing after the mortgaged goods have gone upon demised premises until the expiry of the statutory time of its duration. In this respect a previously levied execution is in no better case than a previously executed and recorded chattel mortgage. I am therefore of opinion that the mortgage in this case must be paid before the landlord's rent.

JERNEE v. JERNEE.

(Court of Chancery of New Jersey. April 18, 1895.)

FAILURE TO PAY ALIMONY — WARRANT FOR COMMITMENT TO JAIL—SUFFICIENCY.

A writ directing the imprisonment of the defendant until he shall have paid the plaintiff "the alimony now due her, * * * and also a fine of $5 for the use of the state, together with the costs of this writ," is not void because it fails to state the amount of alimony and costs to be paid.

Application of Abbie N. Jernee, complainant in an action for alimony against William R. Jernee, to attach the sheriff of Middlesex county for contempt in neglecting to execute a warrant directing the imprisonment of defendant William R. Jernee to enforce payment of the alimony awarded.

Thomas S. Anderson, for the motion. W. P. Voorhees, for respondent.

EMERY, V. C. It is admitted that the sheriff neglected to execute the warrant for commitment delivered to him in this case by retaining the defendant in custody after he had arrested him under the writ, and that he improperly released him on bail. On this application of the complainant to punish him for contempt, the counsel for the sheriff claims that the officer was not bound to execute the writ, because it was void. The invalidity of the writ is the consequence, as is insisted, of the omission of the warrant to specify the amount of alimony and costs to be paid by the defendant; and the direction of the writ to keep defendant in custody until the alimony and costs are paid is void, as being, on the face of the writ, uncertain, and therefore requiring the custody of the defendant, under the writ, for an indefinite time. This uncertainty, it is insisted, renders the writ absolutely void, so that the sheriff was not bound to execute it, and cannot be held in contempt for neglecting to do so. The direction of the writ, after reciting the order for commitment of the defendant to jail, is as follows: "Therefore, we command you, that you take the body of the said William R. Jernee, and him safely and closely keep in your custody in the common jail of the county of Middlesex until he shall have paid to the said complainant (Abbie N. Jernee) the alimony now due her, and the costs of such contempt, to be

Digitized by Google

taxed, and also a fine of five dollars for the use of the state, together with the costs of this writ, or until our said court shall make order to the contrary."

As to the invalidity of the writ, by reason of the failure to specify the amount of alimony then due, and the amount of the taxed costs, the question has been decided by Vice Chancellor Bird, on an application to discharge Jernee from confinement for this alleged defect in the order for commitment and in this warrant. He refused the application, after full argument and consideration, and his decision thereon is binding. There is also, in addition to the reasons given in the vice chancellor's decision, one other reason which is, in my judgment, fatal to the contention of the sheriff that the writ was void for uncertainty. There is no uncertainty in this writ, as to the amount directed to be paid as a fine to the state; and the writ was as valid for defendant's arrest, so far as related to the payment of this $5, as if it had directed him to be held until he had paid $5,000, nor had the sheriff any right to disregard it. If any part of the direction of the writ is valid, the writ cannot be held void. The writ, therefore, was valid and the sheriff must be held to be in contempt. The question as to the amount of fine to be imposed was discussed by counsel at the argument of the motion to attach; the complainant's counsel insisting that a fine should be imposed for the benefit of complainant, equal to the amount of alimony and costs. The counsel for sheriff asked that only a nominal fine be imposed, inasmuch as the failure of the sheriff to keep defendant in custody was due to improper legal advice as to his duty given him by counsel for the defendant, and the defendant is now in custody, having surrendered himself after the return day of the warrant of commitment. The complainant's counsel deny the validity of this custody as an arrest under the writ, and are unwilling to accept it as valid on the part of their client, as it may affect their rights against the sheriff for the escape. I shall not consider this question, or attempt to decide the rights of the parties to the suit on this motion. The defendant is no party to this proceeding, and, for all that appears here, he may even now be contesting the validity of his retention in custody. This present application, as I shall consider it, relates to the original neglect of the sheriff to execute the process of the court; and I cannot now relieve him from the liability for this contempt by attempting to declare, on his motion, and in the absence of defendant, whether the arrest after the return is valid. Nor, on the other hand, can I treat this application as one which is carried on for the benefit of the complainant. The statute relating to sheriffs (Revision, p. 1104) and the chancery act, § 68 (Revision, p. 116) seem to be intended to provide for securing the private rights of the parties, and the only aspect of the case now to be considered is the relation of the sheriff to the court whose process he has neglected to execute. The case seems to come within the provisions of section 69 of the chancery act (Revision, p. 116), directing that, if the sheriff shall not make return of writs according to their tenor, he shall be in contempt, and, before discharge, shall pay to the clerk a fine, for the use of the state, not exceeding $50, and the costs. This section, at least, furnishes a rule that is equitably applicable to this case, and I shall therefore apply it. I have considered the circumstances of the case, as to the amount of the fine, and will direct that for his contempt the sheriff pay a fine of $25 and costs.

SCUDDER v. BUDD.

(Court of Errors and Appeals of New Jersey. March Term, 1894.)

Appeal from court of chancery.

Bill by Isaac W. Budd against William C. Scudder for an accounting. Judgment for complainant (26 Atl. 904), and defendant appeals. Affirmed.

Grey & Grey, for appellant. Henry M. Snyder, Jr., for respondent.

PER CURIAM. Decree affirmed, for the reasons given in the court of chancery.

The CHIEF JUSTICE, and DEPUE, GARRISON, LIPPINCOTT, MAGIE, REED, VAN SYCKEL, BOGERT, BROWN, and KRUEGER, JJ., for affirmance. ABBETT, DIXON, and SMITH, JJ., for reversal.

FIRST BAPTIST CHURCH OF HOBOKEN v. SYMS et al.

(Court of Errors and Appeals of New Jersey. Nov. 23, 1894.)

ANNULMENT OF COLLUSIVE JUDGMENT.

1. Where a judgment obtained by collusion of the parties to an action has deprived another of an action at law, and thrown upon him the burden of proving a negative, equity will decree an annulment of the judgment.

2. On trial of an action brought against a brother as executor, no witnesses were produced in behalf of defendant. The cross-examination of plaintiff's witnesses by the defense clearly showed that it was intended to aid plaintiff's case. A certain witness, without whom the case could not be fairly tried, was not produced. No application was made for continuance, so that her attendance could be had. Other material witnesses, who could have been, were not called. Defendant made no objection to plaintiff being sworn in his own behalf, and testifying to conversations and transactions with defendant's testator. *Held*, that a judgment against the estate was collusive, and would be annulled at the suit of a devisee. 28 Atl. 461, reversed.

Magie, J., dissenting.

Appeal from court of chancery; McGill, Chancellor.

Bill by the First Baptist Church of Hoboken against Robert H. Syms and others. From a decree for defendants (28 Atl. 461), plaintiff appeals. Reversed.

Digitized by Google

Gilbert Collins, for appellant. John H. Garrich, for respondent R. H. Syms. Wm. Brinkerhoff, for respondent Parker Syms.

BEASLEY, C. J. The facts of this case are so fully stated in the opinion read by the chancellor that it is not necessary to rehearse them. The only question that this court has been called upon to consider is whether a certain judgment obtained by Robert Syms against his brother Parker Syms, as the executor of his father, should be permitted to stand or should be set aside. These litigants were brothers, and the chancellor finds that the judgment in question was obtained by collusion between them. In the opinion of this court, no other reasonable conclusion can be reached from the proofs before us. We fully agree with the statements and strictures of the chancellor with respect to the conduct of the trial of the case. He says: "No witnesses were produced in behalf of the defendant [that is, the executor]. The defendant appeared by counsel before the referee, and that counsel cross-examined the plaintiff's witnesses in such a manner that it is impossible to read the cross-examination without an abiding conviction that it was intended to aid the plaintiff's case, rather than to defend against it and defeat it." It is plainly shown that the matter in question could not be fairly tried without the testimony of one Mrs. Serrell, and on this subject the chancellor says: "The plaintiff testified, as an excuse of the nonproduction of Mrs. Serrell as a witness, that she was then ill and absent from home, and that excuse was suffered to account for her absence, no application being made to continue the case until her attendance could be had. Neither she, nor her sons, nor her daughter-in-law, nor John G. Syms, nor George N. Syms, were produced by the executor, although the case abundantly discloses that they were known by him to be most material witnesses in his behalf. Although the executor was sued in a representative capacity, he made no objection to the plaintiff being sworn in his own behalf, and testifying both to conversations and transactions with his decedent. Indeed, it is difficult to see how the case could have been more carefully managed to support the plaintiff's claim," etc. In view of these circumstances, the chancellor thus expresses his conclusion, viz.: "If it were in the power of this court to afford the complainant relief against the judgment upon the establishment merely of collusion between the parties to it, in pursuance of which important evidences were intentionally withheld from the law court, particularly where that collusion is coupled with the fact that the defendant in the judgment occupies a position of trust and confidence, as executor of his father's will, to each of the legatees thereunder, which demands from him the exercise of a more scrupulous fidelity than such collusion admits of, I could have little hesitation in granting it relief." The chancellor then proceeds to explain the ground on which he feels constrained to refuse to grant the prayer of the complainant, such ground being, in his own language, "that this court's jurisdiction obtains in such a case as this only upon the establishment of fraud, and to establish that the proofs must show, not only collusion and the intentional concealment of evidences, but also that the evidences withheld, if they had been presented to the law court, would clearly have been sufficient to defeat the plaintiff's suit. In other words, it must clearly appear that the collusive acts have done injury to the complainant." For the doctrine thus propounded, the case of Herbert v. Herbert, 49 N. J. Eq. 566, 25 Atl. 366, is cited.

With respect to the ascertainment by the chancellor of the facts of the case, and his estimation of their effect, this court in all particulars concurs; but we cannot agree to the legal theory that was applied to them. In our opinion, it is plain that the complainant has been and is greatly wronged and injured by this collusive judgment. Unless it be vacated, it stands as prima facie evidence of the right of the plaintiff in it to recover the sum awarded; and thus the burden of the proof is shifted, so that the appellant is obliged to prove a negative. But more than this, it has deprived the appellant of an honest trial of this case in the courts of common law and the verdict of a jury. It is the prerogative of every man that his adversary shall be compelled to prove the validity of his claim, and that such proof shall be made before the tribunal appointed for that purpose. These are fundamental rights, and of these this appellant has been deprived by the indefensible practices that have been so strongly reprobated in the opinion under criticism. Nor do we think that the case cited will, in any degree, bear the construction put upon it. That was the case of a judgment that had been obtained by virtue of a proceeding in foreign attachment, and it certainly, in no wise, is intimated in it that if such a course of law had originated in or had been carried on by means of covinous practices it would not have been abolished by a decree in equity. The result, therefore, is that this court adjudges that the decree appealed from be reversed, and in its stead that a decree annulling the judgment in question be entered. In order to avoid misconception, it is proper to say, before leaving this subject, that it is not to be inferred that the view that this court has taken of the merits of the case coincides with that expressed by the chancellor. The burden is upon the defendant Robert to show that the alleged gift of his father's interest in the estate in question was actually and legally made, and it may well be doubted whether he had succeeded in fulfilling either requirement. The evidence is conflicting and obscure, and the gift was by parol, although the subject of it was mainly land, and consequently to what extent it is

Digitized by Google

affected by the statute of frauds is obviously a matter of vital interest, although in the progress of the investigation it seems to have escaped attention. But, as this court has disposed of the case on an issue that does not involve these latter questions, with respect to them no definitive conclusion has been reached.

MAGIE J. (dissenting). If the proofs in this cause establish that Robert H. Syms and Parker Syms fraudulently colluded to suppress evidence material to the issue in the trial of the action brought by the former against the latter as executor of Samuel R. Syms, deceased, the decree proposed by the majority of this court is one proper to be made, and I would vote for it without stopping to consider whether the suppressed evidence, if produced, would either have compelled or justified a different result; for, if the evidence so suppressed is relevant and of sufficient importance to tend to produce a different result, in my judgment those who fraudulently and collusively suppressed it ought not to be permitted to avail themselves of the judgment, unless they permit persons interested as appellant is to retry the issue. But, as I am unable to discover in the case sufficient proof that Robert and Parker Syms were guilty of the fraud charged, I cannot concur with the majority of my associates, but must vote to affirm the decree below. A complete review of the evidence is unnecessary. It will be sufficient to briefly indicate wherein I think the evidence falls short of sustaining the charge. The charge is that Parker Syms, by collusion with Robert, purposely refrained from calling, as witnesses, their aunt, Mrs. Serrell, and some of her family, who had been present at an interview when the terms upon which Mrs. Serrell agreed to undertake the contest of the will of her brother William J. Syms were settled. The action of Robert included his claim to a large sum of money which arose out of a compromise of that contest, and whether that money belonged to Robert or to his father, Samuel R. Syms, was the question in dispute, and which depended for solution on what agreement had been made by Mrs. Serrell at that interview. Parker Syms was therefore aware that Mrs. Serrell, and those of her family who had been present, were competent witnesses to the occurrences of that interview. But, before he can be convicted of having fraudulently acted in refraining from calling them as witnesses, it must affirmatively and clearly appear that he either knew, or had good reason to believe, that their testimony would have at least tended to defeat Robert's claim in the action. Parker Syms was present at the same interview as was his brother Robert. Both of them testify that Mrs. Serrell then agreed that one-third of the amount obtained by the contest she proposed to undertake should be paid to Robert for himself. Unless these persons have sworn corruptly (which I can find no ground for imputing), Parker Syms believed, and had a right to believe, that such was the agreement then made. There was also present at the interview Mr. Bormeisler, a lawyer, who was employed to act in the contest of the will for Mrs. Serrell, Robert H. and George Syms. He appears to be entirely indifferent between the parties. By his testimony such an agreement was then made, and he produces, in corroboration, a document which he swears was drawn up on instructions given him by the parties who employed him. That such instructions were given is not denied. The fact that Mrs. Serrell afterwards declined to sign the document is of no significance, as her refusal was put on the ground that her word was as good as her bond. From anything that has been made to appear in this case, I find no reason to suppose that Parker Syms knew, or had reason to believe, that the recollection of his aunt and her family as to the terms of the agreement made at that interview differed in any respect from his recollection and that of his brother Robert and of Mr. Bormeisler. If he knew of such difference of recollection, it has not been proved. Parker Syms was aware that Mrs. Serrell knew that Samuel R. Syms had resisted the urgent entreaties of his children to unite with her in the contest of the will of their brother William; that he had refused to do so, on the ground that he deemed it dishonorable for an executor and trustee under the will to take any steps to defeat it. Parker's knowledge of his aunt's acquaintance with these facts does not render it probable that he had ground to believe she would testify to an agreement with her brother Samuel, through the agency of Robert, by which he should receive a share of the proceeds of a contest, which he was declaring himself too honorable to join in, by an underhand and dishonorable expedient.

After the compromise was effected, the co-executors of Samuel R. Syms contested his right to commissions upon the estate of William J. Syms, on the ground that he had procured or aided in the attack upon William's will, and had shared in the proceeds resulting from a compromise of that attack. It appears that Parker became aware of the charge of misconduct against his father. This might indicate that he had grounds at least to suspect that Mrs. Serrell had, directly or indirectly, implicated Samuel as a secret party to her contest and a sharer in its results. But any such inference is wholly forbidden, for Parker received from Mrs. Serrell her voluntary affidavit, drawn by an attorney engaged and aided by her son, in which affidavit she asserts, in the strongest manner, that Samuel R. Syms had refused to sanction and to render aid to her action: that her agreement with Robert was that he should have one-third of the proceeds of any compromise made, and that she had paid out such portion, which she calls the "share of the said Robert H.

Digitized by Google

Syms," to his father, with his consent. This affidavit, Mrs. Serrell admits, was made by her for the purpose of enabling Parker to contradict the imputations upon his father, including that which charged him with sharing the proceeds of the compromise she had made. Unless he was informed by her or otherwise knew that it was false, he had a right to believe that her recollection of the agreement she had made was in accord with his own. In the absence of anything to show that he did not hold this belief, which, from the circumstances, he was justified in holding, I find it impossible to infer that his failure to call Mrs. Serrell and others present at the interview, as witnesses, was fraudulent. His conduct was not inconsistent with an honest belief that Robert's claim was just, and would be supported by those witnesses if he had called them. This, in my judgment, disposes of the case made by the bill, and it is unnecessary to consider whether appellant might not be otherwise entitled to relief.

WENDELL v. PENNSYLVANIA R. CO.

(Supreme Court of New Jersey. Feb. 21, 1895.)

MASTER AND SERVANT—RELATION—NEGLIGENCE.

1. A complaint for personal injuries alleged that two railroads were engaged in excavating a tunnel beneath their tracks at their intersection; that plaintiff, as the employé of a third person, was working in this tunnel; but contained no allegation that plaintiff or his employer were servants or employed by either one of the roads. *Held*, that plaintiff must be held to be working upon the excavation as a volunteer.

2. Where a railroad company and one working in a tunnel beneath a track with its consent know that the place is dangerous when trains pass over it, and the railroad company agrees to notify the worker of the approach of trains, a failure of the company to give such notice will constitute actionable negligence.

Action by Paul Wendell against the Pennsylvania Railroad Company to recover for personal injury. On demurrer to declaration. Overruled.

Argued November term, 1894, before BEASLEY, C. J., and DEPUE and VAN SYCKEL, JJ.

Voorhees & Booraem, for plaintiff. William S. Gummere, for defendant.

BEASLEY, C. J. From the argument advanced in the brief of the counsel of the plaintiff, as well as the authorities cited in its support, it is manifest that the present action is the ordinary one of an employé claiming damages resulting from the negligent performance of a duty due to him from his employer. But this is an entire misconception of the legal effect of the facts stated in this declaration, which has been demurred to by the Pennsylvania Railroad Company, one of the three defendants. The case made by the pleading may be thus summarized, viz.: It states that the two railroad companies—that is, the Pennsylvania and the Central roads—were engaged in excavating a tunnel or subway beneath their tracks where they inters ct in the city of Elizabeth; that the plaintiff was in the service of one Monroe, who is the third defendant in this suit, and, as such employé or servant, was, in the language of the court, "in said subway or excavation beneath said tracks at the intersection thereof, as aforesaid, engaged in removing said earth," etc. From this statement it will be observed that it is not shown that either the plaintiff or the defendant Monroe, for whom he worked, was the servant of the railroads, or either of them. They were engaged in constructing the subway, which was beneficial to the corporate defendants; but it does not appear in what capacity, or at whose instance, they were so employed. If the plaintiff in truth was, either directly or indirectly, in the service of the Pennsylvania Company, it is an important fact, and cannot be imputed into the court by conjecture. As the fact of service is not averred, in accordance with the usual rule of pleading it must be inferred that such was not the case. By virtue of the maxim, "Quod non apparet, non est," both the plaintiff and Monroe, in working upon the excavation in question, must be regarded as volunteers; and, in view of that theory, the plaintiff's rights must be adjusted.

The other pertinent averments in the count are to the effect that by reason of the running of trains of cars the earth in the excavation was so jarred as to be in danger of caving in, and thus injuring the plaintiff, and in that situation the defendants—again using the language of the pleader—"undertook and promised said plaintiff to well and sufficiently protect said excavation or subway while the plaintiff was employed therein with shore braces or other contrivances, so as to render the same safe, and further undertook and promised to warn and notify him of the approach of their said engines and trains, etc., so that he might withdraw from the said excavation or subway until after the passage of the same." Then follows a statement of the tortious conduct of the defendants, in substance, as follows, viz.: That the defendants, notwithstanding the aforesaid promises, negligently and wrongfully neglected to protect this excavation by shore braces or other contrivances, and failed and neglected to warn the plaintiff of the approach of trains, and negligently and improvidently caused said engines and trains to approach and pass over said point of intersection of their tracks at a high rate of speed, so as greatly to jar and disturb the earth, and did thereby cause a great amount of earth, etc., to cave in and fall upon the plaintiff, etc. In answer to the cause of action thus exhibited it is contended that the undertaking to give notice of the approach of trains, etc., is not founded on any legal considera-

Digitized by Google

tion, and is therefore nudum pactum. This may be so, but how does that circumstance affect this suit? This proceeding is not for the purpose of enforcing any contract between these parties. It is in tort, and sets up the misconduct of the defendants, the gravamen being that they negligently ran their trains over this subway, and thence came the hurt of the plaintiff. The situation, then, is this: The plaintiff was lawfully in this subway, and with the assent of these companies. Both they and he knew it was a place of danger when trains passed over it, and he had been assured by them that he would be warned of their approach. With this knowledge, the companies ran their trains without the promised notice, and thereby the injury was inflicted that forms the foundation of the action. The court is of opinion that this act of the companies was actionable negligence. The plaintiff had a legal right to rely on the assurance made to him that notice of a coming train would be given to him, and the companies were aware that he was relying on such assurance, and that, consequently, they could not, in the absence of notice, pass their trains over the place in question without subjecting him to danger; and to maintain that under such conditions defendant is not liable is to enunciate the doctrine that a person can with impunity do an act, in violation of his own promise, which is likely to, and which does, inflict an injury upon another. Such a principle, we think, is unknown to the law. In order to manifest the fallacy of the contention that in this case there was no legal responsibility as the promise to give notice of the approach of trains was a nullity, being without consideration, we have but to intensify the juncture by supposing the plaintiff to have been in such a situation that his life must have been sacrificed by the running of a train without premonition of its approach; for it will scarcely be pretended that, if the defendants had moved a train without notice, and taken the life of the plaintiff, they could have defended a charge of homicide on the ground that their promise to give the notice in question was merely nudum pactum. The declaration in this case has been carelessly framed, so much so that certain imperfections in it have been observed that might have proved fatal if they had been passed. Not being within the ground of demurrer assigned, they have not been considered. Unless defendant pleads de novo, let plaintiff take judgment.

SWEET v. EXCELSIOR ELECTRIC CO.

(Court of Errors and Appeals of New Jersey. March 28, 1895.)

PLEADINGS—AMENDMENT AFTER VERDICT—DAMAGES—VERDICT.

1. It is error to submit to a jury questions which are not within the issues raised by the pleadings.

2. If, at the trial, the parties have confined their controversy to the issues raised by the pleadings, the pleadings should not after verdict be amended so as to present a different issue, which was first suggested in the charge of the trial judge, and submitted to the jury, against the objection of the plaintiff in error.

3. It is erroneous to enter judgment for a larger sum than is claimed in the plaintiff's declaration, but the plaintiff may have the error corrected by remitting the excess.

4. In a declaration for unliquidated damages, where the only indication of the amount claimed is in the ad damnum clause, the amount there claimed should not be increased, after verdict for the plaintiff, without sending the cause back for a new trial.

(Syllabus by the Court.)

Error to supreme court.

Action by William Sweet against the Excelsior Electric Company for personal injury. A judgment for plaintiff was affirmed by the supreme court (30 Atl. 553), and defendant brings error. Reversed.

The Excelsior Electric Company, under lawful authority, maintained an electric light over the center of Harrison avenue, in the town of Harrison. The lamp was suspended in the following manner: On each side of the avenue a pole stood near the curb, and from one pole to the other a strong wire was stretched about 20 feet above the street, and in the middle of the wire a pulley was fastened. Another pulley was fixed up on one of the poles at the same height. Through these pulleys ran a Manilla rope, at one end of which the lamp was hung; the other end being fastened upon an iron cleat screwed into the pole last mentioned, about five feet above the sidewalk. The rope and pulleys were used so that the lamp might be lowered to be trimmed, and then raised again to its proper height. The plaintiff below, in his declaration, complained that the company had wrongfully and negligently permitted the rope and pulleys by means of which the lamp was suspended to be, become, and remain rotten, weak, insufficient, and defective, by reason whereof the lamp fell upon the plaintiff's horse as he was passing along the highway, and the plaintiff was injured, to his damage $1,000. The defendant pleaded the general issue. At the trial, the plaintiff's testimony was directed solely to the insufficiency of the rope and pulleys as the cause of the accident, his contention being that the rope was abraded by the pulleys, and broke near the end to which the lamp was attached. The defendant's testimony tended to disprove this allegation, and to prove that the cleat upon the pole had been broken by some extraneous force exerted immediately before the lamp fell, and so the rope had been loosed from its fastening. In this condition of the pleadings and proofs, the trial judge charged the jury that "if the cleat on the pole was not a proper one to be placed there, if the defendant did not use reasonable care in placing a safe and secure cleat there, and use reasonable care in keeping it in repair, and the rope slipped

Digitized by Google

from it, and so the lamp fell, that would be negligence on the part of the defendant." To this the defendant excepted, on the ground that the matter was not within the pleadings, and was not raised by the plaintiff. The jury found a verdict for the plaintiff, assessing his damages at $1,457, and judgment was accordingly rendered.

Charles W. Fuller, Gilbert Collins, and H. B. Twombley, for plaintiff in error. Edward Kenny and Charles C. Black, for defendant in error.

DIXON, J. (after stating the facts). It is a cardinal rule for the control of a trial court that the questions submitted to the jury should be within the issues raised by the pleadings. From what is above stated, it plainly appears that the pleadings in this case presented no issue as to the state or position of the cleat, the sole complaint being as to the rotten, weak, insufficient, and defective condition of the rope and pulleys. It was therefore erroneous for the judge to submit such an issue to the jury, under the pleadings as they stood. Martinez v. ..unkle (N. J. Err. & App.) 30 Atl. 593. And the next question for us is whether we should now exert the power of amendment, so as to embody that subject of controversy in the declaration. All the testimony taken at the trial and all the instructions of the judge to the jury seem to be set forth in the bill of exceptions. So far as we can discover from this bill, neither party had in mind at the trial any suggestion of negligence on the part of the defendant with respect to the cleat, until it was broached by the judge, near the close of his charge. The real controversy was over the question whether the rope had broken because of its inherent weakness, or because of abrasion against improper pulleys, the condition of the cleat being dealt with only for the purpose of accounting for the fall of the lamp without the defendant's fault. If, therefore, we should now introduce this issue into the pleadings, it would not be done in order to maintain a determination of the question which was really in controversy between the parties, but it would support a verdict that may have been rendered upon a matter which the parties have not fairly litigated. For such an end, the power of amendment ought not to be exercised. For this error in the charge, the judgment must be reversed, and a venire de novo awarded.

There is another error upon the record, in that the verdict and judgment are for greater damages than the declaration claims. 1 Chit. Pl. 339; Pilfold's Case, 10 Coke, 116; Van Rensselaer's Ex'rs v. Platner's Ex'rs, 2 Johns. Cas. 18, note; Curtiss v. Lawrence, 17 Johns. 111; Cortelyou v. Cortelyou, 3 N. J. Law, 318; Herbert v. Hardenbergh, 10 N. J. Law, 222. Undoubtedly, this error might be corrected by the plaintiff's remitting the excess of damages, and, if such a remittitur were entered, this court would amend the judgment accordingly. But in the supreme court it was held that the declaration would be considered as amended so as to claim the sum found by the verdict, and thus maintain the judgment as it stands. To this we cannot assent. If a declaration should allege a cause of action on proof of which a larger sum must be due than is stated in the ad damnum clause, then that clause might be deemed formal, and, after verdict, might be amended to conform with the real claim set forth in the pleading. But where, as in this case, the declaration is for unliquidated damages, and contains no indication of the extent of the plaintiff's claim outside of the ad damnum clause, we must presume that the defendant regulated his conduct at the trial with reference to a claim for the damages there stated, and might have modified his course of defense had a claim for a larger sum been in controversy. As was said by Lord Kenyon in Tomlinson v. Blacksmith, 7 Term R. 132: "It would be going too far to make the amendment required without sending the cause to a new trial, as the defendant might have gone to trial relying that no more than [the stated] damages could be recovered against him." See, also, Corning v. Corning, 6 N. Y. 97.

NEWARK PASS. RY. CO. et al. v. INHABITANTS OF TOWNSHIP OF EAST ORANGE.

(Court of Chancery of New Jersey. April 13, 1895).

RESTRAINING ABATEMENT OF ALLEGED NUISANCE —ELECTRIC RAILWAYS.

Where, in virtue of a contract between a street-railway company and a municipality, intended to have been made pursuant to law, the motive power of the street railway was changed from horses to electricity supplied through overhead wires supported by poles, at a considerable expense to the railway company, and has been operated accordingly for more than two years by the lessee of the railway company, and the municipality, now denying the legality of the contract upon its part, and also the authority of the lessee of the railway company to operate the railway under the contract or otherwise, and insisting that the contract is not duly performed by the railway company and its assignee, threatens to remove the poles and wires, regarding them as nuisances in the street, which removal will inflict, not only irreparable injury upon the railway company and its lessee in their business, but will also work great inconvenience to the public, the proposed action will be restrained upon the application of the railway company and its lessee, in order that the status quo may be preserved until the final hearing of the cause, provided that the court shall be satisfied that the contract is being duly performed upon the part of the applicants.

(Syllabus by the Court.)

Bill for an injunction by the Newark Passenger Railway Company and the New Jersey Traction Company against the inhabitants of the township of East Orange. Conditional decree for complainants.

Digitized by Google

Q. A. Keasbey, for complainants. J. Frank Fort and Hamilton Wallis, for defendant.

McGILL, Ch. The original and supplemental bills are filed by two complainants. One of them, the Newark Passenger Railway Company, admittedly had power to construct and operate the railway in question through Main street, in East Orange. It did construct it, and until January, 1891, or thereabouts, operated it by horse power. On the 7th of that month, the township committee of East Orange, having charge of the streets in that municipality, by its resolution, consented that the propelling power of the Newark Passenger Railway cars should be electricity, supplied to motors in the cars by overhead wires, supported by iron or steel poles planted within the curbs on opposite sides of the street, and connected by steel wires. The resolution by which the consent was tendered prescribed terms upon which the consent should become effective, to wit, that the railway company should enter into a contract with the township to abide by and perform "all and singular the matters and things" in the resolution recited, and give bond in the penal sum of $10,000, which should be conditioned for the performance of the contract. The contract contemplated was executed by both parties to it, and bond was given by the railway company. The contract, among other things, provided that before the operation of the railway by the new power its tracks should be relaid, and paved between, as stated therein; that the fares to be charged for passage upon the railway should not exceed five cents to any point on the line of the railway in East Orange or other municipalities; that the railway company would pay East Orange township yearly the sum of $10 for each car used in the township; that the railway company would level snow in the street when thrown out of its tracks; and that its cars should be run under five minutes' headway between 5 o'clock in the morning and midnight each day, and should be heated in cold weather, and sufficiently lighted to enable passengers to read. After the delivery of the contract and bond, the Newark Passenger Railway Company, at considerable expense, relaid its tracks through Main street, in East Orange, adapting them to the new motive power, and erected poles, strung wires, procured electric motors, and abandoned its horse cars, and from thence hitherto its railway has been operated by electricity. The motive power of its whole system of railways, extending from Newark, through East Orange, into municipalities west of that township, was changed to electricity, in which system the railway through East Orange constitutes a link of the greatest importance, not only to the complainants, but also to the traveling public. In March, 1892, the Newark Passenger Railway Company executed a paper purporting to be a lease of its railroads, rolling stock, franchises, and privileges to the New Jersey Traction Company, for the term of 999 years from the 1st of January, 1892, the latter company agreeing to pay an annual rental, and to discharge the duties and obligations of the railway company; and thereupon the New Jersey Traction Company took possession of the property leased, and hitherto has operated the railway. Subsequent to this leasing, a question arose between the defendant and the traction company touching the latter's performance of the terms of the contract with the township, and the township committee passed an ordinance which provides for the removal of the poles and wires of the railway company, under authority of which the complainants have each been notified to remove the poles and wires from Main street, and yet later have been served with a notice to appear before the township committee, and show cause why a resolution instructing the chief of police of the municipality to remove the poles and wires should not be passed. At this stage of the proceedings the original bill herein was filed, and an order to the township to show cause why an injunction should not issue to stay the removal of the poles and wires, containing an ad interim stay of such removal, was granted. On the 13th of December, 1893, the state board of commissioners of electrical subways assented to the use of electric motors by the Newark Passenger Railway Company and its lessee as the propelling power of their cars, and to the maintenance of poles and electric wires for the operation of electric motors in East Orange and other localities, and on the 13th of January, 1894, this consent was presented by supplemental bill. The defendant has answered the bill, justifying the moral attitude of its proposed removal of the poles and wires by alleging a noncompliance by the complainants with the terms of their contract, to wit, in running their cars at an excessive rate of speed; in failing to run the cars upon five minutes' headway; in failing to pay the yearly fee of $10 for each car; in failing to pave between their railway tracks, as the contract referred to contemplates; in failing to carry passengers for the rates agreed upon; and in failing to level snow, which has been thrown out of their tracks in the winter; and asserting a legal right to remove the poles, as a nuisance in the highway, for the reasons that its consent to the change of the motive power was by resolution, and not by ordinance, as its charter required; that it was without legal power, either by resolution or by ordinance, to authorize the erection of poles and wires in the street; that its consent, even if valid, was a license to the Newark Passenger Railway Company, not transferable to the New Jersey Traction Company; that the Newark Passenger Railway Company was without power to lease to the New Jersey Traction Company, and the last-named company, being incorporated under the general corporation law, could not be-

Digitized by Google

come the lessee of the franchises of a railway company, and hence that the lease to it was a virtual abandonment, by the Newark Passenger Railway Company, of its franchises. It therefore insists that the rights upon which the complainants base their claim for relief, and which they seek to have protected in limine, failing, or, at least, being doubtful, under well-settled principle, a preliminary injunction will not issue.

It is perceived that the legal right claimed by the defendant is based upon allegations of defective title in the complainants, in that the defendant irregularly entered into a contract which it was without power to make, and the Newark Passenger Railway Company, by leasing to the New Jersey Traction Company, not only forfeits the right which the contract may have secured to it, but has also abandoned its franchises, the traction company having no power to exercise them. What the exact terms in the lease to the traction company are does not appear, for that which is called the "lease" is not before me. Hence I cannot enter upon the question whether or not the Newark Passenger Railway Company has abandoned the exercise of its franchises, and forfeited the right which the contract with the defendant municipality may have secured to it. The questions suggested by the defendant's attitude, if they possess merit, and as to that I do not now mean to express any opinion, appear to be of the utmost importance to the complainants, and of such character that they cannot be satisfactorily passed upon in this present preliminary application. It is conceded that, when the electric road was constructed by the Newark Passenger Railway Company, that corporation had full power and authority to operate a street railway by electricity, provided it should obtain the consent of the defendant municipality, and that such defendant intended to give its consent by its resolution and contract is beyond question. And it is also conceded that the railway company and the traction company successively, or jointly under the lease between them, have been in possession and use of the electric railway, and have operated it in the public service since the contract was entered into. And it is manifest, by the circumstances shown, that the cessation of that operation at this time will work, not only a serious and irreparable injury to the complainants, but also an inestimable inconvenience to the public of East Orange and the municipalities west of it, and, at the same time, that the continuance of the operation to the time at which final hearing may be had upon full proofs, if the complainants, on their part, comply with the terms of the contract, cannot be seriously detrimental to the defendant municipality. Under such conditions I deem it to be my duty to preserve the status quo till the case shall be finally disposed of. Lowndes v. Bettle, 33 Law J. Ch. 451; 1 Spel. Extr. Relief, 32; 1 High, Inj. § 698.

But, as the complainants now virtually seek the enforcement of the contract with the defendant municipality, and it is not equitable that they should have that enforcement, even temporarily, if they fail to obey the requirements of the contract on their part, my proposed action justly must be predicated upon their performance of it. While they deny nonperformance in other respects, they substantially concede that they have failed to pay a license fee for each car used in the transportation of passengers within the limits of East Orange, because they dispute their liability to pay license fees for substituted cars. I construe the contract as the defendant does; that for every car used in the transportation of passengers, whether substituted for a car retired or otherwise, the complainants must pay a license fee of $10 each year. I will therefore require, as a condition precedent to the issuance of an injunction, that all these license fees from the date of the contract shall be paid. By the terms of the order to be made, I will fix a time within which such payment must be made, and to that time the restraint heretofore directed will continue, and thereafter its continuance by injunction will depend upon the event of payment of the license fees or failure to pay them. The defendant will be at liberty to at any time move for the dissolution of the injunction upon clear proof of noncompliance with the contract in other respects.

BERGEN NECK RY. CO. v. POINT BREEZE FERRY & IMP. CO.

(Court of Errors and Appeals of New Jersey. Feb. 28, 1895.)

For majority opinion, see 30 Atl. 584.

VAN SYCKEL, J. (concurring specially). I vote to reverse the judgment below for the reason that the witnesses Seidler and Harrison were permitted to give their opinions, as experts, as to the damages to that portion of the lands not taken by the condemning company. This evidence, when offered, was objected to on the ground that it was not within the limits of expert testimony. On that subject the jurors, in contemplation of the law, were as competent as these witnesses to form an opinion. I am authorized to say that REED, MAGIE, and GARRISON, JJ., concur with me.

LESLIE v. LESLIE.

(Court of Errors and Appeals of New Jersey. March Term, 1894.)

ARBITRATION AND AWARD — ACTION TO VACATE AWARD—BURDEN OF PROOF—ALTERATION OF SUBMISSION.

1. When, in an action to set aside an award, it appears that the arbitrators exceeded their authority and made an award in respect to mat-

Digitized by Google

ters not submitted to them, the burden is on defendant to show that the plaintiff, after seeing the award and understanding what it contained, assented to its execution.

2. A party is not bound by an award when the arbitrators exceed their authority against protest.

3. Evidence of secret offers, made by both parties to an arbitration, to purchase the common property, is not admissible, in an action to set aside the award, to show an agreement to change the original submission.

Appeal from court of chancery.

Bill by Edward Leslie against John S. Leslie to set aside an award by arbitrators. From a decree for plaintiff, defendant appeals. Affirmed.

For report overruling demurrer to bill, see 24 Atl. 319; and for report on motion to strike out part of answer, see 24 Atl. 1029.

On appeal from a decree advised by Vice Chancellor VAN FLEET, who filed the following conclusions:

"The legal questions involved in this case have already been considered and decided. In disposing of the demurrer filed to the bill, it was held that the award shows, on its face, that it is fatally uncertain and inconclusive, and also that, on a comparison of the award with the arbitration agreement, it appears that the arbitrators exceeded their authority, and made an award in respect to matters not submitted to them. Leslie v. Leslie, 50 N. J. Eq. 108, 24 Atl. 319. To complainant's case, standing in this position, the defendant makes two defenses: First, that the complainant, after he had seen the award and fully understood what it contained, assented to its execution, and should therefore be adjudged to have estopped himself from disputing its validity; and, second, that the complainant was responsible for the arbitrators having exceeded their jurisdiction, the averment in that regard being that the complainant appeared before the arbitrators, and admitted that he was indebted to the defendant in the sum of $3,000, and agreed that the arbitrators should take this debt into consideration in making their award, and direct how it should be paid or discharged. The precise form in which these defenses are alleged appears in an opinion written on a motion to strike out parts of the defendant's answer, reported in 50 N. J. Eq. 155, 24 Atl. 1029.

"The burden of proof is on the defendant. Unless the evidence in support of the defense preponderates in the defendant's favor, he cannot prevail, and a decree must go in favor of the complainant. The case is destitute of the least proof in support of the first defense. There is not only no evidence going to show that the complainant assented to the execution of the award, but, on the contrary, it is shown by the evidence of every witness giving testimony on the subject that, from the moment he knew what the award contained, every word he uttered and every act he did plainly indicated that he was dissatisfied with it, and did not intend to abide by it. The award was made by two arbitrators, one chosen by the complainant and the other by the defendant. Within two or three hours after the complainant had read the award, it is proved that he charged the arbitrator he had selected with having been improperly influenced by his associate, and stated that he was not done with the matter; he had plenty of money,—obviously meaning that he meant to try to undo, by litigation, the wrong which he believed had been committed against him. The arbitrator chosen by the defendant stated, while on the witness stand, that the complainant had said to him, within less than four hours after the publication of the award, that he had pulled the wool nicely over the eyes of the other arbitrator. He also testified that he had tried to persuade the complainant to abide by the award by accepting a check for $7,700 and some other papers tendered in execution of the award, but that the complainant promptly and offensively refused to receive them. It is also shown by the decided weight of the evidence that when the arbitrator chosen by the defendant said to the complainant, within less than three hours after the publication of the award, that he had better be satisfied with the award, the complainant instantly replied, in the hearing of the defendant, that he would never be satisfied with it. The fact is that there is not a speck of evidence supporting the defense of assent. On the contrary, all the evidence in the case shows plainly that the complainant, both by conduct and speech, from the moment he knew what the award contained, manifested, in the most unmistakable manner, strong dissatisfaction with it, and that he would not perform it, nor allow it to be performed, if he could prevent it. The complainant undoubtedly believed that the award did him great injustice, and his conduct, from the moment he knew what the award contained, throughout evinced strong dissatisfaction and a deep sense of wrong.

"Nor is the other defense proved. The arbitrators strayed beyond their jurisdiction, in this: They attempted to determine in what amount the complainant was indebted to the defendant, and also in what amount the complainant was indebted to the Leslie Brothers Manufacturing Company, when, in fact, neither of these matters had been submitted to them. Indeed, the Leslie Brothers Manufacturing Company was not a party to the arbitration agreement, and consequently could neither be heard by the arbitrators nor bound by anything they did. After the arbitration agreement had been signed, the arbitrators, before undertaking the duty imposed upon them, attempted to induce the complainant and defendant to agree upon an amicable adjustment of all their disputes and difficulties, including the moneys drawn by them, respectively, from the Leslie Brothers Manufacturing Company. Such an agreement was drawn by one of the arbitrators,

Digitized by Google

When completed, the complainant was unwilling to sign it. He wanted time for consideration, and, after he had considered it, he refused to sign it. It was understood that the proposed amicable agreement should embrace all differences and disputed matters between the parties. While this agreement was in course of negotiation, allusion was made to a duebill for $1,000 which the defendant claimed to hold against the complainant, but which the complainant alleged to be spurious, and also to the state of their respective accounts with the Leslie Brothers Manufacturing Company, and also as between themselves. The evidence shows that, while this agreement was under discussion, the complainant told one of the arbitrators that the duebill was a forgery, and also that the same fact was shortly afterwards communicated to the other arbitrator. It was in this way that the arbitrators obtained knowledge of the matters in respect to which they exceeded their jurisdiction. There is not a single shred of evidence going to show that the complainant admitted that he was indebted to the defendant. On the contrary, the proof shows that whenever the duebill was mentioned he denounced it as a spurious paper. Nor does the evidence show that the complainant uttered a single word indicating that he consented or was willing that the arbitrators should, in making their award, take cognizance of any debt that he owed the defendant. The utmost extent to which the evidence on the part of the defendant goes on this point is this: That the defendant laid evidence of his debt before the arbitrators, and the complainant said nothing. The defendant's own evidence furnishes a fair sample of all the testimony on this point of the case. He says, during the progress of the arbitration, one of the arbitrators asked if it was understood that they were to settle all disputes, so that there should be no further trouble or disturbance, and that he said in answer: 'I told them I wanted all disputes settled, and no more wrangling or fighting about it, and I understood my brother [complainant] agreed to the same thing.' His counsel then put this question: 'Did he say anything or consent by any motion? He was present, wasn't he?' To which the defendant answered: 'Yes, sir; but I cannot remember his words, or whether he said anything at all or not. But he didn't raise any objection in my presence.' The arbitrator chosen by the defendant says that both parties at one time consented that all matters in difference should go into the settlement, but he cannot say whether such consent was given while the amicable agreement was under discussion or while the arbitration was in progress; while the other arbitrator testifies that he is unwilling to say that the complainant did not say, when the duebill was presented, that that was a matter between his brother and himself, with which the arbitrators had nothing to do, and that, if he owed his brother anything, he was good for it, and his brother could sue him for it. The complainant swears positively that that is what he did say, and his testimony is corroborated. A female stenographer, who took notes of parts of the evidence offered before the arbitrators, says that there was a sum in dispute between the parties, which the complainant seemed to think was outside of the jurisdiction of the arbitrators. She said she was unable to repeat the complainant's language, but she knows that he disputed the claim, and that the substance of what he said was that the claim was one which the arbitrators had no right to decide. This résumé embraces all the material evidence on this point. It proves a denial, and not an admission, and a protest against jurisdiction, and not a consent to jurisdiction.

"The offers to purchase laid by each of the parties before the arbitrators were admitted in evidence, not as tending to show that the terms of the arbitration agreement had been enlarged or changed, but merely for the purpose of giving the complainant's offer such weight as it might appear to be entitled to, as a contradiction of his evidence when he said that he had never consented in any way that the arbitrators might, in making an award, depart from the terms of the arbitration agreement. But the counsel of the defendant, on the argument, contended that these offers were entitled to an entirely different effect from that which was ascribed to them when they were admitted in evidence. His claim is that they enlarged the agreement, and gave the arbitrators authority to make the award they did as to the way in which the defendant should pay the complainant for more than two-thirds of the value of his stock. I cannot adopt this view. It appears to me to be utterly fallacious. No change or alteration could be made in the arbitration agreement after it was signed except the minds of the parties came together and assented to the change. Their minds must have met in assent. Nothing of that kind was done or even attempted. So far as appears, neither of the parties ever even thought of changing the agreement. Each offer was made separately and secretly, with no intent or thought of changing the agreement, but manifestly with the sole design of inducing the arbitrators to award the stock of the other to the one who made the offer. How far the complainant's offer might have had the effect to estop him from attacking the validity of the award in case the defendant's stock had been awarded to him upon the terms of his offer it is, of course, unnecessary, in the present condition of the case, to consider. The award must be declared void. The complainant is entitled to a decree, with costs."

John W. Griggs, for appellant. John W. Harding, for respondent.

Digitized by Google

PER CURIAM. Decree affirmed, for reasons given in the court of chancery.

The CHIEF JUSTICE, and ABBETT, DEPUE, GARRISON, LIPPINCOTT, MAGIE, REED, VAN SYCKEL, BOGERT, BROWN, KRUEGER, and SMITH, JJ., for affirmance. DIXON, J., for reversal.

SEA ISLE CITY LOT & BUILDING ASS'N NO. 3 v. McTAGUE.

(Court of Errors and Appeals of New Jersey. April 2, 1895.)

RESCISSION OF CONTRACT—DELAY IN PERFORMANCE.

Mere delay by one party in the execution of an executory contract, whose terms would be satisfied by performance within a reasonable time, does not of itself entitle the other party to rescind. To have this effect, in the absence of express repudiation, the implication arising from the nonperformance of the contract must be inconsistent with its being still in force.

(Syllabus by the Court.)

Error to supreme court.

Action by Edward J. McTague against the Sea Isle City Lot & Building Association No. 3. From the judgment rendered, defendant brings error. Reversed.

S. W. Beldon, for plaintiff in error. D. J. Pancoast, for defendant in error.

GARRISON, J. The contract between the plaintiff and defendant is contained in the printed rules of the latter. Under the special agreement thus arising, the plaintiff had paid to the defendant the sum of money for which judgment was given in his favor in the court below. The defendant was an association, its general scheme being that each subscriber who had made 36 successive monthly payments of $10 each should be entitled to a lot of land, to be selected in accordance with the rules of the association. The plaintiff's case, stated generally, is that he had paid to the association the sum of $720, for which he was entitled to two lots, for which he had received no deeds, although he had repeatedly demanded them from the officers of the association. The payment of the money not being denied, and the failure to deliver the deeds being admitted, the association rested its defense upon proof of the nonpayment of certain penalties by the plaintiff, and tendered to him, in open court, the deeds in question, claiming that mere delay in their delivery did not justify the rescission by the plaintiff of the special contract under which he had paid his money into the association. The court before whom the case was tried (a jury having been waived) refused to give judgment for the defendant, who thereupon took this writ, assigning error, among other grounds, upon this refusal of its motion.

An executory contract that contains no stipulation for its rescission, and that has not been induced by fraud, may, in general, be rescinded by one party only when the other expressly refuses to perform, or has rendered himself incapable of performing, it, or has otherwise evinced his abandonment of it. Mere delay in the execution of a contract whose terms would be satisfied by performance within a reasonable time does not of itself entitle the other party to rescind. To have this effect, the implication arising from the nonperformance of the contract must be inconsistent with its being still in force. The damages resulting from an unreasonable delay may be recovered in an action on the contract; but money paid under a specific arrangement cannot be gotten back unless the conduct of the defendant warrants the belief that the special contract is abrogated. The case below was at most an instance of unreasonable delay, assuming that the plaintiff was at any time in a position to demand the delivery to him of the deeds. The defendant did not deny its obligation to give the deeds, and it had done no act that incapacitated it from so doing. The conduct of both parties down to the time this suit was brought showed that in the mind of each the original undertaking was in force. The repeated demands of the plaintiff for his deeds under the special contract with the association were repeated affirmations of the existence of such a contract. At no time did he give to these demands any character of force inconsistent with the original scheme under which he had parted with his money. Inasmuch as no notice of an intention to rescind was given, the form and effect of such notices is not up for present consideration. The case must rest upon the actual conduct of the parties prior to suit brought, concerning which it is sufficient to say that it is consistent alone with the notion that, in the contemplation of each, the other was bound by the rules that made up the original agreement between them. In such a state of the proofs, the plaintiff could not elect to treat the special contract as rescinded, and sue on the common counts for the money he had paid under it.

Judgment should have been given for the defendant.

The judgment of the supreme court is reversed.

Appeal of WADDELL.

In re McNEILAN'S ESTATE.

(Supreme Court of Pennsylvania. April 22, 1895.)

PARTNERSHIP—EVIDENCE—ADMISSIONS.

Admissions of a person that he is in partnership with a certain person are evidence against him of that fact.

Appeal from orphans' court, Philadelphia county.

James Waddell claimed at the audit of the

Digitized by Google

estate of James A. McNeilan, deceased, the sum of $2,000. The claim was disallowed, on the ground that it had not been loaned by Waddell to deceased, as claimed by Waddell, but was a contribution to the capital of a partnership between them. This adjudication was affirmed, and complainant appeals. Affirmed.

The opinion of the court below in banc was as follows: "The question in this case is whether the sum of $2,000, which was paid to the decedent by the claimant, was a loan or a contribution to the capital of the business which they both proposed to enter into and carry on as partners. If it was the latter, this court would have no jurisdiction until the affairs of the partnership were settled, and the amount found to be due from one to the other ascertained; but, if it was a loan, the claimant would, of course, be entitled to come in with the other creditors, and claim his dividend out of the balance for distribution. The auditing judge has found that this money was not a loan, but a contribution to the capital of a business. As this was a pure and simple question of fact, his finding, like the verdict of a jury, must stand, unless clear error be made to appear. The allegation of error in this case is that the finding of the auditing judge was based upon the admissions of the alleged partners, which, it was contended, without other facts, were not sufficient to establish a partnership. We think the contrary has been laid down as the law. 'An admission made by any one that he is a member of a particular partnership is evidence of that fact against him' (Lindl. Partn. *87); and our supreme court have laid down the same rule. In Appeal of Scull, 115 Pa. St. 150, 7 Atl. 588, they say: 'The existence of a partnership may be proved by the separate declarations of each of the alleged partners;' and in Reed v. Kremer, 111 Pa. St. 482, 5 Atl. 237: 'The partnership might be established by the several admissions of all those who are alleged to compose it, or by the admissions of one, and the acts and declarations of the others.' We think that the admissions were sufficient to establish the partnership. The exceptions are dismissed, and the adjudication confirmed."

J. Campbell Lancaster, for appellant. Alfred Frank Custis, for appellee.

PER CURIAM. The controlling question in this case was whether the $2,000 paid by appellant to the decedent was a loan or a contribution to the capital of the business in which they proposed to engage and carry on as partners. The learned auditing judge found it was a contribution to the capital of said business, and not a loan. In this he was sustained by the court in banc. We find nothing in the record that would justify us in sustaining any of the specifications of error, nor do we think that either of them requires special notice. The decree is affirmed, on the opinion of the court in banc dismissing appellant's exceptions, and confirming the adjudication. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

BODGE v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. April 22, 1895.)

MUNICIPAL CORPORATIONS—NEGLIGENCE OF EMPLOYÉS.

Where an electrical bureau of a city, from certain grants to private citizens, regulated by ordinance, derives a large revenue, which it pays into the treasury of the city, its employés are the servants of the city, and the latter is liable to a person injured by the negligent driving of a wagon of the bureau through the streets of the city.

Appeal from court of common pleas, Philadelphia county.

Action by Frank R. Bodge against the city of Philadelphia for injuries received by being run over by a wagon belonging to the electrical bureau of the city of Philadelphia. Judgment for plaintiff, and defendant appeals. Affirmed.

Leonard Finletter, Asst. City Sol., and Charles F. Warwick, City Sol., for appellant. Mark W. Collet and Michael J. Ryan, for appellee.

PER CURIAM. One of the specifications alleges error "in charging the jury that the electrical bureau was not a branch of the police power of the municipality, and that the city * * * was answerable in damages for the negligence of that bureau." While said bureau neither manufactures nor sells electricity, it was conclusively shown that from certain grants or privileges to private citizens, corporations, etc., regulated by ordinance, it derives an annual revenue of about $150,000, which it pays into the treasury of the city. In the performance of municipal duties, for the benefit of the city, the employés of the bureau are in fact the servants of the city, in like manner as are the employés of its gas and water departments. "When a municipal corporation transacts business as a vendor and distributor of water, the relation of her employés is that of servants to her, and the maxim 'respondeat superior' applies to their acts and negligences in conducting this business." City of Philadelphia v. Gilmartin, 71 Pa. St. 140, 158, and cases cited. In Kibele v. City of Philadelphia, 105 Pa. St. 41, 45, it was said: "The city, as a manufacturer and vendor of gas, was bound to know all about its character, and to take care that through the default of its officers or agents the article which it manufactured and sold was the occasion of harm to no one." In no proper sense can the electrical bureau be regarded as "a branch of the police power of the municipality." The learned trial judge was therefore clearly right in holding

Digitized by Google

that it was a revenue producing department of the municipal government, and consequently the city is liable for the negligent acts of its employés therein.

The only other specification is the refusal of the court to withdraw the case from the jury by directing a verdict for the defendant. To have done so would have been plain error. In view of the testimony, tending to prove that the careless and reckless driving of the employé of the electrical bureau was the proximate cause of plaintiff's injury, the case was necessarily for the exclusive consideration of the jury; and to them it was fairly submitted, with instructions to which no exception was taken. The judgment is affirmed.

DOUGHERTY et al. v. BASH.

(Supreme Court of Pennsylvania. April 15, 1895.)

STATUTE OF FRAUDS—PROMISE TO PAY DEBT OF ANOTHER.

Under an arrangement whereby D. is to continue to sell goods to W., and is to get from him all the cash he can, and for the balance due on each month's settlement W. is to give his note, which D. is to bring to B., who is to discount it for D. without recourse, the promise of B. is to pay the debt of another; and, there being no arrangement that the original debt of W. shall be extinguished by his giving such note or by the discounting of it by B., the promise of B. is collateral to the continued liability of the original debtor, and therefore within the statute of frauds.

Appeal from court of common pleas, Philadelphia county.

Action by H. D. Dougherty and another, trading as H. D. Dougherty & Co., against Michael Bash, for breach of agreement to discount notes. Judgment of nonsuit. Plaintiffs appeal. Affirmed.

Alex. Simpson, Jr., for appellants. A. B. Shearer and Emanuel Furth, for appellee.

GREEN, J. We think it very clear that, in whatever way the plaintiffs' claim may be regarded, it is founded upon a verbal assumption to pay a debt of other parties, without any beneficial consideration moving to the promisor, in which he had no personal interest, and as to which the original promisors continued to be liable. According to the plaintiffs' statement of their cause of action, and according to their testimony on the trial, they were to continue to sell goods to the original debtors, they were to get from them all the cash they could, and for the balance due upon each month's settlement the debtors were to give their own promissory notes, which the plaintiffs were to bring to the defendant, and the "defendant would discount said notes for plaintiffs without recourse." The transaction then would be purchases of goods in the future by Weinman & Co. from Dougherty & Co., settlements every month, and the obtainment from Weinman & Co. of all the money they could on account, and the taking of notes of Weinman & Co. for the balances due, payable at a future day, to their own order, and indorsed by themselves, and these notes were to be brought by Dougherty & Co., to Bash, the defendant, who was to discount them for Dougherty & Co., without recourse to Dougherty & Co. It is perfectly manifest that the only ownership of the notes which could ever accrue to Bash would be by virtue of his discounting them; that is, lending the money on them. If Weinman & Co. paid the notes at maturity, Bash would have no further interest in them, and no interest at any time except as a lender of money. The principal obligation involved under the agreement was the obligation of Weinman & Co., as makers of promissory notes, and that obligation was to continue until the maturity of the notes. It would not be in the least degree extinguished or changed or diminished on account of the defendant's having advanced the money for such a note. Both the original statement of cause of action and the amended statement described the defendant's undertaking as an agreement to "discount said notes for plaintiffs without recourse."

The plaintiff, Dougherty, being on the witness stand, was asked: "Q. What did you do with the note in connection with the note that Mr. Bash had? A. We sent word to Mr. Bash that we had secured Weinman & Co.'s note as directed by him, and we were ready to have him discount it. He sent us word—he sent us a postal card, I think—that he would call." Speaking of his interview with Bash on October 9, 1891, in reference to the first note, he said: "I called to see Mr. Bash in relation to the note that I had taken in settlement of his account with Weinman & Co., on that day, for the purpose of having him discount it. I had some conversation regarding Weinman & Co., and I proposed to him that he take this note, and discount it without recourse to us." In speaking of that note, he said Bash "guarantied the payment of the note." The plaintiffs' bookkeeper, Miss Campbell, spoke in the same language in describing the same conversation. In most of the conversations with Bash, as stated by Dougherty, he said that Bash said he should bring the notes to him (Bash), and he would take them. It matters but little what the precise words used were. It is very evident that, so far as Bash's undertaking was concerned, he was to furnish the money for the notes to the plaintiffs, and to hold the notes without recourse to the plaintiffs. The important feature of the transaction was that Bash did not promise to pay for the goods which the plaintiffs sold to Weinman & Co., but only to furnish the money for such notes of Weinman & Co. as were brought to him by the plaintiffs. This simplifies the matter very much, and eliminates many of the decided cases from consideration.

Digitized by Google

We have also been unable to discover any evidence on the record showing that the original indebtedness of Weinman & Co. to Dougherty & Co., for the goods sold, was extinguished or surrendered. The mere taking of the debtor's note by a creditor, for a debt contracted for goods sold, does not extinguish the debt unless it was specially agreed that the note should be taken as payment of the debt. Kemmer's Appeal, 102 Pa. St. 558. This is well illustrated in the law of mechanics' liens, where it is held that the acceptance of the debtor's note for the materials furnished does not extinguish the lien, which may be enforced notwithstanding the note. Jones v. Shawhan, 4 Watts & S. 257. Without any such evidence in this case, therefore, it is evident that Dougherty & Co., after taking the note of Weinman & Co., still retained their right to collect the debt for the goods sold and delivered to Weinman & Co. It appears, therefore, that the original debt against Weinman & Co. survived after the giving of the note, and its extinction was no part of the agreement between the plaintiffs and the defendant, or between the plaintiffs and Weinman & Co.

It seems to us clear, in view of all the facts and the whole circumstances of the transaction, that the defendant's promise to take the notes of Weinman & Co., and pay or advance the money for them, was only a promise to pay the debt of a third person, and, not being in writing, was void, under the statute of frauds and perjuries. In Maule v. Bucknell, 50 Pa. St. 39, which was one of the earliest and best-considered cases arising under our statute of 1885, Mr. Justice Strong, in a very exhaustive and able opinion, reviewed the cases thoroughly, and stated the following deductions from them: "It is undoubtedly true that a promise to answer for the debt or default of another is not within the statute, unless it be collateral to a continued liability of the original debtor. If it be a substitute, an arrangement by which the debt of the other is extinguished, as where the creditor gives up his claim on his original debtor, and accepts the new promise in lieu thereof, it need not be in writing. And, as the cases referred to show, it may be unaffected by the statute, though the original debt remains, if the promisor has received a fund pledged, set apart, or held for the payment of the debt. But except in such cases, and others, perhaps, of a kindred nature, in which the contract shows an intention of the parties that the new promisor shall become the principal debtor, and the old debtor become but secondarily liable, the rule, it is believed, may be safely stated that, while the old debt remains, the new must be regarded as not an original undertaking, and that it is therefore within the statute. At least, this may be stated as a principle generally accurate. In Williams' Saunders, p. 211e, note 1, it is said: 'The question whether each particular case comes within the clause of the statute or not depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.' The doctrine of this note is supported by very many cases, and it is in harmony with the words of the statute. It is incumbent, then, upon him who would enforce a mere verbal promise of one to answer for the debt or default of another, if the original debt remains, to show that his case is one of those that are recognized as exceptional. And it will be found after examination that in nearly all the decisions in which it has been held that such a promise is not within the statute there was some liability of the promisor, or his property independent of his express promise, or that he had become the actual debtor, so that as between him and the original debtor the superior liability was his." All of the foregoing was repeated and affirmed in Nugent v. Wolfe, 111 Pa. St. 471, and 4 Atl. 15, and it has never been qualified or limited in any of our subsequent cases. If we try the present case by the standard set out in the foregoing citation, it seems to be conclusive. As we have seen, the original debt of Weinman & Co. was not to be extinguished by the arrangement, as testified to by Dougherty. Nor was there to be any liability of Bash except that which was contained in his promise. No fund or property was to be placed in his hands as against his liability, nor did his promise relate to any personal interest or property of his own. The affirmative testimony of the plaintiffs exhibits the absence of the exceptional circumstances which might take the case out of the statute. The debt to be paid was the debt of Weinman & Co., who were third persons as to Bash. That it was to be done by advancing money on or paying their notes does not alter the fact that it was their debt that was to be paid. Nor do the facts warrant any inference that the transaction was to be a mere purchase of securities. The whole arrangement was to be for future purchases of goods by Weinman & Co. from Dougherty & Co., to be paid for, as far as possible, by Weinman & Co., each month, and the giving of Weinman & Co.'s notes for the unpaid balance. These notes the defendant was to discount, or advance money upon them, or to pay, as between the defendant and Dougherty & Co. In real truth, it was a mere discount, because the obligation of Weinman & Co. to pay the notes at maturity continued, and, if they paid them when due, they thereby extinguished what was still their own debt, and the defendant would be reimbursed for his advance.

The case of Mallet v. Bateman, L. R. 1 C. P. 163, comes nearer to this in its facts than any other we have met with. In fact, it is entirely similar in its leading features. The plaintiff sold iron buckles or fasteners for bridge floors to Calvert & Co., at the instance

Digitized by Google

of the defendant, who was an iron broker, and Calvert & Co. were to pay cash for the goods at each delivery. Calvert & Co. became slow in their payments, and the plaintiff, being dissatisfied, called upon the defendant, who said, if the plaintiff would get the acceptance of Calvert & Co. for the goods then delivered at 30 days, he would cash the draft for a discount of 3 per cent. without recourse to the plaintiff. This was done, and the defendant gave the plaintiff a written guaranty against liability on the acceptance. The plaintiff then refused to deliver more buckles to Calvert & Co. unless he was secured for the payment of future invoices, and the defendant, who was interested in having the bridge completed, promised him verbally that he would take the acceptances of Calvert & Co., for future invoices to the extent of the contract with Calvert & Co., off his hands, on the same terms and in the way he had taken the one already mentioned. On the faith of this promise, plaintiff went on and delivered the goods to Calvert & Co., and obtained their acceptance for the price. Calvert & Co. failed, and the defendant refused to take their acceptance off the hands of the plaintiff. It was held by all the judges that the statute applied to the agreement, and that the plaintiff could not recover. The court held that it was substantially an agreement that, if the buyers of the goods did not pay for them at the end of a month's credit, the defendant would indemnify plaintiff against their default. Pollock, C. B., delivering the opinion, said: "The real question here is whether the contract declared upon is not substantially a contract that if Calvert & Co., the buyers of the goods, do not pay for them at the expiration of the month's credit, the defendant will indemnify the plaintiff against their default. In consideration of a discount of 3 per cent., the defendant undertakes to hold the bill without recourse to the plaintiff. That is, in substance, an engagement by which the buyers of the goods are not to be exonerated, but the defendant is to indemnify the seller against their default. That is clearly a contract within the statute of frauds." This case was an appeal from the common pleas to the exchequer chamber, and both courts concurred in the ruling. The learned counsel for the plaintiffs claims that this decision is in conflict with our own cases of Arnold v. Stedman, 45 Pa. St. 186, Taylor v. Preston, 79 Pa. St. 436, and Townsend v. Long, 77 Pa. St. 143; but an examination of those cases fails to disclose any hostility to Mallet v. Bateman, but shows that they were all cases which were taken out of the operation of the statute by the exceptional circumstances previously indicated. Arnold v. Stedman was decided upon the express ground that Arnold's verbal promise was to pay a debt which was a mechanic's lien upon his own property, and in which he was interested to have the proceedings on the lien suspended. In Taylor v. Preston the promise was by the assignee of a vendee under articles to pay unpaid purchase money named in the articles; and we held that the promisor was bound to pay it, because it was his own debt. So, also, in Townsend v. Long the promisor bought out an entire partnership stock, and agreed to pay, as part consideration of the purchase, all the debts of the firm, one of which was due to a former partner, who had sold his interest to the other members for $700, and this debt was also specially named in the transfer. We held the promisor liable on this promise, because it was his own debt which he had agreed to pay, in consideration of the property sold to him. We made the same ruling in Wynn v. Wood, 97 Pa. St. 216. We have not been referred to any case, nor have we met with any, in which a transaction like the present has been held to be clear of the statute. We are of opinion that the promise of the defendant, Bash, was in reality a promise to pay the debt of another, without any acquisition of property as a consideration therefor, and without the presence of any of the exceptional circumstances which preventsthe application of the statute. Being only a verbal promise, it is void, under the statute.

CONNELL, Sheriff, v. SHRYOCK.

(Supreme Court of Pennsylvania. April 22, 1895.)

SHERIFF'S SALE—ACTION FOR PRICE.

Plaintiff, as sheriff, sold land on execution to defendant, subject to a ground rent and a mortgage, the terms being $50 down, balance within 10 days, with provisions that in case of default the property might be resold at expense of defendant, who, in case of deficiency at resale, should make good the same. *Held*, that the plaintiff having thereafter sold and conveyed the property, in proceedings to foreclose the mortgage, to a third person, who paid him full consideration for the conveyance, he could not sue defendant for balance of the purchase price on the sale to him.

Appeal from court of common pleas, Philadelphia county.

Action by Horatio P. Connell, sheriff of Philadelphia county, to the use of John B. Ellison and others, trading as John B. Ellison & Sons, against William Knight Shryock, to recover the balance of the purchase price of land sold by plaintiff to defendant on an execution. Judgment for defendant, and plaintiff appeals. Affirmed.

The property sold belonged to John Gross, and was subject, in the order named, to a ground rent of $70, a mortgage of $1,000 to William McCauley, a judgment in favor of John B. Ellison & Sons for $1,277.26, and a mortgage of $1,000 to Joshua W. Lippincott. The sale to defendant was on execution for the benefit of the Ellison judgment, and the Lippincott mortgage, and was subject to the ground rent and the McCauley mortgage. The amount bid by defendant was $700, and the terms of the sale were $50 down at the time of the sale, otherwise the property to

Digitized by Google

be immediately put up and resold, the balance of the purchase money to be paid within 10 days, otherwise the property might be sold again at the expense of the person to whom it was struck off, who, in case of any deficiency at such resale, should make good the same. Defendant paid only the $50; and after plaintiff had sold the property, subject only to the ground rent, to a third person for $500, on execution in proceedings to foreclose the McCauley mortgage, and had conveyed it to such third person, and received from him the amount of his bid, and after plaintiff had made return to the writ on which he sold the property to defendant that defendant had failed to comply with the terms of the sale, he commenced this action to recover the balance of defendant's bid.

H. C. Thompson, Jr., and Dwight M. Lowrey, for appellant. Arthur Moore and Alfred Moore, for appellee.

PER CURIAM. There is nothing in the contract on which this suit is based that could by any possibility entitle the legal plaintiff to maintain an action against the defendant for the residue of purchase money, under said contract, after the former had sold and conveyed the same property to another person, who paid him the full consideration for said conveyance. The learned judge of the common pleas was therefore right in refusing plaintiff's points for charge, and in directing a verdict for defendant. Judgment affirmed.

In re LOESER'S ESTATE.

(Supreme Court of Pennsylvania. April 22, 1895.)

WILLS—CAPACITY OF TESTATOR.

Where the evidence shows that testator, in the presence of a well-known member of the bar, executed his will, which had been prepared according to his instructions, after consultation with his conveyancer, which will was practically a counterpart of one previously executed, an issue devisavit vel non is properly refused, though testator was 85 years old at the date of his death, two years after the execution of his will, but was possessed of remarkable mental vigor and business ability.

Appeal from orphans' court, Philadelphia county.

Petition by Jacob H. Loeser and others in the matter of the estate of their father, Jacob Loeser, deceased, for an issue devisavit vel non. From a decree overruling exceptions to the report of the auditing judge, and dismissing their appeal from the same, the petitioners appeal. Affirmed.

The opinion of the orphans' court (Hanna, P. J.) was as follows:

"It is but natural the contestants feel disappointed with the disposition made by their father of his estate, and are convinced it is most inequitable. But they fail to recognize his right to do as he deemed best with his own property, to prefer one child above another, or disinherit one or more at his discretion. This dominion and power conferred by statute, and protected by the law, is not to be interfered with for slight cause. And it is not for the courts to produce an equality where a testator has seen fit to make an inequality, merely to relieve the disappointment and chagrin of legatees whose equal or superior claims, in their opinion, have been unjustly disregarded.

"Here it is attempted to set aside the clearly-expressed will of testator by alleging that he was of unsound mind, and wanting in testamentary capacity, at the date of its execution, and that he was induced to execute the testamentary paper through undue influence, exerted mainly by one of his daughters, a sister of the contestants, whereby she became the principal legatee. The will was executed on June 22, 1892, in the office of testator's conveyancer, by whom it had been prepared according to instructions received from him, in the presence of a well-known member of the bar, and one of the most prominent builders in this city, an old and intimate friend of testator, both of whom became subscribing witnesses, and not only credible, but wholly disinterested. Although testator was approaching his eighty-third year, it is abundantly shown he was able to visit his conveyancer alone, consult with him, and, after the execution of his will, return to his home unattended, retaining the will in his possession. He lived until January 11, 1894, almost two years thereafter; and after his death his will was found in the fireproof safe in his dwelling, where he had placed it. After careful examination of the entire testimony, we fail to discover the slightest proof of want of testamentary capacity. It is very satisfactorily shown by the subscribing witnesses, the attending physician, and even by the contestants, that testator, although eighty-five years old at the date of his death, possessed remarkable mental vigor, business ability, and knowledge of all his affairs. This so clearly appeared that the main force of the attack upon the validity of the will was confined to the allegation of undue influence and improper solicitation charged to have been exercised by the favored daughter of testator. But here, too, the contestants fall far short of the proof required to entitle them to submit the question to trial by jury. In the first place, the will now attacked is practically a counterpart of a will executed by testator in 1886, prepared by the same conveyancer, and, after the execution of the present will, destroyed by testator, by tearing and burning, in the office of his conveyancer; and it is not alleged that testator was then of unsound mind, or that any undue or improper influence was used by his daughter in her own behalf. In the next place, there is not the slightest evidence that the will in contest was prepared through the interference or suggestion of testator's daughter,

Digitized by Google

either directly or indirectly. She gave no instructions to the conveyancers, nor was she present at its execution, nor was it in her possession at any time. And, finally there is no proof of any request or solicitation from her to her father that she should be preferred to her sisters or brothers, or that she ever used any deception, artifice, or other undue influence to prejudice him against them, and thus secure a larger share in his estate. In view of these facts, we have reached the conclusion that, under the testimony here produced, such a case has arisen as falls within the well-settled rule that, unless the testimony be sufficient to sustain a verdict against the will, an issue should not be awarded; and it will be unjust to impose upon the parties the delay, expense, and trouble of a trial, when such a verdict ought not to be sustained. The exceptions to the refusal to grant the issue are therefore dismissed, and the issue refused, at the costs of the contestants."

Avery D. Harrington and Hector T. Fenton, for appellants. Robert W. Finletter, and John G. Johnson, for appellees.

PER CURIAM. We find nothing in this record that would justify us in sustaining either of the specifications of error. The issue devisavit vel non was rightly refused, and the decree is affirmed on the clear and convincing opinion of the learned president of the court below. Decree affirmed and appeal dismissed, with costs to be paid by appellants.

Appeal of FERGUSON.

In re TAGGART'S ESTATE.

(Supreme Court of Pennsylvania. April 22, 1895.)

LIMITATIONS—PRESUMPTION OF PAYMENT—ACKNOWLEDGMENT.

On presentation of a claim against a decedent's estate barred by the statute, indefinite evidence of declarations by the decedent that he intended to set up his nephew, the claimant, in business, because he owed him certain money, is insufficient to overcome the presumption raised by the bar of the statute.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of David Taggart, deceased. The claim of Samuel Ferguson was disallowed, and he appeals. Affirmed.

The following is the adjudication of the court below:

"After certain devises of real estate to his sister, Mary Taggart, and a legacy of $2,000, the testator gave the residue of his estate to his brother Hugh Taggart absolutely. He died August 23, 1893. On behalf of Boyle & McGlinn, a claim for liquor sold May 29, 1893, $779.83, and liquors sold June 1 and 8, 1893, $12, in all $791.83, was presented. It was shown that the goods were delivered at the store or tavern of the decedent, and that the bill was received by him without objection. The defense that he had made about May 11, 1893, a transfer of the liquor license to his brother, William Taggart, who thereafter continued the business on his own account, even if it had been established, would be invalid. The fact of the transfer was not shown to have been communicated to the seller, and it was, moreover, contrary to law; the act regulating licenses requiring such transfer to receive the sanction of the court, which it was not pretended was secured until a considerably later date. The claim is admitted.

"Samuel Ferguson presented a claim of $4,000 for services to the decedent, as bartender, from 1884 to 1888. To take the demand out of the statute, certain declarations of the decedent were given in evidence, by which, according to one witness, the decedent said, some time in 1893, that he intended to set the claimant up in business, and to pay for his license, because he owed the claimant about $2,000. Two other witnesses deposed to the same declaration, except that the acknowledgment of the indebtedness was for $3,000 or $4,000. The undisputed testimony was that the decedent had taken care of the claimant when the latter was a mere child; had sent him to school, and had afterwards employed him to do odd chores about the tavern, and had finally placed him behind the bar as bartender. During the five years which intervened between the date at which the claimant left the service of the decedent, and the date of the decedent's death, the claimant, so far as was shown, made no claim for wages, and no demand for payment. The reported declarations of the decedent, varying as they did with the different recollections of the witnesses, will not avail to overcome the presumption, which custom has raised, that the claimant received periodical wages,—a presumption which his own conduct unquestionably strengthened. The claim is rejected.

"William Taggart made claim for wages, which was withdrawn at the audit. He claimed also for payment of $27 made by him for church expenses, and of $4 for opening the grave, both of which were admitted to be correct, and are allowed. He claimed the additional sums of $63 and $76, as paid by him for painting and plumbing. The work was done on premises owned by decedent, and where the business was conducted in the name of the decedent. The claimant was in charge of the place, and appears to have paid the bills; but, at the time the work was performing, he was, by his own testimony, turning over the receipts of the business to the decedent, and the latter was paying all charges. The payment by the claimant must therefore have been out of moneys belonging to decedent. The claim founded upon the items is disallowed."

Thomas R. Elcock, for appellant. John T. Murphy and John H. Sloan, for appellee.

Digitized by Google

PER CURIAM. The only subject of complaint in this case is the rejection of appellant's claim of $4,000 for services rendered testator more than five years prior to his decease in June, 1888, and over six years before his executor's account was filed. The bar of the statute had therefore closed on the claim before it was presented for participation in the fund for distribution. Aside from the circumstances attending the alleged indebtedness, the fact that for several years the testator stood in loco parentis to appellant, the staleness of the claim, etc.,—all of which were calculated to render its original validity at least doubtful,—the testimony relied on by appellant was too vague and uncertain to remove the bar of the statute. The court was therefore right in concluding that, if appellant ever had a valid unpaid claim against his benefactor, it was barred by the statute. For reasons given by the learned auditing judge, the claim was rightly excluded from participation in the fund for distribution. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

SCRANTON LATHE TURNING CO. v. CASSIDY.

(Supreme Court of Pennsylvania. April 22, 1895.)

MECHANIC'S LIEN—AMOUNT—INSTRUCTION.

Defendant cannot complain of an instruction, in an action to enforce a mechanic's lien, restricting plaintiff's recovery to the value of the materials furnished by him on the credit of the buildings, and actually used in their construction.

Appeal from court of common pleas, Philadelphia county.

Scire facias on a mechanic's lien by the Scranton Lathe Turning Company against John J. Cassidy, owner, and C. H. Grunwald, contractor. Judgment for plaintiff. Defendant Cassidy appeals. Affirmed.

William H. Staake, for appellant. Jacob Singer and Emanuel Furth, for appellee.

PER CURIAM. This scire facias is on an apportioned mechanic's lien against "twenty-five adjoining two-story brick dwelling houses, * * * and the lots of ground and curtilage appurtenant thereto." The claim is for the value of balusters, newels, and rails furnished by the plaintiff for and about the erection and construction of said houses, amounting to $281.76, or $11.27 to each house. The right of plaintiff to recover depended on questions of fact, which were submitted to the jury, by the learned trial judge, in a charge quite as favorable to the defendant as he was entitled to. He substantially instructed them that plaintiff's recovery should be restricted to the value of the materials shown to have been furnished by plaintiff on the credit of the buildings, and actually used in their construction. If this was not strictly correct, the plaintiff company is the only party that has any reason to complain; but, while the verdict is nearly 20 per cent. less than its apportioned claim, it is not here complaining. We find nothing in the record that is unduly prejudicial to the defendant, or that requires us to sustain any of the specifications of error. There is nothing in either of them that requires special consideration. Judgment affirmed.

MOORE v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. April 22, 1895.)

INJURY TO EMPLOYE—NEGLIGENCE—ASSUMPTION OF RISK.

An employé, while dismantling a railroad company's trestle work, stepped on an insecure timber, apparently solid, and fell. There was no evidence that the company knew of, or, in the exercise of reasonable care, should have discovered, its insecurity. The work involved the taking up of the flooring of the trestles, the removal of the plates to which the rails were secured, and the removal of the rails. In thus demolishing the structure, it was necessary for the employés to pass over it while partially dismantled. *Held*, that the accident was due to a risk incident to the employment.

Appeal from court of common pleas, Philadelphia county.

Action by Patrick Moore against the Pennsylvania Railroad Company for personal injuries. There was a judgment of nonsuit, which the court refused to take off, and plaintiff appeals. Affirmed.

Charles B. McMichael, for appellant. Geo. Tucker Bispham, for appellee.

PER CURIAM. The only error assigned in this case is the refusal of the court to take off the judgment of nonsuit. A careful examination of the testimony fails to disclose any fact or circumstance that would have warranted the jury in finding that the unfortunate accident which befell the plaintiff was attributable in any degree to negligence of the defendant company. It does not appear that it knew of, or, in the exercise of reasonable care, should have discovered, the insecurity of the "timber, apparently solid and fixed, but in reality insecure," upon which plaintiff stepped, and was thrown "to the ground beneath, a distance of twenty or twenty-five feet." In brief, there is not a scintilla of evidence tending to show that plaintiff's serious injury was the result of any negligence of the defendant company or its agents. On the contrary, it is quite clear that it was due solely to risk incident to the work in which plaintiff and his colaborers were engaged, viz. in dismantling the company's elevated structures or trestle work at Seventeenth and Filbert streets, preparatory to the extension of its depot. This work involved the taking up of the flooring on the trestles, the removal of the plates by which the rails were secured, and the taking up of the rails

Digitized by Google

themselves. In thus demolishing the structure and removing the material, it was necessary for the men engaged therein to pass to and fro over the partially dismantled structure. The risk of such an employment must have been obvious to any one. It was an ordinary and apparent risk necessarily incident to the employment. There was therefore no error in refusing to take off the judgment of nonsuit. Judgment affirmed.

SMITH v. ELDER.

(Supreme Court of Pennsylvania. April 22, 1895.)

ASSUMPSIT—AFFIDAVIT OF DEFENSE.

In assumpsit for four sums of money, two of them loaned by plaintiff to defendant, and two of them advanced to defendant to invest for plaintiff, which sums the statement of claim alleges defendant did not invest, but appropriated to his own use, an affidavit of defense is sufficient to carry the case to the jury where it admits the loans, and that they are due, and admits the advancement for investment, but alleges that they were invested in stocks in defendant's name, with the knowledge and approval of plaintiff, that defendant has offered and is ready to assign them to plaintiff, and that, under the arrangement by which defendant made the investment, he was not to be responsible for the result thereof.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by Monroe Smith against Frank H. Elder. Judgment for plaintiff for want of a sufficient affidavit of defense. Defendant appeals. Reversed.

The statement of plaintiff's demand was as follows:

"The plaintiff, Monroe Smith, complains of the defendant, Frank H. Elder, and says: That on the 4th day of June, 1891, said defendant requested the plaintiff to lend to him the sum of $2,500 for three months, and the defendant then and there stated orally to the plaintiff that he would give to the plaintiff, as security for said loan, his (defendant's) interest in a Fibre patent; and thereupon the plaintiff, at the city of Philadelphia, did lend to said defendant the sum of $2,500, for which defendant then and there made and delivered to plaintiff his certain promissory note, a copy of which is as follows: '$2,500. Philadelphia, June, 4, 1891. Three months after date, I promise to pay to the order of Monroe Smith, Esq., twenty-five hundred dollars at Centennial National Bank, without defalcation, for value received. No. 1. Due Sept. 4th, 7th, '91. F. H. Elder.' And at the same time the said defendant also made and delivered to plaintiff a writing, a copy of which is as follows: 'Philadelphia, June 4, '91. I hereby transfer to Monroe Smith, Esq., of 3805 Locust Street, my right, title, and interest in United States letters patent No. 382,609 (Fibre patent), as security for the payment of my personal note for twenty-five hundred dollars ($2,500), at three months, due September 4th, 7th, 1891. F. H. Elder.' And plaintiff says that he is the true and lawful owner of said promissory note, and demand for payment thereof has been made upon the defendant, who has admitted the same to be justly due, but has refused, and still refuses to pay the same or any part thereof, and the whole of said sum of $2,500 is justly due and owing to the plaintiff by the defendant, with interest thereon from September 7th, 1891. And the plaintiff further says that he has caused the records of the patent office at Washington, D. C., to be examined, and that the letters patent No. 382,609 are not and were not for a Fibre patent, but are for a patent issued May 8, 1888, to Charles W. F. Holbrook, Newark, N. J., for dental abrading disk. And the plaintiff says that said defendant had not at the time he obtained said loan of $2,500 any ownership or interest in said patent No. 382,609, and has not since had, and has not now any ownership or interest in said letters patent No. 382,609. And plaintiff further says that heretofore, on October 18, 1892, the defendant made and delivered his promissory note to the plaintiff, a copy of which is as follows: '$50.00. Philadelphia, Oct. 17, 1892. Thirty days after date, I promise to pay to the order of Monroe Smith fifty ($50) dollars, at 610 Sansom street, without defalcation. Value received. No. 1. Due Nov. 16th, 19th. F. H. Elder.' And the plaintiff says that he is the true and lawful holder and owner of said note, and that the same has been presented for payment at the time and place named therein, for payment, and payment thereof has been refused; and demand for payment thereof has been made upon the defendant, who has admitted the sum to be due but has refused and still refuses to pay the same or any part thereof, and the whole of said sum of $50 is justly due and owing to the plaintiff by the defendant, with interest thereon from November 19, 1892.

"And plaintiff further says that, at the request of the defendant, he advanced to the defendant, on the 20th day of May, 1890, at the city of Philadelphia, the sum of five thousand dollars upon the oral promise and undertaking of the defendant then and there made to the plaintiff that he (the defendant) would invest said sum of five thousand dollars for the plaintiff in something that would pay, and that he (the defendant) and the plaintiff would divide the profits arising from said investment between them; and plaintiff says that defendant has not invested said sum of five thousand dollars or any part of it for him (the plaintiff), and has not returned or made any account of any profit arising from any investment thereof to the plaintiff, but has wholly refused so to do, and has wrongfully and fraudulently appropriated the whole of said sum of five thousand dollars to his (defendant's) own use;

Digitized by Google

and, although payment thereof has been demanded by the plaintiff, defendant has refused to return or repay said sum of five thousand dollars or any part of the same to the plaintiff, and the whole of said sum of five thousand dollars is justly due by defendant to plaintiff, with interest thereon from May 20, 1890. And the plaintiff further avers that said defendant has no receipts, checks, assignments, or other papers showing where and how he invested said sum for the plaintiff's account. And the plaintiff further says that said defendant has admitted that he received the said sum of five thousand dollars for the purposes of investment, and acknowledged his indebtedness to the plaintiff for the same, as appears by a letter written by said defendant to said plaintiff on the 1st day of December, 1892, and received by said plaintiff, and which letter the said plaintiff has now in his possession, a true copy whereof is as follows: 'December 1, 1892. Monroe Smith, Esq.—Dear Sir: I called at your house this evening, and was informed by the servant that you were not at home. I am very sorry not to have seen you. I want to do what I can to reimburse you for money loaned me for certain purposes of investment which I have up to this time been unable to pay back. You know the reason why I have not been able to do this up to this time. You also know that I never denied the fact that I am indebted to you, and never shirked my responsibility. You also know that, by reason of the failure of these same investments, I am to the amount of my indebtedness to you just that much worse off than nothing. Do you not think it would be fair to give me a chance to reimburse you all that I can? It is a matter of much importance to a man of your position financially, but of course not much to me. I am not very happy over this condition of affairs, and do not believe you are the man to kick another when he is down. I will call on you to-morrow, Friday, evening, if you will be at home. Will you not kindly let me know if it will be convenient to you? Sincerely, F. H. Elder.' And the plaintiff further avers that shortly before the said letter of the said defendant, F. H. Elder, was written, the plaintiff asked the said defendant, Elder, how and where he had invested the said sum of $5,000, and he (the defendant) refused to state what investment he had made of the same, and acknowledged that he owed the said money to the plaintiff; that subsequently the defendant claimed that he has invested the said sum of five thousand dollars in one hundred shares of the capital stock of the Kennedy-Groswith Electric Company, a corporation organized under the laws of New Jersey. The plaintiff further avers that said allegation of the defendant is untrue. The plaintiff further avers that the defendant agreed on his own behalf, and not for the plaintiff, to purchase two hundred shares of the Kennedy-Groswith Electric Company from one C. W. Kennedy, on the 7th day of June, 1890, under the following agreement and receipt: 'Philadelphia, June 7, '90. Rec'd of F. H. Elder five hundred dollars on account of investment of five thousand in my electric company. Terms of above investment of $5,000, viz.: $500 in cash as above; $500 in cash within 10 days; $1,000 in cash within 60 days; $3,000 in cash within 90 days. On payment of the above amounts, F. H. Elder will be entitled to two hundred shares or twenty thousand dollars of the capital stock of the aforesaid proposed company. C. W. Kennedy.' If this is in any way connected with the investment which the defendant claims was made for the account of the plaintiff and defendant, the defendant never complied with the said agreement. That he (the defendant) subsequently paid in all $2,000 upon the said stock, but not for or on behalf of the plaintiff.

"The plaintiff further avers that the said defendant, who was to act as trustee for the plaintiff in the investment of said $5,000, has not as such trustee any documentary evidence to show the said investment, and has never produced or shown to plaintiff any receipt, agreement, check, or any other paper in writing showing that he (defendant) has invested the same or any part thereof in behalf of the plaintiff in the stock of the Kennedy-Groswith Electric Company, or in any other way whatever. And plaintiff further says that on the 8th day of February, 1892, at the city of Philadelphia, the defendant stated orally to the plaintiff that several parties had an option to purchase patents, the property of one Charles F. Winkler, for $5,000, and that, if the plaintiff would advance to him (defendant) the sum of one thousand dollars, he (defendant) would buy for the plaintiff for said one thousand dollars a one-fifth interest in said patents; and thereupon the plaintiff, relying upon said promise and undertaking so made to him by the defendant, did advance to the defendant, at Philadelphia, on the 8th day of February, 1892, the sum of one thousand dollars, and at the same time the defendant did make and deliver to the plaintiff a writing, a copy of which is as follows: 'Philadelphia, Feb. 8, 1892. Rec'd of Monroe Smith, Esq., $1,000, to be devoted to fund for purchase of patents, the property of Charles F. Winkler. The said patents to be the foundation for formation of Manufacturing Co., and entitle Monroe Smith to fifty shares of the capital stock, full paid and unassessable. The said $1,000 to be refunded when final settlement is made with the above company. F. H. Elder.' And the plaintiff says that the defendant, after receiving the said sum in trust for said purpose, did not purchase said patents of said Winkler, or any part of the same, and did not obtain any interest therein for him (the plaintiff), and never received any assignment

Digitized by Google

whatever for the plaintiff for the same, and cannot produce or show any receipt or other paper or document showing the purchase thereof or any title therein for the plaintiff; and that the defendant never received said fifty shares of capital stock, or any part thereof, nor can he produce the same to give the plaintiff, and the said $1,000 has not been refunded to the plaintiff by the defendant, nor any part thereof. And the plaintiff further says that the defendant has wrongfully and fraudulently appropriated the whole of the said sum of $1,000 to his (defendant's) own use, and, although demanded, defendant has refused to return or repay said sum of $1,000, or any part of the same, to the plaintiff, and the whole of said sum of $1,000 is justly due by the defendant to the plaintiff, with interest thereon from February 8, 1892."

Defendant's affidavit of defense, supplementary affidavit of defense, and second supplementary affidavit of defense were as follows:

Affidavit of Defense.

"Frank H. Elder, being duly sworn according to law, deposes and says: That he is the defendant in the above-entitled case, and that he has a just, true, full, and legal defense to a part of the plaintiff's claims of the following nature and character, to wit: That he did on or about the 4th day of June, 1891, borrow from the said plaintiff the sum of twenty-five hundred dollars, and has not repaid the said sum owing to his utter inability to do so; and he admits that there is now due and owing to the said plaintiff by him (the said defendant) the said sum of twenty-five hundred dollars, with interest from the maturity of his note. The said defendant has upon several occasions offered to confess judgment therefor to the said plaintiff. That he did give a note for the said loan to the said plaintiff, of which the note set forth in the plaintiff's statement of claim appears to be a true copy. That he also gave to the said plaintiff a writing as an additional security, of which that set forth in the plaintiff's statement of claim appears to be a true copy. That the defendant was and now is a holder and owner of an interest in the patent referred to in the said writing. That the patent No. 382,609, referred to in the said writing, was a number given to the matter in the course of the application for the said patent, and the plaintiff was well aware at the time that the said number 382,609 was not a number given to the patent complete and issued. That the said patent was issued under the number 469,111, and that the assignment to the said defendant of the said interest of the defendant therein bears date the 14th day of February, 1891, and was recorded at Washington, April 14, 1892, in Liber Q 45, p. 339, of Transfers of Patents. That the said defendant showed to the said plaintiff the said assignment and the certificate of the recording thereof, and at a later date, to wit, in May, 1894, the defendant again gave to the said plaintiff a full statement of this matter, with the true number of this patent and complete particulars as given above, by filing and serving his affidavit of defense in a certain suit instituted upon these same claims, and subsequently withdrawn by the plaintiff, as appears of record in this court of March term, 1894 (No. 251). That the said defendant has repeatedly offered to execute in favor of the said plaintiff any more complete assignment and transfer of his interest in the said patent, but the said plaintiff has refused to accept thereof.

"As to the second note set forth in the plaintiff's statement of claim, being dated October 17, 1892, for the sum of fifty dollars, this defendant admits that it is due and owing, but denies that any demand has ever been made upon him for the payment thereof until the service of the plaintiff's statement in the first case instituted upon the claims made in this suit, and referred to above. Deponent further deposes and says that he did receive from the said plaintiff on or about the 20th day of May, 1890, the sum of five thousand dollars, claimed in the third page of the plaintiff's statement of claim, with the understanding and agreement that he (the said defendant) should invest it in his (the said defendant's) name for the mutual benefit and profit of the said plaintiff and said defendant, and that, in pursuance of the said agreement and undertaking, he did so invest it, and it has remained and is now so invested, and that he (the said defendant) has not and did not at any time appropriate the whole or any part of the said sum of five thousand dollars to his own use; that the said sum of $5,000 was invested in the purchase of 100 shares of stock of the Kennedy-Groswith Electric Company, a corporation incorporated under the laws of the state of New Jersey; that the said investment was made with the full knowledge, consent, and approval of the said plaintiff, who was a subscriber to the stock of the said company, and subsequently a director thereof; that subsequently the said stock of the said the Kennedy-Groswith Company was assigned to a trustee, and exchanged for an equal number of shares of the stock of the United Columbian Electric Company, a corporation incorporated under the laws of the state of New Jersey; that this transfer, assignment, and exchange of stock was made with the full knowledge, consent, and approval of the said plaintiff; and the said defendant is now the holder, for the benefit and interest of the said plaintiff and of himself, of the said stocks of the said the United Columbian Electric Company, under and by virtue of its certificate, number 119; and this defendant has frequently offered to and is now and has ever been ready and willing to transfer the said stock to the said plaintiff whenever he desires that such

Digitized by Google

transfer shall be made, but that the said plaintiff has refused to accept such a transfer of the said stock to him. And the defendant denies that he is indebted to the said plaintiff in any sum by reason of the said advance of $5,000 and the investment thereof, or of the agreement made at the time of the said advancement and investment, but he freely acknowledges the plaintiff's interest in the said stock of the United Columbian Electric Company, and is ready to assign and transfer the same to him at any time. It is true that the defendant did write to the plaintiff such a letter as given upon the fourth and fifth pages of the plaintiff's statement, of which that set forth in the plaintiff's statement may be a true copy. As to the accuracy of the copy, the defendant cannot at this time admit. The defendant denies that the said letter is or was an acknowledgment of an indebtedness by the defendant to the plaintiff as set forth in the plaintiff's statement, to wit, the said alleged indebtedness of five thousand dollars; and defendant avers that, when said letter was written, it was not intended for or to express any such acknowledgment of indebtedness as is alleged in plaintiff's statement. And defendant further deposes and says that he did not in the said letter, or at any time or place, or in any manner, ever acknowledge that he owed to the said plaintiff the sum of five thousand dollars as aforesaid, or any other sum or sums except only such sums as he admits herein to be due and owing. And defendant denies that he received or at any time held the said sum of money, or any sum of money, as a trustee for plaintiff, but that the entire matter of the sum of five thousand dollars, as set forth on pages three, four, five, and six of the plaintiff's statement, is a matter of copartnership agreement and business, and that the defendant should not be called upon to answer in the form of proceeding chosen by the plaintiff in this suit, but that the plaintiff should proceed, if at all, in a more appropriate form and manner. And deponent further deposes and says that he invested the entire sum of $5,000 in strict compliance with his agreement with this plaintiff as aforesaid, and never at any time agreed to become personally liable for the results of the said investments, nor assumed any personal liability for the return of the said amount of $5,000 to the said plaintiff.

"And the said defendant further deposes and says that he received from the said plaintiff on or about February 8, 1892, the advance of one thousand dollars referred to on the fourth page of the plaintiff's statement of claim, for the purpose of investment for the mutual benefit and advantage of the said plaintiff and the said defendant, and invested it in accord with an agreement and understanding made at the time with the said plaintiff, and that he has not and did not at any time appropriate the said sum of one thousand dollars or any part thereof to his own use, but that he did, in pursuance of his agreement with the said plaintiff, and with the said plaintiff's full knowledge, consent, and approval, invest the said amount in the purchase of a certain interest in certain patent rights, and did, in pursuance of his agreement with the said plaintiff, use said interest in said patent rights as the foundation with other interests for the formation of a manufacturing company, and did secure for the said plaintiff fifty shares of stock of the said company, and did secure the enactment of resolution of the stockholders and the directors of the said company providing for the payment of the original purchase money expended for the said patents. The name of the said company was the Columbian Electric Company, a corporation incorporated under the laws of the state of New Jersey. The said fifty shares of stock in the said Columbian Electric Company were assigned to a trustee, and exchanged for an equal number of shares of stock in the United Columbian Electric Company, another corporation incorporated under the laws of the state of New Jersey, and which assumed all of the liabilities of the said Columbian Electric Company. And this defendant, until a recent date, to wit, about August, 1894, verily believed that the said purchase money would be refunded by the said the United Columbian Electric Company, and still believes that the said company would have been able ere this to have so refunded it had it not been for certain action of the said plaintiff. And this defendant is now the holder for the said plaintiff of the said fifty shares of stock of the said the United Columbian Electric Company, and is and ever has been ready and willing to transfer the said stock to the said plaintiff when he will accept thereof, and has offered to so transfer the said fifty shares, but the said plaintiff has refused to accept them. Defendant did not agree to purchase a one-fifth interest in said patents. And this defendant further deposes and says that all of the investments and changes in form or manner of investment and the assumption of the liabilities of the Columbian Electric Company by the United Columbian Electric Company was with the full knowledge, consent, and approval of the said plaintiff, and that, for reason herein given, a final settlement has not yet been made of this matter; and this defendant denies that he is indebted to the said plaintiff in any sum by reason of the said advancement of $1,000 or the said investment or the said agreement, save only that he acknowledges the plaintiff's interest in the said fifty shares of stock. And the said defendant further deposes and says that he did not receive the said sum of one thousand dollars in trust, or upon any trust or trusts, save only as herein stated. All of which the defendant expects to prove at the trial of the said case."

Digitized by Google

Supplementary Affidavit of Defense.

"And now, 18th December, 1894, Frank H. Elder. defendant in above-entitled cause, comes, and by permission of court, first had and obtained, files this, his supplementary affidavit of defense. Frank H. Elder, defendant as aforesaid, being duly sworn according to law, deposes and says: I have already filed in this case an affidavit of defense, showing a just, true, full, and legal defense to so much of the plaintiff's claim as is set forth on pages 3, 4, 5, 6, 7, and 8 of the plaintiff's statement in this case, relating to his claim, respectively, for the sums of $5,000 and $1,000, having admitted to be due those sums which he claims upon pages 1 and 2 of his said statement; but, for the better information of the plaintiff and of the court, I do depose and say that the letter dated December 1, 1892, did not refer or relate to the said sums of $5,000 and $1,000, or claims as set forth in plaintiff's statement, pages 3 to 8, and was not and is not any acknowledgment of indebtedness as to those two said claims, but it does refer and acknowledges that indebtedness which I have admitted in my affidavit of defense already filed, to wit, as set forth on pages 1 and 2 of the plaintiff's statement for $2,500 and $50, respectively, and such was the intent and purpose of the said letter when written. All of this I have already averred in my affidavit of defense already filed. I do not admit of the accuracy of the copy of the letter given in the plaintiff's statement. I further depose and say, as I have already averred, that I did not at any time refuse to state what investment I had made of either of these sums of $5,000 or $1,000, as the plaintiff averred on page 5 of his statement; but that the said plaintiff had full knowledge at all times since the said money came into my hands where and how it was invested, and I have further given him a complete accounting for these investments in the affidavit of defense already filed in this case, and also in the affidavit of defense filed in this court in May, 1894, as appears in Smith v. Elder, C. P. No. 3, M. T. 1894, No. 231; and I am now and have been at all times ready and willing to transfer to the plaintiff all of the stock in which he has any equity whatever which I have received as the result of these copartnership investments, and have offered to do so in the affidavit of defense already filed in this case, and also in that filed in the aforesaid former case, to wit, 150 shares of the capital stock of the United Columbian Electric Co., but this plaintiff refuses to accept thereof. As to the paper a copy of which is set forth on page 6 of the plaintiff's statement, I cannot admit of the accuracy of the copy. It appears to have been a memorandum made by C. W. Kennedy, and not made or signed by me. But, for the information of this plaintiff, I depose and say that I did receive 200 shares of stock of the Kennedy-Groswith Electric Co. from the said C. W. Kennedy, but not for or on account of this sum of $5,000 claimed by the plaintiff. 100 shares of the said stock I purchased from the said C. W. Kennedy on my own behalf, for valuable considerations, moving from me to the said C. W. Kennedy, and in no way connected with the claims in this case. That the other 100 shares of the said stock was purchased by me from the said C. W. Kennedy for and on account of and in compliance with my agreement with this plaintiff, and for the said 100 shares of stock I paid in full the sum of $5,000, being the money received from this plaintiff, all of which I expect to prove at the trial of this cause. It is not true, as the plaintiff alleges, that I 'paid in all $2,000 upon the said stock'; but it is true that I paid the sum of $5,000 in full for 100 shares (and no more) of the said stock, and that I have documentary evidence of this fact, which I shall produce at the proper time; and it is not true as the plaintiff alleges, that I have not such evidence. And I further aver that I have evidence in writing showing the investment of the said sum of $1,000 for the purchase of patent rights on behalf and in pursuance of the terms of my agreement with this plaintiff, as set forth in his statement, and in my affidavit of defense already filed, and as detailed at length therein. I am informed and believe that the record in this case shows such a matter of copartnership agreement as regards the said sums of $5,000 and $1,000 as should not require me to answer in a suit in assumpsit. All of the above I expect to prove at the trial of this case."

Second Supplementary Affidavit of Defense.

"And now, this 31st day of December, 1894, Frank H. Elder, defendant in above-entitled cause, comes and files this his second supplemental affidavit of defense. Frank H. Elder, defendant as aforesaid, being duly sworn according to law, deposes and says: The sum of five thousand dollars received from the plaintiff in this case, which I have already averred was invested with the knowledge and consent of the plaintiff in one hundred shares of the capital stock of the Kennedy-Groswith Company, was paid to C. W. Kennedy in payment for the said one hundred shares of stock upon the following dates and in sums as follows: On June 7, 1890, $500; on June 17, 1890, $500; on August 1, 1890, $1,000; on September 15, 1890, $1,000; on January 2, 1891, $500; on February 13, 1891, $1,500. And defendant further deposes and says that all the said payments in purchase of the said stock were made by checks in favor of the said C. W. Kennedy, made and signed by the defendant, F. H. Elder, and drawn upon the Centennial National Bank of the City of Philadelphia, all of which checks were duly presented and paid to the said C. W. Kennedy. And the defendant denies that the memorandum dated June 7, 1890, purporting to be signed by C. W. Kennedy, and set

Digitized by Google

forth in the plaintiff's statement, is a true and correct account of his agreement or transaction with the said C. W. Kennedy; but that the true facts as to the purchase of stock by this defendant from C. W. Kennedy, and as to the agreement between this defendant and plaintiff in reference thereto, are set forth in this defendant's affidavit and supplemental affidavit of defense already filed. And defendant further deposes and says that the one thousand dollars which he has already averred was invested in pursuance of his agreement with said plaintiff, with his full knowledge and consent, in the purchase of an interest of certain patent rights, was paid for the purposes agreed upon, in the manner already given, to C. F. Winkler on April 20, 1892; the said payment being made by one check for one thousand dollars in favor of the said C. F. Winkler, drawn upon the Centennial National Bank of the City of Philadelphia, made and signed by F. H. Elder, this defendant, said check being duly presented and paid to the said C. F. Winkler. And deponent further says that he denies that he agreed with plaintiff that, if he would advance him one thousand dollars, he (defendant) would buy for the plaintiff a one-fifth interest in patents, the property of one Charles F. Winkler, and says that the agreement was as follows: That the said sum of one thousand dollars should, in connection with certain sums advanced by certain other investors, be used in the purchase of the said patent rights, and that the said patent rights were to be used for the formation of a manufacturing company, said company to be formed under the laws of the state of New Jersey; and upon the formation of said company the plaintiff was to receive fifty shares of the stock of said company, full paid and unassessable, as is set forth in copy of the written agreement found in the plaintiff's statement. That the said patent rights were purchased in pursuance of said agreement, and were assigned to the Columbian Electric Company, a manufacturing company, incorporated under the laws of the state of New Jersey, in pursuance of said agreement. And said defendant further deposes and says that there has not at any time been received by him any gain or profit arising from the investment of these sums, nor in any manner, or from the transactions referred to herein, or from the sums received from the plaintiff. All of which the defendant expects to prove at the trial of this case."

Joseph W. Kenworthy and Allen H. Gangewer, for appellant. Alfred Driver and J. Warren Coulston, for appellee.

STERRETT, C. J. We are all satisfied that the averments contained in the affidavits of defense are quite sufficient to carry this case to a jury. The learned court, therefore, erred in entering judgment against the defendant for want of a sufficient affidavit of defense. Judgment reversed, and a procedendo awarded.

RICHARDSON et al. v. ATLAS NAT. BANK OF CHICAGO.

(Supreme Court of Pennsylvania. April 29, 1895.)

BILLS OF LADING — TRANSFER — ATTACHMENT TO DRAFT—RIGHTS OF TRANSFEREE—INDORSEMENTS —ATTACHMENT OF PROPERTY COVERED BY BILLS OF LADING.

1. The indorsement by N. of the words "Deliver to order of J.," on bills of lading made "to the order of N., notify J.," and issued for goods shipped by N. to himself as consignee, will not affect the rights of the A. bank, to which N. sent them, attached to a draft on J., payable to A.'s order; it being obvious that the delivery of them was intended as a pledge of the property mentioned in them as security for the sum advanced or paid on the draft.

2. Where one to whom bills of lading attached to a draft are delivered, and who thereupon, by Act Sept. 24, 1866, is to be deemed the owner of the property pledged, is, under the provisions of Act June 13, 1874, made a garnishee on the property being attached, he can, on securing dissolution of the attachment, and giving notice to the attaching creditors, sell the property at auction, without an order of court, and without being liable if the property, which does not sell for enough to pay the liens, does not sell for its actual value, his bond on securing dissolution providing only that he shall retain, subject to such judgment as plaintiff may recover, so much of the property as shall remain after payment out of it of garnishee's and any prior liens.

Appeal from court of common pleas, Allegheny county.

J. H. Richardson, trading as J. H. Richardson & Co., having a claim against Marks Nathan, by writ of foreign attachment attached certain property in the hands of the Pennsylvania Railroad Company. The Atlas National Bank of Chicago, having previously discounted a draft of said Nathan, to which were attached bills of lading for the property, was on its petition made garnishee, under Act June 13, 1874, and, having obtained a dissolution of the attachment, sold the property. Plaintiff obtained a verdict, and, on facts agreed on by counsel as if found by the jury, judgment for the amount of the verdict was rendered against garnishee, from which it appeals. Reversed.

The facts agreed on by counsel in the nature of a special verdict were as follows:

"Two car loads of iron, amounting to 890,700 pounds, were seized while in the possession of the Pennsylvania Railroad Co. by the sheriff of Allegheny county on an attachment of J. H. Richardson & Co., the plaintiff herein, against Marks Nathan, at No. 956, December term, 1890, common pleas No. 1 of Allegheny county. That said iron was shipped by Marks Nathan to himself as consignee, at Pittsburgh. That two bills of lading were issued for the same, which were not indorsed, 'Not negotiable,' and which were made 'to the order of Marks Nathan, notify J. H. Richardson & Co.' That said bills of lading were indorsed, 'Deliver to the order of J. H. Richardson & Co.,' signed, 'Marks Nathan H.' That they were thus in-

Digitized by Google

dorsed when the attachment was served, but were afterwards returned to Chicago, when said indorsement was erased, and they were indorsed in blank by Marks Nathan, personally. That on November 24, 1890, the Atlas National Bank received from Marks Nathan, the above-named defendant, a draft for $531.41, on J. H. Richardson & Co., payable on demand to the order of the Atlas National Bank, to which draft were attached the above-described bills of lading, issued by the Pennsylvania Railroad Company, a common carrier, for which draft, with bills of lading attached, as aforesaid, as collateral security, the Atlas National Bank paid on the day aforesaid the sum of $531.41. That said draft and bills of lading were duly forwarded to the Pittsburgh National Bank of Commerce for collection, and presented to J. H. Richardson & Co., the plaintiff, on November 28, 1890. That at the time of said presentation the bills of lading were indorsed, 'Deliver to the order of J. H. Richardson & Co.,' and signed, 'Marks Nathan,' but that plaintiff refused to accept or pay for the same, but on the same day issued this foreign attachment, which was served by the sheriff, and the Pennsylvania Co. aforesaid, summoned as garnishee, and said scrap, etc., placed in the warehouse of Union Storage Co., at Pittsburgh. That the draft and bills of lading were returned to Chicago, and said indorsement to J. H. Richardson & Co. erased, and they were then and there indorsed in blank by Marks Nathan, and again returned to the Pittsburgh National Bank of Commerce, and presented to plaintiff, J. H. Richardson & Co., who again refused to accept or pay the same. That the Atlas National Bank, on December 20, 1890, presented its petition to said court, with such representations, as by reference to said petition hereto attached will be observed, and prayed that the name of said Atlas National Bank might be added to the record as garnishee; that a rule might be granted upon the plaintiff to appear and show cause why said attachment should not be dissolved upon its giving security in accordance with the provisions of the act of assembly of June 13, 1874, to which plaintiff appeared and made answer pro ut; whereupon the Atlas National Bank entered into security in the sum of $1,000, conditioned, to wit: 'If so much of the said scrap steel, rails, and ends as shall remain after the settlement or payment thereout of any lien upon any of the said scrap steel, rails, and ends created by the advance of money or credit by the said bank, and also all prior liens for storage, freight, and all charges, shall be retained in the hands of said bank, to answer if plaintiff shall have execution of any judgment of the effects of defendant in the action, attached as aforesaid, or to abide the further order of court, then the bond to be void.' That the property was then taken by the Atlas National Bank, which was made garnishee as prayed, and the said property was subsequently sold by the said bank at public sale, without order of court, but with notice to plaintiff of the time and place of sale, and was sold for the price or sum of $523.03, which garnishee received, and applied first to the payment of freight and other charges of storage, etc., to the amount $107.11, and the remainder, $416.03, upon its claim, leaving no balance in its hands. That the property attached and thus sold at the time it was attached was of the value of $880.98. That a verdict was taken by the court for $375.05 in favor of the plaintiff, subject to the opinion of the court whether plaintiff was entitled to recover in this suit."

Lazear & Orr, for appellant. A. Leo. Weil, for appellee.

McCOLLUM, J We think the indorsements on the bills of lading cannot, under the circumstances shown by the special verdict, be justly considered as injuriously affecting the rights of the appellant to the property specified in the bills. The delivery of them was obviously made, accepted, and intended as a pledge of the property as security for the sum advanced or paid on the draft to which they were attached. The purpose of the parties being evident, delivery without indorsement was sufficient to accomplish it. Holmes v. Bank, 87 Pa. St. 525. The indorsements which are thought by the appellee's counsel to afford his client some advantages, and to abridge the rights of the appellant in this contest, were in the following words, to wit: "Deliver to the order of J. H. Richardson & Co." These indorsements were probably regarded by the consignor as nothing more than a direction to the pledgee to deliver the property specified in the bills to the appellee on his acceptance and payment of the draft, together with charges for transportation, storage, etc. His cancellation of the indorsements on their refusal to honor his draft is in accord with this view and with what we have seen was his purpose in delivering the bills. The indorsements were not intended to qualify the rights of the pledgee, and we cannot assent to a construction of them which would defeat the common purpose of the parties to the transaction, which, we think, should be considered in the determination of this issue as if the indorsements had not been made. Thus considered, the effect of it was to invest the appellant with the rights of a purchaser of the property, so far as it might be necessary to exercise such rights for its protection. 2 Am. & Eng. Enc. Law, p. 243, and cases there cited. In other words, the appellant, after the delivery of the bills, must be deemed and taken to have been the owner of the property for the accomplishment of the purpose for which it was pledged. Act Sept. 24, 1866 (P. L. 1363; Purd. Dig. p. 145). Having acquired this position by vir-

Digitized by Google

tue of the delivery to it of the bills of lading, it was made a garnishee of the property under the act of June 13, 1874 (P. L. 285; Purd. Dig. p. 146), and as such applied for and obtained, in conformity with its provisions, a dissolution of the attachment. The dissolution thus effected released the property from the grasp of the attachment, and the garnishee sold it at public auction, after having given due notice to the appellee of the time and place of sale. The latter, alleging that the property was worth more than it was sold for, was allowed to recover in this proceeding a judgment for the difference between the sum obtained for it and its actual value, on the ground that the sale was made without an order of court. Was such an order necessary to authorize and validate the sale? We think it was not. A sale of the property, or so much thereof as may be necessary to satisfy liens for advances and for freight and storage charges, is evidently contemplated by the act under which the appellant became a party to the suit. The bond required on the dissolution of the attachment is in accord with this view. It provides for the retention by the garnishee, for the purpose stated in it, of so much of the property or its proceeds as shall remain after the sale of the whole or part of it, and the payment of such liens. After seizure, and prior to the dissolution of the attachment, the property was in custodia legis, and could not be lawfully sold without an order of court; but, after the attachment was dissolved, the rights and powers of the appellant to and over it were the same as before the seizure, subject only to the duty of retention imposed by its bond. It follows from what has been said that we regard the sale made as valid, and that the appellee cannot recover from the appellant the difference between the value of the property and what it sold for. Ample opportunity was afforded him to become bidder at the sale, and, if he had availed himself of it, he would have acquired the property for less than its value, or compelled the successful bidder to pay a fair price for it. Judgment reversed.

In re SCHOFIELD'S ESTATE.

Appeal of WEBB et al.

(Supreme Court of Pennsylvania. April 22, 1895.)

ASSIGNEE FOR CREDITORS—ACCOUNTING—LIABILITY FOR LOSSES.

1. An assignee is not liable for loss arising from waiting 15 months after the assignment before selling mill machinery, and 7 months longer before selling the mill, he not having been guilty of negligence, but having exercised what seemed like good business discretion, considering the existing and prospective condition of the market.

2. An owner of a mill, after mortgaging it, furnished it with machinery, so that it became subject to the mortgage as part of the realty, and then made an assignment. *Held* that, the assignee not having been negligent in paying off the mortgage and holding the property a while, instead of selling it at once, and having realized from the mill and machinery, when sold, more than the amount of the mortgage and the sums spent by him in maintaining them, was not liable, though the mill alone realized less than the sums spent on it and the amount of the mortgage.

Appeal from court of common pleas, Philadelphia county.

Assignment for benefit of creditors by John Schofield and another, trading as John Schofield & Son, to William T. Tilden. From a decree dismissing the exceptions of Charles J. Webb & Co. and two other creditors to the report of the auditor of the account of the assignee said creditors appeal. Affirmed.

The report of the auditor was as follows:

"The assigned estate consisted of the Keystone Mills, of Manayunk, with machinery, stock, book accounts, and notes, and a dwelling occupied as a residence by John Schofield, one of the assignors. The deed of assignment was executed January 3, 1890, and was drawn with great care, under the direction, as it was shown, of John Shallcross, Esq. The phraseology is somewhat different from that of the ordinary deed of assignment for benefit of creditors, and it contains, inter alia, this clause: 'In trust, nevertheless, for the following uses and purposes, to wit: First, that as soon as it shall be deemed advisable, to sell and dispose of the factory buildings, messuage, or tenement, and lots or pieces of ground, premises, and real estate hereby granted, either at public or private sale, as he (the assignee) may deem proper, for the best price or prices that can be obtained for the same, and upon receipt of the purchase money therefor make and execute, acknowledge and deliver good or sufficient deed or deeds of conveyance to the purchaser or purchasers thereof in fee simple, without any liability on the part of such purchaser or purchasers as to the application of the purchase money therefor.' It was contended that by virtue of this clause greater authority and discretion were vested in the assignee than are ordinarily possessed by an assignee for the benefit of creditors. The auditor does not so construe it. He considers that this assignee's duties were prescribed and his authority limited by the laws governing assignments for the benefit of creditors in this state, subject to which he accepted his trust. This question, however, is not a material one in this case. The facts are these: The assignment was made January 3, 1890, and the inventory filed February 2d. The outstanding accounts due the estate were evidently collected by the assignee promptly and successfully, he collecting in full the debts considered bad or doubtful, realizing $2,170.25 above their appraisement. The real and personal property of the estate were not sold until April 7th, 1891, fifteen months after the assignment, when, after being well advertised, a sale was held by James A. Freeman &

Digitized by Google

Co., auctioneers. At this sale the raw material and stock were sold for $8,433.64, being $3,418.30 above the appraisement. The mill machinery, which a former member of the firm, Mr. Dobson, stated had cost $60,000, and which Mr. Schofield said had cost $75,000 or $80,000, and which had been appraised at $33,878.85, were then offered together, and the highest bona fide bid was $31,000, by Mr. Webb, one of the largest creditors. They were then withdrawn, and the machinery sold separately, according to advertised schedule, realizing $10,795.46, being $2,083.39 less than the appraisement. There was no bid for the mill without machinery. The accountant testified that while he was willing to sell the machinery at 40 to 50 per cent. of its cost, he was not willing to sacrifice the real estate, and it was withdrawn, not being sold until November 17th, seven months later, when, after efforts to get an offer for it by advertisement, it was sold by Freeman & Co. for $17,200, being $3,800 less than the appraisement. Therefore, while the assignee realized upon the book accounts, notes, and stock $5,594.58 more than the appraisement, he realized upon mill and machinery $5,883.39 less than the appraisement. During the twenty-two months he held the mill he paid out on account of it for mortgage interest, taxes, liens, insurance, watchman, etc., a total of $6,083.40.

"Now, counsel for the creditors, while paying the highest tribute to the honor and integrity of the accountant, claims that he mismanaged the estate in holding the mill and machinery so long, under such heavy expense; that he was guilty of supine negligence in doing so, and should therefore be surcharged with the $5,883.39, the difference between what was realized upon them and their appraisement, and also with the $6,083.40 expended upon them,—a total of $11,966.79, or more than sufficient to pay the creditors in full. But what is the evidence? Mr. Tilden, the assignee, has been engaged for twelve years in the hair, wool, and wool stock business, and must necessarily have been familiar with the condition of the textile manufactures and business. He testified that he acted as conscientiously in the management of the estate as if it had been his own individual property; that, owing to the depressed and unsettled condition of affairs in 1890, he was convinced that it was not a suitable time to offer a property like this; and that, believing there would be an improvement after the passage of the McKinley tariff bill, which was then under discussion by congress, and which became a law in October, 1890, he held the property until a few months after the passage of the act, to see if there was any appreciable effect, and then offered it at an auction April 7, 1891, selling upon that day the stock and machinery, but withdrawing the real estate, as before stated, because he did not believe the bid a reasonable one for such a valuable property, and it was not sold until November. During this time he very frequently consulted his counsel, Mr. Shallcross, having many personal interviews with him, and receiving from him forty-three letters, which were put in evidence, with his letter book, containing copies of the many letters written by him to counsel. Both the accountant and his counsel testified that they kept on the alert for any one seeking mill property. The accountant also called as witnesses Messrs. Robert Dornan, Alexander Crowe, Jr., and George Bromley, three of the largest and best known textile manufacturers of Philadelphia, all of whom testified, in substance, that it would have been unwise and unbusiness-like to have attempted to sell this property in 1890; that there was some rise in raw stock, in anticipation of the passage of the McKinley bill, but it was generally expected there would be a much improved condition of business after the passage of the act in October, but that the great Baring failure occurred in November, and in the words of Mr. Crowe, 'the situation in the fall of 1890 was something fearful'; that there was a better feeling in the spring of 1891, when the effect of the Baring failure had ceased to be felt, and when raw stock reached the highest point, but that mill property did not improve in value, as had been anticipated, there being, according to one witness, 'too much mill property,' and that the improvement in such property was not felt until the summer of 1892. Upon the other hand, however, on the behalf of creditors, Messrs. John Hamilton and Joseph Adams, two large and reputable manufacturers, testified that it was unwise not to have sold at once, and Mr. Adams saying September, 1890, was the time to have sold. Both of these gentlemen, however, admitted that there was a general expectation that the passage of the McKinley bill would greatly improve manufacturing industries, and that the highest prices were realized for yarns only a month or two before the accountant sold the stock. It is true that the accountant was warned by two of the creditors that they would hold him responsible for any loss they should suffer by reason of his not selling the property and closing the matter out. But an assignee is not to be guided by the advice or dictation of creditors. He must exercise his own reasonable and honest discretion under the advice of counsel. Besides, in July, 1891, after the mill had been offered at auction and withdrawn, all the creditors excepting the two just referred to and four others signed a paper agreeing that the accountant should distribute the money then in his hands, a dividend of forty per cent., and 'that further distribution be delayed until an advantageous sale can be made of the real estate,' thus indicating that they, too, thought that it would be advisable to hold the real estate.

"In all the evidence there is nothing to show that the accountant was guilty of mismanagement or negligence in not selling the stock and machinery for fifteen months after

Digitized by Google

the assignment, and in not selling the mill property until seven months later, but, upon the contrary, he is shown to have acted with business-like discretion and prudence. There is, however, another phase of this matter that requires consideration. During the twenty-two months he held the mill property the accountant expended, in payment of liens, taxes, interest on mortgage, insurance, watchman, etc., the sum of $6,083.40, while he only realized upon the mill real estate $4,200 above the incumbrances. The law in our state is now so well defined and so positive as to the duties of an assignee in this respect, and it is so well settled that 'the real estate must bear its own burdens,' that ordinarily the accountant would be surchargeable with this difference. But there were peculiar circumstances in this case which must be considered in passing upon this point. There were upon the mill real estate two mortgages, one of $13,000 and a second one of $6,000, the latter being a lien also upon the machinery and fixtures, etc. Thus the realty and personalty were, to a certain extent, blended. If the interest on the first mortgage or other liens were not paid, then the second mortgage would be jeopardized, and payment of it would be enforced. It would be compulsory then to either permit the machinery to be sold at a time when, according to the testimony, there was no demand for it, or to pay the mortgage of $6,000, if the accountant then had sufficient funds, of which there is no evidence, though he afterwards did pay it off, and remove and store the machinery, if the mill were sold. Therefore, to prevent the valuable machinery from being sacrificed, and to retain it in position, and in such condition in which it was reasonable to believe it would realize the most, it was wise to preserve the property intact by paying the charges against the real estate. It is true that these assets were appraised at more than they were eventually sold for, but the appraisement is not the test of the value. If the evidence of the witnesses both for the accountant and creditors, who were certainly conversant with the condition of affairs, is to be relied upon, the accountant was fully justified in believing that this valuable mill and machinery, which had cost between $70,000 and $80,000, if held until the improvement in textile business, which all of them expected would occur upon the passage of the McKinley bill, would realize far more than the appraisement of $33,878, and far more than enough to pay the liabilities, and in believing that by retaining the real estate he would realize more upon the machinery than if sold separately. He would not be justified in selling for the amount of the appraisement if he had reason to believe the property would bring more. While his duty is primarily due to the creditors, he also owes a duty to the assignor, and cannot needlessly sacrifice the estate. It is unfortunately true that the anticipations of the accountant and others engaged in the textile business were not realized, and that the improvement in that business did not take place as soon as had been expected. For this he cannot be held repsonsible, as their belief and opinions were founded upon extended experience. If he exercised a proper and honest discretion in paying the charges against the realty for the purpose of not only retaining it for a better market, but also thereby to give the machinery greater value, he is not responsible, though it eventually did not realize as much as the appraisement, and in doing what he did he expended some $1,800 more on the mill real estate than he received for it. The auditor finds that he did exercise such discretion, and that his action was based upon reasonable belief and expectation, and he should not, therefore, be surcharged with the loss upon the mill real estate.

"The action of the accountant with reference to the dwelling house occupied by Mr. John Schofield, one of the assignors, is yet to be considered. There is no doubt but that the accountant had a friendly interest in Mr. Schofield. A few weeks after the assignment, a letter was sent to the creditors by the accountant, stating, 'Messrs. John Schofield & Son, desiring to effect a settlement with their creditors, so that they can resume business, and at the same time furnish their creditors as large a settlement as they believe to be possible, request the writer to make the following offer.' Then follow the terms of the offer of 50 per cent., and the letter closes with, 'Hoping to receive a prompt reply, I remain, yours, truly, Wm. T. Tilden, Assignee.' In explanation of this letter the accountant said that he had merely conveyed the offer of the firm, and that, while he had signed as assignee, he had done so inadvertently; that he occupied a position of creditor as well as assignee, he being a creditor for some $1,300, more than a twentieth of the whole indebtedness of the firm. There were meetings of creditors to endeavor to effect a settlement, but there is no evidence that Mr. Tilden instigated them, or in any way tried to influence the creditors to compromise. The signing of the letter as assignee was, of course, an indiscretion, but as it is not shown to have done any harm it would not have been alluded to but for the fact that there was evidence that the accountant had said that he wanted to save the old man (referring to Mr. Schofield) his house. The accountant says he does not remember whether he made these remarks or not; that by advice of counsel he permitted the assignor to remain in the house, desiring to make use of him in the settlement of the estate; and that he did not believe the house could be sold. He permitted the assignor to occupy the house for nearly two years, during which it is not shown that he made any effort to sell, and during which he expended for maintenance, taxes, mortgage interest, liens, etc., $1,173.04, while at the sale it sold for only $300 more than the appraisement. It was an ordinary dwelling, whose value could be very closely approximated, and

Digitized by Google

it is fair to assume that the appraisement was its value at the time, and that it could have been sold for that amount. It was separated from the mill property, and in no way connected with it, and its retention, unlike that of the mill, could have no possible bearing upon, or in any way affect, the value of the machinery. Under the authorities the accountant could not demand rent from the assignor for the house, but he was bound to sell it within a reasonable time; and, if it could not be sold, he was not justified in expending the money of the estate in payment of the charges against it, and he must be surcharged with the difference between the $1,173.04 so expended and the $300 realized over the appraisement, or $873.04. The auditor arrives at this conclusion with very great reluctance, for the motives that actuated the accountant were most honorable ones. Mr. Schofield is an aged man, who, in his declining years, had been overwhelmed by misfortune, and had, without trying to save anything for himself, or making any preferences, assigned all his estate for the benefit of his creditors. In endeavoring to help this old gentleman, and to save for him at least his home, Mr. Tilden, the accountant, was moved by those generous and noble impulses which are so commendable, and which so adorn the character of the true man. But as the creditors for whose benefit he received this property object, among other matters, to this unauthorized expenditure, the stern requirements of the law compel the auditor to surcharge the accountant with it."

The exception of the creditors to the auditor's report were:

"First. Because he refused to surcharge the assignee with the sum of $5,883.39, the difference between the appraised value of the mill and machinery and the gross amount ultimately realized therefor. Second. Because he finds that 'in all the evidence there is nothing to show that the accountant was guilty of mismanagement or negligence in not selling the stock and machinery for fifteen months after the assignment, and in not selling the mill property until seven months later, but, upon the contrary, he is shown to have acted with business-like discretion and prudence.' Third. Because he did not find that the assignee was guilty of supine negligence in holding the property of the assigned estate for fifteen months without offering it for sale. Fourth. Because he did not find that the assignee was guilty of supine negligence in holding the property of the assigned estate for fifteen months without offering it for sale, in the face of the express finding by him that the assignee was warned by two of the creditors now seeking to surcharge him that he would be held responsible for any loss they should suffer by reason of his not selling the property and closing the matter out. Fifth. Because he does not find that at the sale first attempted in April, 1891, one of the attacking creditors, Chas. J. Webb, bid the sum of $31,000 for the mill and machinery, which bid was refused by the assignee without adequate reason, and which, if accepted, would, with the other assets, have been sufficient to pay the indebtedness of the assigned estate. Sixth. Because he does not surcharge the assignee with the sum of $6,883.40, expended by him in the payment of taxes, interest on mortgages, insurance, etc., in and about the mill property. Seventh. Because he finds that, owing to the second mortgage of $6,000 being a lien upon the machinery as well as the real estate, 'it was wise to preserve the property intact by paying the charge against the real estate,' when as matter of fact the assignee had sufficient quick assets in the shape of book accounts and salable stock to have paid off this mortgage, if necessary, within any reasonable time of the assignment. Eighth. Because he finds that 'the assignee exercised a proper and honest discretion in paying the charges against the real estate for the purpose not only of retaining it for a better market, but also thereby to give the machinery greater value, and that he was not responsible though it eventually did not realize as much as the appraisement.' Ninth. Because he does not find that the whole course of conduct pursued by the assignee plainly showed that he was acting in the interest of the assignor, and not of the creditors, and should be surcharged with the losses occurring by reason thereof. Tenth. Because he does not at least surcharge the assignee with a sum sufficient to pay in full the indebtedness proven against the assignor's estate. Eleventh. Because he does not at least surcharge the assignee with the difference between the bid made by Chas. J. Webb, April 18, 1891, for the mill property as a whole, to wit, $31,000, and the amounts of $10,795.46 and $17,200, realized therefor subsequently by separate sales of the machinery and real estate, to wit, the difference of $3,204.84. Twelfth. Because he does not at least surcharge the assignee with the costs of this audit."

The opinion of the court below overruling the exceptions to the auditor's report was as follows:

"The assignment was made upon January 3, 1890. The estate consisted of the Keystone Mills, with the machinery, stock of goods, debts due the assignors, and a dwelling house, occupied by one of the assignors as a residence. Upon the mill there were two mortgages; one for $13,000, the other for $6,000. The assignee sold the stock on April 7, 1891, and realized $3,418.30 above its appraisement. He collected from the debts due the assignors $2,176.28 above their appraisement. On the said April, 7, 1891, the assignee also offered the mill and machinery at public sale, and received a bid for the same of $31,000. This bid was not accepted, and the machinery was sold at public sale for

Digitized by Google

$10,795.46, being $2,083.39 less than the appraisement. On November 17, 1891, the assignee sold the mill building at public sale for $17,200, being $3,200 less than the appraisement. During the time between the assignment and the sale of the mill the assignee had expended for interest on the mortgages on the mill, and for taxes, liens, insurance, and other charges for its maintenance, $6,083.40. The dwelling house was sold about two years after the date of the assignment, and realized $1,800 in excess of the mortgage for $4,000, to which it was subject, and $300 in excess of its appraisement. The assignee, however, had paid $1,173.04 on account of its 'maintenance, taxes, mortgage interest, and liens.' One of the assignors occupied the dwelling house till the time of its sale, and the assignee received no rent for it. The assignee's account having been referred to an auditor, the assignee was allowed all of the credits claimed by him for expenses he had made on account of the mill property, but was refused credits to the amount of $873.04 for expenditures made by him on account of the dwelling house. The auditor arrived at the said sum of $873.04 by deducting from the said sum of $1,173.04 the $300 realized from the sale of the house in excess of the appraisement, he finding 'it was an ordinary dwelling house, whose value could be very closely approximated, and it is fair to assume that the appraisement was its value at the time, and that it could have been sold for that amount.'

"Exceptions were filed to the findings of the auditor, on behalf of four of the creditors, as to the allowance of the credits for the expenditures made by the assignee on account of the mill property; and exceptions were also filed on behalf of the assignee to the refusal of the auditor to allowing the credits, amounting to the said sum of $873.04, for expenditures made by the assignee on account of the dwelling house. We consider that the learned auditor made a proper disposition of the credits claimed for the expenditures made by the assignee on account of the mill property. As the mill was owned by the assignor, the machinery put in it by him for the purpose of adapting it to the use to which he had put it was as between him and the mortgage creditors attached to the real estate. The assignee was bound only to use ordinary prudence. He was bound to exercise discretion. He may have erred. But the very idea of the exercise of discretion admits the possibility of error. The auditor finds 'that in all the evidence there is nothing to show that the accountant was guilty of mismanagement or negligence in not selling the stock and machinery for 15 months after the assignment, and in not selling the mill property until seven months later, but, upon the contrary, he is shown to have acted with business-like discretion and prudence,' and 'to prevent the valuable machinery from being sacrificed, and to retain it in position and in such condition in which it was reasonable to believe it would realize the most, it was wise to preserve the property intact by paying the charges against the real estate.' The mill and machinery realized more than was expended upon their account. Neither by the assignment nor by accepting its benefits did the creditors release their debts. In Detwiler's Appeal, 96 Pa. St. 323, the court, in speaking of an assignee for the benefit of creditors, said: 'Neither he nor the creditors for whom he holds the property in trust are purchasers for value. They are not parties to the deed. They have not relinquished anything in compensation for the benefit of the trust. They have not agreed to look to the property assigned for the satisfaction of their claim. They have not title to the property itself. They acquire a right only to enforce the duty undertaken by the assignee.' And that the assignor has rights which the assignee is bound to regard is apparent from the case just cited, from Breneman's Estate, 150 Pa. St. 494, 24 Atl. 633, and from Glenn v. Mickey, 130 Pa. St. 586, 18 Atl. 939, an injunction having been granted in the last-mentioned case to restrain the assignee from making a sale of the real estate to the prejudice of the assignor. In regard to the credits disallowed for the expenditures made on account of the dwelling house, we think the learned auditor fell into error in not allowing credits for the sum of $550.81, paid for a paving claim filed by the city of Philadelphia to the use of the contractor for paving done in front of the property before the date of the assignment. This was a charge which must have been paid by the assignee or deducted from the purchase money at the time of the sale of the property, and therefore was a proper credit to the assignee. The counsel for the excepting creditors upon the argument conceded that this credit should have been allowed. This amount of $550.81 must, therefore, be deducted from the said amount of $873.04, leaving $322.23 as the amount of the credits to be disallowed to the assignee. We do not think that this is a case in which any part of the costs should be imposed upon the assignee. The exceptions filed on behalf of the said four creditors are dismissed. The exceptions filed on behalf of the assignee are sustained to the extent of the allowance of the credit for the said sum of $550.81. The other exceptions are dismissed. The costs are to be paid out of the fund in the hands of the assignee, and in all respects, except as stated in the opinion, the report of the auditor is confirmed. The counsel may prepare a table of distribution, and submit it to the court for approval."

Joseph de F. Junkin, for appellants. Hampton L. Carson and John Shallcross, for appellee.

PER CURIAM. We are not convinced that there was any error in dismissing the 12

Digitized by Google

exceptions to the auditor's report recited in the specifications of error respectively. On the contrary, we think, in view of the facts and circumstances of the case, that the conclusions reached by the learned judge of the common pleas are substantially correct. We find nothing in the record that requires either a reversal or modification of the decree. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

In re COX'S ESTATE.

Appeal of POTTS.

(Supreme Court of Pennsylvania. April 22, 1895.)

TESTAMENTARY CAPACITY—EVIDENCE.

An issue as to testamentary capacity is properly refused, where, of the four witnesses offered by contestant, two, who were physicians, while asserting positively that he was without testamentary capacity, admitted that they had only casually met him, and that they had never attempted to talk with him on business or to test his ability to carry on a conversation, and were unable to give a single instance in which they had heard him make a foolish, insane, or incoherent remark, though ont of them declared he was "blind, paralyzed, and demented," and the third witness, who was manager of testator's business, while expressing an opinion adverse to his ability to make a will, admitted that all checks in the course of the business were signed by him, that he knew the various employés and their duties, and that he could "understand for a little while," though not capable of any prolonged mental effort, and the fourth witness, who did not know testator till a year after the execution of the will, testified substantially the same as the preceding witness.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of Abraham R. Cox, deceased. From the decision of the register of wills, admitting the will of deceased to probate, Robert T. Potts, by his next friend, William W. Potts, appealed, alleging want of testamentary capacity and undue influence, and praying for an issue devisavit vel non to determine these facts. The auditing judge dismissed the appeal, the exceptions to such adjudication were dismissed by the court in banc, and Robert T. Potts again appeals. Affirmed.

The opinion of the auditing judge (Penrose) was as follows:

"The petition upon which the appeal is founded alleges that at the time it was filed the only persons interested in the estate of the decedent were his son, Abram R. Cox, a brother, Dickson Cox, and a grandson, Robert T. Potts (the appellant), son of Caroline E. Potts, a deceased daughter. The grounds of the appeal are want of testamentary capacity and the procurement of the will by the undue influence and coercion of Caroline E. Cox (the wife of the testator) and others not named. The appeal was originally taken October 23, 1893, by E. Channing Potts, the father of Robert T. Potts, as his next friend; but on the 9th of December, 1893, a petition was presented, setting forth that 'it was found desirable that the said E. Channing Potts should have leave to withdraw from the said litigation, and that another person should be substituted in his stead as next friend of said minor'; and William W. Potts, an uncle, having been suggested as the proper person to act in that capacity, was substituted by decree dated December 16, 1893. The petition for appeal in this court (sworn to by the substituted next friend, December 4, 1893) was presented December 27, 1893. No notice of this application was given to the parties against whom the appeal was taken. The testator died February 5, 1890, and on the 20th of February, 1890, his will, dated August 24, 1887, was admitted to probate upon the petition of the executors named therein, Caroline E. Cox, Abram R. Cox, and E. Channing Potts, averring, under oath, that it was his last will and testament, and that the value of his personal estate was $200,000, and of his real estate $75,000.

"The will gave to Caroline E. Cox, the widow of the testator, all silverware, paintings, household furniture, etc., and $15,000 absolutely, with the right to occupy his house, Nineteenth and Spring Garden streets, for life, and, in the event of its sale at her instance, one-half of the proceeds absolutely; $500 to Sarah M. Johnson (a sister who died in his lifetime); $20,000 to his son, Abram R. Cox; $20,000 to the Fidelity Insurance, etc., Company, in trust for his daughter, Caroline E. Potts (wife of E. Channing Potts, and mother of appellant, Robert T. Potts), for life; and the residue of the estate to the Fidelity Insurance, etc., Company, in trust to divide the net income between his said wife, son, and daughter, in equal shares, for life,—it being provided that at the death of Mrs. Potts, who is spoken of as then very ill and likely to die within a short time, there should be set apart the sum of $30,000, the income of which should be paid to the guardian of her son, Robert T. Potts (the appellant), during his minority, the principal to be paid to him upon attaining the age of twenty-one years, or to his issue if he should die under that age, and in case of his death during minority, and without issue, $5,000 to his father, E. Channing Potts, and the balance to fall back into the residuary estate; at the death of Mrs. Potts the income of the residuary estate to be divided between Mrs. Cox and Abram R. Cox, and at the death of Mrs. Cox the whole to be paid to Abram R. Cox for life, and at his death one-third of the principal to be paid to his widow and two-thirds to his issue, or, if he should leave no issue, one-half to the 'heirs at law' of the testator, and one-half to the 'heirs at law' of his widow, subject to the provisions for the widow of Abram R. Cox. The account was filed by the executors, Caroline E. Cox,

Digitized by Google

Abram R. Cox, and E. Channing Potts, September 18, 1891 (more than a year and a half after the probate of the will as above), charging themselves with principal of personal estate, $175,181, and income, dividends, etc., $86,899.41, making a total of $261,080.41. By the adjudication of that account, filed November 20, 1891, it appears that the testator's daughter, Mrs. Caroline E. Potts, had died in August, 1889, in his lifetime, and the $30,000 given in trust for her son, Robert T. Potts (the appellant), the grandson of the testator, were awarded to the trustee, in accordance with the will, with interest from the testator's death. The executors, who were represented before the auditing judge (Hanna, P. J.) by Charles Hunsicker, of the Montgomery county bar, attended also in person. They claimed and were awarded commissions, $9,433.52. The residue of the estate was awarded to the Fidelity Insurance, Trust & Safe-Deposit Company, in trust for the purposes of the will.

"In March, 1892, a petition was presented to the court by E. Channing Potts and Abram R. Cox, represented by Mr. Hunsicker, by which, after setting forth the death of the testator and the probate of his will, and stating that Mrs. Caroline E. Cox, his widow, had died 'on the —— day of ——, 1892,' and that the property, No. 1901 Spring Garden street, had not been sold in her lifetime, it was asked that the petitioners, as executors, might be permitted to sell it to Abram R. Cox for the sum of $24,000, which was believed to be a just and reasonable price. An indorsement upon this petition by the court called attention to certain points in which it was incomplete and defective, and nothing further was done with regard to it. A second account was filed by the surviving executors, Abram R. Cox and E. Channing Potts, January 18, 1893, by the adjudication of which by Judge Ashman, filed March 8, 1893, it appeared that Mrs. Cox's death had occurred December 28, 1891; that the legacies to her and to Abram R. Cox and to the Fidelity Insurance, etc., Company, in trust for Robert T. Potts, had been paid, and the residue of the estate transferred to the trustee, etc. The balance shown by the account, $2,982.20, less fee to counsel, $100, and clerk's fee, was also awarded to the trustee upon the trusts set forth in the will. The commissions of the two executors upon the moneys embraced in that account were $2,980.13 on personalty, $59,782.63, and $1,668 on realty, $55,600, making in all $4,657.13.

"As already stated, the appeal before the register, taken by E. Channing Potts, as next friend of his son, Robert T. Potts, was entered October 23, 1893, more than three years and eight months after the admission of the will to probate; and in view of the fact that in the meanwhile he had thus asserted in the most solemn way the validity of the will under which, as executor, he had acted, and by virtue of which he had obtained for himself large pecuniary emoluments, it is not surprising that counsel should 'find it desirable' to substitute as next friend in his place some third person to conduct the litigation which he now thought proper to institute. Apart from the fact that the personal estate embraced in the accounts has been thus distributed, the time for appeal from judicial acts of the register of wills is limited by the act of March 15, 1832, § 31 (Purd. Dig. 1476, pl. 18), to three years. The validity of the will has, therefore, become conclusively established, so far as concerns the personal estate of the testator. The act of April 22, 1856, § 7 (Purd. Dig. 509, pl. 12), it is true, gives five years for an appeal in case of real estate, and one year and four months of this period remained when this appeal was taken. Whether one who has accepted the provisions of a will effectually disposing of the personal estate of the testator can contest its validity, so far as relates to the disposition which it makes of his realty, is a question which perhaps admits of but one answer. See Van Dyke's Appeal, 60 Pa. St. 487; Cummings' Estate, 153 Pa. St. 397, 25 Atl. 1125. But, without stopping to consider the question of estoppel or election, it is obvious that, after permitting so long a time to pass after the probate, the person who now alleges the invalidity of the will ought to be able to support his attack by evidence of the most conclusive and satisfactory character, especially if he has delayed until the person most directly affected has died.

"The evidence offered falls very short of this. Four witnesses only testified on behalf of the appellant, and of these one did not make the acquaintance of the testator until a year after the execution of the will. Of the other three, two were physicians, who, while they asserted with considerable positiveness their opinions that he was without testamentary capacity, admitted that they had never attended him professionally, and that their knowledge was derived from casual meetings with him, during which they had never attempted to talk with him upon business or to test the extent of his ability to carry on a conversation. These gentlemen were offered as experts, and they were unable to give a single instance in which they had heard him give utterance to a foolish, insane, or incoherent remark, though one of them declared that he was 'blind, paralyzed, and demented.' To what extent this assertion was warranted by the facts will appear hereafter. The other witness of the three referred to had been in the testator's employ for a number of years as manager or superintendent of his business, which was that of ale and porter brewing at Norristown. He also expressed an opinion adverse to the ability of the testator to make a will, to take care of himself, or to attend to his affairs; and he testified that a former will, prepared by Mr. Hunsicker, not being satisfactory to the testator's wife, she had

Digitized by Google

taken him to a relative of hers, a lawyer in Trenton, by whom the present will was prepared, and that when it was sent from Trenton the testator declared that he did not understand it, and fell asleep while the witness was trying to read it to him. This witness, though he said that the testator always had to have an attendant while coming from a train in Norristown to the brewery,—a distance so short that the witness was able to see him upon his arrival to go to meet him,—admitted that he came from Philadelphia every day by himself, and that he probably was unassisted in going to and from his house at Nineteenth and Spring Garden to the station at Ninth and Green. He also admitted that all checks in the course of the business were signed by the testator, though prepared by the witness; that he knew the various persons employed at the brewery and their duties; and that he could 'understand for a little while,' though he was not capable of any prolonged mental effort, etc.

"The fourth witness, whose acquaintance with the testator, as stated above, began a year after the execution of the will, was also in his employ as manager, and his testimony was of much the same character as that of his predecessor, except that while the latter, in support of his assertion of want of testamentary capacity, referred to some instances of lewd behavior on the part of the testator, the former spoke only of his fondness for, and keen appreciation of, stories of a salacious character. All of this evidence, if uncontradicted, would not be sufficient to overcome the presumption in favor of the testamentary capacity; but it was opposed by the testimony of fifteen witnesses, stating facts, not mere opinions, which leaves not the least doubt upon the subject.

"It appeared that about 1881 the testator, finding his vision becoming impaired, consulted an oculist, who told him that nothing could be done to relieve him, as his trouble was caused by Bright's disease, from which he was suffering. This information naturally gave him great distress, and caused him to constantly brood over his condition. As the disease progressed, his eyesight failed still more, though it does not appear that he ever became totally blind. His nervous system was also much affected. His lower limbs were to some extent paralyzed, and he walked with a shuffling, unsteady step; occasionally falling, if not supported by the person accompanying him. He suffered with attacks of depression, and, when in great pain or distress, at times manifested his emotion by shedding tears. But he continued to go about, often unattended, almost to the time of his death. He was a director of one of the banks of Norristown, and was re-elected each year of his life; knew of the days of meeting, and was usually in attendance, voting intelligently upon the questions submitted for consideration by the board. He knew his acquaintances, and called them by name when he met them; recognized their voices where, on account of his defective sight, he failed to see them before they had spoken; and he talked with them rationally, and without the least indication of mental incapacity, upon the topics of ordinary conversation. The will was not drawn, as asserted by one of the witnesses on the part of the appellant, by a relation of Mrs. Cox. It was drawn by A. G. Richey, Esq., a lawyer of the highest standing, of the Trenton bar, from instructions given directly to him by the testator, to whom, when prepared, it was read and fully explained, and by whom it was fully understood at the time of signing; and it is by no means clear that Mrs. Cox, who was with him at the time, derived a greater benefit under the will than she would have had under the intestate laws. Moreover, Mr. Hunsicker, who is said to have prepared a prior will which this one supersedes, and who certainly was well able to judge of his testamentary capacity, became counsel for the executors, and acted in the settlement of the estate, in accordance with the provisions of the will now the subject of contest, from the time of its admission to probate until at least the application for leave to sell the Spring Garden street house in March, 1892, after the death of Mrs. Cox, in the preceding December. No verdict against the validity of this will would be permitted to stand. The issues are therefore refused, and the appeal dismissed."

W. W. Wiltbank and N. H. Larzelere, for appellant. John G. Johnson, for appellee.

PER CURIAM. Referring to the insufficiency of the evidence in this case, the learned auditing judge, in the conclusion of his opinion, rightly said: "No verdict against the validity of this will would be permitted to stand." He therefore refused the issues prayed for, and dismissed the appeal from the decision of the register of wills. In this he was sustained by the court in banc. All that can be profitably said on the questions involved will be found in the clear and satisfactory opinion above referred to, and on it we affirm the decree. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

DOWDALL v. O'ROURKE.

(Supreme Court of Pennsylvania. April 22, 1895.)

GARNISHMENT—EVIDENCE OF INDEBTEDNESS.

In proceedings by D. against O. as garnishee of W., the court properly directed a verdict for garnishee, though there was evidence that W. confessed judgments to D., O., and other creditors, O.'s judgment having precedence, and that, at the execution sale, O. bought the property used by W. in his drayage business, and, after conducting the business a while, gave W. $500, and, at his request, transferred the property to another person, and though certain witnesses testified that, after W. told O. he was going to confess judgment to him, O. said that all he wanted was what was due him, and that, if he bought

Digitized by Google

the property at execution sale, he would do the right thing by W., and, as soon as he got out of the business what was due, he would turn the property over to W., and though other witnesses testified that at a meeting of the creditors, before the execution sale, it was understood or agreed that O. should buy the property, and should return it to W. after the latter had raised enough to pay them what he owed them.

Appeal from court of common pleas, Philadelphia county.

Garnishee proceedings by Thomas H. Dowdall against John T. O'Rourke, garnishee of John W. Wisher, judgment defendant. Verdict was directed for garnishee, and plaintiff appeals. Affirmed.

John W. Wisher, being financially involved, confessed judgments to John T. O'Rourke, Thomas H. Dowdall, and other creditors. The horses, wagons, harnesses, and other property owned by Wisher, and used by him in his general teaming and drayage business, were sold under executions issued on the judgments, and bought by O'Rourke, whose execution had been lodged with the sheriff before the others. He paid part of the purchase price in cash, to release a lien on the property, and credit was given on his judgment for the balance of the price. After such purchase, Wisher was put in charge of the drayage business as O'Rourke's agent, and was paid therefor $25 per week. After O'Rourke had, as claimed by plaintiff, made some profits out of the business, he gave $500 in money to Wisher, and, at Wisher's request, transferred the property connected with the business to John S. Freemann, who made the purchase for Wisher. Plaintiff, Dowdall, claimed that garnishee, O'Rourke, made profits out of the drayage business exceeding the amount of defendant Wisher's indebtedness to him, and that this was due or belonging to Wisher, and therefore subject to the garnishment, because, as he claimed, O'Rourke agreed with Wisher and him and the other creditors to whom Wisher had confessed judgments, that, if he became the purchaser of the property at the execution sale, he would, after taking out of the profits of the business the amount of Wisher's indebtedness to him, turn over the business and property and remaining profits to Wisher, and that, relying on this, he and the other judgment creditors refrained from bidding at the sale, and O'Rourke bought the property for much less than its value.

Plaintiff makes 28 assignments of error,—26 of them to the exclusion of evidence, and 2 to the charge declaring that there was no evidence to sustain plaintiff's contention that garnishee had in his hands money or property due or belonging to defendant, and directing a verdict for garnishee. Defendant Wisher testified that, when he told O'Rourke he was going to confess judgment to him, O'Rourke said to him that all he wanted was what was due him, and, as soon as he got that, he would turn the balance and the teams over to him, and that when the other creditors, to whom he had confessed judgment, were present, O'Rourke said: "I am going to do the right thing by Mr. Wisher. I have got this thing in my hands, and I am first; and I assure you, gentlemen, I don't want anything but just what belongs to me." John F. Keator, who was counsel for Wisher at the time he confessed the judgments, testified that O'Rourke then said to him and Wisher that he had no desire for anything except the money that Wisher owed him; that he was his friend; and that, when he was paid off the money that was actually owed him, he would be ready to transfer the teams, if he should be fortunate enough to buy them at the sheriff's sale, to either Wisher or any one he might indicate. Plaintiff, Dowdall, testified that after the confession of judgments, and before the execution sale, it was agreed by the judgment creditors that O'Rourke should buy the teams, and, after Wisher had raised enough money to pay them what he owed them, the teams were to be turned back to him. Dowdall also testified in regard to the meeting: "I remember that Mr. Hinchman was not altogether satisfied at the meeting with O'Rourke being the trustee for the creditors, and afterwards O'Rourke bought Hinchman's claim, and I was agreeable to O'Rourke being the trustee, and that was the reason there was no other meeting. It was agreed after that. * * * That is my understanding of it." His testimony that he and others did not bid at the sale because of the agreement that the property was to be purchased by O'Rourke for the benefit of Wisher or his creditors was excluded. Maurice Fells, counsel for Dowdall at the time the judgments were confessed, testified that between that time and the sale there was a meeting of the creditors; that it was understood, though not positively agreed, that O'Rourke should buy the property, and that whatever he would buy would be to pay himself, and the rest of the money should go to the other creditors; and that, when they separated, it was the intention that another meeting should be called by O'Rourke to make a definite arrangement, but none was called.

John F. Keator, John S. Freemann, and Owen B. Jenkins, for appellant. W. Horace Hepburn, for appellee.

PER CURIAM. We find no substantial error in either of the rulings of the learned trial judge. He was clearly right in holding that the evidence was insufficient to sustain plaintiff's contention, and in directing a verdict in favor of the defendant garnishee. There is nothing in either of the specifications that requires discussion. Neither of them is sustained. Judgment affirmed.

Digitized by Google

BRADFORD v. BOLEY.

(Supreme Court of Pennsylvania. April 29, 1895.)

INTOXICATING LIQUORS—CIVIL DAMAGE LAW—INJURY TO PROPERTY—IMPRISONMENT OF HUSBAND — PROXIMATE CAUSE — CONTRIBUTORY NEGLIGENCE.

1. The interest of a wife in the earning power of her husband is not property, within Act May 8, 1854, declaring that one unlawfully furnishing intoxicating drinks to another shall be liable for injury to "person or property" in consequence of the furnishing. She cannot, therefore, recover because of his imprisonment for an act committed while intoxicated.

2. The imprisonment of one for an act committed while intoxicated is not the proximate consequence of the liquor dealer's unlawful negligence in selling to him while intoxicated; the law having intervened, and become the proximate cause.

3. Where a husband, on receiving his wages, was accustomed to deposit them with his wife for family use and for safe-keeping, and when about to enter on a spree, or in the midst of one, would apply to his wife for money to carry it on, the fact that she, comprehending his purpose, let him have it from the deposit, is not such contributory negligence as will prevent her recovering against a liquor dealer for injuries from his unlawful furnishing of liquor.

Appeal from court of common pleas, Allegheny county.

Action by Ella L. Bradford against Samuel C. Boley. Judgment for plaintiff. Defendant appeals. Reversed.

Defendant's first specification of error was the refusal of his first point, which point and answer are as follows: "If the jury find from the evidence that the plaintiff, during the last nine years, supplied her husband weekly with sums of money ranging from three to five dollars, which she knew he used in his weekly sprees, and if the jury further find that he was continuously drunk from the 30th June to 11th of July last on money furnished by her, and that she even provided him with money on the 11th of July, which he spent for drinks at defendant's saloon or elsewhere, it is such contributory negligence to the injury complained of as will prevent her from recovering in this action. Answer. The first point is refused. The evidence does not justify the finding asked for; the evidence being that the wife was but custodian of her husband's money, which he, at his pleasure, had a right to demand. It is an entirely different case from what it would be if the plaintiff, Mrs. Bradford, had, from her own resources, voluntarily furnished her husband money, which she knew he would use for the purchase of liquor, which he could not otherwise have obtained. If that were the evidence, it might be for the jury to say whether or not the wife was guilty of contributory negligence."

Henry Meyer and R. S. Martin, for appellant. K. T. Meade and James C. Doty, for appellee.

McCOLLUM, J. This is an action brought by a wife to recover damages for the imprisonment of her husband for the crime of voluntary manslaughter. It is based on section 3 of the act of May 8, 1854, which provides that: "Any person furnishing intoxicating drinks to any other person in violation of existing laws, or of the provisions of this act, shall be held civilly responsible for any injury to person or property in consequence of such furnishing; and any one aggrieved may recover full damages against such person so furnishing, by action on the case instituted in any court having jurisdiction of such form of action in this commonwealth." The facts which were regarded by the learned court below as sufficient to sustain the action are substantially as follows: John Bradford, the husband of the plaintiff, was an industrious man, and capable of earning good wages. It was his custom, on receiving his wages, to deposit the most of them with his wife, for family uses and for safe-keeping. For several years preceding the occurrence in question, he was in the habit of drinking to excess on Saturday evenings, on Sundays, and whenever he was out of employment. While he had work to do, his excesses in this respect were limited to the evenings and days mentioned. Frequently, when about to enter upon a spree, or in the midst of one, he applied to his wife for money to carry it on; and she, comprehending his purpose, let him have it from the deposits he made with her as above stated. On the 30th of June, 1892, the mills in which he was employed were closed for repairs; and thenceforth, until and including the day of his arrest, he was idle, and the most of the time under the influence of liquor. The afternoon and evening of that day, he was in the saloon of the defendant. He bought and drank liquor, and was intoxicated there. While in a state of intoxication, for which the defendant was at least partially responsible, he became involved in a quarrel with Floyd, in which he received a blow in the face, and shot his antagonist, who died in consequence of the injury thus inflicted. Bradford was arrested, indicted, and tried for murder, convicted of voluntary manslaughter, and sentenced to imprisonment for 12 years. The important question before us, on these facts, is whether the imprisonment of the husband can be regarded as a consequence of the unlawful act of the defendant, for which the statute has given the wife a right of action.

It is settled that the furnishing of intoxicating liquor to a person of known intemperate habits, or obviously intoxicated at the time, is an act of unlawful negligence, and if it results in the death of such person, as a proximate consequence of it, his widow, children, or parents may maintain an action against the party so furnishing the liquor, and recover from him compensation for their loss, to the extent of their pecuniary interest in the life of the deceased. Fink v. Garman, 40 Pa. St. 95. To the same effect are the other cases referred to by the learned court below as sup-

Digitized by Google

porting its conclusion in this case. It must be borne in mind, however, that these were actions for injuries caused by unlawful negligence, and resulting in death, and that they were based on the act of April 15, 1851, which "created a cause of action wholly unknown to the common law"; and the plaintiffs in them were persons who, under the act of 26th April, 1855, were "entitled to recover damages for an injury causing death." But these acts did not give a wife an action for negligence resulting in the imprisonment of her husband, or the impairment of his earning power, nor did she have it by the common law. It is therefore incumbent on her, in the assertion of a claim of this character, to point to the statute which gives her an action for it. In the case under consideration, the plaintiff relies on the act of May 8, 1854, the material part of which we have already inserted in this opinion. That she may, by virtue of its provisions, maintain a suit against the defendant for an injury to her person or property in consequence of his unlawful negligence, is clear; but it does not expressly, or by necessary implication, give her an action for an injury to the person or property of her husband. Is her interest in his earning power property, within the meaning of the statute? Does it give her an action for an injury to him which for a time impairs or prevents the exercise of this power? It seems to us that these questions should be answered in the negative. If the statute is construed as giving her an action for such an injury, its results are neither logical nor harmonious. It does not, standing by itself, authorize an action for an injury which destroys her pecuniary interest in her husband, but it gives her an action for an injury which merely detracts from its value. It makes the furnishing of intoxicating drinks to him, if he is of known intemperate habits, or when he is drunk, an act of unlawful negligence, and, if his earning capacity is injuriously affected by it, gives him a suit against the wrongdoer for damages, when, for any other act of unlawful negligence, having precisely the same effect upon her pecuniary interest in him, she has no action by the common law or by statute. That the legislature may give her an action for an injury which impairs his earning power, and thereby partially deprives her of the support he should afford her, is not denied, but that it has done or intended to do so in the statute we are considering is not apparent. In no case brought to our notice has it been held that an action for injury to property embraced a claim of this character. In all the statutes relating to damages occasioned by the unlawful furnishing of intoxicating drinks that have come under our observation, except the one now before us, actions are given for injuries to the person, to property, and to means of support. The law applicable to these actions, and pertinent to our question, is thus summarized in 3 Am. & Eng. Enc. Law, pp. 261, 262: "Where damages are claimed for injuries to the person, actual injury must be proved. Where no actual violence by the husband—no physical injury to the person or health of the wife—is shown she cannot recover. Where a person squanders money or chattels, or destroys or injures other property belonging to his wife or any other party, while intoxicated, an action for damages by the owner of the property will lie against the party who sold the liquor which produced the intoxication, to the amount of the value of the property destroyed, or the amount of the injury. Wherever any one is legally under obligation to support another, as a husband his wife, or parents their children, the statutes provide that if, in consequence of intoxication or habitual drunkenness of the husband or parent, those dependent on them for support are injured in such support, the person so injured shall have a right to an action for damages against the seller of the liquor producing the intoxication or habitual drunkenness." The cases cited as sustaining this summary show that, while the injuries proceed from the same negligent act, the subjects of them are distinct and independent, and that actions given for injuries to person or property do not include injuries to means of support. It may be affirmed, as a general proposition, that the right of action for an injury to person or property is in the party whose person or property is injured, and that the statute which gives to another person an action for the consequences of such injury must do so in plain terms, or by necessary implication. It is a strained and unjustifiable construction of the act in question which allows a wife, in the lifetime of her husband, to maintain a suit for an injury to his person which diminishes his capacity for labor.

There is another objection to the plaintiff's claim which appears to us to be well taken. It is that the imprisonment of her husband is not the proximate consequence of the unlawful negligence of the defendant. It is the act of the law,—the direct result of the intervention of an independent agency or force. True, Beers v. Walhizer, 43 Hun, 254, appears to conflict with this view, and was regarded by the learned court below as a sufficient answer to the objection that the furnishing of the liquor was not the proximate cause of the imprisonment. But that case was based on a statute which, in plain terms, gave the wife an action for an injury to her means of support, and was construed as extending to and embracing the remote as well as the direct consequences of the unlawful negligence. The decision in Beers v. Walhizer is therefore not only opposed to the common-law rule on this subject, but to our construction of the act of May 8, 1854. In Fink v. Garman, supra, this court, speaking of the defendant's unlawful negligence in the sale of the liquor, said: "His act must be what we call the 'proximate cause' of the injury complained of. If the proximate cause was compounded of his act

Digitized by Google

and the unlawful act of the decedent, the civil liability is gone." For these reasons we decline to assent to the proposition that this case is governed by Beers v. Walbizer.

We do not think that, in view of the evidence in this case, there was any error in the refusal of the defendant's first point. In accordance with these views, we overrule the first specification of error, and sustain the other specifications. Judgment reversed.

MACOMBER v. MACOMBER et al.

(Supreme Court of Rhode Island. Aug. 1, 1894.)

NOTE AS PAYMENT—DISTRIBUTION OF ESTATE.

1. The fact that a note was received in payment of a debt may be proved from the circumstances surrounding the transaction, though there may have been no express agreement to that effect.

2. Where notes given claimant in payment of his share in decedent's estate were based on a settlement which the court subsequently annulled, they were properly disallowed as payment, and the amount due claimant was thereby left to be determined de novo.

Bill in equity by Mary B. Macomber, administratrix, against Joseph E. Macomber and others. Exceptions to master's report. Overruled.

Wm. P. Sheffield and Wm. P. Sheffield, Jr., for plaintiff. Richard E. Comstock and Nathbone Gardner, for respondents.

PER CURIAM. We are of the opinion that the master did not err in refusing to recognize the settlement of August, 1879, as of any force, and in requiring the respondents to give an account of their dealings with the estate of Isaac Borden from the time of the settlement of their second account with the court of probate in the same manner as though the settlement of August, 1878, had not been made. That settlement had been annulled and set aside by the decree of the court under which the account was to be taken. The notes of the respondent Joseph E. Macomber, which the respondents claim were received by William P. Macomber in payment of the sums due him from the estate of Isaac Borden, were based on, or grew out of, the settlement which had been annulled and set aside. The ground on which they were disallowed as payment by the master was that by the law of this state a note does not operate as payment unless received as such under an express contract to that effect. We presume this opinion of the master rested on a remark of Chief Justice Ames in Wheeler v. Schroeder, 4 R. I. 388. We do not think that an express contract is necessary in order that a note shall operate as payment, and that the fact that it was so received may be proved by the circumstances attending the transaction, even if there may have been no express agreement to that effect. Wilbur v. Jernegan, 11 R. I. 113; Nightingale v. Chafee, Id. 609. But, in view of the fact that the notes in question grew out of the settlement which had been annulled, we think that the master properly disallowed them as payment. The settlement having been annulled, the master also properly charged the respondents with interest on the share of the estate belonging to the said William P. Macomber from the time he attained his majority till the date of said settlement. The respondents contend that, as no mention of interest is made in that settlement, William P. Macomber, by accepting the property set apart, and giving his receipt for it as his share according to the settlement, waived his claim for interest prior thereto. In reply it may be said that the interest during the period mentioned may have been taken into account in the valuation of the property set apart to him in the settlement; but, whether this be so or not, the settlement itself having been annulled, left the amount due to him to be determined precisely as though it had never been made. We see no reason to disturb the finding of the master on the evidence that the note for $5,000 was not surrendered to the respondent Joseph E. Macomber by the said William P. Macomber as a donatio causa mortis. The respondents' exceptions to the master's report are overruled, and the report confirmed.

BEAKHURST et ux. v. CRUMBY et ux.

(Supreme Court of Rhode Island. Sept. 28, 1894.)

DISTRIBUTION OF ESTATE—ADVANCEMENTS.

Where a deed by a mother to her son stated an express consideration, when in fact no consideration actually passed at the time, but it was made because the son had for more than 17 years turned over his earnings to her, and during that time had cared for and improved her property, the conveyance will not be held an advancement in a distribution of the mother's estate. 30 Atl. 453, affirmed.

On rehearing. Denied.

For former report, see 30 Atl. 453.

TILLINGHAST, J. The complainants move for a reargument of this case on the grounds (1) that the court has erred in its conclusion as to the facts relating thereto, and (2) that the complainants' counsel did not have sufficient time at the former hearing to properly present their case to the court. As to our conclusion of facts in the case, it was arrived at after long and patient study and consideration of all the testimony submitted (the same comprising 345 pages of typewritten matter), together with a consideration of the full and well-arranged briefs of the respective counsel in the case. It is a case which depends entirely upon the testimony, much of which is more or less conflicting; and the very fact that the court itself was divided in opinion as to the effect thereof shows that it is one in which different minds may fairly reach different conclusions. A re-examina-

Digitized by Google

tion of the grounds upon which our decision was based, taken in connection with the criticism of plaintiffs' counsel upon said decision, fails to satisfy us that we were wrong therein. We think the evidence, taken as a whole, does show that an adequate moral consideration for the conveyance in question did exist, and also that it was recognized by Mary Crumby in connection with the making thereof. That such consideration existed is abundantly shown by the proof that practically all of the earnings of Hilton Crumby for 17 years or more went into his mother's hands, and were used by her as she saw fit, and by the further proof of the services rendered by him to his mother in improving and taking care of her property, he simply receiving from her, during all of this time, his bare living in return therefor. Nor was the total amount earned by him during all of these years inconsiderable, as persistently claimed by complainants' counsel; for, while there is but little direct proof of actual cash payments made to him by his employers, a fact upon which overmuch stress is laid by counsel, there is most satisfactory proof that he worked as continuously and earned as much as ordinary men of his craft; and it is certainly fair to infer that he received the wages of his labor. That Mary Crumby recognized the fact that she was morally indebted to her son Hilton, that he had fairly earned the property in question, and that the conveyance thereof to him was not made merely on account of love and affection, and was not intended as an advancement, is fairly to be inferred from her conduct, taken in connection with the various statements made by her to several of the witnesses called by the respondents. The deed itself from Mary to Hilton shows prima facie that the conveyance was not made by way of advancement, but for a valuable consideration; and all of the testimony which has any bearing upon that branch of the case tends to show the same thing. And, although no money actually passed from Hilton to his mother at the time of the conveyance, yet it sufficiently appears that the property conveyed to him represented in her estimation the product of his labor, and justly belonged to him. But it is urged that to allow the conveyance to Hilton Crumby to operate as an ordinary deed for a valuable consideration will result in an unequal, and hence inequitable, distribution of the property of Mary Crumby among her children; and, furthermore, that whatever moral consideration existed in favor of Hilton Crumby in connection with, and as the moving cause for, the making of the said conveyances to him, also existed in a stronger degree in favor of his sister, Mrs. Beakhurst. It is true that, in determining whether or not a certain transaction between a parent and child is an advancement, the maxim of equality, and that each and every child has an equal moral claim on his property at his death, must always be borne in mind; that, as said by Thornt. Gifts & Adv. p. 509, "inequality is not to be presumed, nor favoritism nor preference for one child to the injury of another." But this doctrine in no wise militates against the right of the parent to recognize the fact that by reason of longer and more valuable services rendered by one child than by another the former is morally entitled to be compensated therefor, and to render such an equivalent as he may see fit. Indeed, such a transaction is not only not in conflict with the rule above stated, but, on the contrary, directly tends to promote the same. As to the contention that Mrs. Crumby was under as strong, and even stronger, moral obligation to make the conveyance in question to Elizabeth as to Hilton, or, in other words, that she had earned as much of the property owned by the mother as he, we have only to say that the proof submitted does not sustain it. Elizabeth was married in 1872, when at the age of 26, and of course ceased from that time to turn over her earnings to her mother, while Hilton continued to turn over his until 1888, at least, when he also got married. The deed from Mary to Hilton was not made until August, 1883, while that from the Omans to Mary and Hilton was not made until 1884, which was 12 years after Elizabeth had ceased to turn over her earnings to her mother. Hilton must therefore have contributed much more to the common fund, if such it may be called, at the time of said conveyances, than his sister, and a moral obligation was thereby created on the part of the mother to compensate him for this excess. That she recognized both the fact and the obligation arising therefrom, and acted thereon, appears to us to be fairly shown in evidence. The falling off in the savings-bank deposits of Mrs. Crumby after the daughter left home is a fact upon which much stress is laid by complainants' counsel as showing that it was largely by her earnings that said deposits were made. But the proof shows that another cause also existed for said falling off, namely, that, soon after the daughter left home, the mother, by reason of failing health, was able to work only a small portion of the time, and then simply as a spare hand in taking the place of other operatives in the mill in case of sickness and the like. It also appears that quite a portion of Hilton's time was required in repairing and taking care of his mother's real estate, which evidently prevented him also from contributing as much to said deposits as he otherwise would have done.

As to the second ground upon which a reargument is asked, namely, that sufficient time was not allowed by the court to the complainants' counsel to fully present their case, we fail to see that there is any reason for such a claim. The case occupied considerable time (three hours or more, as we recollect it); it was carefully and skillfully argued by counsel, and the points were also well presented in their printed brief. It be-

Digitized by Google

ing a case which depends entirely upon the evidence as reported, and, as before stated, having been carefully considered by us after a full hearing of the case, we do not think that the complainants are entitled to a reargument. Motion for reargument denied.

LANDIS v. SEA ISLE CITY HOTEL CO. et al.

(Court of Chancery of New Jersey. April 12, 1895.)

CORPORATIONS—FRAUD OF DIRECTORS—LIABILITY TO STOCKHOLDERS—RIGHTS OF CREDITORS.

1. The directors of a corporation formed to build an hotel purchased, for its site, from themselves, the equitable title to a portion of a tract of land, at a 200 per cent. profit to themselves, and subsequently manipulated the legal title so as to render the land unavailable for the purpose of raising a loan by mortgage, and, when only $25,000 in stock had been subscribed, they contracted, on the part of the corporation, for the erection of improvements involving an outlay of $90,000, in order to themselves realize a profit from the sale of the remainder of the land. On the insolvency of the corporation, they virtually became the owners of the land and improvements, leaving nothing for the stockholders. *Held*, that the directors were liable to the stockholders for the depreciation or entire loss of the value of their stock, though in the contract for the improvements the fair equivalent for the money spent was received by the corporation.

2. Where the directors of a corporation, by gross negligence in the management of the corporation, wreck it, the stockholders may sue the directors for damages without first suing to set aside apparently valid incumbrances created through the connivance of such directors.

3. The fact that, after the directors of a corporation have practically wrecked the corporation through their gross negligence, a stockholder becomes a director, and attempts to retrieve the loss, does not constitute a waiver of their liability to him for such misconduct.

4. A stockholder may sue directors of a corporation, in his own name, for the benefit of himself and of such stockholders as choose to come in, for damage arising from their gross negligence in the management of the corporation, without first asking the directors to commence the suit, or attempting to procure the corporation to do so, where this would plainly be a waste of time.

5. The directors of an ordinary corporation do not bear the relation of trustees to the corporate creditors, so as to render them liable to the creditors for the negligent management of the ordinary business affairs of the corporation, especially where the mismanagement occurred before the debts were incurred, and where they have not diverted corporate assets from the general purpose of paying corporate debts.

Bill by Charles K. Landis against the Sea Isle City Hotel Company and others to hold certain directors of defendant corporation liable for the value of his capital stock, and also for certain moneys advanced to the corporation which it is unable to repay.

Charles K. Landis, Jr., and Howard Carrow, for complainant. Samuel W. Beldon, for defendants.

PITNEY, V. C. The complainant is both a stockholder and a creditor of the defendant the Sea Isle City Hotel Company. The other defendants were directors of that company. The persons named as defendants by reason of their being directors or officers were Michael J. Kelly, Edward Foerderer, George H. Becker, Charles Class, and S. W. Goodman, all nonresidents, and were so returned by the sheriff. An order of publication was taken against them, with the result that Kelly, Class, and Goodman appeared and answered. Foerderer, by counsel, obtained leave for time to answer, but did not. The object of the bill is to hold the individual defendants liable for the amount paid by the complainant for his capital stock, and also for certain moneys lent and advanced to the corporation which it is unable to pay. The facts are as follows: The corporation defendant was organized under the "Act to encourage the establishment of mutual loan, homestead and building associations," approved April 9, 1875 (Revision, p. 92). It was incorporated on the 30th day of August, 1887, by articles of association executed on that day by the defendants Kelly, Goodman, Class, together with Messrs. George H. Becker and Edward Foerderer, and filed in Cape May clerk's office, August 31, 1887. The object of the company therein stated was this: "For the purpose of assisting those who are now or may hereafter become members thereof in acquiring real estate, building an hotel thereon, and making other improvements thereon, and removing incumbrances therefrom by the payment of periodical installments." The certificate of organization further stated that the name of the association should be the "Sea Isle City Hotel Company," and that it was to be located and do business in Sea Isle City, N. J. The first meeting of the promoters of the enterprise was held on the 22d of August, 1887, and then it was declared that there should be 2,000 shares, at $25 a share, making $50,000. Another meeting was held on the 29th, the day before the legal organization, at which 40 persons were present, and a constitution previously prepared was then read and adopted. This was not produced and put in evidence. It was then stated that the Sea Isle City Lot Association No. 2, another corporation of Sea Isle City, organized the previous July, under the same act, had offered to sell the company block No. 88, comprising 21 lots (numbering from 21 to 41, inclusive, on the association's plan), at $460 a lot (not counting lots Nos. 25 and 26, for which no charge was made), making a total price of $8,740. It was then resolved to build an hotel, the cost of which, complete and furnished, with the cost of the lot, should not exceed $60,000, the building itself to cost not more than $35,000. At the same meeting it was resolved to procure plans and specifications for an hotel. It was then reported that 834 shares of stock were subscribed for, and some payments made. On the 6th of September, nearly a week after the legal

Digitized by Google

organization, ten directors were elected, among them being Kelly, Goodman, and Becker, three individual defendants herein. Besides these, Class was elected president, and Foerderer treasurer, who were not named as directors. At a meeting of the directors immediately after this election, at which all the defendants were present, Goodman was elected secretary, and the minutes state that his election as secretary vacated his office as director, and thereupon J. C. Hungerbuehler, who had received the next highest vote for director, was admitted to a seat as director in his place, and Goodman appears not to have acted as director. Immediately after this action, it was resolved that "block No. 88 on the land of the Sea Isle City Lot Association No. 2 be deeded [sic] and paid for in the same manner as other lot holders do in said association." The by-laws of Association No. 2 on this subject provided that the capital stock should not exceed $400,000, divided into shares of $460 each, one share to entitle the holder to one lot; subscription fee to be $20, and after-payments to be $10 per share, to be paid monthly thereafter. The minutes show no further record of the purchase of the land, but payments were made from time to time to Lot Association No. 2, apparently in regular monthly installments, commencing October 17, 1887, until they amounted (August 15, 1888) to $2,660. During the fall of 1887 contracts were entered into for the building of an hotel at a contract price of $37,000. In addition to that would be the furniture and apparatus for lighting, heating, water supply, elevator, and various other things not included in the contract. The complainant was a subscriber for 20 shares of stock, amounting to $500, which he paid in regular installments, commencing on the 6th of September, 1887, and ending on the 23d of May, 1888. On the 6th of July, 1888, he loaned the defendant corporation $1,536.87; on the 6th of August, $1,505.41; and on the 12th of September, $1,410.30,—total, $4,452.58, under circumstances to be stated hereafter. He also became a creditor for a further smaller sum, upon which he had obtained judgment against the company before bill filed. The total amount received by the officers of the company for subscriptions on account of capital stock was a little less than $27,000. All other receipts by the company were either borrowed money or rent of the hotel. The defendant corporation, in the year 1889, became hopelessly insolvent, and the whole of the complainant's investment in stock and also money loaned is lost. The situation of the company in this respect is thus stated in the answer: "(7) They admit that the said company is altogether insolvent; that it has forfeited its interest or estate in the real estate mentioned, by default in payment, and is only possessed of the said hotel building, which, in answer to the special interrogatory in said bill contained, these defendants aver is its only property of any kind of which they are informed or have knowledge, and upon which are liens, by way of mortgage, judgment, and mechanic's lien, greatly in excess of its present value."

The precise ground upon which complainant rests his case, so far as relates to the amount paid for stock, is that the directors and officers of the defendant corporation, including those who have been brought in, and either appeared or answered, were guilty of misappropriation of the funds of the corporation; that they made payments in cash to the extent of $2,660 to Syndicate No. 2, on account of the block of land purchased, without receiving the title or any written contract for it, or any reasonable assurance that they ever would ultimately acquire it; that the contract for the erection of the hotel was entered into before any proper provision was made for funds to pay for it; and that all the money actually invested in the building was a mere waste, for the reason that there was no reasonable expectation of getting title to the land upon which it was placed; and, further, that the expenditure actually made was wasteful in itself, and that the funds were not applied in good faith to the actual building of the hotel, but were wasted with criminal negligence.

With regard to the title to the land on which the hotel was built, the facts, which are complicated, are as follows: There existed, prior to the creation of either of the corporations just named, a corporation known as the "Sea Isle City Improvement Company," of which the complainant was the president. That company owned a large tract of land in and near Sea Isle City, a certain portion of which was oblong in shape, and was laid out in building lots, so that one side of it fronted on Marine Place, which appears to be an ocean beach drive, and the other side fronted on Landis avenue, abutting on one end on Devon street, and on the other end on Ohio avenue, and being crossed by divers other avenues. It comprises, as laid out on Mr. Landis' map, 224 lots, divided into 11 blocks; and each block is intersected lengthwise by a street which is marked on the map as "Pleasure Railroad." One of these is block No. 88, referred to in the minutes of the defendant corporation. By deed dated June 4, 1887, proved on that day, and recorded on the 6th of July, 1887, the Sea Isle City Improvement Company, for an expressed consideration of $42,400, conveyed the 224 lots of land, comprised in the 11 blocks of land just mentioned, to Otto G. Kuehne, who was a mere man of straw, and had no interest in the transaction. Kuehne gave back a mortgage to the Sea Isle City Improvement Company to secure $30,400 of the consideration mentioned, payable at any time within five years, with interest at 5 per cent. per annum. This mortgage left an apparent cash payment

Digitized by Google

of $12,000; but, in point of fact, only $3,520 was paid in cash, the balance, of $8,480, representing a commission or rebate of 20 per cent. on the price named, given by the grantor either to Mr. Kelly, defendant herein, who acted as a broker in the sale, or to the parties hereafter mentioned whom Kuehne represented, of whom Kelly was one. The sum of $42,400 was made up by fixing a price of $200 a lot on 212 lots out of the 224 sold, the other 12 being misshapen and thrown in without charge. This made the actual price paid for the lots $33,920, composed of mortgage $30,400, and cash $3,520, or precisely $160 per lot, instead of $200. The cash payment of $3,520 was furnished by a syndicate of 14 gentlemen, called, in the evidence, "Syndicate No. 2," who shortly afterwards formed themselves into a corporation called the "Sea Isle City Lot Association No. 2." In the evidence this corporation is sometimes called "Syndicate No. 2"; but that name properly belongs to the 14 original promoters of the corporation proper, who became its officers and directors. This corporation was formed by articles of association entered into on the 6th of July, 1887, by the defendants Kelly, Goodman, and three others, who at that time executed articles of association, under the statute above referred to, by which they adopted the name of the Sea Isle City Lot & Building Association No. 2, which certificate was filed in the Cape May county clerk's office on the 11th of July, 1887. On the same day (July 11, 1887), Kuehne executed a declaration of trust, dated and recorded on that day, in which he declared that the cash payment made on the conveyance from the Sea Isle City Improvement Company to himself, which is therein stated at $12,000, was made by George H. Becker and his associates, known as "Sea Isle City Lot Association No. 2"; and that he held the property in trust for the use and benefit of said Becker and his associates, known as "Sea Isle City Lot Association No. 2." This declaration undoubtedly vested the equitable title in the corporation proper just created, as distinguished from the 14 gentlemen who were its promoters, and were known as "Syndicate No. 2." By deed dated July 11, 1887 (but, in fact, executed in November, 1887), Kuehne, together with 14 others, for whom it was declared Kuehne held the title in trust, among whom are Kelly, Class, and Goodman, three individual defendants in this suit, conveyed all the premises so previously conveyed to Kuehne to one Jacob Weil (also a man of straw), in consideration of $54,400, subject to the mortgage of $30,400, previously given by Kuehne to the Sea Isle City Improvement Company. By deed of mortgage of the same date (July 11, 1887), but actually executed in November, 1887, Weil mortgaged the premises to Owen J. McCafferty, another man of straw, to secure the payment of $54,400 in five years from the date, with interest at the rate of 6 per cent. per annum, "and all sums which might be assessed under the laws of Pennsylvania for taxes upon the principal sum or upon the interest, whenever and as often as the said taxes shall be payable." By deed of conveyance of the same date (July 11, 1887), but executed in November, 1887, Jacob Weil conveyed the premises, less 10 lots (none of which are those here in question), to James P. McGuigan, also a man of straw, subject to the two mortgages of $30,400 and $54,400, in trust for the stockholders of Sea Isle City Lot Association No. 2, the corporation organized as aforesaid on July 6, 1887, with provisions for the conveyance of individual lots to the individual subscribers to the stock of said association. These three conveyances purport to have been executed and acknowledged before a notary public of the city of Philadelphia on the 11th of July, 1887. The notary so certifies. That certificate is false. It appears, clearly, that they were not prepared or executed until just before they were recorded, November 15, 1887.

It will be remembered that Kuehne executed a declaration of trust dated July 11, 1887, which was recorded on that day, declaring that he held the property in trust for George H. Becker and his associates, known as "Sea Isle City Lot Association No. 2." This instrument was prepared by the complainant, presumably by request of Becker and the other parties paying the money. Becker was one of the 14 persons called "Syndicate No. 2." Another of the 14 persons originally interested in the enterprise was Mr. Gorman, of the Philadelphia bar, who, however, happened to be absent in Europe at the time Kuehne executed the first declaration of trust (July 11, 1887). Upon his return from Europe, he, for the purpose of overriding the original declaration of trust prepared by the complainant, and actually executed by Kuehne, July 11, 1887, prepared a new declaration of trust to be executed by Kuehne (the man of straw) in favor of the 14 gentlemen named, and also the deed above mentioned from Kuehne to Weil (another man of straw), and the mortgage of $54,400, to be executed by Weil to McCafferty (another man of straw), and kept possession of the bond and mortgage, with a declaration executed by McCafferty that it was held by him for the benefit of the same 14 persons; also the deed from Weil to McGuigan (another man of straw). He procured all these instruments to be executed, and induced a notary of Philadelphia to falsely certify that they were so executed and acknowledged before him on the 11th day of July, 1887. The object of this false certificate was, manifestly, to prevent the shareholders in Association No. 2 from having the benefit of the purchase of the 224 lots from the Sea Isle City Improvement Company (complainant's corporation), which they would undoubtedly have under the declaration of trust which was actually executed on July 11, 1887, and to give the profits of that purchase

Digitized by Google

to the 14 gentlemen composing Syndicate No. 2.

Another fact may as well be again mentioned just here. As has been stated, the conveyance from the complainant's company to Kuehne was in consideration of $42,400, which was $200 a lot for 212 lots. The mortgage back from Kuehne to the complainant's company was for $30,400; and the deed from Kuehne and his 14 cestuis que trustent to Weil recites that $12,000 cash of the purchase money was paid by the 14 gentlemen named to the complainant's company on account of the lots. One of the 14 was Michael J. Kelly, one of the defendants herein. The sum of $12,000, however, was not paid in cash. Only $3,520 was actually paid, 20 per cent. of the whole sum ($42,400) being allowed by the complainant, as president of his land company, to Mr. Kelly, for negotiating the sale. Kelly was not the agent of the complainant's company, but negotiated the purchase on behalf of his 13 associates, and, so far as there is any evidence on the subject, it tends to show that they all got the benefit of it; so that the actual cost of the lots to the syndicate of 14, including the mortgage, was $33,920, or $160 a lot, instead of $200, and in that are not counted several misshapen lots.

At the time of the so-called "contract" of purchase by the hotel company, the matter stood thus: The whole number of lots purchased by Syndicate No. 2 from the Sea Isle City Improvement Company, of which complainant was president (not counting the 12 misshapen and comparatively worthless lots), amounted, at $460 a lot, to about $96,800. Of this amount, $30,400 was represented by the mortgage held by Mr. Landis' company, and the other $54,400 mortgage represented the cash paid by the 14 original associates, and a part of the $300 profit on each lot which they proposed to make upon their sale, and at that price ($460 a lot) they were sold—if it may be called a "sale"—to the hotel company. The mortgage given by Weil to McCafferty for $54,400 was held in trust for the benefit of the 14 original projectors, and the plan was that, as soon as the whole $8,740 (the consideration money for the 21 lots to be sold to the hotel company) should be paid to Association No. 2, the lots would be released, not only from the McCafferty mortgage, but also from Kuehne's mortgage to the original grantor, the land company, of which Mr. Landis is president. The officers and directors of the defendants' company consisted of a president, vice president, treasurer, and ten directors, of whom the president, Class, vice president, Weil, and six out of ten of the directors—Kelly, Goodman (immediately superseded), Becker, Mayer, Wolters, and Knapp,—that is, eight in all,—were cestuis que trustent named in the Kuehne deed, and formed a majority of the 14 persons known as "Syndicate No. 2," and were also directors of the Sea Isle City Lot & Building Association No. 2, and formed a majority of its board of directors, and also formed a majority of and controlled the board of directors of the hotel company. These eight persons, officers and directors of the hotel company, were all present when the resolution of September 6, 1886, was adopted to purchase the 21 lots, at $460 a lot, from Association No. 2. Mr. Landis swears that his understanding when he subscribed to the 25 shares of stock in the hotel company was that it should be let into the Sea Isle City Lot & Building Association No. 2 to buy its lots at their actual cost, viz. $160 each, which would have made the price of the 21 lots, less two misshapen ones, $3,040, on the payment of which amount his company would have released the lots to them. His statement in this behalf is attempted to be denied and contradicted, but I have no reason to disbelieve it. The 14 promoters of the land scheme involved in Association No. 2 were very anxious to have the hotel built as soon as possible, for the reason that they believed that its establishment would promote the sale of their remaining lots, and hasten the realization of their profits, and herein is found an explanation of their conduct.

The complainant's complaint is not only that there was, as above stated, a general mismanagement of the affairs of the company, and wastefulness of its funds, but that it was a fraud upon the stockholders at large for the officers and directors of the hotel company to purchase these lots of Association No. 2 at the price of $460 a lot (which price would have gone into their own pockets); and, further, that it was a gross neglect for them to enter into a contract to build a hotel without seeing to it that they had enough funds provided to finish and furnish it, and without having such control of the title of the land upon which it stood as that they could raise money by mortgage upon their property, and thus save themselves from being driven into insolvency. No written contract inter partes for the purchase of the hotel site was ever entered into between the hotel company and Association No. 2. The hotel company had nothing in writing to show for its purchase, except a resolution said to be entered on the minutes of Association No. 2, which, however, was not produced. Such was the condition of affairs when the contract for the erection of the hotel was entered into, about December 1, 1887. At that time subscriptions to capital stock amounted to less than $25,000, of which about $5,000 had been paid in. Of this less than $3,500 was on hand. The result was that, before the hotel was finished, the company became seriously embarrassed for lack of funds. Of the $38,000 due the contractor, $30,000 was paid, leaving a balance due of $8,000. A variety of extras were contracted for, amounting, in the aggregate, to a con-

Digitized by Google

siderable sum. It is said by counsel and admitted that, had the obligations incurred on these several accounts been paid in full, the whole would have amounted, including the cost of the land, to about $90,000. And this obligation was entered into with less than $25,000 of stock subscribed, and without control of the title of the land upon which the money was spent. Loans were made, including those from the complainant, to the amount of $28,371.28, of which there was repaid $4,920, leaving due, for borrowed money, $23,451.28, besides large amounts to contractors and material men. The defendant company retained possession of the hotel for two summers, viz. 1888 and 1889, and received for rents and from some other miscellaneous sources a trifle over $5,000; making the total receipts, including borrowed money not repaid, about $55,000. As stated in the quotation above taken from defendants' answer, the company stopped payment and abandoned possession of the property to its creditors, and entirely ceased to do business. The last meeting of the directors took place September 20, 1889, and of the stockholders October 2, 1889. Complainant knew nothing of the financial condition of the company until early in the summer of 1888. At that time he was asked and consented to overlook the finishing of the hotel structure, and the completion of some necessary appendages in the way of drains, a driven well, and salt-water main, etc. He was also applied to for pecuniary aid, and granted it in three payments.

At the same time another syndicate of gentlemen was formed, called "Syndicate No. 3," for the purpose of aiding the hotel company to raise money. This syndicate was composed in part of several of the 14 persons composing Syndicate No. 2, and in part of new men, but was under the control and management of Mr. Gorman, who was acting at the same time as counsel for the hotel company, for both syndicates, and also for Association No. 2. The entries on the minutes as to the arrangements with this last syndicate, No. 3, are meager. At a meeting of the directors of the hotel company held June 15, 1888, a committee of three (Messrs. Class, Herold, and Kelly) was appointed "to make arrangements to raise the necessary funds for the purpose of liquidating pressing liabilities." This committee negotiated with both the complainant and Syndicate No. 3. On June 11th, Syndicate No. 3 is credited on the hotel company's books with cash $4,000 (how this was secured does not appear); and, again, on July 6th, with a like sum; and on the same day complainant is credited with $1,536.87, and to him was given a receipt dated July 3d, as follows: "Office of Sea Isle City Hotel Company, 116 North Third Street, Philadelphia. July 3, 1888. Received of Mr. Charles K. Landis $1,536.87, being part of amount for stock subscribed to the Sea Isle Hotel Company, to be secured by mortgage upon same terms as Third Syndicate. S. W. Goodman, Secretary." Just what is meant by "stock subscribed" does not appear, nor why those words were introduced into the receipt. In point of fact, no stock was subscribed or issued. I infer from the circumstances that the cash so advanced by complainant, as well in this as in the subsequent instances, was in fact paid by him to parties whom he had employed at the company's request to put in the extra items of the plant under his supervision. On August 8th, Syndicate No. 3 is credited with $6,200, and complainant with $1,505.41; and to him was given a receipt dated July 31, 1888, for that sum, in precisely the same language as the former one. In the minutes of a meeting of directors of August 9th appears this entry: "Sea Isle City Lot Association No. 3 having expressed their intention not to pay in any more money unless said association receives a mortgage for the amount without interest for two years, it was decided to comply with said request." On September 12th complainant is credited with $1,410.30, and for that he has a receipt dated August 31, 1888, in precisely the same language as the one above recited. At the same time, Syndicate No. 3 is credited with $5,000. There are no debits against either of these credits, so that Syndicate No. 3 stands credited with $19,200, and complainant with $4,452.58.

In order to secure Syndicate No. 3, Mr. Gorman, who, as before remarked, was a member of that syndicate, and also one of the 14 who composed Syndicate No. 2, and at this time counsel for those syndicates, and also for the hotel company, and for Association No. 2, contrived the following plan: He procured McGuigan, in whom the legal title to the premises at that time rested, to convey to one John H. Williams (a man of straw, in Philadelphia) by deed dated September 6, 1888, and acknowledged on the same day, the 21 lots comprising block No. 88, and covered by the contract between Syndicate No. 2 and the hotel company. This deed was recorded September 15, 1888, the very day on which Syndicate No. 3 was credited with its last advance of $5,000. The consideration expressed in this deed from McGuigan to Williams is $2,000, and the execution and delivery of a purchase money mortgage of $8,740. It recites a resolution of the directors of Association No. 2 of August 22, 1888, authorizing the conveyance. Simultaneously with this conveyance, Williams executed to McGuigan a mortgage to secure $8,740, in monthly payments of $190 each. This mortgage represented the agreed consideration for the 21 lots. The previous payments made by the hotel company, amounting to $2,660, were wholly ignored. At the same time, Williams executed another and second mortgage upon the same premises to John J. O'Neil and George

Digitized by Google

H. Becker (Becker being a member of Syndicate No. 2, an officer in Association No. 2, and a director in the hotel company), to secure $35,000 in five years, with interest. This mortgage was made to secure Syndicate No. 3 for their advances of $19,200, and for such further advances as they might make. The language of the receipts given to the complainant shows that this mortgage ought in equity to stand as security for the amounts advanced by him. But, so far as the evidence shows, he has never been recognized as interested in it, or had any notice that he had any interest in it. On the other hand, it does not appear that he ever asked to be treated as entitled to such an interest, and was refused. It does not appear that the individual defendants are responsible for the fact that he was not mentioned in the declaration of trust just mentioned. There is neither allegation nor proof on the subject. The mortgagees, O'Neil and Becker, executed a declaration of trust in favor of Syndicate No. 3. The circumstances attending the origin of the further indebtedness to complainant do not appear.

With regard to the moneys loaned by the complainant, he puts himself in his evidence on the ground that, when the loan was applied for, he was told by some of the officers or directors of the hotel company that the company had a valid contract for the block on which the hotel was built, and that it was paid for, and the company would be entitled to deed in a month or two; that about 2,500 shares of stock had been subscribed for by reliable parties, which, when all paid up, would amount, at $25 per share, to $62,500, and would liquidate all indebtedness; that he did not know the actual condition of the title, except that his company held the $30,400 mortgage on the whole tract, upon which was then paid $8,500; that he knew nothing of the $54,400 mortgage or the entanglement of title resulting from the network of conveyances, declarations of trust, and mortgages contrived by Mr. Gorman in November, 1887, and dated back to July, 1887, and that he advanced his money in reliance upon the representations so made to him by the directors. The complainant, however, fails to connect either of the defendants with these representations. They were, however, all cognizant of the making of the contract to build the hotel, and all except Goodman and Foerderer (who had no vote) voted for and took part in making it.

Upon these facts, the complainant's rights seem to me to be plain, quite independent of any question of misconduct on the part of the officers of the company, or of any rights he may have in equity against them as individuals. Those rights are as follows: First. To have the price to be paid for the 21 lots taken by the hotel company, or rather the 19 lots for which they agreed to pay, reduced from $460 a lot, at which the parol contract was made, to the price actually paid by Syndicate No. 2 to the complainant's company, which was $200 per lot, if the commission of $40 a lot allowed by complainant's company to Becker for negotiating the sale was retained by him personally, or to $160 a lot if, as the evidence indicates, that commission was divided among the members of Syndicate No 2: and to have the sum of $2,660, which was actually paid by the hotel company to Lot Association No. 2, applied upon the price thus ascertained, and the mortgage from Williams to McGuigan for $8,740 reduced accordingly; and to have the $54,400 mortgage satisfied and discharged as to these lots. Second. To have the consideration money mortgage given by Kuehne to the Sea Isle City Improvement Company to secure $30,400 canceled and discharged, so far as the hotel company is concerned. (This was actually done in December, 1891.) Third. To be let in as a cestui que trust to the extent of his money advances in the mortgage for $35,000, executed by Williams to O'Neil and Becker.

The result would be that the hotel company will hold the lots subject only, so far as the mortgages are concerned, to a small balance due on the mortgage for $8,740, and to the amount due upon the mortgage for $35,000, given to O'Neil and Becker, trustees. I put his right to the first item of relief above stated, not alone on the ground that representations were made to him, as an inducement to subscribe to stock, to the effect that the price of the lots to the hotel company was to be the same as that paid to complainant's company therefor, but also upon the ground that all the officers and a majority of the directors of the hotel company were members of Syndicate No. 2, and composed a majority thereof, and that the contract of purchase of the 21 lots was in substance and effect made with themselves. Hence, upon familiar principles, they cannot be permitted to make a profit out of the transaction. Cook, Stocks & S. § 692, and cases; Redmond v. Dickerson, 9 N. J. Eq. 507. There was no serious attempt to show that the block of lots contracted to the hotel company was more valuable than the 21? conveyed by the complainant's company to Kuehne. The giving and holding the $54,400 mortgage for the benefit of Syndicate No. 2 was attempted to be justified upon the ground that the syndicate agreed to make some general improvements in the way of sea wall, etc., and that some were actually made by them at a considerable expense. If any valid contract of that kind was entered into by Syndicate No. 2, and they have actually expended money under it, it may be that this court may find in the circumstances some equitable consideration as against the hotel company, for this large mortgage, and may sustain it accordingly.

Digitized by Google

It remains to inquire what measure of relief complainant is entitled to in this cause, upon the pleadings and facts as they stand. It is manifest that he cannot, in the present shape of the pleadings, and against the parties before the court, have any part of the relief to which I have just intimated he is entitled. He must be confined to such relief as the pleadings and proofs show that he is entitled to against the defendants hereto. It is also plain that the present defendants cannot complain that complainant did not pursue the holders of the several mortgages above set forth for the relief against them to which I think he is entitled. The fact that he had these rights does not deprive him of his right to call these defendants to account for such equitable injuries as they have inflicted upon him. He is before the court in two distinct and independent attitudes, viz.: (1) As an original stockholder; and (2) as a creditor. As a stockholder, the individual defendants occupied towards him the position of trustees and cestuis que trustent (Ackerman v. Halsey, 37 N. J. Eq. 356, 38 N. J. Eq. 509), and are answerable to him for any misconduct or actual negligence which has resulted in a loss to him as a stockholder.

With regard to the claim on the part of the complainant that the directors of the hotel company were guilty of misconduct in a willful and wasteful use of the funds of the company, I do not find it sustained by the proofs. I cannot say that I am satisfied that the company did not receive a fair equivalent for its payments. There is nothing in the case upon which to found a belief that any of the directors or officers—certainly not those here made defendants—were guilty of any corruption in those disbursements, had any interest in the various contracts, or received any commission or personal advantage from them. The business transactions of the company, however, were, in my judgment, decidedly ill-advised and improvident, in that contracts were entered into involving obligations for the payment of large sums of money, without a proper provision to meet them. The subscriptions of stock were entirely insufficient for that purpose, and the title of the land of which the company thought it was the equitable owner was so entangled and involved with mortgages, conveyances, and declarations of trust, recorded and unrecorded, as to render it unavailable for the purpose of raising a loan by mortgage, which, under ordinary circumstances, might have been resorted to for that purpose. In fact, the fortunes of the company were at all times practically at the mercy of the party of gentlemen known as "Syndicate No. 2," and they were interested, as holders of a large mortgage upon other lands, in having the hotel built and occupied, and were comparatively indifferent to the fortunes of those contributing to its erection. This is manifest from the beginning to the end of the case, and is the real cause of the pecuniary misfortunes which have occurred. I think the conduct of the defendant directors, as developed in this case, has been of a character to render them liable to complainant for the depreciation in value, or entire loss, as the case may be, of his stock. It is unnecessary to rehearse the facts as above set out. The purchase of the lots, by parol merely, from themselves, at a profit of nearly 200 per cent., when they were subject to a mortgage for nearly the whole of the consideration money; the subsequent manipulations of the title; the entering into a contract of building requiring a large outlay of money, without any adequate provision for its payment, whereby the company was finally thrown into insolvency by common-law and lien judgments against it, while they all the while held in their own hands, as members of another association, the power of wrecking it after the hotel was built; then, finally, becoming themselves the virtual owners of it, leaving the stockholders practically with nothing to show for their investment,—seems to me to be conduct amounting to a breach of trust of a character to render the defendants Kelly and Class liable to make good to complainant the amount he invested in the stock of the company, with interest after bill filed.

It was suggested that the complainant had, by acquiescence, cured this equitable wrong, but I think the case fails to make out any such acquiescence. The wrong was done without his knowledge, and everything like acquiescence on his part occurred after the defendants had managed to put the corporation in the hopeless condition indicated. He then came in and assisted them in actually finishing the hotel, and loaned them money; but there is not the least proof that he knew anything about the manipulations of the title or the other facts making out the breach of trust. He was elected a director in September, 1888, after all the mischief was done, and after he had advanced the money above mentioned; and he is credited with taking part in several meetings of directors, when he seems to have done all he could to retrieve the fortunes of the company. He denies that he ever knew that he was so elected, or that he ever consciously acted as director. The effect of his evidence on this point is that, if he did attend any meetings of directors, it was as an interested stockholder and creditor, anxious to retrieve the fortunes of the company. But, admitting that he did act for a time as director, I am unable to see how such action, at the time and under the circumstances, can operate as a release and condonation of the previous equitable wrong done to him.

It was not seriously argued that the complainant was premature in bringing his suit, and should first have asked the directors to bring it. As he was suing all the directors he could find in this state, and as it is perfectly manifest that it would have been a waste of time to attempt to procure the company to sue these directors, I see no reason

Digitized by Google

why he was not justified in doing as he did,—commencing a suit in his own name, for his own benefit, and for that of such stockholders as chose to come in.

I come now to his position as a creditor. Here it must be observed that the equitable wrongs I have mentioned committed against him as a stockholder and cestui que trust of these defendants were all done before he became a creditor. And, first, I remark that there is here found no element of an unlawful or inequitable abstraction and disposition of the assets of the corporation by the directors after it had incurred an indebtedness. The defendants herein are not shown to have taken for their own use, at any time, any of the company's assets by any act done after complainant advanced his money, unless the act of their counsel (Mr. Gorman), in procuring to be executed the conveyance of their 21 lots by McGuigan to Williams, the mortgage by Williams to McGuigan for consideration money $8,740, and to O'Neil and Becker for $35,000, may be considered such an abstraction. Williams took the title in trust for the hotel company, and executed a declaration of trust accordingly, which, however, has never been recorded. The mortgage to McGuigan for $8,740 not only, as before stated, ignored the actual payment of $2,660 on account of consideration money, but was, besides, given for too great a sum, if I am right in my conclusion that the directors of the hotel company cannot be permitted, under the circumstances, to purchase from themselves at a greater sum than they paid. But here, again, comes in the question of the amount expended by Syndicate No. 2 for the sea wall, etc. That mortgage was given and held in trust for the benefit, among others, of these defendants, as members of Syndicate No. 2; and if it were shown to have been enforced against the hotel company, and the amount collected paid and distributed among the members of that syndicate, it may be that whatever sum the defendants herein had thereby received more than they ought to receive would be so much funds abstracted by them from the company, which should go to its creditors. In point of fact, however, nothing of that kind has been done. The company still has its defense to that mortgage, and it may be that no use of it will ever be made prejudicial to the interests of creditors situated as is this complainant. Moreover, it is not shown that these defendants took any part, either as directors of the hotel company or otherwise, in the various manipulations of the title above set forth. Those all seem to have been the device and work of Mr. Gorman, acting as counsel for all parties.

If, then, it be competent for the complainant, as a creditor of the company, to proceed in this court against these defendants, on the ground that they either have received assets of the company to which they are not entitled as agnist creditors, or have helped others to do so, I think his case would fail for want of proof, as well as of allegation. I make this observation in view of the state of authorities on this branch of the case. If complainant relies upon misrepresentations made to him by these defendants in the matter of his advances to the company, then it seems to me clear enough that his remedy is in a court of law. If he comes into this court, he must base his right, as I understand the authorities, upon the ground either —First, that these defendants have received moneys belonging to this company which of right should go to its creditors; or, second, that they were his trustees in such a sense that they owe him a duty as a cestui que trust which they have failed to perform, or have been guilty of some act of misfeasance as trustees, resulting in his loss, and which was of a character remediable in this court. Upon this second ground counsel put himself in argument, relying upon Halsey v. Ackerman, 38 N. J. Eq. 509, and Williams v. McKay, 40 N. J. Eq. 189. The well-settled rule in England is that directors of an ordinary trading corporation do not occupy towards its creditors the relation of trustees and cestuis que trustent in such a sense as to make them liable to be called to account by the creditor in equity. Poole's Case (1878) 9 Ch. Div. 322, at page 328; Thomp. Liab. Off. (Lead. Cas.) p. 351, §§ 1, 2; Id. p. 397, § 24; Thomp. Liab. Stockh. § 10. And I confess I am unable to perceive upon what principle the relations between the officers and directors of such a corporation, on the one hand, and its ordinary creditors, on the other, can be held to resemble those between a trustee and cestui que trust. Those relations contain in them no element of personal trust and confidence, such as give rise to and lie at the foundation of the relation of trustee and cestui que trust. A somewhat different doctrine is supposed to prevail in this country, and the present inquiry is as to its extent and true limits.

In Ackerman v. Halsey, supra, which was heard on demurrer, the complainant was both a creditor and stockholder of an ordinary national bank, whose funds had been dissipated through the neglect and mismanagement of the defendant directors. It is plain from a reading of the statement of the bill and printed arguments of counsel, as reported, that reliance was mainly, if not entirely, placed upon the complainant's right as a stockholder to treat the directors as trustees. The complainant's counsel there did, indeed refer to Williams v. Halliard, 38 N. J. Eq. 373, reported on appeal as Williams v. McKay, 40 N. J. Eq. 189, for the position that the assets of a bank are a trust fund for its creditors, and I shall refer to that case hereafter. The attention of the court, however, in Halsey v. Ackerman, does not appear to have been called to the distinction, in respect to the relation of trustee and cestui que trust, between a stockholder and a creditor as

Digitized by Google

urge, and the question was as to the sufficiency of the allegation of the bill to hold the defendants in either capacity, though the learned chief justice does speak of the complainant as being both a stockholder and creditor. In Williams v. McKay the suit was by a receiver of a savings bank, which had no capital stock or stockholders as such, and in which each depositor was entitled to a share of all the earnings, and of necessity must share the losses, and thus became to all intents and purposes a stockholder to the extent of his deposit. See the fifth and seventh sections of the charter of this bank (P. L. 1869, pp. 177, 179); Stockton v. Bank, 32 N. J. Eq. 163, and cases cited. The least reflection will show that this is the true position of a depositor in an ordinary savings bank in this state, whether organized under a special charter or under the general law; since any depositor, by continuing his deposit until the institution is wound up, will be entitled to share ratably with all other depositors in like position in all the assets of the bank, precisely as stockholders do in the winding up of an ordinary bank owned by stockholders. If, however, a depositor in a savings institution withdraws his deposit while the institution is a living one, it is a voluntary abandonment by him of all interest in the surplus. If at any time there be no actual surplus, but an actual deficiency, so that, upon the winding up of the institution, there will not be assets enough to pay each depositor in full, then, clearly, no depositor has a right to withdraw his deposit in full, and it would be a fraud in the directors of such an institution in such a condition of affairs to pay any depositor in full. Nothing can be clearer than that it is the duty of the officers of an ordinary savings bank, if at any time they discover that the assets are not sufficient to pay the depositors in full, to decline to pay any depositor. So that, I repeat, the depositor in an ordinary savings bank stands precisely in the position of a stockholder in an ordinary bank owned by stockholders. The payments made to such depositors at stated periods are properly called "dividends," and the statute provides that all the earnings, above a certain amount reserved for safety, shall be divided among the depositors for the time being. Revision, p. 1064, par. 32; Supp. Revision, p. 916, par. 8. These considerations lead to the result that it by no means follows that, because the directors or managers of an ordinary savings bank hold towards the depositors therein the position of strict trustees, they hold the same relation towards the creditors of an ordinary banking or trading corporation. It is to be observed that an ordinary savings institution usually has no creditors other than its depositors. This consideration must be borne in mind in considering the effect of the language of the learned chief justice in Williams v. McKay, 40 N. J. Eq., at page 196, where he says: "It is a mistake, sure to mislead, to regard this suit as one solely in right of the insolvent corporation. It does not rest upon that narrow footing, for the receiver represents not only the corporate body, but likewise the depositors and creditors; and the question which presents itself, therefore, is as to the status of the managers with reference to the latter two classes of persons, and as to them I entertain no doubt whatever that those officers must respond to them in the character of their trustees." Now, here, again, the distinction in this behalf between stockholders and creditors does not appear to have been in the learned chief justice's mind, and there were, in fact, in that case, no creditors other than depositors. Manifestly, it was this sort of creditor that was in his mind, viz. a depositor in a savings bank who is to all intents and purposes a stockholder, and who, with all the other stockholders, compose, in fact, the corporate body. And, indeed, there was in that case no corporate body, strictly speaking, outside of the depositors, or, rather, the corporate body was composed of the depositors. The same is true of a certain class of life insurance companies and fire insurance companies, which are conducted entirely on the mutual plan, and have no capital stock, and whose assets consist entirely of the accumulated contributions of the persons assured. The assured, in such cases, constitute the only stockholders, and are usually entitled to vote for the directors. They receive dividends of the surplus profits as they accrue, and hold the same relation to the directors that stockholders in an ordinary corporation do. Such a case was Richards v. Insurance Co., 43 N. H. 263, reported in full in Thomp. Liab. Off. p. 288. The directors of a mutual fire insurance company had there made an assessment on the members to meet certain losses by fire to certain of the insured, of whom the plaintiff was one, and it was held that they were bound to divide the proceeds ratably among the several losers without preference. The court incidentally remarked that, in making, collecting, and distributing the assessment, they were acting as agents and trustees of the policy holders.

The notion that the directors of trading corporations occupy the position of trustees towards the creditors thereof in such a sense that they may be called upon to account as such in a court of equity for misconduct had its origin in the opinion of Judge Story in Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944. There the legislature had authorized a bank, whose charter authorized the issue of bank notes, to continue its corporate existence for four years after the expiration of its chartered existence, for the sole purpose of enabling the directors to gradually settle and close its business, and to divide its capital stock (meaning its assets) among the stockholders. The manifest effect of this legislation was to make the directors statutory trustees or receivers

Digitized by Google

for the creditors in the winding up of the affairs of the bank. Under this legislative authority, the stockholders and directors divided the assets among the stockholders, without providing for the payment of the outstanding bank-note circulation. Complainants were holders of a large amount of these notes, and the defendants were stockholders of the bank, who had received dividends on their stock in the final winding up, and the relief prayed and granted was that they should answer for what they had so received. It is thus seen that the case presented was a plain one of following assets of a corporation into the hands of persons not entitled to hold them, as against creditors; and it was by no means necessary to resort to the notion of a "trust fund" and the relation of trustees and cestuis que trustent to sustain the complainants' claim. That rested upon the simple and time-honored ground that it was a fraud upon the creditors for the stockholders to pay money to themselves and leave the creditors unpaid. The holding of Judge Story is that the assets of a corporation in course of winding up constitute a trust fund for its creditors, and that such assets may be followed in the hands of any one not entitled to hold them as against creditors. The case goes no further. It is true that the learned judge uses this language (page 311, 3 Mason, Fed. Cas. No. 17,944): "The capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts of the bank." But it is manifest that by this he means that the "assets" constitute such fund; for he uses this language on page 312, 3 Mason, Fed. Cas. No. 17,944: "On a dissolution of the corporation, the bill holders and stockholders each have equitable claims, but those of the bill holders possess a prior exclusive equity." Sawyer v. Hoag, 17 Wall. 610, also relied upon in support of the doctrine in question, was a suit by the assignee of a bankrupt corporation against a stockholder to recover an unpaid subscription to its capital stock. The stockholder attempted to set off a counterclaim which he held against the company. In holding that the set-off could not be allowed, Justice Miller (page 620) says: "We think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation." Here, again, the general expression "capital stock" must mean the "assets" of the corporation, unless it be confined to the unpaid subscriptions to the capital stock, as, indeed, it was in that case; since all actual payments on account of capital stock do at once mingle with the other moneys of the company, and lose all earmarks and distinction in the mass of general assets; and the dictum that the unpaid subscriptions constitute a trust fund must be construed in connection with the question under consideration, viz. could a stockholder of a corporation who owed a balance upon his subscription for stock buy up a debt against the corporation while insolvent, and set it off against his subscription? Another case supposed to support the general proposition in question is Hodges v. Screw Co., 1 R. I. 312, 3 R. I. 9. That was a suit by a stockholder against directors, and so not in point. A later case in Rhode Island is Olney v. Lace Co., 16 R. I. 597, 18 Atl. 181, decided in 1888. There the directors of the defendant corporation, after complainants had brought suit at law upon a large claim, and when the corporation was pecuniarily unable to pay all its debts in full, executed mortgages to themselves to secure their individual indebtedness against the company. Plaintiffs, having recovered judgment at law and levied execution, filed a bill in equity to set aside the mortgages, on the ground that the directors had no right to prefer themselves when the company was in an insolvent condition. The court held that such preference was invalid, upon grounds of public policy, but they expressly confined it to cases of corporations having become insolvent, using this language: "Where the corporation becomes insolvent, and the stockholders have no longer a substantial interest in the property of the corporation, directors should be regarded as trustees of the creditors to whom the property of the corporation must go." The opinion is elaborate, and contains a collection of the decided cases upon the topic under consideration to that date.

Turning to our own state, we find that the doctrine held in that case that the directors of an insolvent corporation, who were also its creditors, cannot prefer themselves, was directly repudiated by the court of errors and appeals in Wilkinson v. Bauerle, 41 N. J. Eq. 635, 7 Atl. 514. That was a suit by a creditor against the stockholders and officers of an insolvent corporation who, after it became insolvent, had assigned all its assets to one of its members for the benefit of himself and some other members, in payment of a debt to him. The preference was held to be valid; but the favored creditor, and those who with him received the assets, were required to account for the actual value of the property assigned, so far as it should be found to exceed, if at all, the actual indebtedness which it was assigned to pay. This result was put on familiar ground. At page 643, 41 N. J. Eq., and page 514, 7 Atl., the learned judge says: "The sale was not in open market or to a stranger bargaining with the company, whose offer might be presumed to afford some indication of the value of the property. It was a private sale made by directors to a director who took an active part in the transaction. He fixed the price offered as buyer, and united with the others in accepting the offer as seller. Although others were interested in the purchase, this was the plain effect of the

Digitized by Google

ansaction." And further on, at page 644, N. J. Eq., and page 514, 7 Atl., he dis-isses the relations between creditors and ockholders thus: "As between creditors and ockholders, the corporate property has al-ays been held to be a fund for the payment debts, to which creditors have a right in reference to stockholders. So the assets of corporation cannot be divided among its ockholders, nor diverted to uses not con-mplated by its charter, for the benefit of ockholders to the detriment of creditors. or can directors, by fictitious credits or accepting overvalued property in pay-ent for stock subscriptions, deprive credit-s of the fund out of which their debts ould be paid. These doctrines do not at l depend, as I conceive, on the existence of corporation bankrupt law or other like gislation, nor on the prohibitions of the atutes respecting transactions in fraud of editors, but rather on principles inherent the nature of corporations as artificial ersons, whose creditors can only enforce eir debts by a resort to the property the rporation has acquired. So, upon like prin-ples, I apprehend that the property of an corporated company is devoted to the pay-ent of the creditors thereof, at least to is extent: that it may not be diverted to ner purposes. The corporation and its of-cers owe to their creditors this duty: not to ivert the corporate property from the gen-al purpose of paying the creditors. While ey may dispose of the corporate property, d even prefer one creditor to another, they ay neither give away the corporate prop-rty by a direct gift, nor by a sale at less an its full and fair value, to the detriment creditors. A violation of this duty will ntitle the creditors who suffer thereby to elief. If the diversion of the corporate prop-rty from the payment of debts is effected y a mere gift, it is not necessary to dis-ss what relief could be afforded to credit-s. If the diversion is effected under the uise of a sale, and the sale is not objection-ble, as being made with intent to defraud editors, then it is plain that relief cannot e afforded to creditors by setting aside the le, for that, as we have seen, is not now rohibited. But in such a case it is equally lain that the directors who have effected ch a diversion of corporate property from e payment of debts have violated a duty, d will be personally liable to make up to editors what has by their acts been thus iverted. * * * But, when directors make le of corporate property to one of their num-er, who takes part in the transaction as both uyer and seller, and creditors are thereby eprived of the opportunity to enforce their ebts, then it results, from the relation above entioned as existing between them and the editors, that it devolves on the directors show that the transaction was made in ood faith, and that the sale produced the ull value of the property. If they fail to how these facts, creditors are entitled to compel them to account for the full value of the property." It is hardly necessary to say that I must accept this as the latest expression of our courts upon this subject; and, as I understand the language used, in connection with the result arrived at, it fails to hold that directors, before actual insolvency, are responsible as trustees to creditors, and liable as such for mismanagement or neglect in the performance of their ordinary duties in the management of the ordinary business of the corporation, whereby a loss has occurred to the corporation, and it has become unable to pay its debts in full.

One other case deserves notice,—Delano v. Case, 121 Ill. 247, 12 N. E. 676. That was a suit at law in trespass on the case by a depositor in a bank (whether it was in the nature of a savings bank or not is not stated) against the directors for negligence in permitting it to be held out to the public as solvent when it was insolvent. In rendering judgment, the court of intermediate appeal had held: First, that the directors of a bank are trustees for depositors as well as for stockholders; second, that they are bound to the observance of ordinary care and diligence, and are, hence, liable for injuries resulting from its nonobservance. The supreme court of Illinois approved of the doctrine of this court. The authorities cited are a case from Louisiana, one from Kentucky, and one from Tennessee; also, Thomp. Liab. Off. 395. Of the authorities cited, we have seen that neither Mr. Thompson in his book nor the case in Rhode Island sustains the doctrine stated; and, with great respect to the court of Illinois, I am unable to perceive how the doctrine of trustee and cestui que trust can be brought in question in an action at law against directors for misrepresenting the standing of the bank, whereby people were led to deal with it. The Kentucky case cited —Society v. Underwood, 9 Bush, 609—is also reported in 13 Am. Law Reg. (N. S.) 211 (1874), and is severely criticised by Judge Redfield in a note. It was, in fact, a suit by a special depositor of bonds (like Foster v. Bank, 17 Mass. 479) to recover from the directors of the bank the value of certain of them which were unlawfully abstracted by the officers of the bank, and appropriated to the use of the bank, with the knowledge and implied approval of the defendant directors. Some of the language used tends to support the general proposition stated in Delano v. Case, but the circumstances forbid its application here. Of the numerous cases cited by Mr. Beach in his treatise on Private Corporations upon this topic (sections 240, 241, 255, 257), those above noticed are the only ones that seem to support the doctrine in question. And upon the general subject see Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, especially page 381 et seq., 150 U. S., and page 127, 14 Sup. Ct., where the subject is discussed and adjudged cases examined.

My conclusion is that complainant's case as a creditor completely fails—First, because

Digitized by Google

the misconduct complained of occurred before the complainant's debt was incurred; second, because it related to the conduct of the ordinary business of the corporation in furthering the purposes for which it was organized, and not to the winding up of the institution and the distribution of its assets; third, because the proofs fail to show that these individual defendants are responsible for any diversion of the corporate property from the general purpose of paying the debts of the corporation, in the sense stated in the opinion in Wilkinson v. Bauerle, as above quoted. The complainant should be confined to relief as above stated as to his capital stock, and as to his debts against the company his bill should be dismissed, without prejudice to any other remedy he may have; no costs to be allowed to either party. I will advise a decree as above.

RYAN et al. v. REMMEY.

(Supreme Court of New Jersey. April 12, 1895.)

ASSUMPSIT—WHEN LIES—BREACH OF CONTRACT.

Where a person agrees to take clay from beds, to be paid for at a certain rate according to the quantity and quality of the clay so to be raised, and has stripped off the surface earth, but, before he has raised any clay, is stopped in his work by the owner of the beds, with whom he has contracted, a suit will not lie in the common courts for the cost of such stripping. If such contract has been illegally terminated, the remedy of the injured party is to sue on the contract, laying his damage for the loss of such profits as he would have made by the completion of the contract.

(Syllabus by the Court.)

Error to court of common pleas, Middlesex county; Rice, O'Gorman, and Freeman, Judges.

Action by William Ryan and James Ryan, partners, against Richard C. Remmey. From a judgment of nonsuit, plaintiffs bring error. Affirmed.

Argued February Term, 1895, before BEASLEY, C. J., and LIPPINCOTT, VAN SYCKEL, and GARRISON, JJ.

Ephraim Cutter and A. H. Strong, for plaintiffs in error. Vail & Ward, for defendant in error.

BEASLEY, C. J. The defendant in error was the owner of certain clay and spar banks located in Perth Amboy. In the fall of 1887 the plaintiffs undertook to mine this clay and spar. The terms were that, according to the plaintiffs' own statement, they were to mine and deliver at a certain dock for shipment the clay and spar, which were to be shipped immediately upon delivery, and were to be then paid for at a certain designated rate; the agreement further providing that, if there was a surplus stock at the "end of the shipping season," it was to be paid for at a certain fixed and reduced rate. The plaintiffs had the possession of the mines, and worked them at their own discretion. This business was thus carried on until, on the 19th March, 1891, the plaintiffs received a written notice from the defendant "not to dig any more clay or minerals from his farm," and thereafter they ceased to do so. Before they received this notice, the plaintiffs had removed, at a considerable expense, the superincumbent earth from two of the mines, and they claimed that this preparation for mining was useless, by reason of the termination of their contract on the part of the defendant. It is for the expense incurred in this respect that this suit is brought.

The legal question to be decided in this case is presented in this aspect. The declaration contains nothing but the common counts, and as the counsel of the plaintiffs at the trial refused to amend, and his clients were thereupon nonsuited, the inquiry is whether, on the assumption that a legal cause of action exists, it can be enforced in this mode. It would seem plain that, unless the contract between these parties has been illegally terminated by the defendant, no wrong, in a legal point of view, has been committed. The agreement itself has not set any limit to its continuance, and if we were to conclude, as suggested in the brief of the counsel in error, that either party could at will at any time declare it to be at an end, it is not apparent how the exercise of a granted power could afford a basis for an action at law. No matter what the resulting hardship might be, neither party could complain, as it would be nothing more than the product of his own stipulation. And, on the other hand, if we postulate that the act of the defendant in ordering the plaintiff to cease mining was unlawful, the difficulty of permitting a recovery on that ground is, we think, insuperable. On the assumption of an act of this character, the ordinary case is presented where one is prevented by the person with whom he contracts from the full performance of his contract after he has in part executed it. In such junctures the law applies the most satisfactory of all rules; that is, that the person wronged shall be recompensed, as near as may be, for his entire loss. In the case before us this principle is rejected by the plaintiffs, who seek to recover the costs they have incurred in removing the earth in question, without reference to the question whether, if the contract had been fulfilled by them, they would have been compensated for such outlay. It was altogether contingent whether the plaintiffs would gain or lose by the labor thus expended, for the result in that particular could be ascertained only when it should have been discovered that the mines thus stripped contained such a quantity of clay that, at the prices fixed by the contract, the plaintiffs would have realized a sum sufficient to repay to them the cost of its exhumation, and also the cost of this removal of the surface soil. By force of the contract, therefore, it was uncertain whether the plaintiffs, when they did this work, would gain or lose by its performance; and their effort on this suit is to eliminate that uncer-

Digitized by Google

tainty, and to recover for it at a price never contemplated by themselves, nor by the other contracting party. It has not been observed that such a claim has ever been sanctioned by any legal tribunal. In all such cases the action must be founded on the contract, as the damages that have in fact been sustained, and which are those only that the law permits to be recovered, and entirely unliquidated. The case of Gillet v. Maynard, reported in 5 Johns. 85, is much in point. The facts were these: A., having agreed by parol with B. for the purchase of certain lands, paid part of the purchase money, and, entering into possession, made certain improvements. In this posture of things, A. died, and his administrator tendered the residue of the purchase money, which B. refused to accept, but took possession of the land, and sold and conveyed it to a third person. A suit was then brought by the administrator to recover the money paid, and for work and labor of the intestate in improving the land. The court declared that, as the contract was rescinded, the plaintiff was entitled to the money so paid, but that there could be no recovery by way of compensation for the improvements, as there was no express or implied agreement to pay for them. By the rescission of the contract, all right to compensation for the improvements was waived. In regard to the legal principle thus exemplified, this case does not seem distinguishable from the present one. Indeed, in this class of cases, in which one party has been prevented from completing his contract by the illegal action of the other party, the measure of damage is almost universally the loss that has resulted to the innocent party from the entire transaction. This was the rule very clearly defined in the case in this court of Kehoe v. Mayor, etc. (N. J. Sup.) 27 Atl. 912, in which it was said that the party injured "was to lose nothing, but, on the other hand, he was to gain nothing, by the breach of the contract." In this case, as in the present one, the attempt was to recover for the cost of a certain part of the work contracted for, on the ground that the agreement was rescinded; and the court repudiated the proposition, and declared that the general principle in such instances was "that when it can be determined what, according to the contract, the plaintiff would receive for that which he has done, and what profit he would have realized by doing that which without fault he has been prevented from doing, then these sums become the legal, as they are the just, measure of his damages." It will be observed that this reasonable rule was of easy application to the present controversy, for according to the contract, the plaintiffs were to be paid at a certain rate on the spar and clay raised by them; and as they offered to show that such minerals and earth had, since their abandonment of the mines, been taken out by the defendant, there could have been no difficulty in the ascertainment of their damages by reason of the breach of the contract on the part of the defendant, if any such breach existed. From these decisions and many others of the same strain that it is not deemed necessary to refer to, we think it is obvious that the plaintiffs could not consider the contract rescinded, and resort to the common counts.

With respect to the cases cited in the brief of the counsel of the plaintiffs, it is sufficient to say that, in the view of the court, this does not apply to the case before us. Such cases belong to two well-defined categories, that is—First, where money has been paid or work done under void contracts; or, second, under contracts that have been legally rescinded,—and the moneys sought to be recovered are indubitably due without reference to the terms of the abrogated contract. Under such circumstances, the law will verify a promise to pay such sums, as they cannot by any possibility exceed the amount of the damages that result from the breach of the contract. As the plaintiffs at the trial exhibited no claim that could be embraced in the common counts, the nonsuit was proper, and the judgment must be affirmed.

From what has been said in the expression of the foregoing view, it is not to be inferred that the court considers it plain that the act of the defendant in terminating the contract in question was justifiable in law. That is a matter dependent on circumstances, which it would seem have not been fully devoloped. The agreement appears to indicate that it was to continue for the "season," for it provides for a payment of part of the clay exhumed that should remain unshipped at the close of the season. It may be that such a contract could not be terminated by either party, except upon reasonable notice. But, as this matter is not before us, no opinion is expressed with respect to it.

FENDERSON v. ATLANTIC CITY R. CO.

(Court of Errors and Appeals of New Jersey. March Term, 1894.)

INJURY TO EMPLOYE—DEFECTIVE APPLIANCES.

A railroad company is not liable where a car coupler becomes suddenly out of repair, if it has exercised reasonable care in providing a safe coupler, and in inspecting and keeping it in repair.

Error to supreme court.

Action by George C. Fenderson against the Atlantic City Railroad Company. From a judgment of nonsuit, plaintiff brings error. Affirmed.

John W. Wescott, for plaintiff in error. Joseph Thompson, for defendant in error.

LIPPINCOTT, J. The plaintiff below, who is plaintiff in error, sued the Camden & Atlantic Railroad Company, the defendant in error, to recover damages for personal inju-

Digitized by Google

ries. At the trial, after the evidence for the plaintiff was submitted, the trial court directed a judgment of nonsuit to be entered. Upon this judgment error has been assigned, and it is now before this court for review.

The plaintiff was an employé of the defendant, and in its service, as a brakeman on one of its engines at Atlantic City; and it is alleged that the injury occurred by reason of the negligence of the defendant in failing to provide a proper coupling attaching the cars of the defendant company together, whereby the cars became detached and came in contact with the plaintiff, who was on the engine, and seriously injured him. The pleadings in the cause allege this neglect as the sole ground of action, and the evidence in the cause at the trial was directed to the proof of this point. The facts, as developed on the trial, are that the plaintiff was working in the terminal yard of the defendant at Atlantic City, and on the 3d day of July, 1892, met with this accident. A train of cars forming a heavy passenger express train from Philadelphia had just arrived at the depot at Atlantic City. After its passengers had been discharged, the shifting engine upon which the plaintiff was employed as a brakeman ran into the depot, and attached itself to the train, for the purpose of pulling the train, with the train engine following, out of the depot, and off of the main track, and out upon a street called "Baltic Avenue," for the purpose of having the main track clear for another section of the train, or for another train. Baltic avenue runs at right angles across the terminal yard at Atlantic City, and the connection with the track on that street with the main track is made with a switch and a curved connecting track, and it became necessary to pull this train, with the shifting engine, beyond the switch which made connection with the curve. This was done, and then the shifting engine was detached from the train, to allow the train engine to draw the train upon the curved track, and thus upon Baltic avenue. While this was being done, it became the duty of the engineer of the shifting engine to follow the train upon the curve to Baltic avenue, or to some distance towards it, so as to leave the main track perfectly free for the next train to run into the depot. While the train was being drawn along the curve, with the shifting engine following at a short distance, at a very slow pace, the cars of the train ahead of the shifting engine became detached into two parts, and the shifting engine ran into the rear car, injuring the plaintiff, whose duty required him to be at that end of the shifting engine which came into contact with the car. He was quite seriously injured. The proof in the case shows clearly that, upon the two parts of the train separating or becoming detached, the air brakes did their proper work instantly, and brought the rear detached car to an immediate standstill, and that the injury occurred by reason of the shifting engine not stopping, but continuing to go on until it ran into the rear detached car. It is in proof that the cars of this train were connected with each other by what was known as the "Miller coupler," or the system known as the "Miller coupling,"—a well-known appliance for this purpose, operating automatically to some extent. It appeared in the case that upon some of the cars of this train, or in use upon the defendant's road, what is known as "safety chains" were used in aid of the Miller coupler. These safety chains are two or three links of chain attached to the side of a car and to a hook and link on the side of the next car, and the chain thus attached, when connected, is called a "safety chain." It appeared in the evidence that when the rear detached portion of the train stopped the shifting engine was following, quite slowly, about a car length behind. It does not appear by what sort of coupler the two cars which parted were attached to each other. It is contended that they were connected by the Miller coupler, but with no safety chain. It also appeared quite clearly in the evidence that had the engineer, or those in charge of the shifting engine, kept a careful watch over the movements of the engine, it could have been stopped before it came in contact with the rear car of the detached portion of the train. The condition of affairs seems not to have been observed until the moment of contact, when the plaintiff endeavored to save himself from injury, but was unable to prevent himself from being caught between the car and engine. The trial court found, from the undisputed evidence, that the kind of coupler upon the car when the train parted was not identified; that the evidence of the witnesses was very general on this subject, and that, when dissected, this assertion that the coupler was a Miller one was founded on hearsay only; and that this failure to identify any particular car as the one having a defective coupling demanded that judgment of nonsuit be directed. The trial court also rested the judgment upon the ground that the only evidence adduced was the mere occurrence of the accident, and that, in this case, was not prima facie proof of negligence of the defendant towards the plaintiff, its employé.

Upon a review of the evidence, it clearly appears that there was an entire want of any identification of the cars which were detached from each other, and an entire want of any identification of the character of the coupling by which the cars were attached to each other, and an entire want of proof against the defendant tending to show negligence in not supplying a reasonably proper appliance for coupling the cars together. There is also evidence indicating, beyond contradiction, negligence on the part of the engineer of the shifting engine causing the accident; also evidence of negligence on the part of the plaintiff contributing to the injury. There is no evidence, so far as it appears in

Digitized by Google

the case, showing that the coupler was in any wise defective, unless the mere separation of the cars can be considered evidence tending in that direction; and, even if this conclusion was conceded, no evidence that the defendant or its agents had any knowledge of such defectiveness, or ought to have had knowledge of it. There is no evidence of the want of reasonable inspection, nor is there any affirmative proof that the plaintiff had no knowledge of the defective coupling, if it existed. A careful consideration of the evidence reveals only the barren fact that there was an accident to the plaintiff, caused by the separation of the train of cars into two parts, and a collision of the rear portion with the shifting engine. These facts require only the application of familiar principles of law, in order to sustain the conclusions of the trial court.

The rule is that the company is bound to use only reasonable care to prevent accidents to its employés, and, to this end, is bound to exercise reasonable care in furnishing suitable machinery and appliances, and to use a like reasonable care in keeping them in proper repair, as the risks assumed by the employés are not those which are brought about by the negligence of the company in these respects. A railroad company is not held to the exercise of extraordinary care towards its employés, as in the case of passengers; but it is only required to furnish such appliances as are reasonably calculated to insure the safety of its employés. Nor is the company responsible for an injury resulting from what is otherwise a suitable appliance becoming suddenly out of repair, unless it has been guilty of negligence in not ascertaining the defect and remedying it. Thus, if the coupling of a freight car suddenly becomes out of repair, the company using the same will not be liable for an injury to an employé in consequence thereof, unless its attention had been called to the defect, or the company, by the exercise of a reasonable degree of care, should have discovered the defect, and had an opportunity to make the needed repair. 3 Wood, Ry. Law, p. 1451, § 373. The measure of the master's duty is to exercise reasonable care in providing instrumentalities for the servant in the prosecution of the business, and prima facie he is presumed to have done so; and if he has done so no liability attaches for defects therein, unless negligence can be imputed to him in reference to these inspections and repairs. He is not bound to adopt the latest improvements in machinery, nor is he liable for an accident which would not have occurred if such improvements had been adopted. He is not required to furnish the best appliances possible to be obtained, but they must be reasonably safe, and kept so. Applying these principles to the proof here in this case, in order to sustain a recovery it must have affirmatively appeared that the injury resulted from an unsound or defective coupler; that the master had had, or ought to have had, knowledge of the defect,—that is, that the company had failed to furnish such a coupler as was reasonably calculated to insure the safety of the plaintiff, or had been guilty of negligence in not keeping it safe, or ascertaining its defect and repairing it, or supplying another which was reasonably suitable. Now, in this case, no proof exists, directly or by attendant circumstances, in the case of the plaintiff, of these affirmative propositions necessary to a recovery, unless it be that the circumstance of the mere occurrence of the accident fills the necessary measure of proof. But upon this point there exists the conclusive authority of this court. In the case of Bahr v. Lombard, 53 N. J. Law, 233, 21 Atl. 190, and 23 Atl. 167, Mr. Justice Garrison, delivering the opinion of the court, says: "The principle is quite institutional that, whenever a right of action springs from the conduct of a defendant, the plaintiff must present proof of the facts necessary to the recovery which he seeks. It is, furthermore, the general rule of law that the mere proof of the occurrence of an accident raises no presumption of negligence." The trial court determined that there were no facts and circumstances which indicated any negligence on the part of the defendant. The case being devoid of such proof, the judgment of nonsuit ought to be affirmed on that ground. But the conclusion of the court is also that the plaintiff was himself guilty of negligence contributing to the accident. The facts also tend very strongly to the result that the negligence of the engineer of the shifting engine was one of the causes of the injury of the plaintiff. The engineer's negligence was the negligence of a fellow servant of the plaintiff, and would debar him from a recovery. I shall vote for an affirmance of the judgment of nonsuit.

The CHIEF JUSTICE, and DEPUE, LIPPINCOTT, MAGIE, VAN SYCKEL, BROWN, and SMITH, JJ., for affirmance. The CHANCELLOR, and ABBETT, DIXON, and BOGERT, JJ., for reversal.

CONOVER v. PARKER, Tax Collector.

(Supreme Court of New Jersey. April 30, 1895.)

SCHOOL DISTRICTS—SPECIAL CHARTER—CONSTRUCTION OF STATUTES.

The supplement to the general school law (P. L. 1894, p. 506) excepts from its provision that each township shall constitute a separate school district, "any district acting under a special charter." *Held*, that school district No. 85, while acting under the provisions of an act of the legislature (P. L. 1873, p. 613), was within the class thus excepted.

(Syllabus by the Court.)

Certiorari by W. W. Conover against George A. Parker, tax collector, to review an assessment. Assessment sustained.

Digitized by Google

ber, 1893. The chattels were sold by a receiver appointed by this court, and the contest now is over the proceeds of the sale.

Abner Kalisch and Mr. Hammell, for complainants. George M. Keasbey, for landlord. F. M. Olds, for judgment creditors.

PITNEY, V. C. (after stating the facts). The principal question raised at this stage of the case is as to the sufficiency of the affidavit annexed to the complainants' mortgage. The criticism made upon it is that it does not answer the requisition of section 4 of the chattel mortgage act (Supp. Revision, p. 491), in that it does not state the "consideration" of the mortgage, and, as nearly as possible, "the amount due and to grow due thereon." The language of the last part of section 4 is that the affidavit must state "the consideration of said mortgage, and, as nearly as possible, the amount due and to grow due thereon." With regard to the amount due, the affidavit does not state that anything was due, and in this respect it was strictly true; for, although nearly $1,100 worth of gold and silver was delivered on that day by the complainants to the mortgagor, yet it could not be truthfully said that anything was due or would grow due from Bourquin to complainants until he made default in his agreement to work it up into watch cases, and return the product to the complainants. The affidavit does state that the indemnity is to be to the extent of $2,000. For that limit there is no warrant, either in the agreement itself or in the body of the mortgage; and, so far as those instruments show, the security of the mortgage was unlimited, and included all losses which the mortgagees might sustain in the premises. The limit of $2,000, therefore, was voluntarily imposed by the mortgagees. The affidavit says, in effect, that although by the body of the mortgage and the agreement there is no limit, yet a limit is now fixed by this affidavit at $2,000, in obedience to the language of the statute that the affidavit shall state as nearly as possible the amount due and to grow due thereon. Or, more briefly: "There is nothing now due, and the utmost that may become due is $2,000." It seems to me that the affidavit in that respect is sufficient.

The serious question is as to whether it states the contract between the parties with sufficient fullness to show the "consideration," in fulfillment of the requisition of the act in that behalf. It is manifest that the draftsman of the act, in preparing this part of it, had in mind only the ordinary case of a mortgage to secure a simple money demand directly from the mortgagor to the mortgagee. It follows that it is quite difficult, if not impossible, to literally comply with the language of the requisition for the affidavit of consideration, and of the amount due and to grow due, in the few, yet important, cases occurring in practice where the exigencies of legitimate business require a mortgage upon chattels to secure the performance of a contract to do something other than the payment of money, or a contingent or collateral liability, or as a simple indemnity. Yet such difficulty has not been sufficient to prevent the use of such securities for such purposes, and the sanction of their validity as such by bench and bar. In fact, they have been put upon the same basis as mortgages of real estate. Doughten v. Gray, 10 N. J. Eq. 323; Chapman v. Hunt, 13 N. J. Eq. 370; Tompkins v. Crosby, 13 N. J. Law J. 166; Id. (N. J. Ch.) 19 Atl. 720. In cases of this class the affidavit must conform as nearly as practicable to the letter, and must fulfill the spirit of the act. Vice Chancellor Van Fleet in Ehler v. Turner, 35 N. J. Eq. 68, at page 69, says: "The legislature, I think, meant to compel the mortgagee to commit himself to a statement or disclosure of his debt or claim, when he made his mortgage a matter of public record, sufficiently precise and explicit to afford the creditors of the mortgagor, in case fraud was suspected, a fair opportunity to ascertain, by legal investigation or otherwise, whether the mortgage was an honest security or a mere fraudulent cover." That language was used in a case of a mortgage to secure a simple money demand, and so is not literally applicable here. My paraphrase of it, as applied to a case of this kind, would be that the legislature intended to require a disclosure, under oath, of the actual transaction between the parties, including the object and purpose of the instrument, with sufficient precision to enable the creditors of the mortgagor to have a reasonable opportunity to ascertain its true character. In this instance, as usual, that information is found in the condition of the mortgage, which discloses "an agreement of even date, entered into" between the parties, "for the manufacture by the mortgagor for the mortgagees of gold watch cases"; and the object is stated to be "to indemnify and save harmless the mortgagees from loss and damage sustained by them by reason of the nonperformance thereof by the mortgagor." Is this sufficient? Or is it necessary to set out the substance of the agreement more fully, so as, if practicable, to show how and wherein the mortgagor might fail to perform, and how the mortgagees might be injured by such nonperformance? If all that is necessary be to state sufficient data to enable the creditor to successfully prosecute inquiries on this subject, then I should say the affidavit is sufficient, for it gives the names of the parties and the date of the agreement; and refers, as it may rightfully do (Fletcher v. Bonnet, 51 N. J. Eq. 615, 28 Atl. 601), to the body of the mortgage for further particulars, and there the residences of the parties are given. A creditor had but to call upon complainants, and ask to see the agreement, and to be informed of the present condition of affairs under it, in order to obtain all requisite information.

Digitized by Google

That seems to me to be sufficient. If the agreement had been set out in full, as a schedule to the mortgage, the creditor would still have been obliged to resort to a personal inquiry of the mortgagees if he wished to learn the state of the accounts between the parties; so that I do not see how he would have been materially benefited by its perusal as a part of the mortgage. Moreover, it seems to me that the language used in the condition of the mortgage indicates the nature of the risk against which the mortgagees required indemnity, viz. the nonperformance of a contract of bailment, — "locatio operis faciendi." Jones, Bailm. 36; Story, Bailm. §§ 422, 423. The mortgagor agreed to manufacture gold watch cases upon the order of the mortgagees. Now, the only serious risk the latter could, in the ordinary course of business, incur in such a transaction, would be the loss of any material furnished by them to the manufacturer. The force of the word "manufacture" is simply and no more than this: "To make up by hand [original definition] or by machinery [derivative definition] any raw material into a form fit for use." It does not include the idea that the manufacturer shall furnish the raw material. That is, strictly speaking, a mercantile sale, though in common parlance we speak of a man who furnishes the material and works it up as a manufacture. In fact, he is both a merchant and a manufacturer. In the case in hand it seems to me that the language used in the affidavit indicated plainly enough that the mortgagees expected to furnish the material to be manufactured by the mortgagor into gold watch cases. If so, then the nature of the risk indemnified against was sufficiently stated. The case is free from the least appearance of an intention to conceal or defraud, and to hold the affidavit in this case, taken, as it should be, in connection with the statement in the body of the mortgage, to be insufficient, would, in my judgment, be placing a useless and unwarranted clog upon the use of these instruments by business men. In fact, now that we have become accustomed to their use under provisions for their record as a notice to others, it is a little difficult to perceive why any distinction should be made in the law between them and mortgages of land. Upon the whole, and for these reasons, I conclude the affidavit is sufficient.

The remaining question is as to the extent of the complainants' demand. It was suggested that the advance of $375 in cash to Bourquin to pay his workmen was not an item covered by the contract, and hence should be eliminated. I do not perceive on what ground this could be done, and, if it be done, I do not see that it will help the defendants. The total value of the precious metals delivered to Bourquin was $1,588, and the melting value of the watch cases returned by him was about $900, leaving nearly $700 due on that narrow construction of the contract, and the fund in court is only $721.28. It follows that, if complainants' claim is reduced to the actual difference in value between the materials delivered and those returned, it will amount, with interest and costs, to sufficient to absorb the whole fund.

I will advise a decree that the complainants are entitled to the fund.

MONROE et al. v. DE FOREST et al.
(Court of Chancery of New Jersey. March 30, 1895.)

RELEASE OF SURETY—ALTERATION OF AGREEMENT—POWER OF EXECUTOR.

1. When a creditor who holds a collateral security taken from his debtor consents to a material alteration therein, to the prejudice of the surety, the surety is thereby discharged.

2. An executor of a surety cannot consent to the discharge of a mortgage given to secure the debt for which the testatrix was surety until all the conditions of the obligation be complied with.

(Syllabus by the Court.)

Bill by John Monroe and another against William H. De Forest and another for an accounting. Heard on exceptions to the master's report. Exceptions sustained.

James Buchanan and Mr. Rosenberg, for exceptants. Frank Bergen, opposed.

BIRD, V. C. Dix & Phyfe claim to be creditors of the deceased testatrix. They hold a promissory note which was drawn by William H. De Forest, Jr., to the order of William H. De Forest, Sr., and indorsed by the latter, and also indorsed by the deceased testatrix, who was the wife of the first indorser. At the time of the execution of the note, a bond was given by the maker of the note, in the sum of $60,000, for the payment of $30,000, with interest, which bond was secured by a mortgage on certain lots on 144th street and on 76th street, in New York City. At the same time an agreement was entered into between Dix & Phyfe and the maker of the note, which concluded with the stipulation in these words: "The parties of the second part agree that the said mortgage of thirty thousand dollars on the premises on the south side of One Hundred and Forty-Fourth street shall be subordinate and subject to the second mortgage of eighty thousand dollars, and shall be withheld from record for the period of ten months, which is the time provided for the completion of said buildings, provided the party of the first part shall faithfully perform his covenants under this agreement. And the parties of the second part agree to release from time to time any of the houses so to be completed from the lien of said mortgage, on the payment to them of the sum of twenty-five hundred dollars on such house." The maker of the note and the owner of the lots commenced the erection of buildings thereon, and, after the

Digitized by Google

walls were erected, applications were made from time to time by builders or material men to Dix & Phyfe for the release of their lien, to the extent of the labor and material employed in and upon the said buildings, which was granted by them without any payment whatsoever.

It is insisted that this release without compensation according to the agreement works a discharge of the surety. I can find no case or rule of law which will permit me to hold otherwise. It is well settled that a surety is entitled to the benefit of all collaterals which have been taken by the creditor from the principal debtor. In this case, Dix & Phyfe not only had the mortgage referred to, but entered into an agreement in and by which they would release the mortgage from each of the various lots upon the payment of $2,500. It is insisted that this mortgage turned out to be of no value, and that, therefore, the surety is not damaged by the release. I very much doubt, under such a stipulation, if an argument to that effect can be of any avail, especially where the testimony respecting the value of the premises at the time of the release shed so little light upon the question of value. Besides this, the release evidently worked such a change of condition as to make it impossible to determine what the result would have been if such conditions had not been imposed. Who can tell but that the embarrassments which the mortgage presented would not have been overcome by the owner, had the mortgagee refused to be subservient to his wishes in surrendering his position as such mortgagee?

But the material point in the case is the absolute agreement that the mortgage is to stand until the payment of the $2,500. It is that agreement which the surety is entitled to, as well as any benefit that may accrue from the value of the mortgaged premises. The lien of the mortgage may have been embarrassing, but relief against such embarrassment devolved upon the mortgagor or owner of the premises, and not upon the mortgagee, in the face of the agreement. The surety had an undoubted right, in any and every event, to expect that mortgage to stand in the place, by way of seniority, which it held until $2,500 was paid upon each lot. This transaction comes directly within the judgment pronounced by Lord Loughborough in Rees v. Berrington, 2 Ves. Jr. 540, also 2 White & T. Lead. Cas. Eq. 1870: "It only amounts to this: that there shall be no transaction with the principal debtor without acquainting the person who has a great interest in it. The surety only engages to make good the deficiency. It is the clearest and most evident equity, not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement." 2 White & T. Lead. Cas. Eq. 1894, 1901; Harris, Sub. § 19; Pearl v. Deacon, 1 De Gex & J. *p. 461; King v. Baldwin, 2 Am. Lead. Cas. 394; Baker v. Briggs, 8 Pick. 122; Vose v. Railroad Co., 50 N. Y. 374, 375; De Col. Guar. (by Morgan) 388, 389; Miller v. Stewart, 9 Wheat. 690; 1 Story, Eq. Jur. §§ 324, 325; Price v. Trusdell, 28 N. J. Eq. 200; Railroad Co. v. Little, 41 N. J. Eq. 520; Brick v. Banking Co., 37 N. J. Law, 307. The surety, upon discharging the debt, is always entitled to all the securities which the creditor had taken for his own protection, in the same condition as the creditor received them. Pledge v. Buss, Johns. Eng. Ch. 663; 2 White & T. Lead. Cas. Eq. 1890, 1891; Vose v. Railroad Co., supra; Bank v. Colcord, 15 N. H. 119; Guild v. Butler, 127 Mass. 386; Paulin v. Kaighn, 29 N. J. Law, 480. In such cases the law presumes injury to the surety until the contrary is established, the burden of which is upon the creditor. 2 White & T. Lead. Cas. Eq. 1902. When this agreement is read and considered, it will be seen that the bond and mortgage referred to were to give way for other securities therein named, and were in reality to be postponed to such a period of time as would enable the debtor and owner to complete the buildings upon the lands mentioned. For this he was allowed 10 months, by which it was manifestly intended to give him every opportunity to provide for every embarrassment. In the light of the above authorities, the creditor had no right to interfere with or to alter these conditions without the consent of the surety.

But it is claimed that the result above expressed is not the just result, in this particular case, because William H. De Forest, Sr., the executor of the surety, consented to, if he did not request, the execution of the releases by Dix & Phyfe, after he had proved the will, and taken upon himself the burden of the execution thereof. I find nothing in the case that justifies the executor in giving the least countenance to such release. Certainly he derived no such power from the will. This instrument only authorizes him to pay the just debts of the testatrix, and possibly to invest and reinvest certain portions of the money, and to make sale of the real estate. The last clause is in these words: "I hereby grant to my said executor and trustees full power of sale of any or all of my said estate, upon such terms as said executor or trustees shall deem wise; and I hereby grant to my said trustees full discretion in the management of said trust estates, and the character of the investments." Certainly here is no semblance of power to increase the liabilities of the estate, nor to discharge any security then existing against liability, however slight that security might be supposed to be, in the estimation of the executor. Perry, Trusts, § 483, says: "Trustees who hold an equity of redemption in lands mortgaged for more

Digitized by Google

than their value may release the equity of redemption to avoid the costs of a foreclosure suit, where such suit will lie, and where costs would be imposed upon them as defendants. If a trustee is a mortgagee, he would not be justified in releasing part of his security for the convenience of the mortgagor merely, nor unless there was some advantage to be gained to the cestui que trust or the trust estate." Lewin, Trusts, *p. 591, § 44, says: "A trustee may, under circumstances, release or compound a debt. But if a trustee release or compound a debt without some sufficient ground or justification, or if he sell a debt for a grossly inadequate consideration, he will clearly be answerable to the cestuis que trustent for the amount of the devastavit." In Jevon v. Bush, 1 Vern. 342, a trustee in a recognizance, having released it without any consideration, was decreed to pay the principal and interest. Dix & Phyfe had full notice of the fact that William H. De Forest was executor of the surety who had died, and consequently that it was his duty to administer her estate in the interests of the cestuis que trustent, the creditors of his testatrix.

However, it is pressed upon the attention of the court that the real estate so mortgaged as security for the payment of the $30,000 was absolutely worthless for any such purpose, and that consequently no injury was done to the estate of the testatrix; or, in other words, that consent to such release by the executor did not increase in any wise the liability of the estate. This conclusion has no foundation to rest upon, under the circumstances of the case. And, what is more to be regretted, it is impossible, as was said by Lord Chief Justice Knight-Bruce in Wiles v. Gresham, 5 De Gex, M. & G. 773, now to determine that question. Indeed, that question could only have been satisfactorily settled by the ordinary or natural progress of events, in the just prosecution of the rights of all parties interested in the premises. From this statement it will be perceived that the point to be determined is not the value of the premises at any particular time, but whether William H. De Forest, Jr., or any one in his stead, would have carried out the implied promises and agreement entered into with Dix & Phyfe, and paid the $2,500 in discharge of their mortgage to that extent, in case no release had been executed. This was his undertaking. Upon the strength of this undertaking the transaction was completed, not only as to Dix & Phyfe, but as to Mrs. De Forest, the surety. When this transaction, in all its details, was carried through, the prospective value of the property must have been considered; but, whether it was or not, the expressed condition was that, upon the execution of a release, $2,500 should be paid. The value of the property had nothing whatever to do with this condition, and as was clearly and forcibly intimated in the case of Wiles v. Gresham, supra, none can say that if the release had not been executed the mortgagor or owner of the premises would not have raised the $2,500. It was not only his contract that he would, but his highest interest to do so. The buildings were partially erected. It would be absurd for the court to assume that it was impossible for the owner to raise the $2,500 upon each lot. It was incumbent upon him to raise the money, or submit to the sacrifice of all that he had already invested, the former of which is clearly much more probable than the latter.

The foregoing conclusions seem to be quite in harmony with the authorities which hold that an executor or administrator cannot bind the estate which he is administering by any new promise. Sumner v. Williams, 8 Mass. 162; Schmittler v. Simon, 101 N. Y. 554, 5 N. E. 452; Pinney v. Johnson, 8 Wend. 500; Austin v. Munro, 47 N. Y. 360; McFarlin v. Stinson, 56 Ga. 396. An executor cannot, by his promise as such, bind the assets in his hands, nor can he consent to their diminution or surrender, without a reasonable consideration therefor, or until all the conditions of the obligation be complied with. The estate being insolvent, the creditors have a right to be heard. I think the exception to the master's report, in this respect, should be sustained, with costs.

STATE (WILSON, Prosecutor) v. INHABITANTS OF CITY OF TRENTON.

(Court of Errors and Appeals of New Jersey. March Term, 1894.)

Certiorari by Samuel K. Wilson against the inhabitants of the city of Trenton to review an award for damages, and an assessment of benefits. The award and assessment were modified by the supreme court (26 Atl. 83), and the prosecutor brings error. Affirmed.

George M. Robeson, for plaintiff in error. William M. Lanning for defendant in error.

PER CURIAM. The judgment in this case is affirmed, for the reasons given by the supreme court. Decree unanimously affirmed.

BRADBURY v. MUTUAL RESERVE FUND LIFE ASS'N.

(Court of Chancery of New Jersey. April 22, 1895.)

FORFEITURE OF MUTUAL INSURANCE — REINSTATEMENT—REMEDY.

Where a policy in a mutual life insurance company has been forfeited by failure to pay the premiums upon the day fixed, and the holder has the right, upon certain terms, which he is able and willing to fulfill, to be relieved from his default, his remedy against the company is not by mandamus, but in a court of equity, for relief in the nature of specific performance.

(Syllabus by the Court.)

Bill by John Bradbury against the Mutual Reserve Fund Life Association to restore complainant to his standing and pecuniary rights

Digitized by Google

in the defendant association. Heard on demurrer to the bill. Demurrer overruled.

John Griffin, for complainant. J. Frank Fort, for defendant.

PITNEY, V. C. The object of the bill is to restore complainant to his standing and pecuniary rights in the defendant association, which he says he has temporarily lost by failing to pay his bimonthly dues on the precise day upon which they came due. Two points are made against the bill: First, that it fails to show facts entitling complainant to relief; second, that complainant's remedy is by mandamus.

The bill is somewhat meager in its statements,—so much so that complainant's counsel suggested an amendment. Without determining whether it is sufficient in its present shape, I will consider it as if amended as suggested. Read in that way, it sets out that defendant is a mutual assessment life association, duly incorporated under the laws of New York, in which certificates of membership are given in particular sums, which entitle the holder, or his personal representatives, to the payment of that sum upon his death. The statement, in effect, is that the certificate does not, like an ordinary life insurance policy, contain the terms of the contract between the association and the complainant, but is a mere certificate of his membership, including the extent of his interest, resembling in that respect a certificate of stock in an ordinary corporation. The contract proper is found in the constitution and rules of the association, which require the member to make certain annual payments for the purpose of meeting the expense of operation, and, in addition, certain bimonthly payments or assessments, called "mortuary calls," which last constitute the fund proper, from which death payments are made. The bill states that, as an inducement to complainant to become a member, it was represented to him by the officers of the association, in such a manner as to become a part of the terms of the contract of membership: "A member who lapses his certificate may reinstate the same at any time within one year, for good cause shown, and upon satisfactory evidence of good health, and upon payment of all delinquent dues and assessments,"—and that "the mortuary premiums, unless paid half-yearly or yearly, in advance, are due and payable every two months, viz. February, April, June, August, October, and December, and if not paid within thirty days from the first week days of said months the policy will lapse, but may be revived at any time, within twelve months from date of lapse, on presentation of a health certificate satisfactory to the association, and payment of all arrears of premium." And the constitution provides that "the executive committee shall have power to reinstate a delinquent member at any time within a year, for good cause shown, and upon satisfactory evidence of good health, and upon payment of all delinquent dues and assessments."

Complainant purchased a certificate of membership in 1883, to the extent of $1,000, and paid all his dues thereon up to and including August, 1893. On October 1, 1893, a mortuary call of $2.57 was made by the association upon him, payable November 1, 1893, which he was unable to pay, for a cause which is not set out with particularity, but which I shall assume will, upon actual amendment, appear to be a good cause, and that he made default, but that three days afterwards he procured the necessary sum, and on November 4, 1893, duly called at the office of the association, and applied for reinstatement, and offered to pay the August dues, and that he subjected himself to examination as to the state of his health, and was examined by a medical examiner of the association, and that the defendant declined to reinstate him, on the ground, as I infer (though it is not so stated), that he was not in a proper state of health. Then follows this statement: "And your orator further shows unto your honor that he is in good health and has been examined by prominent physicians in the city of Jersey City, who have made a thorough examination of him, and pronounce him in good health, and a first-class, insurable risk, and he has tendered himself ready and willing to submit to a medical examination of competent physicians as to whether or not he is in good health, and forms a good, insurable risk; and the said defendants have refused to comply with such reasonable request, and decline to take, as satisfactory evidence of good health, the certificate of any physician, excepting such as are employed by them, and fraudulently refuse to reinstate your orator, well knowing that your orator is in good health, and forms a proper subject of insurance, according to their rules and regulations." And then this allegation: "And your orator tenders himself ready and willing to pay the dues and assessments accrued, and to submit to the examination of physicians, to give satisfactory evidence to said association that he is in good health, and forms a proper, insurable risk, according to their rules and regulations, under the direction of this honorable court." The prayer is that defendant may be decreed to reinstate complainant to membership. Upon this allegation, I must assume that complainant, at the date of his failure (November 1, 1893), and subsequent tender (November 4, 1893), was in fact in good health, and a fit person to be insured, and that he fully met the requisitions of the contract above set out. If so, I can see no ground for the refusal to restore him. It is well settled, as I suppose, that no person has a right to refuse, arbitrarily, to be satisfied with that which in justice he ought to be satisfied with, because it is intrinsically satisfactory. If A. contract to construct for B. a carriage of a particular quality and description, to the satisfaction of B.,

Digitized by Google

and does in point of fact construct such a carriage, of the particular quality and description provided for in the contract, B. cannot escape payment by simply declaring that he is not satisfied with it. He is bound to be satisfied with it. I think, therefore, the complainant has shown a right to be reinstated, upon terms, of course, of proving that he was in such state of health, and of paying the arrears of dues.

Next as to his remedy by mandamus: It is well settled that mandamus is an extraordinary writ, and does not lie where there is another legal remedy. Mr. High properly defines it as a command directed to some corporation, officer, or inferior court, requiring the performance of a particular duty, which results from the official station of the party to whom the writ is directed, or from operation of law. And see Bac. Abr. tit. "Mandamus"; Bailey v. Ovlatt, 46 Vt. 627. Originally it was resorted to for the purpose of reinstatement of membership only in public or municipal corporations, but has of late been extended to membership in certain classes of private corporations. High, Extr. Rem. § 294; Sibley v. Carteret Club, 40 N. J. Law, 295. That was a case where the prosecutor had been unlawfully removed from membership in an ordinary social club, of which the membership, like that in an ordinary medical society, or a chamber of commerce, or a religious corporation, has no intrinsic money value, but its value depends upon the personal use of the privileges of membership. No case was cited to me, nor have I found any, where it was ever resorted to for the purpose of restoring a party to membership in an incorporated association, like that here in question (which, as I view it, does not differ materially from an ordinary mutual life insurance company), nor where the prosecutor had not been removed, but had lost his right by a simple failure to perform something on his part, and where something was to be done as a condition precedent to his restoration. The real question is as to the intrinsic character of the right which has here been infringed. Is it one resting in private contract, for whose breach the party has his remedy either by action at law, for damages, or in equity, for specific performance? If such be its character, and the matter ultimately involved is money, merely, then the party has no standing to ask for the prerogative writ of mandamus. This seems to be the acknowledged rule. The common-law procedure act of 1854, § 68, enlarged the use of the writ of mandamus in England by declaring that the plaintiff should be entitled to that writ, "commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested." Under that act, distinguished counsel applied to the court of queen's bench for a writ to be directed to a landlord, commanding him to execute a lease of lands pursuant to a written contract. Benson v. Paull, 6 El. & Bl. 273. Lord Campbell, in denying the writ, said that the statute did not extend to the fulfillment of duties arising merely from personal contract. To the same effect were the judgments of the other judges who sat with him. The authorities in this country are to the same effect. In Parrott v. City of Bridgeport, 44 Conn. 180, the application was for a mandamus to compel the city to construct part of a certain street in a particular and special manner, for the especial benefit of the applicant, whose right to have it so constructed depended upon a special contract entered into by the city with the applicant. At page 182 the court says: "The duty, therefore, if any, which rests upon the city in this regard, is one which it owes to the petitioner as an individual, not to the public, and the special contract is the foundation upon which it rests. But the writ of mandamus has never been considered as an appropriate remedy for the enforcement of contract rights of a private and personal nature, and obligations which rest wholly upon contract, and which involve no questions of public trust or official duty. Indeed, strictly speaking, it never lies where the party aggrieved has adequate remedy at law, and its aid is only to be invoked to prevent an absolute failure of justice, in cases where ordinary legal processes furnish no relief." The learned judge cites State v. Zanesville & Maysville Turnpike Road Co., 16 Ohio St. 308, and State v. Howard County Court, 39 Mo. 375. In the latter case the supreme court of Missouri refused a mandamus asked for by a military recruit who was entitled to a bounty offered by the county for volunteers, on the ground that his right rested entirely in contract. In Bailey v. Ovlatt, supra, a writ of mandamus was refused which was asked for by a legislative investigating committee, to be directed to the stenographer employed by the committee, commanding him to write up his notes of the evidence given to the committee in the course of its duties. In the course of its opinion the court says, "The writ can be used only to compel the discharge of duties imposed by law, as distinguished from duties imposed by contract merely." And see High, Extr. Rem. §§ 25, 28; Spelling, Extr. Relief, § 1379. Apgar v. Trustees, 34 N. J. Law, 308, is not discordant with this rule. There the mandamus was directed to the trustees of a school district, commanding them to perform an official and ministerial duty imposed upon them by statute, viz. to give the applicant an order on the township collector for the amount of her salary duly earned as a teacher in the public school; the order to be paid out of public moneys in the collector's hands, devoted to that particular purpose. In the course of his opinion the learned judge says: "The true test by which to determine the right of a party suing for a mandamus is—First, whether he has a clear legal right; and, secondly, whether there is any other

Digitized by Google

appropriate specific remedy to enforce that right. This writ can be invoked only where no other adequate remedy exists, to prevent the failure of justice. It cannot be appealed to where the end sought to be attained can be otherwise accomplished, and was never designed to be applied to the mere collection of debts." Turning now to the case in hand, I find nothing in it other than the contractual relations between an ordinary mutual life insurance company and the special individual members of which it is composed. The incorporated association agrees, in consideration of certain periodical payments, to pay the personal representative or nominee of the member a certain sum of money at his death. There is here no present, current, social, or professional benefit to the member attached to his membership, nor is he subject to any continuing conditions of personal behavior, conduct, or qualification, such as we find in memberships in religious, benevolent, or other social organizations, or in medical or other scientific societies. The right to the prospective benefit of his membership has been lost, not by any breach of the rules of personal conduct, but by failure in a matter of contractual duty,—to pay money on the day fixed by the contract,—and his right to be restored to his contractual rights depends upon a clause or clauses in the contract which entitle him to such restoration upon certain conditions, which I have found he either performed, or is ready to perform. This view shows clearly enough that the case is not a proper one for mandamus, but is one for specific performance in this court.

This result is sustained by the adjudged cases. In Cohn v. Insurance Co., 50 N. Y. 610, relief was prayed in equity, and was resisted, inter alia, on the ground that mandamus was the proper remedy, but the contrary was adjudged. This ruling was followed in Meyer v. Insurance Co., 73 N. Y. 516. To the same effect are Day v. Insurance Co., 45 Conn. 480, and Insurance Co. v. Pottker, 33 Ohio St. 459, at pages 464, 465. The demurrer should be overruled, without costs.

MERSHON et al. v. WILLIAMS et al.

(Court of Chancery of New Jersey. April 18, 1895.)

RES JUDICATA.

Defenses which were considered or were admissible in an action of ejectment, and decided against defendant therein, cannot be reconsidered on a bill to restrain an action for mesne profits based on the recovery in ejectment.

Bill in equity by John T. Mershon and another against Attie E. Williams and another to enjoin a suit at law. On rule to show cause why injunction should not issue. Rule discharged.

John S. Voorhees, for complainants. Wm. H. Vredenburgh, for defendants.

EMERY, V. C. The present application is to restrain by preliminary injunction the prosecution of an action at law for mesne profits. This action for mesne profits is based upon a recovery in ejectment by the defendants against the complainants, under which recovery the defendants have been put into possession of the premises. The complainant Harvey H. Mershon, who is the son of the complainant John T. Mershon, was in possession of the premises in question under a lease dated January 26, 1892, between the defendant John H. Williams (who was the husband of the defendant Attie E. Williams as lessor, and the complainant John T. Mershon, as lessee. The lease was "for the term of one year from March 1, 1892, with the privilege of four more years, from March 1, 1893; and said Mershon [John T.] agrees to take said farm, with the privilege of four more years from March 1, 1893." The title to the farm was in the defendant Attie E. Williams, and the lease was not signed by her, nor was her husband authorized, in writing, to sign the lease, as required by the statute of frauds, and upon suit in ejectment brought on March 3, 1893, by the defendants against both of the complainants, final judgment was given against the defendants in the supreme court. Pending the suit, as appears by the bill, Harvey H. Mershon was forcibly evicted on April 20, 1893; and by proceedings under the forcible entry and detainer act he was afterwards restored to the possession of the premises, and remained in possession until both defendants were removed on the writ of execution in ejectment on December 17, 1894. No rent has been paid since March 1, 1893.

The equity upon which the complainant relies in his bill to overcome the effect of this judgment, which, by statute (Revision, p. 332, par. 44), is conclusive as to the right to possession, is based upon two propositions: First, that the complainants, under the lease, were entitled to remain for the further term of four years from March 1, 1893; and, second, that the defendant Attie E. Williams is, by her acts, admissions, and conduct set out in the bill and affidavits, equitably bound by the lease to the same extent as if she had signed. It is not claimed that she is bound to any greater or other extent than if she had signed the lease. The primary and fundamental question, therefore, is, what is the complainant's right, under the lease, to the extended term after March 1, 1893? The bill, upon this point, simply alleges, "And your orators further show that they exercised the option in said lease contained, of continuing said term for four years from and after the 1st day of March, 1893." The affidavits of both complainants, attached to the bill, fail to disclose how or in what manner, if at all, this option was exercised, and, indeed, are altogether silent as to this paragraph in the bill. The answer of defendants denies that this option under the lease was exercised by complainants, and shows that it

Digitized by Google

February, 1893, the following notice was given by the complainant Harvey H. Mershon, who was then in possession of the farm, to the defendant John H. Williams: "Mr. John H. Williams—Dear Sir: I hereby notify you that I will remain on the farm for the year 1893, and shall work the same according to your lease. [Signed] H. H. Mershon. Dated Feb. 20, '93." In the action of ejectment the supreme court held that this notice was, in effect, a notice by the tenant that he did not elect to take the farm for the further term of four years, but for a lesser term, to which the lessor had not assented, and that the tenant had not availed himself of his privilege to retain possession under the lease. Williams v. Mershon (N. J. Sup., 1894) 30 Atl. 519. This decision is a construction by the supreme court as to the effect of a notice of this character upon the tenant's option, and the respective rights of parties under a lease of this kind, which is binding in equity as well as at law; and it is, moreover, in the present case, an actual adjudication between these parties, which settles the question of the effect of the notice between them for all purposes, so long as the judgment remains unreversed. This court has no jurisdiction to review the judgment of the supreme court for any supposed error in the construction of the effect of this notice.

The claim of complainant's counsel, upon the argument, that a court of equity could give an effect to the notice different from that given to it in a court of law, because of a supposed intention on the part of the tenant who gave the notice to remain for the full term, cannot be admitted. In the first place, the question as to the effect of such notice under the terms of the lease is a purely legal question upon which equity must follow the law, in deciding upon that branch of complainant's case which relates to the legal rights of complainant against John H. Williams under the lease. In the second place, there is no allegation in the bill, nor is there anything in complainant's affidavits, upon which a court of equity would have any right to proceed to adjudicate that this notice should, in equity, have any different equity from what it has been construed to have at law.

Complainant also insists that the notice was ineffectual to make any change in the rights of the parties under the lease, because it was given, not by the lessee, John T. Mershon, but by his son, and that there is no proof of his agency. But in view of the fact that the complainant's bill is founded on the son's rights under the lease, and on his entry into possession under it, a court of equity must treat his notice as affecting the right he claims. And, besides, the question as to whether this notice given by the son was effective to determine the option under the lease seems to be the precise point upon which the case at law was decided, and was decided affirmatively. It is thereby conclusively settled between the parties by the judgment in ejectment. The defenses which were considered or admissible in the court of law, in the action of ejectment, and which were there decided against the complainants, cannot be reconsidered here on bill for injunction to restrain the action for mesne profits. Holding this to be the effect of the decision and judgment by the court of law upon the question of the legal rights of the parties under the lease, I must deny the application for injunction, and will advise that the order to show cause be discharged, with costs.

CROSIER v. STILLSON.

(Supreme Court of Vermont. Rutland. Feb. 4, 1895.)

REPLEVIN WRIT—SERVICE.

A writ of replevin, made returnable to the county in which the property is detained, may be served in another county, to which the property has been transferred after the beginning of the suit.

Exceptions from Rutland county court; Start, Judge.

Action of replevin by C. H. Crosier against George Stillson. Judgment for plaintiff, and defendant excepts. Affirmed.

Fayette Potter, for plaintiff. J. C. Baker, for defendant.

TAFT, J. This is an action of replevin returnable in Rutland county. The writ was served at Rupert, in Bennington county. It is provided in R. L. § 1231, that, when a writ of replevin for goods and chattels is issued, it "shall be returnable to the county court for the county in which the goods are detained." The defendant moved to dismiss the action, for that it appears from the writ and officer's return that the property replevied was detained at Rupert, in Bennington county, and that the action could be commenced and prosecuted only in that county. It is alleged in the declaration that the detention of the mare replevied was at Pawlet, in Rutland county. The return of the officer shows that the writ was served in Bennington county. If the mare was detained at Pawlet,—and we must be governed in that respect by the declaration,—the writ was properly made returnable in Rutland county. Property detained in one county may be sued for in replevin, and the writ served in another county, if the situs of the property in the meantime has been changed. Such seems to be the case under consideration. The motion to dismiss was properly overruled. Judgment affirmed, and cause remanded.

Digitized by Google

STATE v. TOMASI.

(Supreme Court of Vermont. Washington. Feb. 4, 1895.)

INTOXICATING LIQUORS—ILLEGAL SALE.

It is no defense for violating a statute prohibiting the sale of lager beer that accused did not know that the substance sold was lager beer.

Exceptions from Washington county court; Munson, Judge.

D. Tomasi was convicted of keeping a nuisance, and excepts. Exceptions overruled.

Geo. W. Wing and F. L. Laird, for respondent. Zed S. Stanton, State's Atty.

TAFT, J. But one question arises in this case. The jury were instructed that, if the respondent sold what was in fact lager beer, he might be found guilty, even though he did not know or suppose that the article was lager beer. The respondent insists that the charge so given was erroneous, claiming that ignorance of fact, unaccompanied by any negligence, exempts one from criminal responsibility. If knowledge of certain facts is necessary to constitute an offense, the respondent can always show an ignorance of such facts in defense, or, rather, to insure a conviction, it is incumbent upon the prosecution to show the respondent's knowledge; e. g. it is an offense to pass counterfeit money, knowing it to be counterfeit. To convict, the prosecution must always show the respondent's knowledge of its baseness. The case cited by the respondent (Crabtree v. State, 30 Ohio St. 382) is of this class. The statute prohibited the sale of liquor to a person by one knowing him, the vendee, to be a person in the habit of getting intoxicated. It was held necessary to show knowledge of the respondent of the person's habit. The rule in most instances seems to be this: If, to constitute an offense, knowledge of certain facts is essential, it must invariably be shown that the respondent has such knowledge; but if a statute makes an act penal, without reference to knowledge, it is then unnecessary to show it, and ignorance of the fact is no defense. The rule may be stated in other words, thus: If a statute commands that an act be done or omitted, which in the absence of the statute would be blameless, ignorance of the fact or state of things contemplated by the statute will not excuse its violation. The charge of the court was in accord with the rule as stated in State v. Hopkins, 56 Vt. 250. For the many cases in which the same doctrine is held, see People v. Roby, 52 Mich. 577, 18 N. W. 365, and Farrell v. State, 32 Ohio St. 456, 30 Am. Rep. note, p. 617. A case much in point may be found in the English exchequer. Reg. v. Woodrow, 15 Mees. & W. 404. The respondent was tried, that eminent jurist, Sir Frederick Pollock, C. B., presiding, upon the charge of having in his possession adulterated tobacco, the defense being that he purchased it as genuine, and had no knowledge nor cause to suspect that it was not so. His counsel argued that, in order to enable the respondent to ascertain the character of the tobacco, a nice chemical analysis might be required, but he was interrupted by Park, B., who said: "You must get some one to make that nice chemical analysis, or you must rely upon the manufacturer or dealer who sells to you, and take your remedy against him." It appears from the exceptions that a "nice chemical analysis" of the beer in question was made, presumably at the expense of the state. It would have been a better and wiser thing for the respondent if he had had one made prior to his purchase. Exceptions overruled. Judgment of guilty upon the verdict affirmed; execution of sentence ordered.

CUTLER et al. v. DIX.

(Supreme Court of Vermont. Washington. Feb. 4, 1895.)

CONSTRUCTION OF CONTRACT—PAROL EVIDENCE.

1. Plaintiffs contracted in writing to furnish defendant with a monument according to a certain design of certain specified dimensions. Plaintiffs conceded that in the monument furnished several of the measurements were a departure from the specifications. *Held*, that it was for the court to say whether there was a compliance with the contract.

2. The design must yield to the measurements, and parol testimony is not admissible to show that the variations were made in order that the monument might conform to the design. Ross, C. J., dissenting.

Exceptions from Washington county court; Tyler, Judge.

Action by Cutler & Burnham against Sophia A. Dix. Judgment for plaintiffs, and defendant excepts. Exceptions overruled.

S. C. Shurtleff and O. B. Boyce, for plaintiffs. John W. Gordon and John H. Senter, for defendant.

TAFT, J. The plaintiffs agreed in writing to furnish the defendant a monument according to the Dickinson design (except the corner on the die), and of certain specified dimensions. They furnished one the various parts of which were not cut according to the sizes specified in the contract. Nine of the 15 measurements varied from those specified. In the monument furnished the plinth was 4⅞ inches longer, and the die 3¾ inches thicker, than the dimensions required by the agreement. This change of sizes was made by the plaintiffs without the knowledge or consent of the defendant. In reference to this question of the changes in the dimensions of the monument it is stated in the exceptions that the plaintiffs and the witnesses were allowed to testify what they thought the sizes of the monument ought to be, and the effect that the variations made from the contract sizes had upon the proportions of the monument. We infer, although

Digitized by Google

it is not so stated, that the variations from the measurements which the parol evidence tended to show and which were conceded by the plaintiffs to have been made, were so made in order to make the monument conform to the Dickinson design. The court submitted to the jury the question whether the variations shown were a departure from the contract. The evidence in regard to the variations was admitted under exception, and the defendant also excepted to the submission to the jury of the question of the construction of the contract, claiming that it was a question for the court. Had it been uncertain what the dimensions of the monument were, there might have been a question to submit to the jury; but what the dimensions were was conceded, and it was a question for the court to say whether the monument was a compliance with the contract. Had the plaintiffs a right to change the dimensions of the monument, and make them other than the prescribed ones? We think not. The fact that the monument was to be of a certain design did not justify the plaintiffs in constructing it with other dimensions than those specified in the contract. The design must yield to the measurements. The case is analogous to a conveyance of land which is described by metes and bounds or courses and distances, and it is held that such description prevails over any general description of the subject-matter that may have been used in the deed tending to enlarge or diminish the boundaries. While many of the variations were so slight that essentially they were such as the contract called for, there were others that we must hold were a substantial departure from the contract. Thus the plinth was more than 12 per cent. longer, and the cap more than 28 per cent. thicker, than the contract dimensions. It cannot well be said that the contract presents a case of latent ambiguity, for the measurements prevail over the design, and thus there is no uncertainty. The dimensions must govern, and they are made certain. If the contract was erroneously drawn, its reformation cannot be had in a court of law. The dimensions of the monument furnished being conceded, it became a question of law whether the contract was complied with. It does not appear that there was any difficulty in constructing a monument according to the specified measurements, and the defendant was entitled to a compliance with the contract. Under this holding the defendant was under no obligation to accept the monument, and to pay the consideration named in the agreement. The other questions which arose upon the trial become immaterial, and it is unnecessary to consider them. Judgment reversed, and cause remanded.

ROSS, C. J. (dissenting). I concur in the result, but not in the grounds of the decision. I think that all of the terms of the contract are to be considered in ascertaining the intention of the parties. On the face of the contract there is discoverable no contradiction nor ambiguity between the Dickinson design and the measurements. But on applying this design and the measurements to a monument, it is found they do not agree, and a doubt or ambiguity arises in regard to which the parties intended should control. I think parol testimony was admissible to remove this latent ambiguity. But the court erroneously rejected testimony to show what the several measurements of the Dickinson monument were, which had been made in accordance with the Dickinson design. I do not think that the measurements are to control, and that the design, with its proper proportions, is to be rejected. But when a substantial variance between the design and the measurements is shown, then the ambiguity may be cleared up by parol testimony, that the intention of the parties may prevail.

SARGENT et ux. v. KING.

(Supreme Court of Vermont. Windsor. Feb. 16, 1895.)

VENDOR AND PURCHASER—CONSTRUCTION OF CONTRACT.

Under a contract whereby plaintiffs agreed to sell a farm to defendant for $1,200, and leased it to him for $100 per year, and providing that, upon payment of $500 annual rent, the same should be applied on the price, and plaintiffs should convey, taking back a mortgage for the balance, and that defendant might cut timber on the premises, provided he applied the proceeds thereof upon the price, the proceeds of the timber cut could not be applied in payment of overdue rent.

Exceptions from Windsor county court; Thompson, Judge.

Action by W. H. Sargent and wife against S. H. King for breach of covenant. There was a judgment for plaintiffs, and defendant excepts. Affirmed.

J. J. Wilson, for plaintiffs. N. L. Boyden and J. D. Denison, for defendant.

TYLER, J. By the contract the plaintiffs agreed to sell and convey the farm to the defendant for $1,200. By the same writing they leased it to him for an annual rent of $100, with permission to enter upon and occupy it so long as he performed his part of the conditions. It further provided that when he had paid $500 in annual rent, with annual interest from the date of the contract, the rent so paid should be applied on the contract price, and the plaintiffs should then convey the farm to him, he giving them his note secured by mortgage for the remaining $700. The defendant might also cut wood and timber on the farm, provided he applied the avails thereof in payment of the $1,200. To this end the plaintiffs were to have a lien on all wood and timber so cut. The defendant also gave a lien to the plaintiffs on all his annual crops as security for

Digitized by Google

the payment of the rent. He agreed to use and improve the premises in a husband-like manner, keep the buildings in repair, and keep them insured for the plaintiffs' benefit, pay the taxes, and, in default, to surrender the premises and all his rights to the same to the plaintiffs. These were stipulations contained in the contract. The defendant's counsel contend that the avails of wood and timber stood precisely like the $500 paid as rent; that both were to be reckoned as payments towards the contract price of the farm, and therefore that the $96.21 received from the sale of wood and lumber, and paid over to the plaintiffs, and the $37.50 worth of wood which the plaintiffs took and applied to their own use, more than paid the rent and taxes that were due when the suit was brought. This contention cannot be maintained, for the reason that the annual rent was not to be treated as a payment on the $1,200 until it amounted to $500. If the defendant had paid his rent for any number of years less than five and then ceased payment, he could not have claimed that the amount then paid should be applied on the $1,200. It was not until rent had been paid for five years, and to the amount of $500, and annual interest had been paid on the $500, that it was to be applied on the contract price. In was in this view that the court below held that the $96.21 could not be applied in payment of the overdue rent. It could not have held otherwise when it was found that it was understood by the parties that it should be applied on the contract price of the farm, and that the defendant took a receipt from the plaintiffs, specifying that it was to be so applied. Therefore this sum and the $37.50 will be applicable on the $700 at the termination of the five-years lease, provided the defendant has performed his part of the contract. Judgment affirmed.

NEWTON v. TOWN OF WATERFORD.

(Supreme Court of Vermont. Caledonia. Feb. 4, 1895.)

PAUPER—LIABILITY FOR SUPPORT.

1. One under contract with a town to support a pauper for a year, at a fixed price per week, removed the pauper, during the year, to another town. *Held*, that such removal did not terminate the contract, and that the town, not having taken the pauper back, was liable for his support until the end of the year.

2. A town is not liable for support furnished a pauper, after the expiration of an express contract, by one who has removed such pauper from the town during the existence of the express contract.

Exceptions from Caledonia county court; Tyler, Judge.

Assumpsit by N. R. Newton against the town of Waterford, to recover for the support of a pauper. Plea, the general issue. The court held, upon the facts found, that the plaintiff was not entitled to recover for the pauper's support, but might recover 50 cents for goods purchased for the pauper, and gave judgment accordingly. The plaintiff excepts. Reversed.

W. P. Stafford, for plaintiff. Bates & May, for defendant.

ROWELL, J. The pauper, plaintiff's brother, has always been of unsound mind, and incapable of choosing a residence. His father died in Waterford in 1874, where he had lived for many years. He always lived with his father till he died, and then with his mother and the plaintiff, till the latter was married, in 1880, and then with the plaintiff. He was supported thus in Waterford till March, 1891, when the defendant's overseer of the poor agreed with the plaintiff to pay him $1.50 per week towards the pauper's support, and payment at that rate was made quarterly for a year. At the end of the year, the overseer agreed with the plaintiff to pay him $2 per week for another year, and clothes and doctor's bills. Nothing was said as to the town in which the pauper should be kept. Defendant paid the stipulated price at the end of the first two quarters, but, before the expiration of the third quarter, the plaintiff moved to St. Johnsbury, and took the pauper with him, without the knowledge or consent of the overseer. Soon after his removal, the plaintiff saw the overseer, and told him he had moved, and asked him to send the pay for that quarter to him at St. Johnsbury, and the the overseer said, "All right." Nothing more was said about the removal of the pauper. At the end of the quarter, the overseer sent to the plaintiff, by letter, pay up to the time of his removal, and claimed that, by the removal of the pauper, the town was relieved from further liability for his support, and said that the town would stand on its legal rights in the matter. Plaintiff now seeks to recover on the express contract for keeping the pauper from the time of his removal to the end of the year, and on a quasi contract for keeping him thence till the commencement of the suit.

As to recovery on the express contract: The rule is that although a party may, in general, terminate an executory contract, thereby subjecting himself to the payment of damages for nonperformance, yet, when the matter of the contract is the keeping of something that the repudiating party has delivered to the other, and for the support of which continued expenditure is necessary, such party cannot terminate the contract without taking back what he delivered. That rule was adopted and applied in Durfey v. Town of Worcester, 63 Vt. 418, 22 Atl. 609, a case like this in its essential facts, and quite as strong against recovery, for there the overseer knew that the pauper was to be removed from the town, and protested against it.

As to recovery on a quasi contract: Baldwin v. Town of Worcester, reported in 31 Atl. 413, the sequel of Durfey v. Town of Worcester,

Digitized by Google

above cited, is decisive against such recovery. There the plaintiff sought to recover on a quasi contract for keeping the pauper after the expiration of the express contract; but it was held that the town was not bound to go for the pauper after the expiration of the express contract for keeping him, and for not doing so was not liable for the support thereafter. Nor was here an accord and satisfaction, for the order sent was not tendered in full payment of the town's liability, as claimed in argument, but in a way that left the plaintiff free to accept it and go for more.

Judgment reversed, and judgment for the plaintiff for $34.43, and interest thereon from the date of the judgment below.

SCHOOL DIST. NO. 20 IN CHESTER v. PIERCE et al.

(Supreme Court of Vermont. Windsor. Feb. 25, 1895.)

REORGANIZED SCHOOL DISTRICT—RIGHTS AND POWERS.

Under Act 1892, abolishing school districts, and making each town a single district for school purposes, the new corporation is entitled to wood which the school district had on hand for use in the school at the time the law took effect. Town of Barre v. School Dist. No. 13, 67 Vt. 108, 30 Atl. 807, followed.[1]

Exceptions from Windsor county court; Thompson, Judge.

Trover by school district No. 20 in Chester against F. W. Pierce and others for a quantity of wood. Plea, the general issue. Judgment for the defendants. The plaintiff excepts. Affirmed.

Geo. L. Fletcher, for plaintiff. L. M. Read, for defendants.

START, J. In this action the plaintiff seeks to recover the value of a quantity of wood which it had on hand for use in its schoolhouse when No. 20 of the Acts of 1892[1] took effect. The wood was taken and used in the schoolhouse, under the direction of the school directors for the town of Chester. The court below rendered judgment for the defendants to recover their costs. The case of Town of Barre v. School Dist. No. 13, 67 Vt. 108, 30 Atl. 807, is full authority for this holding. Judgment affirmed.

LEONARD'S ADM'R v. LEONARD'S EX'R.

Supreme Court of Vermont. Rutland. Feb. 21, 1895.)

AMENDMENT ON APPEAL—PROBATE COURT—EQUITY JURISDICTION—JOINT TITLE TO LAND—RIGHTS IN PROCEEDS.

1. A declaration in an action in the probate court may be amended on appeal to the county court.

2. The equity jurisdiction of the probate court does not extend to the establishment of an equitable claim against a decedent's estate.

3. R. L. §§ 1214–1217, conferring certain equity powers on courts which have jurisdiction of the action of account in such action, are confined to actions in which the legal title to the property in suit is in the parties.

4. When the title to land purchased by several jointly was taken in one only, the others can establish their interests in the proceeds of the sale of the property only in equity.

5. Where title to land purchased by several jointly was taken in one only, no one of the others can establish his interest in the proceeds of the sale of the land without making all the purchasers parties to the action.

Exceptions from Rutland county court; Tyler, Judge.

Assumpsit by the administrator of Jane Leonard against the administrator of Jerry Leonard. The court directed a verdict for defendant, and plaintiff excepts. Affirmed.

This was an appeal from probate court. The evidence of the plaintiff tended to show that his intestate, Jane Leonard, her sister, Nancy Leonard, and the defendant's intestate, Jerry Leonard, their brother, lived together as one family, carrying on different farms, in the town of Rutland, for many years; that subsequently they purchased a farm in Pittsford, upon which they continued to live until after the death of the two sisters; that they paid a portion of the purchase price down, and gave a mortgage for the balance; that the amount which they paid down belonged to the three jointly; and that the mortgage was subsequently paid off with money produced by their joint efforts. Nancy died in 1884, and Jane in 1886. Soon after the death of Jane, Jerry sold the farm and stock, receiving his pay therefor in money. The evidence of the plaintiff tended to show that after the sale he admitted to various persons that his sisters had an interest in the property. The declaration of the plaintiff was in general assumpsit. After the conclusion of the plaintiff's testimony, the defendant moved the court to direct a verdict in his favor, for that, if the plaintiff had any cause of action, it was not in assumpsit, but in account. Thereupon the plaintiff moved the court for leave to file a declaration in account, as an amendment of the declaration in assumpsit already on file. The court held, as a matter of law, that the declaration could not be so amended in the county court.

Geo. E. Lawrence, for plaintiff. J. C. Baker, for defendant.

ROSS, C. J. The county court erroneously held, as a matter of law, that the appeal papers could not be amended in that court, and for that reason it could not allow the plaintiff to amend his declaration by filing a declaration in account. Brown v. Brown, 66 Vt. 76, 28 Atl. 666; Cutting v. Ellis' Estate (Vt.) 30 Pac. 688. But, if it had allowed the amendment, it would not have availed the plaintiff. The claim, if any, in favor of the

[1] Act 1892, No. 20, provides that each town shall constitute a single district for school purposes, and that school districts shall no longer exist except for the settlement of their pecuniary affairs.

Digitized by Google

plaintiff estate against the defendant estate, is equitable in its origin, and in the extent of the plaintiff's right. Of such claims the probate court has not jurisdiction. At law the title to the farm in Pittsford, and the title to the money coming from its sale, were vested in Jerry Leonard; and at law the plaintiff estate could not establish that there was a resulting trust therein in its favor, nor could it establish the extent or amount of such trust interest. The equity powers conferred upon the probate court and upon appellate courts of law do not extend to the establishment of purely equitable claims and equitable rights. Mann v. Mann, 53 Vt. 48; Graves v. Wakefield, 54 Vt. 313; Little v. Dwinell, 57 Vt. 311; Purdy v. Purdy's Estate, 67 Vt. 50, 30 Atl. 695.

The testimony in the county court tended to establish that the money used in making payment for the purchase of the farm in Pittsford, the title to which was taken to Jerry Leonard, in part belonged to each of his sisters, Nancy and Jane, and that the mortgage given to secure the balance of the purchase money was paid in part with money belonging to each of them. To the extent that the money belonging to each sister went to make the first payment for the farm, and, probably, to make payment of the mortgage given to secure the payment of the balance of the purchase money, on the facts which the testimony tended to establish, there was, in equity, a resulting trust therein to her, vested in Jerry Leonard. To establish this trust, and to ascertain its extent, resort must be had to a court of equity. Pinney v. Fellows, 15 Vt. 525. R. L. §§ 1214–1217, conferring certain equity powers upon courts which have jurisdiction of the action of account in such action, are confined to actions in which the legal title to the property brought into contention exists in the parties, as copartners, cotenants or coparceners. But, where the parties' rights are strictly equitable in their origin and extent, the action of account cannot be maintained. Cearnes v. Irving, 31 Vt. 604. There is no allusion to the acts of 1852 and 1853 embodied in R. L. §§ 1214–1217, in Cearnes v. Irving. Yet that action was brought after those acts were passed. Besides, the grounds of that decision show that the acts of 1852 and 1853, giving courts at law certain equitable powers, are not applicable to the case at bar. A resort to equity being necessary to establish both the right and the extent of the right of the plaintiff estate in the defendant estate, assumpsit could not be sustained to enforce it.

There is another objection to the maintenance of either assumpsit or account. The right of the three estates, on the facts which the testimony tended to establish, are intermingled in such a manner that each estate has the right to be heard in regard, not only to its own right, and the extent of it, but, as an incident to its rights, in regard to the right, and its extent, of each of the other estates. Hence it is necessary to have all the estates before the court, that its judgment may bind all. The estate of Nancy is not made party to this proceeding, and probably could not be. If no administration has been, nor should be, taken on that estate, a court of equity could bring before it, and adjudicate the rights of, those who may be entitled to that estate. Judgment affirmed.

DODGE v. SOUTH ROYALTON GRADED SCHOOL DIST.

(Supreme Court of Vermont. Windsor. Feb. 22, 1895.)

SCHOOL DISTRICTS.

In 1847 plaintiff's farm in school district 4 in Royalton was attached to school district 16 in Tunbridge; in March, 1893, district 4 in Royalton became a part of the south graded school district of Royalton; April 1, 1893, school district 16 in Tunbridge was abolished. *Held*, that, upon the abolishment of this district, plaintiff's farm became a part of the town school district of Royalton.

Exceptions from Windsor county court; Ross, Chief Judge.

Action of assumpsit by Chester B. Dodge against the South Royalton graded school district to recover a tax paid under protest. There was a judgment for plaintiff, and defendant excepts. Affirmed.

Hunton & Stickney, for plaintiff.

THOMPSON, J. In 1847, the plaintiff's farm in school district 4 in Royalton, by proper proceedings, was set to school district 16 in Tunbridge, and continued a part thereof until that district was abolished, April 1, 1893, by St. 1892, No. 20. In March, 1893, school district 4 in Royalton became a part of the defendant district, but the plaintiff's farm was not thereby annexed to defendant, for it was then a part of district 16, and when that district was abolished it became, and still is, a part of the town school district of Royalton. Judgment affirmed, without costs.

PADDOCK et al. v. POTTER et al.

(Supreme Court of Vermont. Bennington. Feb. 4, 1895.)

COMPETENCY OF WITNESS — TRANSACTIONS WITH DECEDENT— CONSTRUCTION OF MORTGAGE—CONVEYANCE OF AFTER-ACQUIRED INTEREST — DELIVERY OF DEED—EFFECT OF DELAY.

1. In an action, after the death of P., to foreclose a mortgage given to B. and P. jointly to secure the payment of two notes to B. and two other notes of the same amount to P., the mortgagor is competent to testify concerning the scope of the mortgage, B. being alive.

2. A clause in a mortgage: "And we hereby convey any and all other real estate in the town of P. that we or either of us own or possess, or any interest that we or either of us may have in any other real estate in said P.," does not embrace an after-acquired interest.

3. In 1884 defendant and his brother conveyed to L. a piece of land, in pursuance of a

Digitized by Google

verbal agreement that she would build an expensive house thereon, and in the expectation that she would convey the premises to defendant at some future time, he being her son-in-law. The same day L. executed a deed of the property to defendant, reserving to herself the use thereof for life, and in 1891 this deed was delivered. Defendant never considered that he had any legal interest in the property. There was no secret trust, and the deed and property were until 1891 under the sole control of L. *Held*, that the deed passed no title till delivery.

Appeal in chancery, Bennington county; Taft, Chancellor.

Petition by C. A. Paddock and others against A. H. Potter and another to foreclose a mortgage.

Foreclosure was decreed as to all the pieces sought to be foreclosed, except the sixth, and the petition was dismissed as to that. The petitioners appeal. Affirmed.

April 2, 1889, the defendants, A. H. Potter and wife, executed to the orator Bates, and the testate of the orator, Paddock, the mortgage which it was sought to foreclose. The mortgage describes specifically five different parcels of land, and no question was made by the defendant but what the orators were entitled to foreclosure in respect to these parcels. The mortgage also contained this clause: "And we further hereby convey any and all other real estate in the town of Pownal that we or either of us own or possess, or any interest that we or either of us may have in any other real estate in said Pownal." Under this clause the orators claimed foreclosure of four other parcels not specifically described. As to the seventh, eighth, and ninth parcels no serious question was made by the defendants, the dispute being upon the sixth, as to which the facts were these: March 9, 1884, one Sarah E. Lincoln executed and acknowledged, in due form, a deed of certain land in the town of Pownal to the defendant A. H. Potter, being said sixth parcel. By the terms of this deed, Mrs. Lincoln reserved to herself the use of the premises during her lifetime. The deed was not delivered by her to the defendant Potter until about October 13, 1891. It was at once taken by him to the town clerk of Pownal, and recorded. Mrs. Lincoln deceased in 1892, and before the commencement of this suit. The premises were conveyed to Mrs. Lincoln by defendant Potter and his brother E. A. Potter, upon the same day that she executed the deed in question. At that time there was a dwelling house upon the land nearly completed, and the master found that the conveyance from Potter and his brother was in pursuance of an agreement to do so if she erected the house; that the value of the land before the erection of the house was from $200 to $300, and of the house $5,000; that there was no consideration for the conveyance to Mrs. Lincoln, who was the mother of defendant Potter's first wife, except the hope that it might result in benefit to him; that he had no legal right to demand a conveyance from her; but that there was always an expectation upon his part that she would make the conveyance as she did; and that he had expended considerable labor upon the premises without compensation, upon the strength of this expectation. The mortgage was given to Ichabod F. Paddock and Daniel F. Bates jointly, and was conditioned for the payment to the said Paddock of two promissory notes for the sum of $2,100, and for the payment to the said Bates of two other promissory notes for the like sum of $2,100. Upon the trial before the master, the defendant A. H. Potter was offered as a witness. The orators objected that his testimony was incompetent. for the reason that the said Ichabod F. Paddock had deceased. The testimony was received by the master, subject to this objection and exception, and the orators excepted to the master's report upon that ground.

W. B. Sheldon, for orators. Waterman, Martin & Hitt, for defendants.

ROWELL, J. Although the mortgage secured only the several debts of the mortgagees, yet it was executed to them jointly, and therefore they together were the party thereto of the one part, and the mortgagors of the other part; hence the death of one of the mortgagees did not render the mortgagor, Potter, incompetent to testify concerning the scope of the mortgage in respect of what land it embraced, as the other mortgagee was living, and competent to testify.

After specifically describing five pieces of land, the mortgage contains these words: "And we further hereby convey any and all other real estate in the town of Pownal that we or either of us own or possess, or any interest that we or either of us may have in any other real estate in said Pownal." The petitioners claim that, at the time of the execution of the mortgage, the mortgagor, Augustus H. Potter, had an interest in the piece of land called in the case the "sixth parcel" that passed under those general words of the mortgage; but, if not an interest, then that those words are broad enough to embrace an after-acquired interest therein, and that he acquired such interest, which, when it accrued, fed the estoppel, and passed it at once under the mortgage, as it contains full covenants of warranty. But we construe those words to embrace only a then present interest, and not an after-acquired interest. The words "may have," as there used, mean "may now have," and not "may hereafter have." This is clear from the context. This construction disposes of the claim of title by estoppel, and leaves for consideration only whether Potter had an interest in that parcel when the mortgage was given, which depends upon whether the deed from Mrs. Lincoln to him, executed long before the mortgage was given, conveyed title to him before it was delivered. The facts concerning that deed are these: Potter and his brother owned a lot of land worth two or three hundred dollars. Under an oral agreement to convey it to her, Mrs. Lincoln, the

Digitized by Google

mother of Potter's first wife, erected an expensive house thereon, in the building of which Potter labored without compensation. After it was built, he and his brother conveyed the land to Mrs. Lincoln, as agreed; and she at the same time executed to Potter a quitclaim deed of the premises with certain conditions, but kept the deed in her possession and control till October 15, 1891, long after the mortgage was given, when, thinking her end near, she delivered it to him, and it was recorded. There was no understanding when Potter and his brother deeded to Mrs. Lincoln that she should reconvey to him, and he never considered that he had any legal interest in the premises; but, although Potter was not entitled to demand a deed, yet there was an expectation that she would reconvey to him, and that her affection for him would inure to his benefit. The only consideration moving to Potter's brother for deeding to Mrs. Lincoln was the benefit that Potter might derive therefrom.

Many claims are put forth in argument as affording ground for holding that this deed conveyed a present interest to Potter that passed under the mortgage; but a careful consideration of them fails to disclose such ground, and mainly because the facts found do not warrant the claims. Upon the findings, this deed was subject to the absolute control of Mrs. Lincoln till its delivery. There was no secret trust in the matter, and she could have destroyed the deed at any time, and conveyed the premises to whomsoever else she pleased, and Potter would have had no legal ground of complaint. In these circumstances, the deed evidently passed no title till delivery, and then, for present purposes, as of that date, and not by relation as of the date of the deed.

The defendants claim that the seventh and the ninth parcels did not pass under the mortgage, but the question is not pressed at all, as well it may not be, for no such defense is made by the answer, but, on the contrary, the answer pretty much says that no question is made about it.

Decree affirmed, and cause remanded. Let the court of chancery fix the time of redemption.

In re ENRIGHT.

(Supreme Court of Vermont. Chittenden. Feb. 21, 1895.)

DISBARMENT OF ATTORNEY.

Defendant, during the pendency of an action in which he was both party, as an executor of an estate, and attorney, approached the attorney on the other side, and, fraudulently pretending to have knowledge of certain facts, offered to sell it, for the purpose of inducing an offer of settlement which would not otherwise have been made. *Held*, that defendant should be disbarred.

Proceedings for disbarment of J. J. Enright. Heard upon the report of a committee.

J. S. Cushman, for the prosecution. W. L. Burnap and Henry Ballard, for defendant.

PER CURIAM. Mr. Enright is a duly admitted and sworn attorney of this court, and under the law, by virtue thereof, entitled to practice in the other courts of the state. As such attorney he brought a suit in favor of Matthew Bingham against the Phoenix Insurance Company of New York. Mr. E. R. Hard was the attorney for the insurance company, and Mr. U. C. Crosby its agent. Subsequently Mr. Bingham died, and Mr. Enright and Mr. Dodds were duly appointed executors of Mr. Bingham's will, and as such entered to prosecute the suit. Mr. Enright continued to act as attorney for the plaintiffs, but, some disagreement having arisen between Mr. Enright and Mr. Dodds, the latter employed another attorney to appear and act for him. On the trial of this suit, at the April term of Chittenden county court, 1894, evidence was given that Mr. Enright, before the trial, had approached Mr. Hard, and told him that the Bingham estate was owing him considerably, and that if Mr. Hard could influence the company to pay his claim, or $400, he would impart to him information which would be absolutely sure to insure the defense in that case. Evidence was also given that on another occasion, before the trial, Mr. Enright had an interview with Mr. Crosby, and told him that he was tired and disgusted with the case, and that Mr. Dodds, his coexecutor, was a rascal, that he had got more or less money in it, and that he had in his possession facts which, if placed in the possession of the company, would make the defense of the suit absolute, and if he could be remunerated he would put Mr. Crosby in possession of such facts. Knowledge that such testimony had been given having come to this court, the court, of its own motion, filed an order directing the state's attorney of Chittenden county to file charges of unprofessional conduct against Mr. Enright, stating therein the matters which had appeared in evidence on the trial, and calling upon Mr. Enright to make answer to the charges so made. Mr. Enright filed his answer, specifically and generally denying the charges. This court referred the matter for hearing and for the determination of the truth of the charges to two members of the bar of the state, and prominent members of the bar association. This committee, having fully heard the state's attorney, Mr. Enright, and their respective witnesses, in respect to such charges, have reported that they find that Mr. Enright, while the suit against the insurance company, in which he was one of the plaintiffs, as executor of Mr. Bingham's will, and attorney, was pending, did, in substance, make the proposition set forth in the charges to Mr. Hard, as the attorney of the insurance company, and to Mr. Crosby, its agent. The committee do not find that Mr. Enright had knowledge of any such facts as would make

Digitized by Google

an absolute defense for the insurance company, and report that there was no evidence before them, except his statements to Mr. Hard and to Mr. Crosby, that he had knowledge of any such facts. They, in substance, find that these statements of Mr. Enright that he had knowledge of such facts are not to be credited, and find that he is not guilty of knowingly suing or prosecuting a false or unlawful suit. One of the committee, from the facts and circumstances, infers and finds that these offers were made by Mr. Enright with the corrupt intention of benefiting himself at the expense of the estate of which he was then executor, and in violation of his oath as an attorney. The committee find that the estate of Mr. Bingham was small, and insufficient to pay much, if anything, on the claims against it, or the expenses of administration, unless something was realized out of the suit against the insurance company, and that Mr. Enright's claim against it amounted to $210. Mr. Dodds also had a claim against the estate. Both were anxious to procure a settlement of the suit against the insurance company. The other member of the committee fails to find that Mr. Enright had any corrupt motive in having these interviews and making the offers, "but infers that what Mr. Enright said was but an attempt to draw out something from the other party looking towards the settlement of the suit, and, failing in this, the whole subject-matter was dropped." This committee was selected because the court knew that they were fair-minded, careful men, who had had a large experience in the trial of cases. This court, however much any one of its members might think that the facts and circumstances found by both of the committee support the inference of one of the committee and fail to support the inference of the other, feels bound to rest its judgment upon the inference most favorable to Mr. Enright. A judgment of disbarment is a serious matter to Mr. Enright. It removes him from the practice of his chosen profession. It has cost him considerable money, and several years' time, to prepare himself for such practice. It also leaves a stain upon his character. We are fully mindful of its grave consequences to him. We are also mindful that by admitting him to the bar, and allowing him to practice law in the courts of the state, the court held him out to the community as worthy of confidence, as a man of integrity and honesty, to whom all could safely confide and intrust their rights to property, liberty, and life. The statute and rules formulated by its authority require that before this court can admit, to the practice of the law, any one, it must be satisfied, not only that he has acquired a creditable knowledge of the principles of the law, of their application, and of the practice of the courts, but also that he sustains a good moral character. He must also take a solemn oath that he will do no falsehood, nor consent that any be done, in court, and if he should know of any he will give knowledge thereof to the judges of the court, or some of them, that it may be reformed; that he will not wittingly, willingly, or knowingly sue, or procure to be sued, any false or unlawful suit, or give aid or consent to the same; that he will delay no man for lucre or malice, but will act in the office of attorney, within the court, according to his best learning and discretion, with all good fidelity, as well to the court as to his client. This is the rule of his conduct in the practice of his profession. He places himself under the most solemn obligation known to the law to obey and be ruled by it. On the most favorable inference, in a pending suit, in which he was both party and attorney, on one occasion he approached the attorney, and, on another, the agent, of the other party, with a falsehood; pretended to have knowledge of facts which he did not possess; offered to sell it for a price, to induce an offer of settlement, which would not otherwise be made. This was done with reference to a suit then pending in court, and to secure an unfair and fraudulent settlement of it. It was a plain violation of his oath and of his duty, when considered in its most favorable light. All decisions and authorities concur in holding that it is the right and duty of the court, when an attorney is found guilty of corrupt or fraudulent acts performed in his office of attorney, to withdraw the right and privilege which were conferred by admitting him to the bar of the courts of the state. Delano's Case, 58 N. H. 5; Barker's Case, 49 N. H. 195; Bryant's Case, 24 N. H. 149; State v. Kirke, 12 Fla. 278, 95 Am. Dec. 314, and extended note. Judgment that Mr. Enright is removed from the office of attorney at law, and from the office of solicitor in chancery.

TAFT, J., being a member of the same bar with the accused, did not sit.

NORTON v. HENRY et al.

(Supreme Court of Vermont. Washington. Feb. 25, 1895.)

SALE OF MORTGAGED PREMISES—PARTIAL RELEASE OF LAND—EFFECT AS RELEASING MORTGAGOR.

Where a mortgagor, who had given a bond for the payment of the mortgage, conveyed the premises to another, who agreed to pay the debt, and a part of the property was subsequently sold, a release by the mortgagee of the part so conveyed from the mortgage debt, without the knowledge of the mortgagor, will not discharge the latter from personal liability for a deficiency arising on foreclosure of the balance, where the amount received for the part sold and released was applied to the payment of the mortgage.

Exceptions from Washington county court; Munson, Judge.

Action by Marcus Norton, administrator, on a bond against Frank S. Henry and others. Heard upon the report of a referee. Judg-

Digitized by Google

ment for plaintiff, and defendants except. Affirmed.

H. W. Kemp and John H. Senter, for plaintiff. Dillingham, Huse & Howland, for defendants.

START, J. The defendants executed a mortgage of the High Rock Spring premises at Saratoga Springs, N. Y., conditioned for the payment of $13,875, and gave their joint and several bond conditioned for the payment of the same sum. Defendants Frank S. Henry and Harvey R. Henry conveyed their shares in the equity of redemption in the premises to one Mower, and Mower assumed and agreed to pay the mortgage debt pro rata according to the interest of his grantors. Mower and defendant Lance quitclaimed the entire premises to Walter S. Henry, and he conveyed the same to one Young. Young mortgaged the entire premises to the plaintiff's testator, to secure the payment of the sum of $3,000. The mortgage and bond so executed by the defendants were duly transferred to the plaintiff's testator. Young conveyed a part of the premises, known as the "Front Street Property," to Tromlees, for $2,750. This sum was paid to the plaintiff's testator, and by him applied upon the debt secured by Young's mortgage; and he, without the knowledge of defendant Harvey R. Henry, released the property conveyed to Tromlees from the mortgage executed by the defendants. The plaintiff brought suit to foreclose the defendants' mortgage, and the property not conveyed to Tromlees was duly sold, and the proceeds applied upon the debt evidenced by the defendants' bond and mortgage. The referee, with the consent of the plaintiff, applied the $2,750 received for the Front street property upon the debt evidenced by the defendants' bond, and found a deficiency, with interest of $2,131.64, and awarded that the plaintiff recover this sum of defendant Harvey R. Henry; and the court below rendered judgment accordingly. Defendant Harvey R. Henry claims that he was released from further liability upon his bond by the discharge of the Front street property from his mortgage. No other defense is suggested in the defendants' brief, and this is the only question we are called upon to consider. While the authorities upon this question are conflicting, we hold that defendant Harvey R. Henry was not discharged from further liability upon his bond. When a mortgagor, who is personally liable for the mortgage debt, conveys the mortgaged premises subject to the mortgage incumbrance, and his grantee assumes and agrees to pay the mortgage debt, as between the parties the grantee becomes the principal debtor, the mortgagor the surety, and the mortgaged premises the primary fund for the payment of the mortgage debt; and the mortgagor has a right to have the premises applied to its payment. Under such circumstances, a mortgagee, having notice of such agreement, has no right to release any security which he holds, if the mortgagor is thereby exposed to a personal liability for the mortgage debt which he would not otherwise incur; and if, under such circumstances, he does dispose of the mortgage security, or any part of it, without the mortgagor's consent, he must see to it that the mortgagor is not thereby damnified. If he does thus protect the mortgagor, the mortgagor has no just ground for complaint, and he is not discharged from personal liability for the balance of the debt. He cannot claim immunity from the mortgage debt beyond the extent of his injury. Bank v. Thayer, 136 Mass. 459. Judgment affirmed.

STATE ex rel. BALTIMORE, C. & P. B. RY. CO. OF CITY OF BALTIMORE v. LATROBE, Mayor, et al.

(Court of Appeals of Maryland. April 4, 1895.)

MANDAMUS—TO CITY OFFICERS—ISSUANCE OF PERMIT TO DIG UP STREETS—GRANT TO STREET-RAILROAD COMPANY—FORFEITURE.

1. A writ of mandamus will not issue to interfere with the performance of a duty dependent upon the judgment or discretion of the person to whom the performance of the duty is assigned.

2. Ordinance No. 50 of the city of Baltimore, approved April 18, 1892, authorized plaintiff corporation to lay its tracks along certain streets of that city, and required that the work be commenced within 6 months from the approval of the ordinance, and completed within 12 months thereafter; otherwise the rights and privileges therein granted to "be null and void," unless plaintiff was delayed by other parties, or some of the streets should not be graded and paved at the time of the approval of the ordinance, or be undergoing repairs, so as to interfere with the laying of the tracks, in which case the time was to be extended for 12 months from the removal of such cause of delay. Ordinance No. 2, approved November 25, 1892, declared it unlawful for any person, under any pretext, to dig up any portion of the streets without a permit from the commissioner, approved by the mayor. On October 7th, without the knowledge of the commissioner, plaintiff caused 30 feet of track to be laid on one of the streets, and then stopped the work, though many of the streets over which it was proposed to lay tracks were in condition for doing so. *Held* that, as plaintiff had no clear and unequivocal right to dig up the streets, there was no plain ministerial duty imposed on the mayor and commissioner to issue a permit authorizing plaintiff to do so in order to lay its tracks, and hence mandamus would not lie to compel the issue of such permit.

3. On a petition by a street-railway company for mandamus to compel the mayor of a city to grant a permit to tear up streets, the mayor may set up that the petitioner had forfeited its rights to a permit by delay in prosecuting the work of laying its tracks.

Appeal from court of common pleas.

Application upon relation of the Baltimore, Canton & Point Breeze Railway Company against Frederick C. Latrobe, mayor of the city of Baltimore, and the city commissioner, for writ of mandamus to compel the commissioner to issue and the mayor to approve a permit authorizing the relator to dig up the streets for the purpose of laying its tracks

Digitized by Google

From an order denying the writ, plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Bernard Carter, for appellant. Wm. S. Bryan, Jr., and A. W. Machen, for appellees.

McSHERRY, J. The Baltimore, Canton & Point Breeze Railway Company is a body corporate, and by Ordinance No. 50 of the mayor and city council of Baltimore, approved April 18, 1892, it was authorized to lay its tracks upon and along certain designated streets of Baltimore city. By the twelfth section of the ordinance the work was required to be commenced within six months from the approval of the ordinance, and to be completed within twelve months thereafter; "otherwise," so the section declares, "the rights and privileges herein granted shall be null and void." A qualifying proviso then follows. Its terms and provisions, which vitally affect the pending controversy, will be fully stated later on. By Ordinance No. 2, approved November 25, 1892, it was declared unlawful for any person, under any pretext, or for any cause whatever, to dig up any portion of the streets, lanes, or alleys of the city "without first having obtained a written permit therefor from the city commissioner, approved by the mayor." On the 7th day of October, 1892, without the knowledge of the city commissioner, and not under his supervision, the railway company caused 30 feet of track to be laid on North Bond street, south of North avenue; and although many of the streets over which the proposed railway was projected to be laid were graded and paved, and in a condition to have tracks constructed upon them, no further steps were taken to build the line until June 7, 1894, when application was made to the city commissioner for a permit, and to the mayor for an approval of a permit, to dig up the streets for the purpose of laying the tracks. The mayor and city commissioner refused to issue the permit, and they based that refusal on the ground that Ordinance No. 50 of 1892 had not been complied with in such manner as would authorize the construction of the work. Upon June 11, 1894, the state of Maryland, on the relation of the Baltimore, Canton & Point Breeze Railway Company, filed a petition in the court of common pleas against the mayor and the city commissioner, praying that a writ of mandamus be granted requiring the city commissioner to issue and the mayor to approve a permit authorizing the relator to dig up the streets mentioned in Ordinance No. 50, for the purpose of laying upon those streets the tracks of the relator's railway. The respondents duly answered, and on July 28th an order was signed denying the relief sought and dismissing the petition altogether. From that order this appeal was taken.

There are two questions arising out of these facts. The one is whether the mayor had a discretion to grant or refuse the permit, and, upon the assumption that he had not, the other question is whether, when the application was made for the permit, the relator had such a clear right and authority, under Ordinance No. 50, to lay its tracks, as entitled it to relief by mandamus. With respect to the first question but little need be said. The law is definitively settled both here and elsewhere that whenever the performance of a duty is dependent upon the exercise of judgment and discretion on the part of the person to whom the performance of that duty is assigned, that judgment and that discretion will never be interfered with, fettered, or controlled by the writ of mandamus. The reason for this is apparent, and it is that there is no warrant of law justifying the substitution of the judgment of the court in the place of the discretion and judgment of the individual exclusively intrusted with the performance of the particular duty. But when the duty imposed is strictly a ministerial one, is absolute and imperative, and in its discharge requires the exercise of neither official discretion nor judgment, then a mandamus will lie to enforce its performance. Wailes v. Smith, 76 Md. 477, 25 Atl. 922; Madison v. Harbor Board, 76 Md. 398, 25 Atl. 337; Devin v. Belt, 70 Md. 352, 17 Atl. 375. To which class of duties, then, discretionary or strictly ministerial, does the one relating to the granting and approving the permit applied for by the relator belong? Where a clear right exists to do an act,—as, for instance, to lay a street railway on a public thoroughfare of the city,—the mayor and city commissioner have no authority to refuse a permit allowing the streets to be torn up in furtherance of that object. If the act to be done be a lawful one, and be sanctioned by legislative enactment or by a city ordinance, and if the person or body corporate proposing to do it be duly empowered to perform it, the mayor and city commissioner cannot, nor can either of them, make the act illegal, or prevent its performance by refusing to issue a permit, which, if granted in the case supposed, would add nothing to the pre-existing power, and whose sole effect would be to indicate to the police authorities that the interference with the streets was no invasion of the laws of the municipality. To concede to the mayor a discretion to grant or withhold a permit in such a case would clothe him with authority to nullify at his pleasure a formal grant made by the city council. There may possibly be instances where, under Ordinance No. 2, the mayor would have a discretion; but when permission has, by ordinance, been distinctly granted to a person to do an act which necessarily requires and in terms is declared to involve in its proper performance the digging up of the city streets as a part of the very thing to be done, the mayor obvi-

Digitized by Google

ously has no right, by a simple refusal of a permit, to defeat the doing of the act authorized to be done, and thus practically to abrogate and repeal the formal permission granted to do it. Clearly, then, if when the permit was applied for in the case at bar the relator possessed an undoubted power under Ordinance No. 50 to occupy with its tracks certain streets of Baltimore city, it was the duty of the mayor to approve that permit; and this duty, involving the exercise of no discretion whatever, was, if it existed at all, plainly and imperatively ministerial. But if there were, then, no authority under the laws of the state or under the ordinances of the city to do the act for the doing of which the permit was sought, the mayor cannot be required to issue the permit; because, even if issued, it would not, under such conditions, of its own vigor, make that legal which would otherwise be illegal. It follows, then, that, if a person or a body corporate has no lawful right to do the thing which it is proposed to do under the license applied for, the mayor would be under no obligation to issue the permit; not because he has a discretionary power to grant or withhold it at his option or according to his judgment, but solely because either with or without the permit the act proposed to be done would be illegal. If there were no duty on his part to issue the permit, his refusal to grant it would furnish no ground for requiring him by mandamus to do that which, under the law, he had no authority to do at all. As a consequence, the question is as to the power of the mayor to issue the permit, and that question is for judicial determination. And this brings us to the second and vital inquiry arising on the record. The solution of that inquiry depends upon the meaning of the twelfth section of Ordinance No. 50, and it will therefore be necessary to quote that section in full, so that its exact provisions may be seen. It is in these words: "That the said proprietors, their associates or assigns, shall commence the work of laying down and constructing the railway tracks aforesaid within six months from the approval of this ordinance, and shall complete the said work and commence the regular running of cars within twelve months thereafter, otherwise the rights and privileges herein granted shall be null and void; provided that the provisions of this section shall not apply in case of delay caused by other parties, or in case any of the streets herein before named may not have been graded and paved at the time of the approval of this ordinance, or should any of said streets be undergoing repairs by the city authorities in such manner as would interfere with the laying and constructing of the railway tracks aforesaid, then the time for the completion of said railways shall be extended for a period of twelve months from the removal of such delay or the completion of such grading and paving or repairs."

It is needless to allude to the familiar rules and canons of construction frequently invoked in the interpretation of legislative enactments, because the language employed in the section just transcribed is so free from obscurity or uncertainty that little or no difficulty in ascertaining its meaning and purpose is or can be presented. There was, obviously, a reason for inserting the provision fixing a time for beginning and for completing the construction of the road. As the railway was, when finished, to occupy a number of streets, all of which would have to be interfered with to some extent during the progress of the work on the road, it was clearly for the protection of the public interests, and for the convenience of persons who might use these thoroughfares, that the requirement exacting proper diligence in beginning and in prosecuting the work to completion was incorporated in the ordinance. It was not an idle or a meaningless clause, and its terms are neither ambiguous nor equivocal. That it was intended to be operative and effective, the city council left no room for speculation, because for a failure to comply with it they, in the same sentence, by plain language, whose meaning is unmistakable, imposed the drastic penalty of a revocation of all the rights and privileges granted by the preceding sections of the ordinance. As, however, it was apparent at the time the ordinance was passed that conditions then existed, and that others might arise later on, which, while not retarding the prompt beginning of the work, might possibly prevent its ultimate completion within the allotted period of 12 months, the saving proviso was inserted. With a view, then, of suspending for a definite time the prescribed penalty, and to arrest its operation upon a failure to complete the road within the limit of time designated, the proviso was added. It contains three contingencies, each one of which has specific reference to an interruption in the actual progress of the work, whereby its completion would be unavoidably delayed through no fault or laches of the relator. There is not a suggestion in the whole ordinance that the relator's voluntary delay in beginning and in prosecuting the work, though not actually impeded or stopped in any one of the three ways specified in the proviso, should be treated or considered as a waiver or suspension of the penalty. The policy and purpose of the twelfth section, as well as its natural reading, imperatively forbid the adoption of a different construction. If delays were caused by other parties, not the relator; or if the streets over which the road was to be laid were not graded and paved when the ordinance was approved; or if any of the streets were undergoing repairs so as to interfere with the laying of the tracks—then, and it is put as a consequence of these interruptions, "the time for the completion of said railways"—not for the beginning of the work thereon—"shall be extended for a period of twelve months from the removal of such

Digitized by Google

delay or the completion of such grading and paving or repairs." It is obvious, then, that the extension of time relates not to the beginning of the work, but to the completion thereof after its substantial progress had been arrested in one or more of the three ways indicated. As we have already explained, on October 7, 1892, or just 10 days before the expiration of six months from the approval of the ordinance, the relator laid down 30 feet of track on Bond street, and then voluntarily stopped. This was manifestly not such a beginning of the work as the ordinance contemplated. The relator was not prevented by delays caused by third persons, or caused in either of the other modes named in the proviso, from proceeding with the work; nor did it go on with the work thus commenced, as, according to the plain meaning of the ordinance, it was bound to do, until it reached an ungraded and unpaved street, or encountered a street undergoing repairs. The company, however, assumed that the proviso did not relate solely to the time of completing the work, but that its effect was actually to strike down and completely nullify the express limit of six months within which to begin the work, and, as a consequence, it insists that it was under no obligation to do anything towards building the road if, when the ordinance was approved, any of the obstacles in the way of the final completion of the whole work existed at any point upon the entire route. To this we cannot agree, because, when the proviso declares that the "provisions of this section shall not apply" in the three designated instances, its manifest meaning is that the preceding limit as to time is not to apply in the event that the specified obstacles should present physical obstructions to the continuous prosecution and completion of the work, and that the time limit should then be suspended, but only in so far as these physical impediments interrupted the progress of actual construction. In support of this view, the case of People v. Broadway R. Co., 126 N. Y. 29, 26 N. E. 961, is directly in point. It follows, then, that according to the terms of the twelfth section the relator, when it made application for the permit in June, 1894, had no right or authority to lay its tracks under Ordinance No. 50. Whether that want of authority or lack of power can be availed of in this proceeding will be discussed later on. Now, the remedy by mandamus is not one which is accorded ex debito justitiae. The writ is a prerogative one, and, unless the right which the relator seeks to enforce is clear and unequivocal, it will not be granted. Brown v. Bragunier, 79 Md. —, 29 Atl. 7; Weber v. Zimmerman, 23 Md. 45; Hardcastle v. Railroad Co., 32 Md. 32; Legg v. Mayor, etc., of Annapolis, 42 Md. 203. If the construction which we have placed upon the twelfth section of Ordinance No. 50 be the correct one, as we believe it to be, then it is perfectly manifest, as already observed, that the relator, on June 7, 1894, had no such clear and unequivocal right to dig up the streets as it lays claim to in its petition. And, if this be so, then obviously there was no such plain correlative duty devolved upon the mayor by Ordinance No. 2, of November, 1892, as to make it unconditionally obligatory on him to grant the permit applied for. There being, then, neither the clear and unequivocal right, on the one hand, to do the act proposed to be done, nor, on the other hand, the plain ministerial duty to issue the permit allowing it to be done, there is no case presented for redress by the writ of mandamus.

But it was objected that under the decisions in the Canal Case, 4 Gill & J. 1; Hodges' Case, 58 Md. 603; and Bonaparte's Case, 75 Md. 349, 23 Atl. 784,—the failure of the company to begin and complete the construction of its road within the times limited in the ordinance could not be availed of collaterally by the mayor of the city as a defense in this proceeding. In Hodges' Case the railway company did not begin to construct its road within the time prescribed by the ordinance which authorized the tracks to be laid; and when the company did thereafter proceed to construct its road several persons who owned property which abutted upon Park avenue, one of the streets proposed to be occupied, filed a bill in equity for an injunction to restrain the building of the road. They claimed, among other things, that the company, by its failure to begin the work within the time limited, had forfeited its rights under the ordinance to build the road at all. Upon the question as thus presented it was held that the provision fixing a limit was intended for the benefit of the city, and was one which its authorities might waive at pleasure, and was, consequently, one which could not be invoked by a private individual. "No principle," say this court, "is better settled than that a cause of forfeiture cannot be taken advantage of or enforced against a corporation collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation." But it cannot be pretended that we are confronted with the same conditions now. This defense by the mayor is not an attempt by a private person to enforce in a collateral proceeding a cause of forfeiture. The executive of the very municipality which originally granted the privilege to lay the tracks, in acting under a valid subsequent ordinance, whose due execution he was charged with faithfully enforcing, refused to grant a permit prescribed by Ordinance No. 2, of November, 1892. The reasons assigned by him are immaterial if he had no power to approve the permit. Now, Ordinance No. 2, approved a month after the expiration of the limit of six months fixed by Ordinance No. 50 for the commencement of the work, is a declaration by the mayor and city council that the municipality did not waive the time limit in Ordinance No. 50, nor the consequences

Digitized by Google

following the nonobservance thereof; for it expressly prohibited, from and after its passage, the digging up of the streets under any pretext, or for any cause, without a permit being first procured,—a broad restriction that did not exist during the whole period allowed for beginning the work under Ordinance No. 50, and one utterly inconsistent with the hypothesis that the city authorities recognized the company's unqualified right to lay the tracks thereafter. Its effect was, not to waive the enforcement of the time limit, but to provide a direct and speedy mode for putting into force the provision containing that limit. It substantially ordained that the city not only refused to waive the time limit, but that it designed to enforce it, and therefore the ordinance exacted a permit as a means to prevent that from being done which previously could have been lawfully done, but which, by reason of the lapse of the time within which it ought to have been done, could not afterwards lawfully be performed. If the city, by a direct repeal of Ordinance No. 50, could have taken away the rights conferred by that ordinance,—and of this there can be no question,—then it could equally accomplish the same result by a general enactment that involved in its operation and effect a denial of authority to exercise those rights which, as between the city that granted them and the company that had accepted them, coupled with conditions, were lost and had lapsed by a failure on part of the company to comply with those very conditions. Of course, legislation of this sort, to be effective as a repeal or a revocation of previously granted rights and privileges for a breach of a condition subsequent annexed to the grant, must show an intention to reassert title and to resume possession. And as we understand it, such was at least one of the objects and purposes of Ordinance No. 2, of November, 1892. After the lapse of the time limit and the enactment of Ordinance No. 2, the mayor had no right to grant the license; and the city, by adopting the last-named ordinance after the expiration of the time limited for beginning the work, having asserted an enforcement of the consequences following from a breach of that condition, the case as thus presented materially differs from those cited above; and while they announce a perfectly correct and well-established principle, this case, for the reasons we have stated, does not fall within its range or application.

We need only add that nothing we have said is to be understood as affecting in any way the franchise conferred upon the relator by its charter to operate a street railway in Baltimore city, though the franchise can only be exercised in such mode as the city, which has absolute control over its own streets, may by reasonable regulations prescribe. For the reasons we have assigned, the order appealed from will be affirmed, with costs. Order affirmed, with costs.

BRYAN, J. (concurring). This was a petition for a mandamus, addressed to the court of common pleas. The relator in the petition is the Baltimore, Canton & Point Breeze Railway Company of Baltimore City, a corporation duly constituted and organized. The mayor and city council of Baltimore, by ordinance approved April 18, 1892, granted permission to the relator to lay down and construct double iron railway tracks in certain streets of the city of Baltimore. These streets are designated in the first section of the ordinance. The tracks were permitted to commence on North Calvert, between Fayette and Lexington, and to run eastwardly on Lexington, and over a number of other streets, to the eastern limit of the city, on O'Donnell street. The time for commencing and completing these tracks was limited by the twelfth section of the ordinance. As the construction of this section was earnestly debated at the bar, we think it proper to insert it in full, premising that the relator is duly invested with all the rights granted to the persons therein described as "the said proprietors, their associates and assigns." "And be it further enacted and ordained, that the said proprietors, their associates and assigns, shall commence the work of laying down and constructing the railway tracks aforesaid within six months from the approval of this ordinance, and shall complete the said work and commence the regular running of cars within twelve months thereafter; otherwise the rights and privileges herein granted shall be null and void; provided, that the provisions of this section shall not apply in case of delay caused by other parties, or in case any of the streets hereinbefore named may not have been graded and paved at the time of the approval of this ordinance; or should any of said streets be undergoing repairs by the city authorities in such manner as would interfere with the laying and constructing of the railway tracks aforesaid, then the time for the completion of said railways shall be extended for a period of twelve months from the removal of such delay or the completion of such grading and paving or repairs." The petition for a mandamus alleged, at the time of the approval of the ordinance, a portion of Lexington street, on which the railway tracks were authorized, was not graded and paved, and that this grading and this paving were not completed until the 21st day of October, 1893; that a bridge over Jones' falls, which the tracks were authorized to cross, was not completed prior to September 23, 1893; and that a portion of Canton avenue, forming a part of its route, is not yet graded and paved. The petition further alleged that it did commence laying its tracks within six months after the approval of the ordinance. It further alleged that on the 7th day of June, 1894, it made application in writing to the city commissioner for permission to tear up the streets for the purpose of laying its tracks

Digitized by Google

and that the commissioner and the mayor refused to grant the permission, and made, under their signature, the following indorsement on the application: "Permit refused, on the ground that the provisions of Ordinance No. 50, approved April 18th, 1892, were not complied with in such manner as would authorize the construction of the road under said ordinance." The prayer of the petition was for a mandamus requiring the commissioner and the mayor to approve the permission. By an ordinance of the mayor and city council of Baltimore (approved November 25, 1892) it was enacted that no person or corporation should, under any pretext, or for any cause whatever, dig up any of the streets, lanes, or alleys of the city, or remove therefrom any of the stones, bricks, blocks, cement, or other material with which the same may be paved in whole or in part, without having first obtained a written permit therefor from the city commissioner, approved by the mayor. The answer of the respondents maintained that the relator had forfeited whatever right it had to lay down the tracks by its failure to perform the conditions on which the right was granted. After hearing, the court below dismissed the petition for a mandamus, and the relator appealed to this court.

The agreed statement of facts shows that on the 7th day of October, 1892, the relator laid 30 feet of the tracks of its railway on one of the streets designated as its route. It also showed that at the time of the approval of the ordinance some portion of some of the streets over which the tracks were to run was ungraded and unpaved, and still is ungraded and unpaved. It also showed that the mayor had refused to give his approval of the tearing up the streets because he believed that the relator had not complied with the provisions of the ordinance approved April 18, 1892, and had not commenced the construction of the road within the time required by it, and had not completed it within the time so required. In the argument of the case, besides contending that the work on the road had been commenced in due time, the counsel for the railroad contended that by the true construction of the twelfth section of the ordinance it was not required to commence the work within six months after its approval, because some portions of the streets over which the tracks were to run were not at that time graded and paved. And it was contended that for the same reason the obligation to complete the road within 12 months after the approval of the ordinance was removed, and that it was not required to complete it until 12 months had expired after all the streets had been graded and paved which were ungraded and unpaved at the time when the ordinance was approved. Upon this basis it is maintained that the relator had the right to use the streets for the construction of its road, and that the mayor, when he refused the desired permission, committed an error, which the court ought to correct by the writ of mandamus. Let us consider the nature of the duty which the mayor was required to perform in this regard. The ordinance which requires the permit from the mayor was not necessary to protect the streets from mere trespassers. The police force, in the ordinary discharge of its duties, was adequate to deal as effectually with them as with other law breakers. But there are others, persons of a far higher character, who reasonably believe that they have a right to dig up the streets in the prosecution of their lawful business. It was not considered expedient that they should decide the question of right for themselves. The ordinance places the decision of the question, in the first instance, in the hands of the mayor, by enacting that without his approval the streets shall not be torn up "under any pretext, or for any cause whatever." It does not enact, and could not competently enact, that the mayor's decision should control the judgment of the courts in any suit where they should have jurisdiction of the question. But it imposes on him the duty of deciding whether, under given circumstances, it is proper that the street should be dug up. He is required to decide the question for himself. The ordinance does not subject his judgment to the control of any other person, official or unofficial. In deciding whether he would approve the permit in the present case he would necessarily determine whether the relator had a right, under the ordinance, to use the streets for its railways. To do this, he would be obliged to exercise his judgment in construing the twelfth section of the ordinance. He would be confronted with the question whether the building of 30 feet of the tracks, and then stopping, was such a commencement of the work as was contemplated by the ordinance, or whether it was a merely illusory act. If he decided that this was not a real commencement of the work, he would then consider whether the ordinance should be interpreted as meaning that the limitation of six months for the commencement of the works was inapplicable if any of the streets lying in the route of the railway were unpaved and ungraded at the time when the ordinance was approved. And he would also have to determine whether, under the same circumstances, the relator was relieved from the obligation to complete the work within 12 months. The duty of approving or disapproving the permit imposed on the mayor thus requiring the exercise of judgment and discretion, it cannot be controlled by the writ of mandamus. The authorities are uniform and consistent that it cannot issue in such a case, but only where the act is merely ministerial. In U. S. v. Seaman, 17 How. 225, the supreme court sums up its reasons why the writ should not issue against the respondent in that case in these words: "He was obliged, therefore, to examine evidence and form his judgment before he acted, and whenever that is to be done it is not a case

Digitized by Google

for a mandamus." And it contrasted the case before it with Kendall v. Stokes, 12 Pet. 524, where a mandamus was issued against the postmaster general, commanding him to enter in the books of the department a credit in favor of the relators, which had been ascertained and fixed by law, and to which the court said their right ought to be considered as irreversibly established. Of this case the court, speaking of the postmaster general, said: "He was merely to record it. His duty, under that act of congress, was like that of a clerk of a court, who is required to record its proceedings, or of an officer appointed by law to record deeds which a party has a right by law to place on record, or of the register of the treasury of the United States to record accounts transmitted to him by the proper accounting officers to be recorded. The duty in such cases is merely ministerial; as much so as that of a sheriff or marshal to execute the process of a court." After the repeated decisions of this court to the effect that a mandamus will not issue in any case where discretion and judgment are to be exercised by a public officer, we do not think it any longer a subject for discussion. Green v. Purnell, 12 Md. 336; Devin v. Belt, 70 Md. 352, 17 Atl. 375; Madison v. Harbor Board, 76 Md. 398, 25 Atl. 337; Wailes v. Smith, 76 Md. 477, 25 Atl. 922, and many other cases.

The counsel for the relator argue that by the proper construction of section 12 of the ordinance of April 18, 1892, it has the right to construct the road, and that, therefore, it was the mayor's duty to approve the permit to tear up the streets. The inference is drawn that we ought to compel him to do so by mandamus. But, as the mayor's judgment is to decide this question, we cannot entertain an appeal from his decision by means of this writ, and thus revise and reverse his determination. As a matter of course, if, in a case where we have jurisdiction, a suit involving the construction of the ordinance should come before this court, we would not be bound by the mayor's opinion, but would pronounce such judgment as we thought to be right. In Decatur v. Paulding, 14 Pet. 497, the widow of Commodore Decatur claimed a sum of money under a joint resolution of the senate and house of representatives. The secretary of the treasury, upon his construction of the resolution, in connection with an act of congress passed on the same day, decided that she was not entitled to the money, and thereupon she applied for a mandamus to compel him to pay her. The supreme court, after saying that the secretary must exercise his judgment in expounding the laws and resolutions of congress, under which he is required to act, proceeded as follows: "If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department; and if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of congress, in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment, in any case where the law authorized him to exercise discretion or judgment. Nor can it, by mandamus, act directly upon the officer and guide and control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties." We must affirm the judgment of the court of common pleas. Judgment affirmed.

GARRISON et al. v. HILL et al.

(Court of Appeals of Maryland. March 27, 1895.)

SUIT AGAINST EXECUTOR—ENFORCEMENT OF DISTRIBUTION—ALLOWANCE OF CREDITS—CLAIM APPROVED BY ORPHANS' COURT.

1. In a suit in equity against an executor to compel the final distribution of the funds in his hands, it was shown that the sole devisee was dead, that the plaintiff was his next of kin, and that defendant, upon proper demand, had refused to pay to her the proceeds of the estate. The executor, as a defense, relied on the pendency of another suit brought by himself to settle the estate of the testatrix and to determine who was entitled to the funds in his hands. The two actions were begun on the same day, and matters were involved in the latter suit which were calculated to unnecessarily delay the final distribution of the proceeds of the estate. *Held*, that plaintiff was entitled to the relief asked by him.

2. In the absence of clear and positive evidence of fraud on the part of an executor in the payment of an account proven in the orphans' court, he should be credited with the amount of such account upon the final settlement of the estate.

Appeal from circuit court of Baltimore city.

Bill by Mary De Charmes Garrison and others against Thomas Hill, personally and as executor, and others, for the construction of wills and other purposes. From a decree dismissing the bill, plaintiffs appeal. Reversed.

Argued before ROBINSON, C. J., and McSHERRY, FOWLER, BRISCOE, ROBERTS, and BOYD, JJ.

Hyland P. Stewart, for appellants. Thos. I. Elliott, Wm. T. Brantly, and Richard M. Duvall, for appellees.

BOYD, J. On May 10, 1892, the appellants filed their bill of complaint in the circuit court of Baltimore city against Thomas Hill, individually and as executor of Maria M. Johnson, as executor of Emma M. C. Johnson, as administrator c. t. a. of Maria E. Weise, and as administrator c. t. a. of W. W. Johnson. On May 13, 1892, on a petition filed by the plaintiffs, leave was granted to make the trustees of the Seventh Baptist

Digitized by Google

Church of Baltimore, Samuel E. Hill and Thomas Hill, trustees under the will of Maria E. Weise, defendants, which was accordingly done. The bill alleges that Mary De Charmes Garrison, one of the plaintiffs, is the only heir at law and the next of kin of Maria M. Johnson; claims certain interests in the estates of Maria E. Weise and others in charge of Thomas Hill; and prays the court: (1) To take jurisdiction in the premises; (2) to construe the wills, and determine the rights of the plaintiffs; (3) to require Thomas Hill, as executor of Emma M. C. Johnson, to account for the rents and profits of the real estate, for the overpayments by him of the collateral inheritance tax from the estate of Emma M. C. Johnson, for the excessive wages paid to an alleged nurse from said Emma's estate, and for the extra commissions claimed on the rents collected from the real estate; (4) to require Thomas Hill, as executor of Maria M. Johnson and of Emma M. C. Johnson, to pay over the money in his hands belonging to the plaintiffs; (5) to restrain Thomas Hill from interfering with the real estate and collecting the rents therefrom; (6) asks for the appointment of a receiver pendente lite; and then concludes with a prayer for general relief. It alleges that Thomas Hill has paid and settled all the debts due by the estate of Emma M. C. Johnson, as shown by his account filed in the orphans' court, and has refused to deliver possession of the balance of the estate over to the plaintiffs, though often requested so to do, etc. On June 16, 1892, Thomas Hill filed his answer as executor of Maria E. Weise, Maria M. Johnson, and Emma M. C. Johnson, as administrator of W. W. Johnson, and individually. Among other things, he admits that he is collecting the rents of the real estate mentioned in the bill of complaint, that he holds in his possession the residue of the personal estate of Emma M. C. Johnson remaining after the settlement of her estate, and that he has refused to deliver the real estate and personal property to complainants. The answer also alleges that the respondent had filed in the circuit court for Baltimore city a bill asking the court to assume jurisdiction over the settlement of the estate of Emma M. C. Johnson prior to the filing of the bill in this case, as was well known to the complainants' solicitor. On the 19th of September, 1892, he obtained leave to withdraw his answer and demur. He filed a demurrer, alleging that the court had assumed jurisdiction of the same subject-matter in a cause wherein all the parties to this cause had been joined. On February 7, 1893, the demurrer was overruled, and on the 13th of the same month a plea was filed, by the permission of the court, which practically raised the same question as the demurrer. On February 16, 1893, the court passed an order adjudging the plea insufficient in law, and giving the defendant 10 days to answer the bill. On March 17, 1893, a decree pro confesso was passed against Thomas Hill, and on the 24th of that month he prayed an appeal to this court from the order overruling his plea. On May 8, 1893, a certified copy of the order of this court dismissing that appeal was filed, and on May 10th an agreement of solicitors to strike out the decree pro confesso was filed, and an order of court passed striking out said decree, and granting him leave to file his answer; and the answer was filed the same day. By it he admits that he has refused to surrender either the real or the personal property to the complainants pending a decision as to the parties properly entitled to the same in a case already instituted by himself, and still in existence. A general replication was filed and leave granted to take testimony on September 6, 1893. Testimony was commenced October 26, 1893, and returned March 5, 1894. In the meantime the title to the real estate had been determined by ejectment suits, one of which was in this court at the January term, 1894. The case referred to in the pleadings of the defendant Thomas Hill as pending was instituted on May 10, 1892,—the same day that this one was,—by Eliza P. Johnson and husband, Thomas Hill, executor of Emma M. C. Johnson, and Thomas Hill, trustee under the will of Maria E. Weise, against the trustees of the Seventh Baptist Church of Baltimore, Mary Garrison, Thomas Garrison, her husband, and others. That bill prayed the court to assume jurisdiction over the personal estate of the said Emma M. C. Johnson, asked that a decree be passed for the sale of the real estate mentioned in the bill, and for further relief. On August 9, 1892, a demurrer was filed to the bill by Mr. and Mrs. Garrison, and on December 19, 1892, the court sustained the demurrer, with leave to the plaintiffs to amend within 10 days by striking out all except so much as covered the case made by the executor in asking for a construction of the will and the administration by this court of the assets remaining in his hands. On January 9, 1893, the plaintiffs having failed to amend within the time fixed by the court, a decree was passed dismissing the bill of complaint. An agreement of solicitors having been filed, an order of court was passed February 4, 1893, striking out the decree of January 9, 1893, and extending the time for filing an amended bill to three days from the date of the order. On February 6, 1893, an amended bill was filed. It omits the prayer for the sale of the real estate, asks the court to assume jurisdiction over the distribution of the personal estate of Emma M. C. Johnson, to construe the wills of Maria E. Weise, Maria M. Johnson, and Emma M. C. Johnson, and determine who are entitled to the personalty by reason of said wills or otherwise, and then contains a prayer for general relief. Since the amended bill was filed, the plaintiffs in that case, so far as disclosed by this record, seem to have done but little, if anything, towards bringing the case to a hearing and distributing the estate.

Digitized by Google

We have thus referred in detail to a number of dates upon which pleadings were filed, disposed of, etc., as we believe they materially reflect upon the question as to whether the executor has used such diligence in endeavoring to settle the estate of Emma M. C. Johnson as the law requires of him, which is relevant to some of the matters hereinafter referred to. The case was finally heard, and on December 19, 1894, a decree was passed dismissing the bill, with costs. In the decree it is stated that the court is of the opinion that neither as a matter of law nor of fact are the plaintiffs entitled to relief in the premises. The reasons for such opinion are not given.

We do not see any difficulty in granting the plaintiffs relief under this bill. Which suit was first instituted is by no means clearly shown, and it is doubtful whether it could be, as the bills were filed the same day. The demurrer and plea of Thomas Hill, by which he undertook to set up the defense of a pending suit, were overruled, and apparently that line of defense was decided against him. The bill in the case brought by him was determined on demurrer to be insufficient in law, and, in fact, the court passed a decree dismissing his bill as late as January, 1893, although the case was subsequently reinstated. The amended bill filed by him involves a number of matters which were calculated to embarrass and delay the determination of the question which the plaintiffs in this case are interested in having speedily settled. Some persons have been made parties to the suit instituted by Mr. Hill who can have no possible interest in the controversy between these plaintiffs and him as executor of Emma M. C. Johnson. If it be determined that Mrs. Garrison is, as the only surviving niece of Maria M. Johnson, entitled to the personal estate of Emma M. C. Johnson, then nothing remains to be done but to ascertain how much Mr. Hill, as her executor, is chargeable with, and require him to pay it over. That Mrs. Garrison is so entitled has not been seriously questioned in this court, and there would seem to be no room for any controversy about it. Emma M. C. Johnson died April 22, 1891, leaving a will by which she gave everything to her mother, Maria M. Johnson, who died January 31, 1889. Inasmuch as Maria M. was dead when the testatrix died, the personal property bequeathed to her passes to her next of kin living at the death of the testatrix. Glenn v. Belt, 7 Gill & J. 362; Wallace v. Du Bois, 65 Md. 153, 4 Atl. 402; Halsey v. Convention, 75 Md. 275, 23 Atl. 781. The evidence shows that Mrs. Garrison was the only living child of a brother or sister, and was the next of kin, of Maria M. Johnson. Grandnephews and grandnieces are not entitled to share in the distribution. McComas v. Amos, 29 Md. 120. So we see that Mrs. Garrison is entitled to the personal estate of Emma M. C. Johnson, and we know of no reason why this could not have been determined, so as to protect the executor, several years ago.

It being alleged in the bill and admitted in the answer that the executor refused to pay over to Mrs. Garrison the balance in his hands, a court of equity can give her relief, especially under such circumstances as those in this case. Alexander v. Leakin, 72 Md. 199, 19 Atl. 532. It is but just to the executor that the right of the appellants to the distribution be fully and properly established. This can be done in a court of equity better than in the orphans' court. Then, as he refuses to pay over the distribution to the appellants until they establish the fact that Mrs. Garrison is entitled to it, the orphans' court could not furnish them all the relief they were entitled to. But it is not denied that a court of equity has jurisdiction in such cases. On the contrary, the executor himself has asked the aid of that court.

It only remains for us to determine what relief the appellants are entitled to. We do not think the executor should be charged with the amount paid Mrs. Michean by him for services alleged to have been rendered by her. Her account was regularly passed by the orphans' court, and when the executor settled his account he was allowed the amount of the claim which he had paid to her. The evidence wholly fails to show collusion between the executor and Mrs. Michean, or any such knowledge of the incorrectness of the claim as would justify us in charging him with it. If we were called upon to determine whether the account was a proper one, we would hesitate to reject it, under all the evidence in this case; but we need not pass upon that question. If Mr. Hill can be required to repay to the estate the amount of that account, no executor or administrator would be safe in paying debts proven in the orphans' court. When a court of equity does take charge of a personal estate it has no right or authority to disturb accounts already settled in the orphans' court, unless they are clearly shown to be erroneous, and it should always be inclined to protect and uphold, as far as possible, the bona fide acts of an executor or administrator done in that court, as under the laws of this state it has been especially established for the settlement of estates of deceased persons. The system providing for the settlement of accounts, etc., in that court does not afford such protection to an administrator or executor as should be given to them, and courts of equity must not necessarily increase the risks and liabilities assumed by them. Clear and unequivocal evidence of guilty knowledge, fraud, or collusion should be produced to justify a court in holding an executor responsible for a claim paid by him after it had been passed by an orphans' court. We think, therefore, the executor should be credited with the

Digitized by Google

amount paid by him to Mrs. Michean when his account is stated. As to the claim that the executor should be charged with the interest, the bill does not claim interest, and there is nothing to show that the executor had notice that it would be claimed. There have been so many cases and so much contention between these parties that we do not feel justified in directing interest to be charged against the executor without some more definite evidence of default on his part. The record does not disclose such diligence on the part of Mr. Hill in securing a settlement of the estate as there should be by an executor. When he settled his account in the orphans' court, nearly three years ago, he had a balance of $6,123.56 in his hands for distribution, and, although he has probably paid out about one-half of that amount on account of rents improperly charged in his account, there would still be in his hands probably $3,000 or more of that money, without taking into consideration any other sums that the appellants claim he is chargeable with. His own evidence shows that he has kept this in his individual account in bank. If he has used it for his own purposes, he should be required to pay interest on it, especially if he has unnecessarily delayed the settlement of the estate. As there are a number of other items with which the appellants seek to charge the executor, this cause should be referred to the auditor to state an account from the testimony now in the case and such additional evidence as either party may desire to take, if the court below deems it necessary and proper. We do not think it necessary or proper to pass upon all those items. Some of them cannot well be determined in the present condition of the record, as the evidence is too indefinite and meager to enable us to reach an intelligent conclusion concerning them. We can see nothing connected with the settlement of this estate which required so much litigation, expense, and delay, and the court below should require the case to be concluded without any unnecessary delay.

It follows from what we have said that the decree must be reversed, and the case remanded, in order that an account may be stated in accordance with this opinion. Decree reversed and cause remanded, costs to be paid by Thomas Hill individually.

On Motion for Reargument.

(April 19, 1895.)

The motion for a reargument in this case upon the question of the payment of the costs must be overruled. We directed Thomas Hill to pay the costs individually because the appellant is the only person entitled to the distribution of the estate of Maria M. Johnson, and if the costs were paid out of the fund held by the executor it would be equivalent to requiring the appellant to pay them. We do not deem it necessary to discuss the several reasons argued in support of the motion. We gave the matter full consideration before passing the decree, and are of the opinion now, as we were then, that the facts disclosed by the record fully justify the disposition of the costs made by us. The inquiry has been made as to what costs are included. The decree directs the costs to be paid by Thomas Hill individually. That includes all costs in this court and the court below. Of course, such costs as are incurred after this cause is remanded must abide the final result of the case.

LAKE ROLAND EL. RY. CO. v. McKEWEN.

(Court of Appeals of Maryland. March 26, 1895.)

ACCIDENT ON STREET-CAR TRACK — INSTRUCTIONS — CONTRIBUTORY NEGLIGENCE.

1. In an action for damages, it is not error to give an instruction announcing the rule of damages, which was not controverted at the trial.

2. In an action by one injured in attempting to cross a street-car track, a charge that the plaintiff was guilty of contributory negligence, and that he could not recover unless the jury believed the defendant could have avoided the accident by the exercise of ordinary care, but failed to do so, was not prejudicial to the defendant.

3. The question of contributory negligence, under conflicting evidence, should be left to the jury.

4. It is proper to refuse charges asked which are rendered unnecessary by a special charge given by the court, and after which they would be misleading.

5. A charge that "a street car has a right of way on that portion of the street upon which alone it can travel, paramount to that of ordinary vehicles," is error.

Appeal from superior court of Baltimore city.

Action by John McKewen against the Lake Roland Elevated Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff was approaching a crossing of defendant's electric road in a buggy, with the top lowered, at the rate of about four miles an hour, and claimed that he looked towards the left to see if a car was approaching, when, hearing a rumbling on the wire, he turned to the right, and saw a car coming at great speed; and, though he made every effort to get out of the way, his buggy was struck, and his horse killed, and he was seriously injured. Defendant claimed that plaintiff attempted to cross the track without looking to the right, and without paying any attention to the approaching of a car from that side until his horse was on the track, and that plaintiff had an unobstructed view of the railroad for two blocks.

The following is the court's instruction: "The court instructs the jury that the plaintiff, being familiar with the crossing of defendant's electric road at the corner of Chase and North streets, and approaching the same on Chase street from the east, in a buggy

Digitized by Google

with the top lowered, at the rate of about four miles an hour, was guilty of contributory negligence in attempting to cross the tracks of said road without lowering his rate of speed, and without looking to the north, and without paying any attention whatever to the possibility of the approach of a car from that direction, or making any inquiry or effort to ascertain whether or not a car was approaching from said quarter, until his horse was upon the second or westerly track, it appearing that the plaintiff, had he looked to the north when he reached the east building line of North street, would have had an unobstructed view of the railroad for two blocks, and could have seen the car in question, and that he, therefore, is not entitled to recover, unless the jury believe from the evidence that the motorman of the car in question, after he saw, or by the exercise of due care might have seen, that the plaintiff was approaching the tracks, and was apparently about to cross in front of his car, and that the attempt to do so would be dangerous to the plaintiff, might still, by the exercise of reasonable care in the management of said car, have avoided the collision, but failed to exercise such care."

The following are the rejected prayers of the defendant: "(1) The defendant prays the court to instruct the jury that there is no legally sufficient evidence in the case from which the jury can find that the injury complained of resulted from the negligence of the defendant or its servants, and the verdict of the jury must therefore be for the defendant. (2) The defendant prays the court to instruct the jury that it appears, from the uncontradicted evidence in the cause, that the plaintiff, by his own negligence, directly contributed to the happening of the injury complained of, and the verdict of the jury must therefore be for the defendant. (3) The defendant prays the court to instruct the jury that if they believe from the evidence that the plaintiff could have avoided the happening of the injury complained of by the exercise of ordinary care on his part, then their verdict must be for the defendant. (4) The defendant prays the court to instruct the jury that if they believe from the evidence that the plaintiff could have avoided the happening of the injury complained of by the exercise of ordinary care on his part, then their verdict must be for the defendant, even though they should further find that the defendant's agent was guilty of negligence. (5) The defendant prays the court to instruct the jury that if they shall believe from the evidence that the accident was directly caused by the concurrent negligence of the plaintiff and the said defendant, and that it could have been avoided by due and proper care on the part of either said plaintiff or said defendant, then their verdict must be for the defendant, without regard to whose negligence was greater. (6) The defendant prays the court to instruct the jury that if they shall find from the evidence that the plaintiff was in the habit of crossing the tracks of the defendant at the corner of Guilford avenue and Chase street, and knew that the electric cars of the defendant were passing and repassing on said tracks at short intervals, and at six miles an hour, then it was the duty of the plaintiff, at the time of the happening of the injury complained of, to look in both directions, up and down the street, to observe the movements of the cars of the defendant; and if the jury shall find that the plaintiff did not so look, and that the injury would not have happened if he had so looked, then their verdict must be for the defendant." "(8) The defendant prays the court to instruct the jury that if they shall find from the evidence that the motorman of the defendant saw the plaintiff driving slowly along Chase street, approaching the track upon which the defendant's car was running, seated in an open buggy, then the motorman had the legal right to assume that the plaintiff saw the approach of the defendant's car, and that he would not attempt to cross the track in front of the defendant's car, but would stop and allow the defendant's car to pass. (9) The defendant prays the court to instruct the jury that it is the duty of a person crossing an electric street railway, on a city street, to look in both directions to observe whether a car is approaching before driving upon the track, and a failure to do so is negligence per se; and the facts, if the jury shall find them as facts, that the defendant's car was traveling at a rate of speed not authorized by law or that the motorman was not ringing his gong, do not excuse the plaintiff from the duty of looking in both directions. (10) The defendant prays the court to instruct the jury that a street car has a right of way on that portion of the street upon which alone it can travel, paramount to that of ordinary vehicles. (11) The defendant prays the court to instruct the jury that the burden of proof is upon the plaintiff to show that the motorman of the defendant did not use reasonable care, to avoid the consequences of the negligence of the plaintiff."

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

N. Steele, J. E. Semmes, F. K. Carey, and Wm. H. Buckler, for appellant. Geo. R. Gaither and H. M. Clabaugh, for appellee.

ROBERTS, J. This action was brought in the court below to recover damages from the defendant company for its alleged negligence. A satisfactory statement of the facts contained in the record will be found in the reporter's notes of testimony placed at the head of this case. The record presents but one exception, which is taken by the defendant to the action of the court in granting a special instruction of its own, and also the fourth prayer of the plaintiff, and in rejecting the first, second, third, fourth, fifth, sixth, eighth, ninth, and tenth prayers of the defendant. The plaintiff's fourth prayer an-

Digitized by Google

nounces the rule of damages, which was not discussed at the hearing; and, if controverted, we fail to discover any objection to it. The instruction given by the court is quite as favorable, if not more so, than, under the testimony in the record, the defendant was entitled to have. This instruction does not leave the question of contributory negligence on the part of the plaintiff to be found by the jury, but declares, as matter of law, that in what he did he was guilty of contributory negligence, and concludes: "And therefore the plaintiff is not entitled to recover, unless the jury believe from the evidence that the motorman of the car in question, after he saw, or by the exercise of due care might have seen, that the plaintiff was approaching the track, and was apparently about to cross in front of his car, and that the attempt to do so would be dangerous to the plaintiff, might still, by the exercise of reasonable care in the management of said car, have avoided the collision, but failed to exercise such care."

The contention of the defendant in this appeal is mainly to the court's instruction, and not so much to the refusal of the court to grant its prayers. The court's instruction upon the subject of the plaintiff's contributory negligence is, as already stated, quite as favorable to the defendant as it had any right to expect.

The court was clearly right in rejecting the defendant's first and second prayers, for the reason that the court should in no case take the question of negligence from the jury, unless the conduct of the plaintiff relied on as amounting in law to contributory negligence is established by clear and uncontradicted evidence. McMahon's Case, 39 Md. 449. The conflict of testimony in the record justified the court's action in this respect, and left no other course to be rightly followed.

After the court's special instruction, the fourth, fifth, sixth, eighth, and ninth prayers were unnecessary, and well calculated to mislead the jury. The doctrine announced in the concluding portion of the court's special instruction, to which exception is taken, has been so frequently and so thoroughly discussed and affirmed by this court in all its legal relations to the subject of negligence that there remains nothing further to be said, except to repeat that we have repeatedly approved and applied the doctrine of the instruction in numerous cases, notably in McMahon's Case, supra; McDonnell's Case, 43 Md. 551; Green's Case, 56 Md. 92; Wallace's Case, 77 Md. 437, 26 Atl. 518; Arnreich's Case (Md.) 28 Atl. 809; Coleman's Case (decided Dec. 19, 1894) 30 Atl. 918.

The tenth prayer asserts a proposition which has never been declared to be law in this state, and which, for very obvious reasons, we think, is not entitled to the sanction of this court. The court below was asked to say "that a street car has a right of way on that portion of the street upon which alone it can travel, paramount to that of ordinary vehicles." The doctrine had at one time found expression in some of the courts of this country, but a just sense of criticism has caused it to be abandoned. It would be both unjust and unwise to permit such a doctrine to prevail in our courts. It makes no material difference how street cars are propelled, whether by animal power, electricity, or otherwise. The vice of the doctrine contended for does not involve the subject of the motive power. It is solely a question as to the mutual rights of street-car companies and of individual citizens to use the streets of a city. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not to unreasonably abridge or interfere with the rights of the other. Railway Co. v. Cameron (Neb.) 61 N. W. 606; Lynam v. Railroad Co., 114 Mass. 83; Adolph v. Railroad Co., 65 N. Y. 554; Connelly v. Railway Co. (N. J. Err. & App.) 29 Atl. 440.

Since the preparation of this opinion, the case of Cooke v. Traction Co., 31 Atl. 327, has been decided by the court (March 1, 1895). The opinion in that case contains a careful review of the questions presented on this appeal, and dispenses with the necessity for further consideration of the case. The judgment will be affirmed. Judgment affirmed, with costs.

MISH v. MAIN.

(Court of Appeals of Maryland. March 26, 1895.)

CORPORATIONS—INSOLVENCY—FRAUDULENT CONTRACTS OF DIRECTORS—EVIDENCE.

1. A corporation is insolvent when it is unable to pay its debts in the usual course of business.

2. On an issue as to the insolvency of a corporation, testimony of a notary that he had protested its commercial paper for nonpayment is admissible.

3. In replevin by a receiver of a corporation for chattels alleged to have been fraudulently sold by the directors to one of their number, evidence that they were so sold in consideration of such director's purchase of the stock of the others at 20 per cent. of its par value, and that the property was removed from the corporate premises in the night, is admissible to show fraud.

4. Evidence of the difference between the actual value of corporate property sold by the directors to one of their number, and the price paid, is admissible to show fraud in the sale.

5. In replevin for property alleged to have been fraudulently transferred by an insolvent corporation to one of its directors, where such transfer is shown to constitute part of a general scheme to defraud creditors, notes of the purchasing director showing the consideration for the transfer, accepted by another director, who admitted his connection with the transfer, may be read to the jury.

Appeal from circuit court, Washington county.

Action of replevin by Frank W. Mish, receiver, against Martin L. Main. Judgment

Digitized by Google

for defendant, and plaintiff appeals. Reversed.

The Surbridge Manufacturing Company was incorporated in 1892. M. L. Main was secretary and director of the company. He had charge of the books of the company. September 28, 1893, a meeting of the directors was held, and they closed out their stock in the company, at 20 per cent. on the dollar, to R. G. Surbridge, a director, taking from him notes for the payment of the moneys due for the sale of their capital stock, as stated. These notes were made payable in bicycles. These bicycles were to be manufactured out of the material on hand and belonging to the Surbridge Company which, at the time of the sale of the stock, was turned over to Surbridge. At the time this sale was made, and prior thereto, for 30 days, the Surbridge Company was hopelessly insolvent. Liens existed on all the property of the company, and the liabilities of the company exceeded the assets by nine or ten thousand dollars. Frank W. Mish was appointed receiver, and sues to recover the property from the defendant. Plaintiff offered to show the sale of the real estate and machinery under a decree of the circuit court, for the purpose of showing the insolvency of the company, and further offered to show that the real estate and the machinery covered by said mortgage were all the real estate and machinery the said Surbridge Manufacturing Company had at the time of the sale of stock as aforesaid to the said Surbridge, and further show that the assets of the company, now included in said mortgages, were worth about $3,500, and further show by testimony that all of the assets of the Surbridge Manufacturing Company were turned over to Surbridge; that the defendant, Main, had no knowledge of any means by which the said Surbridge could pay for said property, except out of the property itself. The plaintiff then closed his case. It being admitted by the plaintiff that all the capital stock of the Surbridge Manufacturing Company had been purchased by R. G. Surbridge, and that all the personal property, including the articles replevied in this case, had been sold by the said manufacturing company in the sale of said capital stock, and had been delivered to the said R. G. Surbridge by the directors and stockholders before the appointment of the receiver, and at the time of the delivery of said personal property to said Surbridge he was conducting the business of manufacturing as his own individual business, without corporate formalities or franchises, but was using the corporate name. The defendant then offered the following prayer, which was granted by the court: "The defendants pray the court to instruct the jury, that the plaintiff has offered no legally sufficient testimony to entitle him to recover under the pleadings in this case, and the verdict must be for the defendants."

Argued before ROBINSON, C. J., and BRISCOE, McSHERRY, FOWLER, ROBERTS, and PAGE, JJ.

T. A. Poffenberger, Alex. Armstrong, M. L. Keedy, C. A. Little, and A. R. Hagner, for appellant. W. J. Witzenbacker and F. F. McComas, for appellee.

ROBERTS, J. This suit was brought by the appellant, as receiver of the Surbridge Manufacturing Company, to recover possession of a number of bicycles. The facts are sufficiently set out in the reporter's statement, and need not be again repeated. The record contains nine exceptions, eight of which relate to the admissibility of the proof offered, and the ninth exception is taken to the granting by the court of the appellee's prayer, by which the case was taken from the jury. It will not be necessary to examine in detail the various exceptions to the testimony offered, as most of them are closely analogous and can, in most instances, be considered together.

The first exception is taken to the appellee's offer to prove by a notary public the fact of his having protested, for nonpayment, the negotiable paper of the Surbridge Company, and to prove how much of said paper he had protested, and when the same had been done. One of the questions in issue in the cause was the insolvency vel non of the company. It has been repeatedly held in this state, and by the supreme court of the United States, that a merchant or trader who is unable to pay his debts as they became due, in the ordinary course of business, is insolvent. Castleberg v. Wheeler, 68 Md. 277, 12 Atl. 3; Toof v. Martin, 13 Wall. 40. And, if insolvent, how can the fact be better established than by one who has direct information as to the protest, for nonpayment, of the company's negotiable paper? At common law the notary was a competent witness to establish the fact of the protest, for nonpayment, of such paper. Cookendorfer v. Preston, 4 How. 317; Johnson v. Harth, 2 Bailey, 183. There is nothing in the law of this state which affects the notary's status as a witness, although it may have enlarged the scope of his special acts. This proof the appellant should have been permitted to give.

The second exception presents the same question already disposed of in considering the first exception, and in addition thereto the appellant offered to prove the facts set out in the statement of the reporter. In seeking to establish a right to the possession of the bicycles in controversy, the appellant offers to prove, not only that the company was hopelessly insolvent, but that the directors, and especially the appellee, had full knowledge of the exact financial status of the company. And yet, possessed of this information, the directors sold all of the property and effects of the company to Surbridge, after whom the company was named, and who was then a director in and the president of the same, on the following terms of sale: Surbridge, the president and a director of the concern, was

Digitized by Google

to pay for the stock subscribed or held by the other directors at the rate of 20 per cent. of the par value of the same, by giving his personal notes, which were to be paid in bicycles to be manufactured out of material bought by the company prior to such sale. That the bicycles manufactured by said Surbridge aforesaid were delivered to the appellee, and by him removed, during the nighttime, from the premises of the company, and are the same replevied in this case. It is scarcely necessary to discuss a question of this character, as it speaks for itself, and the proof offered should have been admitted.

We fail to see the importance of the third exception. It is quite immaterial, so far as we can perceive, as to how many hands were working for the company, and we find no error in the ruling of the court in refusing to allow the question to be asked.

The very gist of this action, as indicated by the appellant's offer of proof, is the fraudulent misconduct of the directors in effecting a sale of the company's effects to one of their own number, by which the rights of its creditors were utterly ignored and sacrificed. In this state of case, it was clearly competent for the appellant to show the actual value of the property sold to Surbridge, and replevied in this case, as compared with the amount to be paid by him for the bicycles. This offer constitutes the fourth exception, and we think the testimony was clearly admissible.

The fifth exception is taken to the refusal of the court to permit the appellant to read to the jury the notes, payable in bicycles, which the witness Schindel had accepted from Surbridge in payment of his stock in the company. Schindel had previously testified, without objection, that he was one of the original incorporators of the company, and one of the directors, who, together with the others, had participated in the sale of the company's effects and property made to Surbridge, who had paid none of the purchase notes. We think the court erred in refusing to allow the appellant to read these notes to the jury, for the reason that the controversy with the appellee is but part of a general intrigue to cheat and defraud the creditors of the company; and all of the directors who participated in the consummation of the fraud are, in a greater or less degree, affected by it. So that, while Schindel's notes were unmistakable evidence of his own misconduct, they were more. Taken in connection with the other proof in the record, they clearly demonstrate that they are only integral parts of a common design for wrongdoing, in which the appellee is shown to have been an active participant.

It is only necessary to say that the sixth, seventh, and eighth exceptions should have been overruled. We think the mortgages, judgments, and account should have been admitted. The issue here is one of fraud, and the proof offered is clearly applicable to the issue, and on that issue directly depends the right to the possession of the property replevied. The admissions of the appellant receiver contained in the record do not affect or impair the rights of creditors whose protection it was his duty to enforce. The assets of the company, insolvent as it manifestly is, must be applied, not to reimburse to directors any losses which they may have sustained, but they must, in good faith, be applied to the payment of the creditors of the company according to their respective legal rights.

It might as well be said here, at the conclusion of this somewhat remarkable case, that—it matters not how the assets of the company have been concealed, misappropriated, or misapplied—it is the duty of the appellant receiver to strike down all disguises and contrivances which ingenuity has suggested, and which have been resorted to, for the purpose of depriving the creditors of their legal rights, that directors might profit thereby. In this case the remedy by action of replevin is appropriate and proper. The instruction granted by the court was, we think, erroneous, and should not have been granted. There was sufficient evidence before the jury for the case to have been submitted to them. Our conclusion is that the judgment below must be reversed. Judgment below reversed, and new trial awarded.

BALTIMORE & O. R. CO. v. CAIN.

(Court of Appeals of Maryland. March 26, 1895.)

UNLAWFUL ARREST—FALSE IMPRISONMENT — INSTRUCTIONS—HARMLESS ERROR—DIRECTING VERDICT—SPECIAL INTERROGATORIES.

1. Where a railway conductor, being unable to eject several passengers guilty of disorderly conduct on his train, telegraphs to a station ahead for an officer, who immediately on the arrival of the train arrests one of such passengers on the conductor's complaint, the arrest is lawful, though without a warrant.

2. A charge which makes the right of arrest in such case depend on the fact of plaintiff's having been charged by the conductor with being disorderly, instead of as being disorderly in fact, is properly refused.

3. Error in admitting improper evidence is harmless where the fact sought to be proven thereby is subsequently established by unobjectionable evidence.

4. When the evidence is conflicting as to whether one suing for false imprisonment in having him arrested on a charge of disorderly conduct was in fact guilty of any disorderly conduct, sufficient to justify the arrest, the case is properly left to the jury.

5. It is error to refuse to submit to the jury, pursuant to Acts 1894, c. 185, special interrogations, seasonably presented by defendant before the arguments to the jury, and submitting material questions of fact which he had the right under the statute to have the jury pass upon.

Appeal from circuit court, Howard county.

Action by Richard W. Cain against the Baltimore & Ohio Railroad Company for false imprisonment in having plaintiff arrested on a charge of disorderly conduct on one of de-

Digitized by Google

fendant's trains. From a verdict and judgment for plaintiff, defendant appeals. Reversed, and new trial awarded.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

John K. Cowen, Geo. D. Penniman, John G. Rogers, and J. S. Newman, for appellant. Alex. Kilgour and Jos. D. McGuire, for appellee.

McSHERRY, J. This is an action of trespass for false imprisonment. The declaration alleges, in substance, that the plaintiff was a passenger upon one of the cars of the defendant; that he was received as such passenger at Washington Grove station, for the purpose of being carried from that place to Washington city, and that it thereupon became the duty of the defendant to carry the plaintiff safely to his destination; yet the defendant did not carry the plaintiff safely to Washington, but instead thereof, when the car conveying the plaintiff reached the depot of the defendant in said city, the defendant, by its agents and servants, assaulted and beat the plaintiff, and forced him to go from said car and depot into the public street, and gave him into the custody of a police officer, who took him to a police station, and caused the plaintiff to be there imprisoned, without any probable cause, for the space of two hours, whereby he was greatly bruised, hurt, and injured. The defendant pleaded not guilty. During the progress of the trial, which resulted in a verdict and judgment for the plaintiff, four exceptions were reserved, and the defendant then took a pending appeal.

There is, as might be expected, and as is usual in cases of this character, some diametrically conflicting testimony respecting a portion of the material facts; but only so much of this as is necessary to give apprehension of the legal principles involved need be alluded to or stated. It is not disputed by either side that early on Sunday morning, August 21, 1892, the plaintiff and three companions drove to a camp meeting held at Washington Grove, in Montgomery county, and that, shortly after reaching the ground, they, together with several others, went to the railroad station near by, and the four, namely, the plaintiff and three others by the name of Watkins, took passage on the cars of the defendant for the city of Washington, in the District of Columbia. They entered the ladies' car, and from this point the conflicting statements of the witnesses begin. According to the plaintiff's evidence, these four parties demeaned themselves in the car with perfect propriety until the conductor charged one of them (Robert Watkins) with smoking. Watkins denied the accusation, and some words followed, whereupon the conductor threatened to put Watkins off the train. The plaintiff then told the conductor that he (the conductor) would go off too if he put Watkins off for nothing. After further words, the conductor said he would have the party arrested when they got to Washington, and, just as the plaintiff stepped off the train in the depot at Washington, he was arrested by a police officer, to whom the conductor, then standing by and pointing to the plaintiff and the elder Watkins, said, "These are the men." They were taken to the police station, and after having given their watches and effects as bail, and after having been in custody 15 of 20 minutes, they were released. The conductor appeared against them at the station house. The plaintiff himself testified that "the police fined them five dollars apiece, and he left his watch as security, and afterwards produced the money and got the watch." Upon the part of the defendant it was proved by a number of witnesses, some of whom were passengers on the same train of cars, that the conduct of the plaintiff and his three companions was most disgraceful, shocking, and disorderly from the time they reached the camp-meeting ground until they arrived in Washington. They were drunk before boarding the train, and, as stated by one of the witnesses, "It was not decent for them to be where there were ladies;" and when they were remonstrated with, and requested to desist from using profane language in the presence of ladies, they all, including the plaintiff, in loud and boisterous tones, replied by saying, "God damn the ladies." The defendant further proved that, after these men entered the ladies' car, they cursed and swore and drank liquor openly, and that one of them was smoking; that the conductor expostulated with them, and urged them to be quiet or to go into the smoking car, where they could drink and smoke as much as they pleased; that they said they had paid their fares, and would ride where it suited them. The conductor again appealed to them to be orderly, or he would be obliged to put them off the car; whereupon the plaintiff replied: "If you put him off [meaning Watkins, who was smoking], you will have to go too." It was further proved that numerous complaints were made by ladies and gentlemen about the conduct of these four men, and that one lady left the car, and went into the forward car. Afterwards other ladies who got on the train at other stations were put in the forward car, because it was not fit for them to enter the one where the men were. The conductor did not undertake to put them off, because he did not believe himself able to cope with these four intoxicated and lawless men. Just before the train arrived in Washington, the plaintiff was still behaving in a disorderly manner, and using profane language, in the hearing of the passengers on the same car. There were between 50 and 60 passengers on the train, most of whom were on their way to church in Washington. Finding himself unable to control these men or to suppress their disorder, and feeling

Digitized by Google

powerless to eject them because of their threatened resistance, the conductor telegraphed from Forest Grove to Washington for an officer to arrest them, and, when the train drew up in the depot in that city, the policeman was there, and the conductor pointed out to him the plaintiff; and the officer then and there arrested the plaintiff, and took him to the station house. With these facts before the jury, there were two prayers presented by the plaintiff, both of which were granted; and there were nine presented by the defendant, all of which, except the sixth, were rejected. The view we take of the case dispenses with a separate consideration of each of these prayers, inasmuch as the defendant's fifth prayer raises the crucial inquiry contained in the record; and what we shall say in discussing that prayer will, with a few brief additional observations, dispose of most, if not all, of the others. The fifth prayer maintains that, if the plaintiff was riotous and disorderly, the conductor had the right to eject him; that, if the conductor was unable to do this by reason of the threat of resistance, then the conductor was justified in requesting the first police officer whom he could find to arrest the plaintiff; and it proceeds: "If the jury further find that the police officer at the Washington depot was the first police officer the conductor saw, and that the conductor used due diligence in procuring a police officer, and that the conductor directed the police officer to arrest the plaintiff for said disorderly conduct, that the defendant is not liable for this arrest, and the verdict of the jury must be for the defendant." From this prayer, considered in connection with the evidence to which allusion has been made, it is obvious at a glance that the predominant and controlling question before us involves the legality of the conceded arrest made in the city of Washington. Under the undisputed proof, that arrest was made without a warrant having been first procured. It was not made for an alleged felony, nor for a misdemeanor or breach of the peace, committed within view of the officer who took the plaintiff into custody, but, if the evidence of the defendant's witnesses be credited, it was made for a flagrant breach of the peace, which began at Washington Grove, and continued into Washington city, on the morning train of the defendant, and was made at the instance of the conductor, the very moment he reached a place where he could deliver these intoxicated offenders into the custody of a police officer. Was the arrest so made illegal?

It is settled that an officer has the right to arrest without a warrant for any crime committed within his view. It was his duty to do so at the common law, and this is still the law (Roddy v. Finnegan, 43 Md. 504; Phillips v. Trull, 11 Johns. 486; Derecourt v. Corbishley, 5 El. & Bl. 188); and in cases of felony he may arrest upon information, without warrant, where he has reasonable cause (Rex v. Birnie, 1 Moody & R. 160; Rohan v. Sawin, 5 Cush. 281). And so any person, though not an officer, in whose view a felony is committed, may arrest the offender. Ruloff v. People, 45 N. Y. 213. But the right of a person not an officer to make an arrest is not confined to cases of felony, for he may take into custody, without a warrant, one who in his presence is guilty of an affray or a breach of the peace. Knot v. Gay, 1 Root, 66. "It seems agreed that any one who sees others fighting may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable, who may carry them before a justice of the peace, in order to their finding sureties for the peace." 1 Russ. Crimes, 272; 1 Archb. Cr. Prac. & Pl. 82; 1 Hawk. P. C. c. 63, §§ 11, 17; 2 Hale, P. C. 90; East, P. C. 306; Timothy v. Simpson, 1 Cromp. M. & R. 757. The case last cited was one of trespass for assault and false imprisonment, and taking the plaintiff to a police station. Plea, that the defendant was possessed of a dwelling house, and the plaintiff entered the same, and then and there insulted, abused, and ill treated the defendant and his servants, and greatly disturbed them in the peaceable enjoyment thereof, in breach of the peace; whereupon the defendant requested the plaintiff to cease his disturbance, and to depart from and out of the house, which the plaintiff refused to do; that thereupon the defendant, in order to preserve the peace and restore good order in the house, gave charge of the plaintiff to a policeman, and requested the policeman to take the plaintiff into his custody, to be dealt with according to law, and the policeman gently laid his hands on the plaintiff, and took him into custody. It appeared in evidence that the plaintiff entered the defendant's shop to purchase an article, when a dispute arose between the plaintiff and the defendant's shopman; that plaintiff refused on request to go out of the shop; the shopman endeavored to turn him out, and an affray ensued between them; that the defendant came into the shop during the affray, which continued for a short time after he came in; that the defendant then requested the plaintiff to leave the shop quietly, but, he refusing to do so, the defendant gave him in charge to a policeman, who took him to a station house. Parke, B., in the course of his lucid opinion, said: "It is unquestionable that any bystander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it till the affray be ended. It is also clearly laid down that he may arrest the affrayers, and detain them until the heat be over, and then deliver them to a constable." Then, after quoting from Hawk. P. C. the same passage we have transcribed from 1 Russ. Crimes, the learned baron went on: "And pleas founded upon this rule, and signed by Mr. Justice Butler, are to be found in 9 Went. Pl. 344, 345. And De Grey, C. J., on the trial, held the justification to be good. It

Digitized by Google

is clear, therefore, that any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled and his desire to break the peace has ceased, and then deliver him to a peace officer. And, if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is over, but while he shows a disposition to renew it, by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is that, for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts. In truth, while those are assembled together who have committed acts of violence, and the danger of their renewal continues, the affray itself may be said to continue; and during the affray the constable may not merely on his own view, but on the information and complaint of another, arrest the offender; and, of course, the person so complaining is justified in giving the charge to the constable. Hale, P. C. 86. * * * It is clear upon the facts that there was a defense on the ground of the defendant's right to arrest for a breach of the peace in his presence." See, also, Grant v. Moser, 5 Man. & G. 127; Simmons v. Millingen, 2 C. B. 534; Webster v. Watts, 63 E. C. L. 311; Cohen v. Huskisson, 2 Mees. & W. 477; Shaw v. Chairitie, 3 Car. & K. 21; Burns v. Erben, 40 N. Y. 466; Smith v. Donelly, 66 Ill. 464; Tied. Lim. 84; State v. Sims, 16 S. C. 486, a case strikingly apposite. In Burns v. Erben, supra, it was held that, "as a general principle, no person can be arrested or taken into custody without a warrant. But, if a felony or a breach of the peace has in fact been committed by the person arrested, the arrest may be justified by any person, without warrant, whether there was time to procure a warrant or not; but, if an innocent person be arrested upon suspicion by a private individual, such individual is not excused unless such offense has, in fact, been committed, and there was reasonable ground to suspect the person arrested. Hale, P. C. 72; 1 Chit. Cr. Law, 15; Holley v. Mix, 3 Wend. 353."

Now, if it be true that the plaintiff was guilty of the reprehensible and disorderly conduct attributed to him by the witnesses, he was incontestably engaged in a flagrant and an outrageous breach of the peace, as pronounced as if there had been an actual affray during the whole time he was in the defendant's car; and it was clearly lawful, under these conditions, for the conductor to expel him and his drunken companions from the train if he had a sufficient force to overcome their threatened resistance, or else to arrest them all without warrant, and then deliver them to the first peace officer he could procure within a reasonable time. If this were not so, then, as said by Lord Chief Justice Denman in Webster v. Watts, supra, "the peace of all the world would be in jeopardy." And it would be in jeopardy, because if, in such and similar instances, no arrest could be lawfully made without a warrant, the culprit, "if transient and unknown, would escape altogether," before a warrant could be obtained (Mitchell v. Lemon, 34 Md. 181), and there would soon cease to be any order or any security or protection afforded the public on swiftly-moving railroad trains, or even elsewhere, unless a peace officer were constantly present. The delay necessarily incident to obtaining a warrant would be in many, if not in most, cases of this and a kindred character equivalent to an absolute immunity from arrest and punishment; and, should the name of the offender be unknown, he, most probably, would never be apprehended if once suffered to depart. The law is not so impotent and ineffective as that. Being physically unable to expel these alleged riotous persons from the train, the conductor telegraphed for a peace officer, and without delay, and while the plaintiff was still drunk, caused his arrest the instant the officer thus summoned came in view of the plaintiff. If, then, any bystander could, in the language of Baron Parke, "for the sake of the preservation of the peace, * * * restrain the liberty of him whom he sees breaking" the peace, the act of the conductor in telegraphing for the policeman, and within a short space of time thereafter handing the plaintiff over to the officer, was in no respect different from a formal arrest of the plaintiff by the conductor, in the midst of the riot and disorder, and the prompt delivery of him afterwards to the officer. If the plaintiff was not in fact arrested by the conductor because of the presence of superior resisting force, that fact cannot make the subsequent act of the conductor in pointing out the plaintiff to the officer wrongful or illegal. The charge, according to the plaintiff's own testimony, was sustained. A fine was imposed, and he paid it. The accusation was therefore well founded, and what was done by the conductor, if the facts testified to by the defendant's witnesses be credited, was undeniably lawful, under all the circumstances. If this be so, then there is obviously no cause of action against the defendant, because no wrong has been done to the plaintiff. This is the theory of the defendant's fifth prayer. That prayer, being correct in principle and proper in form, ought to have been granted. For the same reasons, the second, third, fourth, and seventh prayers should have been granted.

The eighth was properly rejected. It makes the right to arrest depend on the fact that, while on the train, the plaintiff was charged by the conductor with being disorderly, whereas the right to arrest depended on the fact that the plaintiff was in reality disorderly. His having been charged by

Digitized by Google

the conductor with being disorderly is quite a different thing from his having been in fact disorderly. The ninth prayer was properly rejected. It failed to submit to the jury that the arrest was made for the alleged breach of the peace. Though the arrest had been made without an assigned cause, the prayer exonerated the defendant.

The plaintiff's first prayer ought to have been rejected. Its fallacy lies in the postulate that an arrest for a breach of the peace, committed out of the view of a peace officer, necessarily could not be legally made without a warrant.

The second prayer of the plaintiff related to the measure of damages, and was correct.

The ruling in the first exception is affirmed. Though the evidence objected to had been inadmissible, the same fact was subsequently proved in an unobjectionable way by Officer Howe. Consequently, no injury was done, and without injury there can be no reversible error.

At the conclusion of the plaintiff's case, the defendant offered two prayers, asking the court below to withdraw the case from the jury. They were rejected, and this ruling is the one complained of in the second exception. We find no error in this. If the plaintiff had been guilty of no breach of the peace, his arrest at the instance of the conductor was unlawful; and having been made in the defendant's depot, while the plaintiff, a passenger, was still entitled to be protected by the defendant against assaults and injuries by the defendant's own employés, if wrongfully made, by or at the request of the defendant's own servants, while they were in and about the performance of their prescribed duties, the master would be liable. There was some evidence before the jury that the arrest had been made without a warrant, and therefore the second prayer was properly rejected. One of these prayers was again presented at the close of the case, and was again rejected, and we think properly refused.

The remaining exception relates to the refusal of the court below to submit special interrogatories to the jury, under Act 1894, c. 185. We have had occasion to consider that act during the present term of this court, and need not refer again to its provisions. The interrogatories propounded by the defendant were presented before the arguments to the jury began, and therefore at a seasonable time; and the third, fourth, and fifth, submitting material questions of fact which the defendant, under the statute, had the right to require the jury to pass on and respond to, should have gone to the jury for specific answers. There was error in refusing this request. The other questions submitted were immaterial.

For the error, then, in rejecting the defendant's second, third, fourth, fifth, and seventh prayers, and in granting the plaintiff's first instruction, and for the error in refusing to submit the third, fourth, and fifth special interrogatories to the jury, the judgment must be reversed, and a new trial will be awarded. Judgment reversed, with costs above and below, and new trial awarded.

KILPATRICK et al. v. MAYOR, ETC., OF BALTIMORE.

(Court of Appeals of Maryland. March 27, 1895.)

CONSTRUCTION OF DEED—CONDITION SUBSEQUENT—CONVEYANCE FOR CERTAIN PURPOSE.

In response to a resolution of a city council, directing a lease "for public use" with the right reserved "to purchase," certain land described in the resolution was conveyed to the city by two deeds. The first conveyed a portion of the land with a habendum clause, stating that it was to be held by the city "as and for a street, to be kept as a public highway"; and the second, after setting out the resolution, leased to the city, with the right reserved to purchase in fee, all the ground mentioned in the resolution, except that which had been granted by the prior deed to the city in "fee simple." All the land thus conveyed was used by the city for a public park. *Held*, that the habendum clause of the first deed did not create a condition subsequent so as to work a forfeiture in case the property was not maintained as a public street.

Appeal from superior court of Baltimore city.

Action of ejectment by Rebecca H. Kilpatrick and Joseph F. Perkins against the mayor and city council of Baltimore. From a judgment for defendant, plaintiffs appeal. Affirmed.

Argued before BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, and PAGE, JJ.

Harry M. Benzinger, James S. Calwell, J. V. L. Findlay, and Thomas Mackenzie, for appellant. Thomas G. Hayes, for appellees.

PAGE, J. This is an action of ejectment, brought by the appellants to recover from the appellees a strip of land running through Perkins Spring property in the city of Baltimore. The case was heard below upon an agreed statement of facts, and from the proforma judgment thereupon rendered this appeal is taken. On the 16th day of October, 1872, the mayor and city council of Baltimore passed a resolution authorizing and directing the city comptroller to lease "for public use" all that portion of the Perkins Spring property located within the bounds of Ogston, George, and Chatsworth streets (except a portion theretofore leased), "at a rate not to exceed four dollars and a half per front foot, for the building lots contained within said bounds," with the right reserved "to purchase at six per cent., capitalized, at the convenience of the city." The land described in this resolution was conveyed to the city in separate parcels, by two deeds, dated respectively the 11th day of January, 1873, and

Digitized by Google

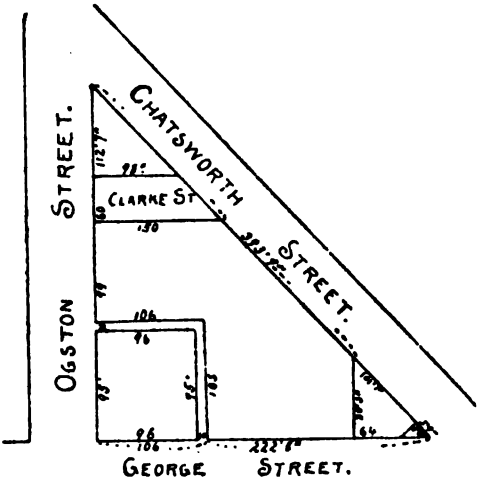
the 14th day of January of the same year. These deeds were submitted to and approved by the city solicitor at the same time; that is to say, on the 4th of January. By the deed of the 14th day of January, the grantors, first having set out the resolution above cited, lease to the city for 99 years, renewable forever, with the right reserved to purchase the fee, all of the ground mentioned in the resolution, except so much thereof as constituted Clark street, which was granted by the deed of the 11th of January to the city "in fee simple." Clark street, thus referred to, did not in fact exist. It was only the strip of land running from Ogston to Chatsworth street, 60 feet wide, which the grantors, by the deed of the 11th of January, had, in consideration of one dollar, granted unto the mayor and city council of Baltimore and its successors, with a habendum clause as follows: "To have and to hold the parcel of ground above described, with the appurtenances aforesaid, unto the mayor and city council of Baltimore, aforesaid, and its successors, forever, as and for a street to be kept as a public highway." Upon the execution and delivery of these deeds, the city took possession of the property, and since then has used it as a part of Perkins Spring Square. It has expended large sums of money in improving it, by the construction of expensive paved ways for persons using the square, and of a large mound of earth in the center, ornamented and embellished with receptacles for flowers. No ordinance or resolution was ever passed by the mayor and city council authorizing the purchase of the land mentioned in the declaration as a public highway, or accepting it as such; on the contrary, if it should be used as a street, such use would render the triangular parcel incapable of improvement as a public square, as provided by the ordinance or resolution of 1872. It is agreed by the parties that the court shall draw such inferences of law or fact from the "statement of facts and exhibits" as may be right and proper, and all questions of law, as well as inferences that might have been made in the court below, shall be open for consideration and decision by this court.

Under these circumstances the appellants contend that the deed of the 11th of January, 1873, was made for the purpose of opening and forever keeping open Clark street from Ogston to Chatsworth as a public highway; that the words, "as and for a street to be kept as a public highway," found in the habendum, create a condition; and, as the city has failed to use the land in accordance with this condition, a forfeiture has occurred, and the title has reverted to the grantors. To sustain this contention, it obviously is necessary to determine that the words in themselves import a condition, or, when taken in connection with the whole deed, that they show a clear and unmistakable intention on the part of the grantor to grant an estate on condition. Technical words are not absolutely essential to create a condition, nor, on the other hand, does their use necessarily raise one. Such words may be controlled by the context of the instrument in which they are used, so that sometimes they work a limitation and condition, and sometimes a covenant or a trust only. Paschall v. Passmore, 15 Pa. St. 295; Bacon v. Huntington, 14 Conn. 92; Worman's Lessee v. Teagarden, 2 Ohio St. 380; Watters v. Bredin, 70 Pa. St. 235; Laberee v. Carleton, 33 Me. 211. Conditions subsequent are not favored in law, "because on breach of such conditions there is a forfeiture, and the law is adverse to forfeitures." 4 Kent, Comm. 130; Stanley v. Colt, 5 Wall. 119. Therefore it is that a condition will not be raised by implication from a mere declaration in the deed that the grant is made for a special and particular purpose, without being coupled with words appropriate to make such a condition. Packard v. Ames, 16 Gray, 327; Bigelow v. Barr, 4 Ohio, 359. And as a further consequence of this rule it has always been held that "in doubtful cases the disposition of the courts is to construe language as creating a trust or covenant, rather than a condition." See Mr. Brantley's note to the case of Earle v. Dawes, 3 Md. Ch. 230, and authorities there cited; Scovill v. McMahon (Conn.) 26 Atl. 481; Greene v. O'Connor (R. I.) 25 Atl. 692; Rawson v. Inhabitants of School Dist. No. 5, 7 Allen, 128, 129. In the elaborate and able opinion delivered in the last-cited case by Bigelow, C. J., the court said: "If it be doubtful whether a clause in a deed be a covenant or condition, courts of law will always incline against the latter construction. Conditions are not to be raised readily by inference or argument. * * * We believe there is no authoritative sanction for the doctrine that a deed is to be construed a grant on a condition subsequent, solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature for the general public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled."

These principles, which, so far as our researches have gone, seem to be of universal acceptance, are fully sustained by the decisions of this court. Without undertaking to review the cases in which questions of this nature have been considered, we deem it quite sufficient to refer to the case of Newbold v. Glenn, 67 Md. 490, 10 Atl. 242, in which Judge Robinson, speaking for the court, has succinctly stated the whole law. There, in pursuance of an ordinance of the city, the trustees of the McDonough Educational Fund and Institute bought of Wolfarden a lot of ground as a site for the proposed McDonough Institute. The deed recited the ordinance, and conveyed the property to the city "in trust for the uses and

Digitized by Google

purposes, and subject to the trusts, limitations, powers, and provisions imposed, expressed, and declared in and by the ordinance." Subsequently the city sold the property to William W. Glenn, and bought another, on which the buildings were erected. One of the questions involved was whether the city acquired an indefeasible fee-simple title, or only a fee on condition subsequent that the property was to be used as a site for the institute, and, on failure so to use it, there was a reverter to the grantor. It was held, however, the words relied on to establish the condition were used only "for showing the purpose for which the property was bought, and the character in which it was held, and not for the purpose of limiting the right of alienation." It was also held there was nothing "to justify the inference that the property was sold or conveyed on condition that it was to be used as a site for the McDonough Institute, and, on failure thus to use it, the title was to revert to the vendor; * * * and, if such had been the intention, we must presume that it would have been expressed in clear and explicit terms, or in terms, at least, from which such intention could be fairly inferred." The court also distinguish that case from those of Reed v. Stouffer, 56 Md. 236, and Society v. Dugan, 65 Md. 460, 5 Atl. 415, in which it was held, "on the express terms of the grant, and the incapacity of the grantee to take upon any other conditions," that, upon the "failure to use the property for the purposes in consideration of which it was conveyed, the title reverted to the grantor." Applying these principles to the case at bar, we cannot find anything in the deed of the 11th of January to justify the inference that the property was conveyed on condition that it was to be used as a public highway, and, "on failure thus to use it, the title was to revert to the vendor." In the granting clause the property is conveyed absolutely to the city, and in the habendum are the words, "to have and to hold," etc., "as and for a street, to be kept as a public highway." These words do not, ex proprio vigore, import a condition, nor are they so connected with the grant itself, as in any manner to qualify the general terms there employed; and there is no such language to be found in the deed from which, when the context is taken into consideration, an intention to create a condition can be inferred. The lot was acquired by the city under the authority of a resolution which directed a lease "for public use, with the right reserved to purchase." It was part of the property included within what was called the "Perkins Spring Property"; and, inasmuch as the whole of the property was, immediately upon its acquisition, devoted by the city to the uses of a public square, it may reasonably be presumed that such was the "public use" had in view when the resolution was passed. Under these circumstances, it is inconceivable, and it would require the plainest terms to enable us to determine that it was the intent of the deed that if the property was put to the public use contemplated by the resolution, and not to the use of a public street, the city should lose its title, and the property revert to the grantors. A glance at the plat, with which



we have been furnished, will satisfy any one that to use this parcel of land as a street would be profitless both to the grantors and the public; and it is agreed by the parties that such use would render the property included in the resolution "incapable of improvement as a public square, as provided in the ordinance of 1872." We are disposed to place but little importance upon the fact that the consideration in the deed is merely nominal. The whole of the Perkins Spring property (except a portion thereof) was transferred to the city by the same parties. The resolution authorized a lease at $4.50 per front foot of the building lots contained. Prior to the passage of the resolution, Clark street did not exist. It is obvious that, if Clark street be taken into account, more front feet can be obtained than would otherwise be possible, and thus a larger price could be realized for the entire property. The transfer to the city of the Spring property, although accomplished by two deeds, ought to be regarded as one transaction, and the real consideration for the conveyances must be taken to be the aggregate amounts received from the entire property. In view of all the facts of the case and the terms of the deed, we think the words relied on to create the condition are quite as consistent with an intent to repose a confidence in the authorities of the city that they "would fulfill the purpose of the grant, so long as it was reasonable and practicable so to do, as they are with an intent to impose a condition which should compel it, on pain of forfeiture, to maintain the property as a public street, however inconvenient, imprac-

Digitized by Google

ticable, or worthless it might become either to the vendor or vendee." "Language so equivocal cannot be construed as a condition subsequent without disregarding the cardinal principle of real property * * * that conditions subsequent which defeat an estate are not to be favored or raised by inference or implication." Rawson v. Inhabitants of School Dist. No. 5, 7 Allen, 131. From what we have said it follows that the judgment of the court below must be affirmed. Judgment affirmed.

CLASSEN et al. v. CHESAPEAKE GUANO CO. OF BALTIMORE CITY.

(Court of Appeals of Maryland. April 19, 1895.)

RIPARIAN RIGHTS—CONSTRUCTION OF PIER—PERMISSION OF CITY—VESTED RIGHTS—BULKHEAD LINE.

1. Baltimore City Code, §§ 343, 351, authorizes the mayor and city council to prescribe what the frontage of a particular riparian lot, which is bounded by a concave shore, shall be on the bulkhead line. The council fixed by ordinance the bulkhead line of a lot, and authorized the owner to construct a bulkhead as fixed by the ordinance, which he did. *Held*, that the owner acquired a vested right in the bulkhead as constructed, which could not be questioned by adjoining lot owners, though the council subsequently attempted to lessen his frontage on the bulkhead line.

2. Permission by the city to a riparian lot owner to construct a pier may be revoked at any time before the pier is constructed.

3. After defendant, under permission from the city, constructed a bulkhead, and so acquired a vested right to a certain frontage on the bulkhead line, the city fixed the frontage of each lot on the bulkhead and on the pierhead lines, the lots being bounded by a concave shore. A portion of defendant's bulkhead frontage was included in the frontage thus subsequently allotted to plaintiff. *Held*, that in determining the extent of defendant's frontage on the pierhead line he was entitled, in addition to his allotted frontage, to such a proportion of the pierhead frontage allotted to plaintiff as the part of the bulkhead frontage allotted to plaintiff, but acquired by defendant by reason of his having previously built his bulkhead, bore to the whole of the bulkhead frontage allotted to plaintiff.

Appeal from circuit court of Baltimore city.

Action by Charles H. Classen and another against the Chesapeake Guano Company of Baltimore City. There was a judgment for defendant, and plaintiffs appeal. Modified.

Argued before ROBINSON, C. J., and McSHERRY, ROBERTS, PAGE, and BRISCOE, JJ.

Charles M. Howard and Geo. R. Willis, for appellants. T. M. Lanahan and Frank Gosnell, for appellee.

BRISCOE, J. The appellants are the owners of a lot of ground fronting on the Patapsco river, in the city of Baltimore, and the appellee is the owner of the adjoining lot on the west, likewise fronting on the river. The shore line of the river is concave, so that, if some of the riparian owners should build out wharves or piers in straight lines, the full width of their lots, to the pierhead or port warden's line, other riparian owners would be deprived of the privilege of building piers to the pierhead line, since the water front on the pierhead line is much less in extent than the shore line in the rear. In 1876, Joshua Horner, who then owned the appellee's lot and also the lot now adjoining on the west, was authorized by the mayor and city council, by Ordinance No. 114 of that year, to erect a bulkhead and piers in front of his lot. By Ordinance No. 141 of 1880, approved October 6, 1880, the ordinance of 1876 was repealed and re-enacted to grant permission to the heirs of Joshua Horner to erect said bulkhead and piers. The heirs of Horner, in August, 1880, agreed to sell to the appellee a portion of the lot referred to in these ordinances, fronting 150 feet on Gould street, and running to the port warden's line; and as a part of the consideration agreed to build a solid bulkhead to the bulkhead line. And this bulkhead was constructed under the above-mentioned ordinance between October 6, 1880, and January 6, 1881, extending the whole width of the appellee's lot, and running out in straight lines to the bulkhead line. Subsequently Ordinance No. 83 was passed and approved on May 17, 1881, establishing certain piers and bulkhead lines in the harbor of Baltimore city. It recites in its preamble that, whereas it has become evident that further legislation is necessary to enable the mayor and city council, with equity to the riparian owners and to the public interest, to grant permits for pier or bulkhead extensions in such portions of the harbor as the shore line may be concave or hollow, or where it forms sharp, re-entrant angles, so that the water front measured on the pier or bulkhead lines is much less in length than the shore line in rear; and then enacts as follows: "That from and after the passage of this ordinance the lines marked and shaded in 'red' in the maps numbered from 1 to 5, submitted this day by the joint standing committee on harbor, be, and are hereby, declared to be the pier and bulkhead lines, beyond which no extension of piers or bulkheads shall be made in the portions of the harbor to which said maps relate." Now, it appears that the southeast part of the appellee's solid bulkhead or wharf is within the lines of what would be the appellants' lot if extended according to the ordinance of 1881, and that the piers authorized in front of the appellee's lot by the ordinance of 1880 would be, if constructed, almost wholly within the lines of the appellants' lot extended to the pierhead or port warden's line. And upon the case as thus stated the court was asked to declare the erection of the appellee's bulkhead a trespass, and to enjoin it from constructing piers to the pierhead line.

There can be no question, it seems to us, that the appellee has the right to maintain its wharf or bulkhead in front of its lot to

Digitized by Google

the bulkhead line. The Patapsco river, in the city of Baltimore, is a navigable stream, and the power of the legislature, or of the municipality under its authority, to establish the lines within which wharves may be built, or other improvements made into the water, cannot be disputed. Browne v. Kennedy, 5 Har. & J. 195; Hess v. Muir, 65 Md. 586, 5 Atl. 540, and 6 Atl. 673. In the case of Railroad Co. v. Chase, 43 Md. 23, this court said that, by the construction of the act of 1745 (chapter 9, § 10) as settled by the decisions of our predecessors, the right of the lot owner fronting on the water to extend his lot or improve out to the limit prescribed by the authorities of the city is a franchise, a vested right peculiar in its nature, but a quasi property, of which the lot owner cannot be lawfully deprived without his consent. And if any other person, without his authority, make such extension, no interest or estate in the improvement vests in the improver, but it becomes the property and estate of the owner of the franchise. And in Horner v. Pleasants, 66 Md. 475, 7 Atl. 691, it was distinctly held that, where a wharf is built by a riparian owner under a statute authorizing such improvement, he is entitled to the perpetual use of the land covered by water for the wharf. But under the statute now in force in Baltimore city, the mayor and city council are authorized to prescribe the extent and mode within which riparian owners may make improvements in front of their lots, and, when they bound upon a concave shore, to declare what the front of a particular lot shall comprehend upon the bulkhead or port warden's line. Baltimore City Code, §§ 343, 351. Now, in this case, the wharf of the appellee, built out to the bulkhead line, was actually constructed prior to the ordinance of 1881, and under the ordinance of 1880, and the right of the appellee to maintain it cannot now be questioned by the appellants.

We come now to the second question,—as to the right of the appellee to build the piers authorized by the ordinance of 1880 to the pierhead line. It will be observed that no piers were erected during the time the ordinance of 1880 was in force, nor down to the institution of this suit. It is contended by the appellee that the ordinance of 1881 "does nothing but define the pier and bulkhead lines, the reasonable interpretation of which is that the heavier lines, marked 'Bulkhead Line' and 'Pierhead Line,' are the lines meant to be established." But we think, when this ordinance is considered in connection with the preamble, and the map ordered to be placed on file in the office of the harbor board, it is clear that its design was to give each of the owners along this concave shore a right to so much of the bulkhead and pierhead lines in front of their respective lots as is comprehended within the red lines on said map, traversing in a southerly direction the bulkhead line. The effect of this ordinance was to abrogate, so far as these parties are concerned, any right which the appellee may have as the elder grantee, and to give all these riparian owners equal rights to make improvements within the lines prescribed by the ordinance to the pierhead or port warden's line. But it is manifest, since the right to build piers beyond the bulkhead line, conferred by the ordinance of 1880, has not been exercised, the appellee has no vested right in the same. It was a privilege subject to revocation at any time before it was acted upon, and the ordinance of 1881, which repealed all ordinances inconsistent therewith, was a revocation of this privilege. Casey v. Inloes, 1 Gill. 430; Giraud v. Hughes, 1 Gill. & J. 249; Linthicum v. Coan, 64 Md. 453, 2 Atl. 826. The appellants were therefore entitled to an injunction restraining the appellee from constructing piers beyond the bulkhead line, according to its contention, as being in front of the appellants' lot. And to allow the appellee, in this case, to improve out in a straight line, the shore line being concave, would permit it to shut off, and almost entirely deprive the adjacent lot owners, the appellants here, of water frontage and rights on the pierhead or port warden's line. Inasmuch, however, as the appellee acquired, by building its wharf under the ordinance of 1880, a vested right to a part of the bulkhead line which has been allotted by the ordinance of 1881 to the appellants, the Chesapeake Guano Company now has a right to build piers to the pierhead line, taking so much of the pierhead line in front of the appellants' property (as laid down in the plat) as will bear the same proportion to the whole of said line as the part of the bulkhead line acquired by the appellee bears to the whole bulkhead line in front of the appellants' property, such piers to be built according to the converging lines, in the direction of the lines laid down in the ordinance of 1881. And the right of the appellants to extend to the pierhead line is to be measured by their proportion of frontage of the bulkhead line, diminished by that part occupied by the wharf of the appellee. It follows, then, that the pro forma decree appealed from will be affirmed in part and reversed in part, and the cause remanded, to the end that a decree may be passed in conformity with this opinion. Each party to pay one-half of costs in this court and the court below. Decree affirmed in part and reversed in part, each party to pay one-half of costs.

HOLT v. TENNALLYTOWN & R. RY. CO.

(Court of Appeals of Maryland. April 4, 1895.)

DISMISSAL OF APPEAL — SECURITY FOR COSTS — RULE ON NONRESIDENT PLAINTIFF—ENFORCEMENT—CHANGE OF VENUE—EFFECT.

1. An appeal will not be dismissed for failure to file the transcript of the record in time, where the delay was caused by the clerk of the lower court.

Digitized by Google

2. Code, art. 24, § 9, requiring nonresident plaintiffs to give security for costs, is not repugnant to Const. U. S. art. 4, § 2, providing that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.

3. A rule security for costs may be enforced against a nonresident plaintiff in a county to which the cause was removed from the county in which the rule was laid.

4. The right to enforce a rule security for costs against a nonresident plaintiff is not waived by a delay of eight months after plaintiff's default in enforcing it.

Appeal from circuit court, Anne Arundel county.

Action by William H. Holt against the Tennallytown & Rockville Railway Company to recover damages for personal injuries. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BRISCOE, ROBERTS, and PAGE, JJ.

Chapin Brown, Thos. Anderson, W. Veirs Bouic, Jr., and Jas. M. Monroe, for appellant. Jas. B. Henderson, Ed. C. Peters, and Frank H. Stockett, for appellee.

FOWLER, J. The motion to dismiss the appeal in this case must be overruled, for it appears from the affidavits filed that the delay in transmitting the transcript of record to this court was the fault of the clerk of the court below. The plaintiff, having been injured, as he alleges, by the negligence of the defendant, a railroad corporation, he instituted an action in the circuit court for Montgomery county to recover damages. Issue having been joined, the defendant suggested that the plaintiff was a nonresident, and asked the court to place him under a rule security for costs, which was accordingly done; and on the same day the defendant also filed a suggestion for removal, and an order was thereupon passed to remove the cause to the circuit court for Anne Arundel county, in which court the record was filed on the 19th of April, 1893. On the 16th of October following, the defendant moved to enforce the rule security which had been laid in Montgomery county. This motion, at the instance of the plaintiff's attorney, was not pressed. At any rate, no action was taken, and the case was continued. On the first day of January term, 1894, the defendant again moved the court to enforce the rule security of the circuit court for Montgomery county, which was accordingly done. The plaintiff being in default, a judgment of non pros. was therefore entered against him. The question of the constitutionality of the provision of our Code (article 24, § 9) requiring nonresident plaintiffs to give security for costs as therein provided was fully argued by plaintiff's counsel, but it was said 40 years ago by our predecessors that this law, having then been in operation for more than half a century, and having always been recognized by the profession, both on the bench and at the bar, as a valid law, they were not disposed to declare it a nullity Haney v. Marshall, 9 Md. 200. And at this late day we are equally unwilling to interfere with its operation by declaring it unconstitutional and void, because in violation of section 2, art. 4, of the constitution of the United States, this being the same ground of objection which was urged in Md. 200.

Is the rule security of the Montgomery county court enforceable in the circuit court for Anne Arundel county? We think it is. This view is in conformity with the general practice, and will enlarge the operation of the law in question, which was passed for the protection of resident defendants. If the rule can be enforced only in the county where it is laid, the plaintiff could escape from all obligation to comply with it by simply filing a suggestion for removal. And in that event the defendant would be compelled to have another rule laid in the county to which the cause should be removed, or lose the protection the law affords him. Nor do we think that the fact of removal should be allowed to make any change in the time within which the plaintiff is required to give security. In this case the rule was laid at the March term, 1893, of the Montgomery county court, and the plaintiff had until the second day of the next term of that court to comply,—that is to say, until the 6th of June,—and, having failed so to do, he was in default at the time the judgment of non pros. was entered, namely, at the January term, 1894, of the Anne Arundel county court.

It was suggested that the defendant waived its right to enforce the rule because of delay, and that, having failed to act more promptly, it ought not to have been allowed to take advantage of the plaintiff's default. In the case of Heinekamp v. Beaty, 74 Md. 388, 21 Atl. 1098, and 22 Atl. 67, the rule security was laid on the 23d September, 1889, and the judgment of non pros. for failure to comply with it was not moved for until the 30th September following, or more than nine months after default. It is true, there was no question made in the case just cited as to delay on the part of the defendant, but it seems to have been assumed by counsel and court that, notwithstanding the lapse of time, the defendant would have been entitled to enforce the rule if it had not been complied with before the judgment was entered. In the case we are considering there was a delay of less than eight months, the default of the plaintiff having occurred on the 6th of June, 1893, and the judgment having been taken on the 16th January, 1894. But, as it appears to be conceded that the defendant may obtain the rule at any time before the beginning of the trial, unless temporarily waived, as by continuance by consent (Ha

Digitized by Google

ney v. Marshall, 9 Md. 209; Spencer v. Trafford, 42 Md. 2; Poe, Pl. & Prac. § 78), it would seem to follow that the right to enforce the penalty for failure to comply with the rule must continue to exist to the same period. Finding no error, the judgment will be affirmed. Judgment affirmed, with costs.

STOCKWELL v. BAIRD.

(Superior Court of Delaware. April 20, 1895.)

SALE OF HORSE—CONSTRUCTIVE DELIVERY — GIFT BY HUSBAND TO WIFE—SALE TO THIRD PERSON —ACQUIESCENCE OF HUSBAND—EFFECT.

1. Payment by one for the pasturage of a colt after his purchase thereof, the seller having previously paid therefor, constitutes a constructive delivery of the colt.

2. Though a wife cannot acquire title to property from her husband (Rev. Code 1893, § 1), yet where the husband stands by and acquiesces in the sale by his wife of property given her by him, the buyer, provided he acted in good faith, is entitled to the same, as against the husband's creditors.

Replevin by Lewis M. Stockwell against Joseph C. Baird.

James H. Hughes, for plaintiff. C. H. B. Day, for defendant.

LORE, C. J. (charging jury). This is an action of replevin brought by Lewis M. Stockwell, the plaintiff, against Joseph C. Baird, the defendant, for the recovery of the value of a sorrel mare colt which the plaintiff claims he bought of his sister-in-law, the wife of his brother, Frederick C. Stockwell. The claim is, as we understand it, that Frederick C. Stockwell bought the mare, with foal, at a public sale, under the condition, and the mare passed into his possession with the understanding, that the purchaser of the mare should pay for the service of the sire; that the wife claimed the colt as hers, even before it was dropped, and that after it was dropped the husband, F. C. Stockwell, agreed with her that if she would pay for the services of the sire the colt should be hers, and that afterwards, in pursuance of that agreement, she paid for the services of the sire, and put the colt to pasturage with one Mr. Clark, and paid for the pasturage up to the time it was sold to her brother-in-law, Lewis M. Stockwell, the plaintiff in this suit, which was about the 15th of June, 1892; that after that time the pasturage was paid by the purchaser of the colt, Lewis M. Stockwell, the plaintiff, —one witness testifying that she paid the whole bill for the pasturage of the colt, and another stating that Lewis M. Stockwell furnished his part of that money. It is claimed on the one side that the sorrel mare did not belong to the plaintiff, in the first place, as we understand the contention of defendant's counsel, because there was no delivery of the colt, under the statute of frauds, either to the wife, by the husband, in the first instance, or to the present claimant, the purchaser, by the wife, in the second place; second, that, even if there was a delivery, the wife could not take any property from her husband,—that she never could take any title under the law, and therefore could give none. This case comes right down to those two questions. If this plaintiff recovers at all, he must do so upon the strength of his own title; and, if the title to the colt was in anybody else, he cannot recover.

Upon the first point, we say to you that if you believe that the colt was put to pasturage by the wife, and paid for by her up to the time of the alleged sale to her brother-in-law, Lewis M. Stockwell, the present plaintiff, and that after that time this plaintiff took such ownership of it as is implied by the paying for its pasturage, there would be constructive delivery, just as where persons buy goods that are in a warehouse, and the seller gives to the purchaser the key to said warehouse, in which case there is a constructive delivery of those goods. We therefore say to you that the payment for the pasturage of the colt on the part of the plaintiff in this case was such an assumption of ownership, and such an exercise of right, as constituted a constructive delivery; and, if you so believe, upon that point your verdict should be for the plaintiff.

Now comes another question: Could the wife acquire any property from her husband, as against creditors? The law governing this matter is found at page 600, § 1, Rev. Code 1893, and is in these words: "That the real and personal property of any married woman, which has been heretofore acquired, is now held, or which she may hereafter acquire in any manner whatsoever, from any person other than her husband shall be her sole and separate property," etc. So that, by the very terms of this law, there is an inhibition against the wife's acquiring property directly from her husband. This statute is in dereliction of the common law, and while it gives the wife the right to take property from any other person than her husband, and to hold it as her sole and separate property, it expressly negatives the idea that the wife can take property directly from her husband. If this case rested there, your verdict would have to be for the defendant. But there is another question: Although she could not take property, and although, under our construction of the law, no title vested in her by this direct transfer of property from the husband to the wife, if you believe there was any such bona fide transaction, yet if you believe that, at the time of the sale of this mare colt by Mrs. Stockwell to her brother-in-law, this husband stood by, permitted his wife to make the sale, wrote the receipt, recognized in that way the authority of the wife to make the sale, by his presence, connivance, or consent, although there may have been no property in the wife, and the property was in the husband, yet that would transfer to the plaintiff in this case this mare colt, because it would trans-

Digitized by Google

fer his right to the property, by permitting the wife, in that respect, to act as his agent, and to sell that colt for him. Therefore, if you believe there was a bona fide sale of that colt by the wife, in the presence of the husband, acknowledged by him,—he writing the receipt, and in that way confirming it,—to this plaintiff, and that this plaintiff took possession of it, and paid for the pasturage afterwards, then we say to you that your verdict should be for the plaintiff. As a matter of course, we mean, provided it was done in good faith, and bona fide, and not with intent to defraud any of the creditors having a lien by levy at the time of that sale. It is not disputed in this case that there was no lien, and so we may say to you that there was no lien at that time.

In case your verdict should be for the plaintiff, it should be for the value of the colt, proved at the time of the replevin, with damages for detention. You have heard the proof as to the value of the colt at that time, and you must determine what that is. If your verdict should be for the defendant, you should simply find, "for the defendant," he having kept the horse under a property bond.

Verdict for plaintiff for $76.53.

GROSS v. SHEELER.

(Superior Court of Delaware. Sept., 1885.)

WILLS—CONSTRUCTION—NATURE OF ESTATE—RULE IN SHELLEY'S CASE.

1. Testator directed certain land to be rented by the executor during the minority of his son, and that when the son became of age it should be sold by his executor, and the income of $600 of the proceeds should be paid to his daughter annually during her life, "and at her death the principal sum to her heir or heirs, in equal proportion." *Held*, that the daughter was entitled only to the income of the $600 after the sale of the property, and not to the principal sum.

2. In such case the rule in Shelley's Case does not apply.

Action by Melissa Gross against Caroline Sheeler, administratrix de bonis non with the will annexed of the estate of Elhanan Benner, deceased, to recover a legacy. Judgment for defendant.

Ignatius C. Grubb and Mr. Anderson, for plaintiff, cited Bright's Appeal, 12 Wkly. Notes Cas. 403; Sharpley v. Townsend, 4 Har. (Del.) 336; Estate of Stevenson, 2 Del. Ch. 197; Van Rensselaer v. Dunkin, 24 Pa. St. 252; Butterfield v. Butterfield, 1 Ves. Sr. 153; Train v. Fisher, 15 Serg. & R. 145; Parke's Appeal, 61 Pa. St. 478; Stewart v. Garnett, 3 Sim. 398; Mannox v. Greener, L. R. 14 Eq. 456; Gulick's Ex'rs v. Gulick, 25 N. J. Eq. 324; Feare, 464; Martin v. Roach, 1 Har. (Del.) 477; Criswell's Appeal, 41 Pa. St. 290; Nice's Appeal, 50 Pa. St. 149; Physick's Appeal, Id. 128; Curtis v. Longstreth, 44 Pa. St. 297; Steiner v. Kolb, 57 Pa. St. 123.

Benjamin Nields, for defendant.

COMEGYS, C. J. The testator, who was the owner of the house and lot 915 Market street, Wilmington, by his will, which is part of the record, after directing the property to be rented by his executor and the proceeds to be annually applied first to keeping the property in order, and the balance, or the whole, as the case might be, appropriated by the guardian of his son, William E. Benner, to clothing and educating him during his minority, devised, in substance, that when his son came of age the property should be sold by his executor, and the proceeds, after expense of sale, etc., be divided thus: "To my daughter, Melissa Ann Boers, intermarried with J. Augustus Boers, the income of six hundred dollars annually during her natural life, and at her death the principal sum to her heir or heirs, in equal proportions," etc. It will be observed at once, in reading the will, as recited in the case, that this devise is different in language from that used in disposing of the residue of the fund arising from the sale. In the case of Caroline Sheeler, there is no bequest of the income of the principal mentioned in the devise with respect to her, but the bequest is to her and her heirs,—clear words of fee simple. So, in the disposition of the balance in favor of the son, the direction is that it is to be "invested in real estate, or paid over to him if required." Then come these words: "This balance or remaining sum I give and bequeath to him and his heirs." In view of this, I am unable to see how the conclusion can be avoided that the testator only meant to give his daughter Melissa the income of $600 of the proceeds during her life-time, and the principal at her death to others, who were to take independent of her. Such intention seems perfectly manifest. What is there, then, in the way of the court deciding accordingly? The plaintiff says, the rule in Shelley's Case—a rule which has done more to produce litigation, and, when sustained, thwart the actual purpose of a testator, than all the other arbitrary rules combined. While it remains a rule of law and of property, this court must abide by it; but where, in the construction of a will, it is not clearly and indisputably applicable, no countenance should be given to it. It is certainly true that if the devise in this case were of the land itself, the plaintiff would take a fee simple. It would then be to her for life, and after her death to her heirs, which, by the rule referred to, would operate a fee simple. But this is not a devise of the land, for it is ordered to be sold on the attainment by the son of his majority, and the proceeds divided and disposed of as directed by the will. Although it is true that where real estate is directed to be sold, and the proceeds paid to certain beneficiaries, they may take the land itself, in lieu of such proceeds, and thus become seised of the legal estate and entitled to possession, yet until that be done they cannot be said to have title

Digitized by Google

o the property, except in the sense of keeping it from becoming abeyant, if they be eirs at law. The direction by the testator o sell the property, and sale made accordngly, as in this case, is a conversion of it; nd the proceeds become personalty, for the urposes mentioned, as if they had always een such. The case of Sharpley v. Townend, 4 Har. (Del.) 336, shows this. When the ale took place, then the proceeds became personalty in the hands of the executor for the pecific purpose declared by the testator. This much is plain. In fact, there does not eem to be any contention between the parles about it.

The claim of the plaintiff rests wholly upon ne rule in Shelley's Case. I have already aid, in effect, that if the subject of the acion were land, and not personal estate, she ould be entitled to it in fee simple, accordng to that rule. But it is not land, but oney. The learned counsel for the plaintiff, n support of their contention, have referred o us a number of cases; but all of them, xcept those in Pennsylvania, simply sustain n ancient rule that personalty cannot be ntailed, and that the tenant for life takes ne absolute interest. The rule in Shelley's ase has nothing to do with them. The citions from the Pennsylvania Reports apear to be, all of them, cases of real estate, s to the application of the rule to which here can be no mistake. No case has been ited by the plaintiff's counsel where it has ver been held that the rule in Shelley's Case pplies to personalty; and we have the emhatic language to the contrary, if it were eeded, of a lately deceased master of the olls (Sir George Jessel, one of the greatest awyers of this century), pronounced in 1878 n the case of Smith v. Butcher, 10 Ch. Div. 13, where the testator had desired the rest f his personal property, of debts due him, oney in the funds or otherwise, for the sale f his furniture, books, or from any other ource, should be placed in the public funds, and the interest arising therefrom to be qually divided among the children of my rother during their lives, and, on the dease of either of them, his or her share of ne principal to go to his or her lawful heir r heirs." He said, after discussing the ques-ion, in his manner, "I hold that the testaor has used expressions which mean that ne right heirs of the children are to take, nd I so decide." I am of opinion that, in he case before us, the plaintiff is not entitled to the sum of $600 mentioned in the equest concerning her, but only its income or her life.

ETHRIDGE v. BENNETT'S EX'RS.

(Superior Court of Delaware. Nov., 1891.)

CONTEST OF WILL—UNDUE INFLUENCE—WITNESS—EVIDENCE.

1. In an action contesting a second will, evidence of declarations by testatrix, made between the making of the first and the second wills, relative to her views as to the disposition of her property, is admissible.

2. A legatee and executor, having renounced his rights as executor, is a competent witness in a contest of the will.

3. A clergyman who visited testatrix during her last sickness is competent to express an opinion, together with the facts on which it is based, relative to her testamentary capacity at that time.

4. A will made by one uncontrolled by external influences, and whose mind at the time is sound enough to enable him to exercise judgment or reflection, is valid.

5. The fact that the legatees were in the testator's presence while the will was being made does not cast suspicion on the will.

Action by Susanna Ethridge against the executors of the will of Hannah Bennett, deceased, to determine the validity of a will.

After proving the formal execution of the will of January 9, 1891, proponent asked one of the testamentary witnesses to state the circumstances under which the said will was written. Objected to.

Benjamin Nields, for plaintiff. William S. Hilles, for defendants.

CULLEN, J. You have proved the formal execution, and in proving this you have the right to prove the facts connected with it. The objection is merely technical, and I do not see that it affects the rights of the parties on the other side. It is true that, if you go back in the cases tried in this court as long as 20 years ago, you will find that the party proves the formal execution of the will, and there rests; but it is also true that there are facts surrounding it that must come out, such as: Did you draw the will? What are the circumstances connected with it? They are part of the res gestae. That evidently was the practice in the case of Hall v. Dougherty, 5 Houst. 435. You have the right to examine all of the facts and circumstances in proving these facts, because the burden is upon you here.

The defendants produced Dr. Kittinger, the attending physician of the deceased, and asked him what was her capacity to make a will. The plaintiff objected.

HOUSTON, J. It has always been considered that a reputable physician can testify as to weakness or debility of mind at the time. You can ask the question.

CULLEN, J. To be restricted to the fact of making the will.

Defendants produced William B. Pyle, one of the defendants, and asked him the following question: "State what you said to Mrs. Bennett in the parlor of her house at 1202 King street on Sunday, December 7, 1890, and what she said to you at that time."

CULLEN, J. If I understand the question, you propose to prove by this witness the views that were expressed by the testatrix some five or six months after the first will was made, and a month or two prior

Digitized by Google

to the making of the second will. That testimony, of course, is not conclusive so far as that matter is concerned, but I understand that it is offered merely as corroborative of the other facts growing out of it, for the purpose of showing what the views of the testatrix were as to the disposition of her property; in other words, the declarations of the testatrix at this time as showing her state of mind and condition.

HOUSTON, J. According to the citation, it is admissible testimony.

William J. Fisher was produced on the part of the defendants, he being a legatee under the will, and named as one of the executors of the same, and a party in interest.

CULLEN, J. We think the testimony is admissible, though in admitting it, under the precedents established by the courts, it is not to be necessarily conclusive.

Rev. George M. Hickman, who had visited the testatrix during her last sickness, was produced and asked: "From the facts and circumstances to which you have testified, what is your opinion of Mrs. Bennett's power then to make a will?"

HOUSTON, J. His opinion goes to the jury upon the facts and circumstances upon which it is based, with the general intelligence of the witness.

CULLEN, J. (charging jury). I have no doubt that you are gratified—as well as the court and counsel in this case, which has been somewhat prolonged, but not by any means unnecessarily, we think—that this case is coming to a close. And I must say, gentlemen, that, of all the cases which I have ever heard tried,—and they have not been few,—I have never heard one more ably tried, better tried, or in which the manner of counsel was more pleasant, not only towards each other, but towards the court, than in this case; and it has been a matter of great satisfaction and of great pleasure to the court. We say to you, gentlemen, that each of the counsel in the trial of this case has discharged his duty fully and clearly.

The question involved, gentlemen, is an important one. It is not a question, I am very glad to say, in which there are perplexing questions of law arising. It is one relative to which, as between the learned counsel who argued this case, there is no dispute whatever upon the questions of law that arise. It is purely a question of evidence for you to decide, according to principles of law which have been laid down by the decisions of our own courts, and which are in conformity with previous English decisions, whence we have derived our law, as well as the unanimous decisions all over this country. The question for you, gentlemen, is a simple one; and it is better to remove and eradicate all other matters from your minds relative to this case, except those things which pertain to the matter that you are immediately to try. The question which you are to decide is whether or not the paper writing which purports to be the last will and testament of Hannah Bennett is her last will and testament. You have nothing to do with any matters as connected with any other will or any other transaction whatever, though something has been said and necessarily brought into the argument of this case, in relation to another will; but you are to confine your deliberations in arriving at your decision to the facts and circumstances immediately surrounding the execution of this paper, so that you may determine as to whether or not, according to the rules and instructions which we shall have to give you as laid down by the decisions of this court, this party was capable of making a last will and testament. So far as the making of the will was concerned under the statutory provision, a person 21 years of age, of sound and disposing mind and memory, is competent to make a will. Where a will is made in due form,—that is, where the will is signed by the testator, and is attested by two credible witnesses,—then it is prima facie a valid will. The law presumes every man to be a man of sound and disposing mind and memory. When the formalities, under those circumstances as required by the statute, are executed, the will is prima facie proved. This paper writing, as I have said, purports to be the last will and testament of Hannah Bennett, and is her last will, in the presumption of the law until facts and circumstances are presented which go to show and prove that, according to the decisions of law applying to the evidence as offered, she was not competent to make that last will and testament. Now, it is contended on the part of the parties who opposed the will that she was not possessed of sufficient capacity to make a will. If that fact is proved to your satisfaction, that, of course, would invalidate the will.

There is another ground, also, which is taken, and that is that the party, though possessed of sufficient capacity to make a will, yet, by reason of a superior influence that was exerted over her (influence of such a nature and character as would control the will of the testator), she was not competent to make a will.

Those are the two matters which are presented here in avoidance of this last will and testament. In order that you may understand this matter as to what constitutes a sound and disposing mind and memory, I will state to you very briefly a few of the decisions in this state.

The first case I will cite is Chandler v. Ferris, 1 Har. (Del.) 464, which is somewhat different from this; yet the same principles apply in both cases. This is one of the earliest cases that have been tried in this court, and in it this question as to what constitutes a sound mind and memory was decided. The chief justice charged the jury "that if they were of opin-

Digitized by Google

ion from the evidence that the testator was capable of exercising thought, judgment, and reflection, if he knew what he was about, and had memory and judgment, his will could not be invalidated on the ground of insanity. Neither could it be set aside on the ground of undue influence, unless such influence amounted to a degree of constraint such as the testator was too weak to resist, such as deprived him of his free agency, and prevented him from doing as he pleased with his property. Neither advice nor argument nor persuasions would vitiate a will made freely and from conviction, though such a will might not have been made but for such advice and persuasions." This matter of making wills, gentlemen, is one relative to which I do not see that there should be any great misunderstanding. It does not take a wise man to make a will. A man must be possessed of sufficient memory to know what he has. He has a right, under the laws under which we live, to dispose of his property just as he pleases. It matters not whether he gives it to his own relatives or to somebody else. He may have eccentricities and peculiarities, but, if those are accompanied at the same time with a sound judgment, discretion, and reason, he has a perfect right to do as he pleases with his property. This matter of undue influence is such an influence as prevents the party from exercising his own judgment; in other words, doing as he pleases. A person has a perfect right, by kindness, by attentions,—even though that may be the ulterior motive which governs him,—to prevail upon a person to devise to him what perhaps without the appeals of kindness and the manner towards him he would not have done. That is proper and lawful, and a will would be perfectly legal made under those circumstances; but if that will were made by reason of any person being taken advantage of, by reason of weakness, of disease, of threats, so that the party is not able to avoid this influence, and is prevented from freely exercising his own will, then that would be undue influence.

Further upon this same question as to what is a sound and disposing mind and memory are the cases of Duffield v. Morris' Ex'rs, 2 Har. (Del.) 379; Cordrey v. Cordrey, 1 Houst. 273, 274; and Lodge v. Lodge's Will, 2 Houst. 423. Jamison v. Jamison's Will, 3 Houst. 119, was a case that excited a great deal of interest, and was for the purpose of establishing a will which had been drawn by Mr. Lore. The will was lost, and it became necessary to set up that will, and to prove the facts; and, in proving the facts of the will, the question was raised as to the capacity of the party to make the will; and all of these questions necessarily arose in the matter. You will observe that all of these decisions reaffirm and reiterate the same principle. Though it is a thrice-told tale as to what constitutes a sound and disposing mind and memory, yet, considering the high authorities from which they come, I repeat them to you: "What is the meaning of the terms employed in our law, 'a sound disposing mind and memory,' and how is the question to be decided?" "This question, it seems to me, cannot be properly determined by any metaphysical theory that we know of, for these are mainly mere theoretical speculations, and are very difficult of comprehension by the common mind, uneducated as it is in the subtleties and niceties of what is called 'moral philosophy.' Nor can it be settled by conjecture or the mere opinions of the witnesses. On the contrary, the question is to be decided solely and only by the facts which the testimony in the case discloses." "It is therefore to the words, the conversations, the appearance, the acts and doings, the conduct and behavior of the man we are to look, to ascertain the state of his mind. These alone are to us the external, visible, and natural signs or indications of his mental condition. And, therefore, in this case, as in all other cases of like nature, the question of capacity must be determined from the facts and circumstances disclosed and established by the evidence. In examining and weighing that evidence, you will carefully consider the character of the several witnesses for veracity and integrity,—their bias, on the one side, or, on the other, if any, their intelligence and judgment, and their respective opportunities and powers of observation. And here it is but proper I should say to you that the law makes a distinction between the subscribing witnesses to the will and other witnesses. The subscribing witnesses being placed around the testator at the time of the execution of his will, for the special purpose, among others, of ascertaining and judging of his capacity, they are permitted to testify as to the opinion they formed at the time as to the condition of his mind,—whether it was sound or unsound. And, if they are persons of intelligence and veracity, their opinions are always entitled to great weight with the jury." This I desire especially to call your attention to, gentlemen, as it is one of the questions raised in this case. "Other witnesses may testify to his behavior, his conduct and conversations, his appearance, and to particular facts tending to throw light on the state of his mind, and from which its condition can be fairly inferred; but they cannot testify to their opinion, merely, of his capacity, without also stating the facts upon which that opinion is founded; and, if the facts do not fully and clearly warrant that opinion, the opinion must go for nothing, for it is the fact, and not the opinion, upon which you must rely in forming your judgment." In other words, persons acquainted with the party immediately before or at the time have a right to testify to you as to the facts and circumstances,—how the party acted, what the party said, what was the condition of health, from what the party was suffering; and they are permitted to form their own

Digitized by Google

individual opinions as to what they thought was the capacity of the person to make a will. But you are not thereby bound, for you are to take into consideration what the facts are, and may draw a different conclusion. It is so with regard to medical witnesses.

The matter, as represented to you, is this: This old lady was in a bad condition of health; that she was an elderly lady; that Mr. Emmons was sent for, Mr. Ethridge, the husband of the plaintiff, going for him to draw the will, and at his request he went there. About these matters there is no dispute. You have heard Mr. Emmons' testimony. He has told you what he saw and the conversation that took place. This is a matter which goes to form a part of the evidence in this case, and has to be taken into consideration in this case. So, gentlemen, you have also heard the testimony of the several other witnesses. There is some conflict of testimony. Where there is a conflict of testimony, you must, if you can, reconcile that testimony. Under our law, all witnesses are competent, but it does not necessarily follow that, because a man is a competent witness, he is credible. It is your province to ascertain and judge of the credibility of the evidence offered to you. In doing that, you should take into consideration all the opportunities and facilities that the witnesses have of judging with regard to the mental condition of this person, as far as her capacity to make a will is concerned. It is not for the court to say anything to you with regard to the weight of that testimony. It is entirely with you, applying to that testimony the law as I have laid it down. And if, gentlemen, taking the testimony into consideration, you should be satisfied from the evidence that the mind and memory of Hannah Bennett at the time when she executed her will, on the 9th day of January, 1891, were sufficiently sound to enable her to know and understand what she was about or what she was doing, and that she made such a disposition of her property as she intended to make, and that she was not unduly influenced, no outside influence by which her will was controlled without her wish or desire,—in other words, that a will paramount to her own was substituted in place of her own will, which induced her to make a will contrary to her own wish and desire,—then, in that case, you should pronounce this as her last will and testament. But if, on the contrary, you should be satisfied from the evidence that the mind and memory of the testator at the time she executed her will were not sufficiently sound to enable her to exercise thought, judgment, or reflection, and to know and understand what she was about or what she was doing, then this will ought not to stand; or, if you consider that the influence exerted over her was such as controlled her will, this will should not stand.

A question has been raised here in relation to a decision in the case of Pennypacker v. Pennypacker (Pa. Sup.) 8 Atl. 634, in which it is held: "The law does not regard the presence of a brother or of a nephew of a testator at the execution of his will as improper, suspicious, or objectionable, although they are legatees." We have to say in relation to that case that it is good law. The mere fact, per se, that a man is making his will, and that the beneficiaries in that will are admitted into the room, alone, is not calculated to throw a suspicion on the will, unless it is coupled with some facts and circumstances surrounding it, going to show that the immediate presence of those persons while the will was being made influenced and changed, contrary to the will of the testator, what she actually intended to do. It is a very common occurrence—I suppose every member of the bar has drawn a will under such circumstances—for the beneficiary to be present when a will is being drawn; and there is no impropriety in that. It is contended here, however, that it was not the mere fact that the beneficiary was present, but that the intention, was to control the will of this old lady. Whether that was the intention, or whether it had any effect or not, is a matter entirely for your consideration, and rests entirely upon the evidence.

The jury disagreed.

CUMMINS et al. v. CUMMINS et al.

(Superior Court of Delaware. April 18, 1895.)

CONTEST OF WILL—TRIAL BY JURY.

1. Act Feb. 16, 1829 (Rev. Code, c. 89, § 4), provides that the register, when the probate of a will is contested, "shall have power" to order any issue of fact to be tried by a jury in the superior court. Prior to the passage of the act, it was the custom of the register to order issue to be so tried. *Held*, that the heir was not entitled, as a matter of right, to have the issue of "devisavit vel non" tried by a jury, but such matter lies within the register's discretion.

2. Const. art. 6, § 22, provides that appeals may be made from the register's court to the superior court, whose decisions shall be "final." *Held*, that on such appeals the heir is not entitled, as a matter of right, to have the issue "devisavit vel non" submitted to a jury.

Appeal from the register of wills of Kent county.

Contest of the probate of a will between Eveline Cummins and others, contestants, and Alexander G. Cummins and others. From a decree of the register's court admitting the will to probate, contestants appeal. Affirmed.

Edward Ridgely, Edward G. Bradford, and Henry Ridgely, Jr., for appellants. George Gray and James Pennewill, for appellees.

LORE, C. J. This is an appeal from the register of wills of Kent county, admitting to probate the will of George W. Cummins, deceased. The will bears date December 28

Digitized by Google

1888. It is signed by the testator, witnessed by W. H. Janney, John E. Collins, and William Faries, with a codicil dated May 28, 1889, signed by the testator, and witnessed by O. B. Voshell, Samuel J. Reynolds, and Charles J. Allen. The will was proved before Register James L. Heverin, Esq., February 3, 1891; and the allowance of the will and granting of letters was affirmed by Register Ezekiel T. Cooper, Esq., October 12, 1891, upon proceedings in review. The appeal rests on two grounds, viz.: First. That the register erred in admitting the will to probate, for the reason that the testator, at the time of executing the same, was not of sound and disposing mind and memory, and also that he was unduly influenced. Second. That the register erred in refusing to grant an issue of devisavit vel non, to be tried by a jury of this court, upon the prayer of the appellants, who are heirs at law of the testator.

The appellants, in presenting their case, relied mainly upon the second ground; that is, the right of the heirs at law to an issue to be tried by a jury. They contended that such right subsisted wherever the testimony disclosed any material conflict, and that in every such case the existence of the right created a corresponding duty on the part of the register to grant such an issue; that, the register having failed to do so, it was the duty of this court to make such order. This involved the consideration of the powers and duties of the register of wills and of this court on appeals from the register. Section 22 of article 6 of the constitution provides as follows: "The registers of the several counties shall respectively hold the register's court in each county. Upon the litigation of a cause, the depositions of the witnesses examined, shall be taken at large in writing, and make a part of the proceedings in the case. Appeals may be made from the register's court to the superior court, whose decisions shall be final." By the terms of the act of February 16, 1829 (Rev. Code, c. 89, § 4), it is provided: "The register shall have power to order any issue of fact whereof he may prescribe the form, touching an instrument purporting to be a will, to be tried by a jury in the superior court." Chief Justice John M. Clayton, in announcing the opinion of the court in Rash v. Purnel, 2 Har. (Del.) 451, uses this language: "The register is a judge, and the sentence of his court is the judgment of a tribunal of exclusive and peculiar jurisdiction on the subject-matter before him;" that the object of an issue "is to inform the conscience of the register"; that it is in his power to "pay respect to the verdict of a jury in case it should not commend itself to his judgment." The language of the court in the case of Barker v. Spicer (decided in 1846) 4 Har. (Del.) 349, is still more emphatic. The court there says: "The probate of wills is, in the first instance, with the register; and, if he thinks proper, he may, in his discretion, direct an issue to try any fact by a jury." The act of February 16, 1829, which first clothes the register with statutory power to direct an issue of fact, merely expressed the practice which existed prior to that time. This is shown by the cases of Cubbage v. Cubbage, decided in 1818, and that of Bell v. Buckmaster, decided in 1820, cited in Chandler v. Ferris, 1 Har. (Del.) 454, note. This act was, doubtless, passed to set at rest any question as to the validity of such procedure.

It was contended by the appellants with much force that, as the power to direct an issue was exercised by the register prior to the statute of 1829, it must have arisen by analogy to the practice in the courts of chancery in England upon bills filed to establish wills, where, upon the demand of an heir at law, an issue was uniformly granted; that this practice was adopted by our courts as a part of the then existing law; that this uniform rule in the court of chancery attached to and controlled the granting of an issue under our procedure. It nowhere appears in the cases prior to 1829 from whence this power came, or that it was a matter of right in the heirs at law to have an issue. The act which embodies the practice says: "The register shall have power to order any issue of fact;" that is to say, he may order it. The statute is not mandatory in terms, as it most probably would have been if the right existed absolutely in the heir at law to demand it. The court, in Barker v. Spicer, interpreted the statute when it said: "The register, if he thinks proper, may, in his discretion, direct an issue." From the foregoing citations it must be manifest that the granting of an issue by the register is discretionary. It is true that the courts say in Barker v. Spicer: "In general, a will ought not to be established against an heir at law, without an issue, when he prays one at the proper time." This implies, however, that it may be so established. We find no law, no well-considered case, controlling the discretion of the register in granting or refusing an issue, subject only to the decision of this court upon an appeal. It may be said, in passing, that the case of Hall v. Dougherty, 5 Houst. 435, somewhat relied upon by the appellants, was declared by the learned judge who decided it to be "a novel and unprecedented case," and evidently was so treated by the court. This case is not in harmony with the older or with the more recent adjudicated cases, and was distinctly overruled by the same learned judge in Bennett's will case (Ethridge v. Bennett's Ex'rs) 9 Houst. 295, 31 Atl. 813, in 1891, where the case was remanded to the register, with directions to send up an issue.

The register, therefore, being a judge of peculiar and exclusive jurisdiction, with the right to send an issue to inform his conscience if he thinks proper, with the right also to disregard the verdict of a jury upon such issue, it follows that it was in his discretion to direct an issue or not. It would be absurd to hold that he must send an issue,

Digitized by Google

when he has the right to disregard the verdict of a jury upon such issue. In the exercise of that clear right, the register having refused to grant an issue, is it now, in this appeal, the duty of the court to direct such issue, and, if so, in what manner? This court has no original jurisdiction in the probate of wills. Its authority is appellate only. Its function is to affirm or to reverse the decision of the court below, in whole or in part, as it may deem meet. It does not try the case de novo, or upon new evidence, but upon the record and evidence as sent up, which evidence, under the constitutional provision, is taken at large in writing, and makes a part of the proceeding. Therefore, in an appeal from the register as to the validity of a will, if the court is satisfied from the evidence, as sent up by the register, that his decision is correct, it may, without the intervention of a jury, affirm the same. If, on the other hand, it is satisfied from such testimony that his decision is wrong, it may set it aside, and remand the case to the register for correction. The court expressly say in Barker v. Spicer: "The practice under the amended constitution [1831], as well as under the constitution of 1792, which are the same in this respect, has uniformly been to try appeals from the register in probate cases by the court. We have examined the records for more than thirty years back, and find no case of trial in the appellate court otherwise; * * * and this is in conformity with the course of trial in all other appeals, except appeals from judgments of justices of the peace, which is provided for by act of assembly. The cause is tried on appeal on the same evidence as was heard in the court below." It would none the less be a trial by the court, even should the court, through an issue, ask the verdict of a jury as to any question of fact, as, in deciding the case, the verdict would in no wise be binding, and the court could accept or reject the conclusion of the jury, as it deemed best; the verdict of the jury being only to inform the conscience of the court, and to aid it in determining the questions submitted on appeal, and which, either with or without an issue, are being tried by the court. If, upon examination of the record, this court should conclude that the register ought to have granted an issue, the regular procedure would be to reverse the decision of the register, and remand the case to him, with a view to have an issue directed. This would preserve the continuity of the record in the register's office, where the law evidently intended it should be complete as to probate of wills, and is also in conformity with the ruling in Barker v. Spicer, in 1846, and Bennett's Will Case, in 1891. We do not say that this court has not the inherent right to send an issue directly to a jury, to inform its conscience as to any matter of fact in a case before it; but such a course would seem to be irregular and embarrassed by restrictions in appeals from the register. Should the court order an issue directly, the jury, in trying the case, would be confined to the evidence taken before the register, and sent up with the appeal, and could not go outside of it; while upon the trial of an issue sent by the register of his own motion, or at the suggestion of the court, after a reversal of his decision, the jury might hear all pertinent evidence, whether it had been taken before the register or not, and thus a just determination of the questions raised would be more certain.

The principal question remains: Ought the court to overrule the register, and direct an issue in this case, either directly or indirectly? True, there is some conflict of testimony. Careful examination, however, of the evidence sent up, has satisfied the court that, at the time of the execution of the will and codicil in question, the testator, George W. Cummins, was of sound and disposing mind and memory, and that he was not subject to undue influence. Our judgment is, therefore, that an issue should not be sent to the jury.

This is conclusive, unless the right of an heir at law to an issue by the register in the first instance and by this court upon appeal is paramount. This point has already been somewhat considered with reference to the duties of the register. It may be further said that, under the English statutes and practice, the right of the heir at law was coupled with that of the rector of the parish, and evidently grew out of the feudal system and the rule of primogeniture, on the one hand, and the maintenance of the established church, on the other. To keep the inheritance intact for the heir at law, and to maintain the established church, were the ends aimed at. These reasons do not now and never have existed in this country. Our laws are framed to facilitate the transfer of property. We have no state church. In the mutations of wealth, property which formerly consisted chiefly of realty now consists largely of personalty. In reason, there would seem to be no more sacredness attaching to the rights and remedies of an heir at law of real estate than to those of a distributee of personal property.

The appellants urged that the constitution contemplated a jury trial when it provided that an issue should be directed to the superior court, which was a court of common-law jurisdiction, and had a jury; that, when the issue was in that court, it must be tried by due course of law; claiming that due course of law meant the trial of the law by the court and of the facts by the jury. This is by no means clear. The register, of his own motion, has a right to send an issue to be tried by a jury of this court. It would therefore only be reasonable that an appeal, which might involve an issue, should be taken to the same court, and thus preserve the unity of jurisdiction, and avoid confusion. Again, it does not follow that a

Digitized by Google

trial of questions of fact by "due course of law" necessarily involves a trial by jury. Under our system of jurisprudence, questions of fact, of the gravest moment, and embracing the largest interests, are heard and determined without a jury. We need not cite instances. They are numerous, and must be familiar to every lawyer. Besides, in appeals from the register our courts have quite uniformly decided both the law and fact, without reference to a jury. This case, however, does not depend upon the practice and proceedings in England, but upon the constitution and statutes of this state, and the decisions and practice thereunder. Under these, in contested cases, the register of wills hears all the evidence, takes the same at large in writing, and primarily determines all questions at issue. His decision is final, unless an appeal is taken. Such an appeal lies to this court, where the case is again heard and finally determined. The right of jury trial is preserved, dependent, however, upon the discretion of the register and of this court, instead of the heirs at law as in England. Both real and personal estates are administered by this simple and harmonious method. In our judgment, this was the intention of the framers of our law, who unquestionably were familiar with the English system. They intended to and have given us a distinct and wise statutory substitute for that complex system; carefully guarding, it would seem, all rights and interests.

Upon the most careful consideration, we see no just reason for overruling the action of the register. The judgment of the court, therefore, is that the decree of the register be affirmed.

CULLEN, J., concurred.

GRUBB, J. (concurring). This cause is here on appeal from the register's court for this county, in the matter of the probate of the alleged last will and testament, and codicil thereto, of George W. Cummins, deceased. The appellants are the widow and three of the four children and heirs at law of the deceased. Two causes of appeal were presented by the record, and urged at the argument: First, that the register erred in refusing the application of the appellants for an issue of devisavit vel non to be tried by a jury of this court; second, that the register's court erred in admitting said will and codicil to probate, for the reason that the testator, when he executed the same, was not of sound and disposing mind and memory, and, moreover, was subject to undue influence.

The first ground, although clearly presented, was treated as of minor importance in the cause. The main contention was upon the second ground, relating to the definitive decree of the register's court admitting the will to probate, and arose upon the motion of the appellants that this court, on this appeal, do frame and direct an issue of devisavit vel non to be tried by a jury at bar. In support of this motion, the learned counsel for the appellants contended: First, that, as heirs at law, the appellants were absolutely entitled as of right to have such issue and trial, on demand; second, that, at the least, they were so entitled thereto if, in the judgment of the court, there was a contrariety of evidence in the case. These questions were argued on both sides with such a degree of research and exhaustiveness, and by such an array of distinguished and learned counsel as were doubtless never before engaged in the discussion of them in this state. On this account, and also because of the unsettled state of the law under our prior adjudications, this case has merited and received the most careful consideration of the court.

The decision of these questions raises two principal inquiries: First. Has the superior court, on appeal from the final decree of the register's court allowing or disallowing the probate of a will of realty, the power to frame and try by its jury an issue of devisavit vel non? Second. If so, is the heir at law entitled as of right to have such issue so framed and tried on demand?

These inquiries require the consideration of the origin, constitution, and design of our probate system, composed of the register's court, as the court of first instance, and the superior court on appeal therefrom. This system originated in our constitution of 1792, which first created it. The identical language of that constitution was incorporated in our present constitution of 1831, unaltered, except as to the substitution of our present superior court on the appeal for the prior supreme court, whose jurisdiction and powers were merged in the former. It is found in section 22, art. 6, of the constitution, as follows: "The registers of the several counties shall respectively hold the register's court in each county. Upon the litigation of a cause, the depositions of the witnesses examined, shall be taken at large in writing, and make part of the proceedings in the cause. This court may issue process throughout the state, to compel the attendance of witnesses. Appeals may be made from a register's court to the superior court, whose decisions shall be final. In cases where a register is interested in questions concerning the probate of wills, the granting letters of administration, or executors', administrators' or guardians' accounts, the cognizance thereof shall belong to the orphans' court, with an appeal to the superior court, whose decision shall be final." By these provisions it is manifest that exclusive original jurisdiction of the probate of wills of both realty and personalty, except where the register is interested, was vested in the register's court, and, on appeal, complete, exclusive, and conclusive jurisdiction in the former supreme and present superior court. Their obvious intent

Digitized by Google

is that the decision of the register's court shall be conclusive if unappealed from, as our courts have uniformly held, but that the heir at law or other interested contestant shall, on appeal, have the right of a retrial before a court of higher grade and authority.

The constitutional mandate that the decisions of the superior court, on appeal, shall be final, imports not only that its jurisdiction shall exclude that of the court of errors and appeals in respect to the probate of wills, but also the jurisdiction of the register's court after the appeal has been received above. Accordingly, upon the appeal, the cause is removed from the register's court in toto to the superior court, there to be tried de novo. Thereafter the validity or invalidity of the will in controversy is determined by the latter, and not by the former. The constitutional grant of exclusive and conclusive jurisdiction of the probate of wills to the superior court on appeal also necessarily confers plenary power over the subject thereof, and, by implication, all the particular powers necessary and appropriate to the due exercise of such jurisdiction. The selection of the superior court, which has both law and equity powers within the scope of the jurisdiction conferred upon it, and also its own juries, as the court of appeal from the register's court, instead of the court of errors and appeals or the court of chancery, forcibly indicates a constitutional intent that these should be appropriately employed in the appellate proceedings. This inference is greatly strengthened by the fact that, while the constitution confers on said appellate court exclusive jurisdiction and plenary powers in the premises, it nowhere prescribes the mode of their exercise, or any regulation or limitation thereof. Nor does any statute.

All these significant circumstances seem to warrant the view that, on appeal from the definitive decree of the register's court, the superior court is, by the intent and operation of the constitution itself, an appellate court of peculiar jurisdiction and exceptional character in our judicial system, established for a particular purpose, and not strictly similar to courts of general and purely appellate jurisdiction, or subject to their usual course of procedure and practice. Therefore, in the absence of constitutional or statutory regulations or limitations, it may, on appeal, exercise its jurisdiction and powers in such manner and subject to such rules of procedure adopted by it as are appropriate and essential thereto. That it has the power, on appeal from the final decree of the register's court, allowing or disallowing the probate of a will of realty or personalty, to frame and try by a jury at bar an issue of devisavit vel non, seems to be in accord with the constitutional meaning and purpose, and well established by the adjudications in this state.

In the case of Barker v. Spicer (decided in 1846) 4 Har. (Del.) 347, this power was affirmed. It is true that the first impression of the court was to the contrary, but, upon reargument and reconsideration, the court declared that it was "inclined to affirm its power to order an issue of devisavit vel non to be tried by a jury at bar." This is the first case in which the question had been formally raised and adjudicated in this state. It was heard before Booth, C. J., and Harrington and Milligan, JJ. The next case involving this question was Hall v. Dougherty, 5 Houst. 435. It was heard in 1878, before Comegys, C. J., and Wootten and Houston, JJ. In this case, although the motion for the issue was strenuously opposed, the court directed the issue to be tried at bar. Judge Houston, in his published report of this case, says: "The court, after consideration of the question, concluded that as the appeal was a novel and peculiar one, although on a good and sufficient ground, that is to say, to the decision specially of the register refusing to order and award in the case an issue of devisavit vel non to be tried before a jury at the bar of this court on the application of the appellants in the register's court, the sole object of the appeal would be defeated, and the remedy and redress sought by it rendered wholly nugatory and void, unless an issue of devisavit vel non should be ordered by this court to be framed and tried before a jury at the bar of it on the trial of the appeal in this court; and, accordingly, such an order was made by the court."

The next and last case (until the present appeal) raising the same question was Ethridge v. Bennett, 9 Houst. 295. In the published report of this case nothing is said in reference to the proceedings or the appeal. Said report merely shows the trial of the cause on the issue sent up by the register. The court record discloses, however, that on the appeal the court remanded the proceedings to the register, directing him to send up an issue for trial by a jury at its bar, which direction he complied with. Upon inquiry of the counsel on both sides in said appeal, they concur in stating that the court uttered nothing in denial of the power of the appellate court to order an issue for trial at its bar, or of the legality or propriety of the course pursued in the Hall v. Dougherty appeal. In the latter the full court sat, while in the appeal of Ethridge v. Bennett only two of them sat (Comegys, C. J., and Houston, J.). So that, while the latter case is an instance of ordering the register to send up an issue, it cannot truly be considered as overruling Hall v. Dougherty. As it stands, it may be claimed that it indicates that these two judges who sat in both cases considered that either course might be pursued. But the Bennett ruling is clearly at variance with Hall v. Dougherty, and also with the final opinion upon reconsideration of the question of the court in Barker v. Spicer, and therefore cannot be deemed as authoritative in this state or binding upon this court. It is also inconsistent with the opinion now held by this court in the case before

Digitized by Google

us,—that the refusing or granting of an issue is a discretionary power of the register, even upon the demand of the heir at law; for, if it be true that the granting or refusing an issue is discretionary with the register, it necessarily follows that, in the exercise of this discretion, he may lawfully refuse such issue. This being so, it would seem clear that this court on appeal cannot reverse, on the ground of such refusal, either his decree allowing or disallowing the probate of a will, or his decision refusing such issue. Without the reversal of either decree, this court manifestly could not lawfully either order or require him to grant or refuse any issue. Until such reversal the case is in the appellate court, wholly removed from the register's jurisdiction, and he is powerless to frame or award such an issue, or, if he did so, to affirm any verdict thereon, or render any other decision while his first decision is still pending above. It was for this reason that in Hall v. Dougherty this court asserted its power to frame and try an issue when, in its discretion, it appeared essential to the proper and just determination of the cause before it on appeal.

At the argument, the counsel for the respondents conceded that this court could exercise such power, in its discretion, but denied that the heir at law was absolutely entitled as of right to have the issue ordered and tried at the bar of the court on demand, as contended by the appellants. The error underlying this latter and principal contention of the appellants is in assuming that the right to a jury, as incident to either the common-law action of ejectment or to the English chancery procedure for establishing a will of realty, still exists in Delaware, unaffected by our constitutional changes and the modifications of our polity and policy. Our constitution has created a special judicial system for the probate of wills, composed of the register's court and the superior court on appeal, with exclusive and conclusive jurisdiction over that subject, whose procedure has excluded and superseded both of the said common-law and chancery modes of procedure. Here the register's court has been virtually substituted for the English ecclesiastical probate court, with the latter's jurisdiction enlarged to include wills of realty as well as of personalty. The procedure of the register's court is according to the course of the civil, and not of the common, law; hence, on appeal to the superior court, the nature of the probate proceeding in the register's court still adheres to it in the said appellate court, which has both law and equity jurisdiction and procedure, for the superior court has express and ample authority to minister justice according to equity as well as law, in its exercise of the jurisdiction and powers conferred upon it.

In this country it has been held by the highest courts, both federal and state, that there is no constitutional or general right to jury trial in cases clearly within equity jurisdiction. In support of this proposition numerous cases may be cited. It is the general rule of equity procedure that the ordering of an issue for jury trial is discretionary with the court. To this general rule an exception was made in England in favor of the heir at law in cases of proceedings in equity for the establishment of a will of realty. Nearly two centuries ago this exception was declared and established in Great Britain by the house of lords; but it must be remembered that this high appellate tribunal was a co-ordinate branch of the British government, and was composed of titled classes, largely supported by great landed estates. From such a polity naturally emanated a policy which discountenanced the alienation of realty by will, and jealously guarded and favored its uninterrupted descent to the heir. But our governmental polity, even during our colonial period, and certainly since the birth of our statehood, in 1776, has been differently constituted under altered conditions, creating dissimilar needs, and demanding new or modified policies. So that the reason for the English rule in equity in favor of the absolute right of the heir at law, on demand, to have an issue of devisavit vel non before he shall be disinherited by will, having become inapplicable here, it cannot reasonably be held to be adopted or in force within this state, and to have changed in his behalf the general equitable rule that the right to a jury trial is subject to the discretion of the equity judge. It is true that in many respects the common-law rules of descent have been adopted, and particular favor shown to realty and the rights of the heir at law, in Delaware. It is also true that the rule of primogeniture has been observed here upon the death of the trustee of realty, and that, from our earliest colonial period until the adoption of our constitution of 1792, the eldest son was, by statute, entitled to a double share of intestate realty. But it is significant that in 1794, immediately after the establishment of said constitution, this provision of said statute was repealed by an act expressly declaring that equality is our policy, and that such discrimination is inconsistent therewith. Therefore, it is reasonable to conclude, until the contrary is shown by the production of some constitutional or statutory provision, or some authoritative adjudication or practice, that the superior court, on appeal from the register's court, is not bound by the rigid English rule, as claimed by the appellants, but may or may not direct an issue in its discretion, and according as, in its judgment, the necessities of the particular case and the attainment of justice may require.

At the argument it was not shown, nor has this court since discovered, that any such constitutional or statutory provision, or any such adjudication or practice in favor of said alleged absolute right of the heir

Digitized by Google

at law, has ever existed or been operative at any time during our state or colonial history. Under the Duke of York's government of our three counties, wills of realty, as well as of personalty, were proved in open court by the attesting witnesses; but no instance has been shown of the trial by jury of any mandatory issue of devisavit vel non during that period, or of any absolute right of the heir at law to have the same on demand. Under Penn's government registers for the probate of wills were introduced, and within the Delaware counties as early as 1684, who, as our will records show, probated wills of realty as well as of personalty. Their mode of probate seems to have immediately superseded that theretofore in vogue in open court; and also to have been conclusive, for, so far as yet shown or discovered in our records, there does not appear, prior to the adoption of the constitution of 1792, to have been any instance in which the validity of a will of realty, after probate by the register, was allowed to be collaterally impeached in any other court; while, since the establishment of the present register's court under said constitution, our courts have repeatedly and uniformly held that its decisions allowing or disallowing the probate of wills are conclusive, if unappealed from. Indeed, our records, so far as yet discovered or disclosed, do not show any instance, either prior or subsequent to the creation of the register's court in 1792, of the adoption of the common-law or of the chancery mode of proving or establishing a will of realty, and consequently of the recognition thereby in Delaware of either of said modes of probate, or of the alleged absolute right of the heir at law to a jury trial. Nor does it appear from any constitutional or statutory provision, adjudication, or record, or otherwise, that any such absolute right has ever been granted or recognized here on appeal from the register or the register's court. In 1766 a statute provided for a court of delegates for each county, to be a court of appeal from the register; but it neither provided it with a jury of its own, nor authorized it to order an issue for trial by the jury of any other court. This provision for the said court of appeal was abrogated by the constitution of 1792, which first created the present probate system of a register's court, with an appeal to the old supreme (now the superior) court.

Although it became a practice of the register's court, from its origin in 1792 until 1829, to frame and order an issue for trial by a jury of the old supreme or the old common pleas court, yet there was no express authority, either constitutional or statutory, for the register's court to order, or the said courts to entertain, or for the heir or other party in interest to have, either as of right or of favor, any such issue or trial by jury. Nor, in the absence of satisfactory evidence, as already shown, of some prior authoritative adjudication or practice in that behalf, can any implied authority reasonably be presumed. It must be presumed, therefore, that this practice began and continued with the mutual consent of all the participants,—of the register, the parties, and the court,—because it was recognized as a convenient direct, and effectual mode of determining a controversy respecting a will, and thereby avoiding, in most cases, the delay and expense of an appeal. So that, in its inception, doubtless, the awarding of the issue for trial by jury was not mandatory upon the register, as of absolute right in the heir or other contestant, but wholly discretionary with him. In that light the act of 1829 seems to have regarded it. In recognition of its manifest convenience and utility, the legislature accordingly sanctioned the practice, and authorized its continuance. Instead of providing in imperative language that the register "shall" order the issue, it provides that he "shall have the power" to do so. It simply gives to him the authority, which theretofore he had not possessed, to order and require the court and jury to try such issue. If the legislature had intended to make his exercise of the power conferred mandatory, it must be presumed that it would have used language which naturally and unequivocally expressed that design. Under the circumstances, this legislative intent cannot be held to be implied. The legislature found the register engaged in a practice which was a matter of favor, not of duty; of discretion, not of compulsion,—in making an order for a trial by jury which he had no judicial power either to grant or to enforce. So that the act of 1829 simply gave him the power which he needed, and left him the discretion which he already had. Therefore, on appeal from the decision of the register's court, this court will not reverse his decision allowing or disallowing the probate of the will, on the ground that he has either granted or refused an issue when prayed for by the heir or other party in interest. The dissatisfied litigant still has his resort to this court, on appeal from the final decree of the register's court granting or refusing the probate of the will, where he may have the cause retried, and his rights finally determined.

The fact that the appeal is from the register's court, which has no jury, to this court, which has one, as a part of its common-law original jurisdiction and procedure, does not necessarily imply that, by the selection of it as such appellate court, the framers of the constitution designed that the English rule of the absolute right to a jury trial was to be recognized and allowed ex debito justitiae. The probate procedure throughout, both before the register and this court, being of an equitable or civil-law nature, this court has been preferred, doubtless, to the court of chancery as the appel

Digitized by Google

late court, because the issue could be tried, when deemed proper, in one and the same court, and so save circuity, delay, and expense. This reason, in connection with the difference between the English polity and policy and our own, heretofore referred to, manifestly negatives any such implication in favor of the alleged right of the heir at law in this court on appeal. Upon careful consideration of the entire subject, the correct conclusion, therefore, seems to be, that this court, on appeal from the register's court, has the power, in its discretion, to retry the cause either with or without the aid of a jury; and that the appellants in this case, as heirs at law or otherwise, are not entitled as of right to have the issue framed and tried before a jury of this court, as moved for by them. Nor does the testimony or any matter urged in this cause disclose any need of the court for the aid of a jury in determining whether it will reverse or affirm the decree of the register's court in the present instance.

This court has no difficulty in reaching a satisfactory conclusion in this case without the trial of the issue sought by the appellants, and the needless and therefore unjustifiable delay and expense thereof. While there is a conflict of testimony, it is, nevertheless, true that the decisive preponderance of evidence clearly and satisfactorily proves that George W. Cummins, at the time he executed his alleged last will and testament, and the alleged codicil thereto, was of sound and disposing mind and memory, and not the subject of undue influence. Therefore, the decree of the register's court admitting said will and codicil to probate should be affirmed by this court.

WHITE v. EDDY.

(Supreme Court of Rhode Island. May 4, 1895.)

ENTRY OF JUDGMENT—REPORT OF REFEREE—JURY TRIAL—LIMITATIONS—PLEADING—ACCOUNTING.

1. Where the court entered judgment on the report of an auditor appointed to state an account, instead of noting its decision, such error is harmless, when the same judgment must have necessarily been entered at a later date.
2. Right to claim jury trial in an action of account does not exist after the court has noted its decision on the report of the auditor.
3. When the statute of limitations is not pleaded as required by Judiciary Act, c. 17, § 3, it is not available as a defense.
4. Where the plaintiff's interest in an estate was one-sixteenth, and the defendant, a cotenant living on the land, received the entire profits, it is proper to charge the defendant with rent, and allow plaintiff one-sixteenth of the net receipts.

Appeal from district court.

Action of account brought by Charles W. White against Marilla Eddy. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry J. Dubois, for plaintiff. William B. Greenough, for defendant.

PER CURIAM. This is an action of account brought in the district court of the Sixth judicial district. After the interlocutory judgment that the defendant account had been entered, an auditor was appointed to state the account. The auditor filed his report, January 5, 1895. On January 10, 1895, the court rendered judgment for the plaintiff in conformity to the report for $287.57 and costs, including $25 for the auditor's fee. The defendant, on April 11, 1895, filed her petition for a new trial, alleging that the court erred in entering the judgment, instead of noting its conclusions of law and fact or decision; thereby depriving her of the right to claim a jury trial or to take exceptions to the report.

We think that the court erred in entering its judgment on January 10, 1895, instead of noting its decision. Lavelle v. Kimball, Index PP, 83, 31 Atl. 166. But we do not see that the error worked any injury to the defendant, since the same judgment must, necessarily, have been entered at a subsequent date. The only right to claim a jury trial in an action of account in the district court is from the judgment to account. The procedure in such an action after the judgment to account is stated in Whipple v. Whipple, 13 R. I. 584, by which it appears that when, in the taking of the account, questions arise which the parties are unwilling to trust to the decision of the auditor, the correct practice is to have issues made up,—for the court if the question be one of law, for the jury if the question be one of fact,—the auditor meanwhile waiting for the decision, and conforming the report to it when received; and that, when the account reported by the auditor has been filed, no exceptions will lie to it except for errors apparent on its face. This being so, it was too late for the defendant, even if the district court had merely noted its decision instead of rendering judgment, to have claimed a jury trial. Her only remedy at that stage of the proceedings was to except to the report for errors apparent on its face. Unless such errors appeared, judgment must have been entered, necessarily, on the report.

The petition alleges that the report is erroneous on its face, because it charges the defendant with the rents and profits of the estate from October 19, 1883, to December 19, 1894, contrary to the statute of limitations by which, as the defendant claims, the accounting should have been limited to the six years next preceding the bringing of the suit, to wit, six years from April 27, 1888. The record, however, does not show that the statute of limitations was pleaded as required by Judiciary Act, c. 17, § 3, if the defendant wished to avail herself of the defense of the statute. In the absence of such a plea, the auditor had no alternative but to take the account for the entire period prior as well as subsequent to the six years next preceding the bringing of the suit. His account so taken is not erroneous.

Digitized by Google

The petition also alleges that the report is erroneous because it charges the defendant with rent for the portion of the estate occupied by her, such portion being less than the share of said defendant as a cotenant with the plaintiff in the estate. The plaintiff's interest in the estate, as was agreed, is one-sixteenth. The defendant had received the entire rents and profits of the estate. The auditor, having ascertained the gross rents and profits so received, and deducted the sums properly allowable to the defendant for taxes, insurance, repairs, etc., allowed one-sixteenth of the sum remaining to the plaintiff. There is nothing on the face of the report to indicate any unfairness towards the defendant, or that the amount reported in favor of the plaintiff is any greater than he is entitled to receive. Petition denied and dismissed.

WEBSTER et al. v. WIGGIN et al.

(Supreme Court of Rhode Island. April 20, 1895.)

WILLS—AFTER-ACQUIRED PROPERTY—WHAT CONSTITUTES—VESTING OF ESTATE—RULE AGAINST PERPETUITIES—CHARITABLE BEQUEST.

1. After-acquired real estate is not affected by a will in which no express reference is made to after-acquired property, although the description of property devised is general, and a design to dispose of all his property, might be inferred from the whole scheme of the will.

2. Property on which testator had a mortgage before the date of the will, and to which he subsequently acquired absolute title under a power of sale in the mortgage, is after-acquired property.

3. Land sold under a mortgage, and conveyed, before the date of the will, to a trustee who was under obligation to transfer it to the testator at any time, and who conveyed it after the date of the will, is not after-acquired real estate.

4. Where a testator leaves the residue of his estate, in trust for a charity, to a corporation which was not in existence at the date of the will, but which was designed by him to carry out the trusts declared in the will, and the declarations in the will for the administration of the trusts are not repugnant to the provisions of the charter of the corporation, which was subsequently formed by the testator and others, such corporation is legally authorized to administer the trust.

5. A testator directed his executors to collect his book accounts and other credits, and manage his other estate, and, out of the proceeds of the book accounts and credits and the income of the estate, to pay seven legacies in a certain order. He then gave his whole estate, except such part of the proceeds of book accounts and other credits as were used to pay legacies, to a certain corporation; giving power to the executors, while in control of the estate, to change investments. *Held*, that the corporation was given a legal estate in fee simple in the real estate, and a vested interest in the personal property.

6. The provision for changes of the fund by the executors did not necessarily imply a legal interest in the executors.

7. A gift to a corporation organized for the purpose, with which to purchase land and build residences thereon for the laboring classes, to be controlled so as to "improve the moral, physical, and intellectual condition of the youth of this city," and to be let to laborers for rent, and not gratuitously, is a charitable trust, which may be sustained, by analogy, under St. 43 Eliz. c. 4.

8. A charitable trust is one which originates from a gift, and which limits property to any public use to which it is lawful to devote property forever.

9. A provision in a will that, when a fund amounts to $500,000, one-half of the income shall be devoted to the payment of the salaries of additional teachers in the public schools, or, if the city refuses to co-operate in that design, the trustees may devote it to the establishment of schools for the education of children residing in certain tenements controlled by the trustees under a previous provision of the will, creates a charitable trust.

10. Where a will provides that the executors shall pay, out of the proceeds of the book accounts and credits of the estate, and the income thereof, seven legacies to individuals in the order named, the legacies subsequent to the one first payable are not void for remoteness if the book accounts and credits alone are sufficient for the payment of all such legacies.

11. A resolution of the general assembly accepting a legacy and its conditions is a sufficient assurance to justify the executors in paying over a legacy to the state.

12. The court of testator's domicile will not require a bond to be given by a testamentary trustee, when the trust will be administered under the supervision of the equity courts of another state.

Petition by George E. Webster and others, executors, against John L. Wiggin and others, for the construction of the will of Chase Wiggin.

C. M. Van Slyck, for complainants. E. K. Parker, James B. Richardson, Herbert Almy, and Joseph C. Ely, for respondents.

DOUGLAS, J. The scheme of the will upon which the questions suggested to us arise is briefly as follows: The testator, after directing payment of his debts and funeral expenses, and the purchase of a place for his burial, makes a specific bequest of certain property, used by him in the practice of his medical profession, to one of his nephews. He then directs his executors to collect his book accounts and other credits, and to manage his other estate, real and personal, and out of the proceeds of the book accounts and credits, and the income of the estate, to pay the expenses of administration, and seven legacies, in the following order: (1) To each of five nephews, $500,—$2,500. (2) To Charles D. Wiggin, in trust for three of the testator's grandnieces, $1,500. (3) To the town of Meredith, N. H., upon certain trusts, $4,000. (4) To the state of New Hampshire, upon certain trusts, $500. (5) To the Rhode Island Medical Society, upon certain trusts, $4,000. (6) To Brown University, upon certain trusts, $2,000. (7) To Dartmouth College, N. H., upon certain trusts, $2,000. In all, $16,500. The rest, residue, and remainder of his estate,—that is to say, the capital of the whole estate, excepting so much of the proceeds of book accounts and other credits which have been collected by the executors as may have been used by them for the payment of legacies,—he gives to the Providence Building, Sanitary

Digitized by Google

& Educational Association, to constitute a fund to be called the "Providence Building, Sanitary, and Educational Fund," which is to be held and administered by said corporation upon certain trusts. Power is given to the executors, while they are in control of this estate, to change the investment of it, and to sell and reinvest the proceeds for that purpose. All the legacies and devises are made conditional upon the acceptance of the conditions attached to each gift within six months after notice from the executors. The bequests to the town of Meredith and the school districts thereof, and to the state of New Hampshire, are to be paid only after formal acceptance by the legatees of such legacies, and satisfactory assurance to the executors of the execution of the trusts attached to them. The debts and funeral expenses of the testator, and the legacies to his nephews, and in trust for his nieces, have been paid, and a surplus of personal estate and income remains in the executors' hands. A corporation of the name designated in the residuary clause was chartered by the general assembly June 1, 1883, and was organized during the lifetime of the testator, with the testator and three of the executors originally named in his will among the corporators, and this corporation claims to be entitled under the residuary clause.

The questions raised by the bill are of three classes: The eighth question relates to the condition of the estate, as affecting the application of the will; the seventh relates to the validity of the residuary clause; the first six relate to the construction of the direction to the executors to give notice to, and demand assurance from, the legatees. It appears that the testator died February 23, 1891, seised and possessed, besides his personal estate, (1) of real property acquired by him prior to the date of his will, of the value of about $4,000; (2) of real property situated in the state of Rhode Island, acquired by him subsequently to the date of said will, of the value of about $6,400; (3) of real property situated in the state of Massachusetts, acquired by him subsequently to the date of said will, of the value of about $1,000; (4) of real property situated in the state of Rhode Island, acquired by him subsequently to the date of said will, at foreclosure sales made by virtue of powers of attorney contained in mortgages acquired by him prior to the date of said will, of the value of about $6,500; (5) and also of a certain tract of land situated in said Providence,—which was conveyed in fee and in mortgage to said Chase Wiggin by deed dated August 15, A. D. 1874, and recorded August 17, A. D. 1874, and sold, by virtue of the power of attorney contained in said mortgage deed, to the defendant Charles D. Wiggin, by deed dated April 3, A. D. 1875, acknowledged June 28, A. D. 1883, and recorded June 29, A. D. 1883, and conveyed by said defendant Charles D. Wiggin to said Chase Wiggin by deed dated, acknowledged, and recorded June 30, A. D. 1883,—of the value of about $1,500.

The heirs at law contend that the lands in classes numbered 2 and 4, above, did not pass by the will, but that as to these lands, and the income of them, the testator died intestate, and that the land in class 3, not being within the jurisdiction of the court, cannot be affected by this proceeding. We are constrained to agree with this contention. While it may be inferred from the whole scheme of the will that the testator designed to dispose of all the estate which the law gave him power to affect by his will, we do not think he has availed himself of the privilege which our statute gives to a testator to dispose of after-acquired real estate in the manner pointed out by the statute. There are no express terms in this will referring to property which he might acquire after the execution of it. The description of the property devised is as general as possible, but it is no more comprehensive than what might well have been used if he had intended only to convey what he then possessed. Pub. St. c. 182, § 1; Church v. Manufacturing Co., 14 R. I. 539; Lorillard, Petitioner, 16 R. I. 254, 14 Atl. 920. As to the property in class 4, it seems plain that it was acquired as real estate after the making of the will. As a debt secured by a mortgage, it would have passed under the will as personal property; but the testator changed its character, and so we think exempted it from his testamentary provisions. Ballard v. Carter, 5 Pick. 112; Brigham v. Winchester, 1 Metc. (Mass.) 390; Yardley v. Holland, L. R. 20 Eq. 428; Strode v. Russel, 2 Vern. 624.

As in Clarkson v. Pell, 17 R. I. 646, 24 Atl. 110, we express no opinion as to the property in class 3.

The property in class 5 was owned by the testator at the date of the will. The legal title was in his trustee, who was under obligation to transfer it at any time, and who held it for the testator's benefit or convenience, subject to the testator's absolute dominion. It was in no real sense acquired afterwards, when the legal title was conveyed. We conclude, therefore, that it is included in the estate affected by the will.

The heirs at law contend that the residuary clause is void because the trusts imposed upon the legatee are not those which the claimant is authorized by law to administer; because these trusts are not charitable; because the time when the gift is to become effectual is too remote. There can be no doubt that the testator intended the corporation which claims this gift to be the recipient and administrator of it. No such corporation was in existence at the date of his will, but he expressly says that "it is to be incorporated, and will be incorporated before the devise and bequests to it herein provided shall take effect"; and before his death he, together with his friends, organized the claimant corpora-

Digitized by Google

tion under a charter which he procured from the general assembly, in which the objects of this clause of the will are substantially stated as the purposes of the corporation. This was an ancient method of founding a charity. "In other cases," says Mr. Tyssen, "the founders of charitable institutions procured for them charters of incorporation from the crown, with licenses to take lands in mortmain, and then conveyed or devised land to them." Tyssen, Char. Bequests, 243. The residuary clause of the will, and the charter, were evidently conceived by the same mind, and were designed to correspond to each other in the trusts declared by the testator and the trusts to be executed by the recipient. We find no discrepancy between them. Certain directions for the administration of the trusts in the will, not in any way repugnant to the provisions of the charter, are not repeated in it; and the direction for accumulation before commencing the building of houses, being optional, is not prescribed in the act. These differences, however, as well as the variations in expression between the two instruments, are only such as would naturally occur between a testamentary clause establishing a trust and a charter providing for a corporation for the purpose of administering it, and are appropriate to the different structures of the two instruments. The intention of the testator was, then, to convey his property to this corporation, to be managed as it might be under the terms of this charter, and under the trusts specified in the will. Does the law forbid such a disposition of his estate in the manner he desires, or can his expressed intention be carried out? The trusts annexed to the gift to the residuary legatee are: First. To purchase land or real estate in such localities in the city of Providence as shall be most convenient for residences for the laboring classes, and to build thereon such convenient and healthful tenements as shall be suitable, in amount of room and cost of construction, for such tenements. This employment of the fund may be made by the trustees, either at once, or when the fund invested in other ways by them shall amount to $500,000 in value. Certain directions as to the mode of administering the trust are added. A sufficient number of these tenements shall be built in one locality to require most of the time of one suitable person to supervise and take charge of them; to keep them in proper repair; to see that they are not abused by the occupants, and that they are kept clean and tidy at all times; to collect rents; to attend to all sanitary matters connected with them; and to otherwise oversee and direct in all matters relative to such tenements and their tenants which may be intrusted to him by the corporation. No intemperate, disorderly, or filthy persons shall be allowed to occupy any tenement built or provided by this fund. These directions imply that the tenements so directed to be built may be let to laborers for rent, not gratuitously furnished to them. Secondly. When the trust fund, with its accumulations, amounts to $500,000 in value, one-half of the future income is to be devoted to the payment of salaries of additional teachers in the public schools of Providence, or, if the city refuses to co-operate with the trustees in that design, then the trustees may devote it to the establishment of schools for the education of the children residing in the tenements controlled by the trustees.

We think the second branch of the trust is charitable, in the light of all the precedents. Attorney General v. Earl of Lonsdale, 1 Sim. 105; Russell v. Allen, 107 U. S. 163, 2 Sup. Ct. 327; Pell v. Mercer, 14 R. I. 439, and cases cited. It is for the purpose of promoting the efficiency of the public schools, and seems wisely designed for that purpose; or, in the alternative, to establish schools under the powers granted to the trustee by its charter. But it is objected to on the ground that the application of income for the promotion of education, in either way, is contingent upon such an accumulation as may not take place within the time permitted by the rule against perpetuities. It must be conceded, however, that this rule has no application if the fund, in the meantime, is devoted to charity. Gray, Perp. § 597; Hospital v. Grainger, 16 Sim. 83; 1 McN. & G. 460; Odell v. Odell, 10 Allen, 1; Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336; Chamberlayne v. Brockett, 8 Ch. App. 206; Russell v. Allen, supra. Prof. Gray criticises the reasons given for Lord Cottenham's decision in Hospital v. Grainger as assuming that the object of the rule against perpetuities is to prevent property from becoming inalienable. Gray, Perp. §§ 599, 600 et seq. The avoidance of an indefinite suspension of the right of alienation is at the root of the rule against perpetuities, and cannot be ignored, but we may suggest that the doctrine of the case may be supported on another ground. Where property is well given in trust for a charity, and, upon a remote contingency, this first trust is to terminate, and a second charitable trust to begin, the intention of the testator is that the first trust shall be benefited so long as, in his opinion, its provisions can be usefully carried out, and then that the fund shall still be devoted to charity in some other way; that is to say, he makes a case for the cy pres disposition of the fund. The first trust failing to be practicable or useful, he points out another charitable object of his bounty, and so does, in advance, what the court would do if he had omitted the second provision. In the case at bar the testator supposed that, after the fund in question should have increased to the

Digitized by Google

value of $500,000, one-half of the accruing income would be enough for the primary branch of this trust, and so has directed a different disposition of one-half the income from that time. This is substantially what the court would have done when it became apparent to them that the whole income of the fund could not usefully be expended for the purposes of the first charity. In making a cy pres disposition of a fund, the court follows the supposed wish of the donor. Why should it not confirm his express direction? But, upon whatever ground the doctrine may be based, it has met with universal approbation as a rule of law.

The crucial test, therefore, of the validity of the whole residuary clause, is whether or not the first trust declared is a valid charitable trust. The objections to the validity of the trust which have been urged upon us are: First, that it is not charitable; and, secondly, that, not being charitable, it is void, under the rule against perpetuities. If the residuary legatee were a private person, and the gift were not affected by a trust, he would take in the corpus of the estate, at the death of the testator, either a vested estate in fee, charged with the term given to the executors, or an absolute equitable fee, postponed in its enjoyment to a later time; and in the latter case the legal estate would pass to the executors in trust, first to raise legacies, and then to convey to the residuary legatee. The legal estate, in the first construction, or the equitable estate, in the second, being surely given to a definite person, are equally exempt from the rule against perpetuities. Gray, Perp. § 205. We think that the estate given by this will to the residuary legatee in trust is a legal estate in fee simple in the real estate, and a vested interested in the personal property and surplus book accounts and credits. The rents and income are, it is true, given to the executors, and such a general gift, standing alone, is undoubtedly a gift of the fee itself. 1 Jarm. Wills, *741, and cases cited. But here the income is separated from the estate for a temporary purpose, and the intention of the testator is plain that the corpus of the estate should be reserved for the residuary legatee. In Buchanan v. Harrison, 8 Jur. (N. S.) 965, 31 Law J. Ch. 74, Wood, V. C. says: "The first contest was that those who take the indefinite gift of income were entitled to the actual corpus of the property. As to that, I hold, quite independently of general authorities, which are numerous on the subject, that on this will it was clear that there was a gift of income, limited entirely by the period when he took upon himself to dispose of the corpus." The provisions for changes of the fund by the executors are powers not necessarily implying a legal interest. If the power of sale of any part of the estate is exercised, the new investment must immediately take the place of the old, and come into the ownership of the residuary legatee. 1 Chance, Pow. p. 53, §§ 141, 142; Buchanan v. Harrison, supra. And so in regard to any income coming to the manual possession of the executors after the charges on the income are satisfied. The power and control of the executors cease the moment the income accrued, together with the book accounts and credits, has amounted to enough to pay the legacies. The future income at once accrues to the owner of the corpus of the estate, and so there is no need of transfer of title by the executors. It belongs to the residuary legatee the moment it comes into existence. If, however, the residuary legatee takes only in trust to pay over to a private person, or for a private purpose, upon a contingency which may happen beyond the time limited by the rule against perpetuities, such trust is void, and the legatee takes, if at all, only in trust for the heirs at law. Equitable rights in individuals are subject to the rule against perpetuities, as well as legal estates. Gray, Perp. §§ 202, 323. Where the gift is upon a private trust, the beneficial interest must vest, or the application to the beneficial object must begin within the time prescribed for contingent remainders at common law to vest; and so, in ascertaining the validity of a private trust, we must inquire at what time the beneficiaries, as well as the trustee, are to acquire their interest. Perry, Trusts, 383; Gray, Perp. §§ 246, 413; Mainwaring v. Baxter, 5 Ves. 458. It is argued that this is the present case; that though the legatee takes, by the terms of the will, a vested legal interest in the corpus of the estate, the trust is to devote the fund to certain purposes, not charitable, at some time in the future, after its income, together with book accounts and credits, has been sufficient to pay the seven preceding legacies. It is certain that, if this be a private trust, no individual to be benefited by it can be ascertained until after the earning of the preceding legacies; and even if the legacies are paid out of book accounts and credits, without resort to the income, no one of these individuals can enforce upon the trustee an execution of the trust in his favor until the lapse of the further time required for the fund to grow to $500,000. It is those persons, of the laboring classes, who shall desire to live in Providence when the preceding legacies are earned, and the accumulation of the fund is completed, who are to be the beneficiaries under the trust. But if the trust is charitable, and no remote condition precedent is imposed to its operation, it is lawful and valid, whatever may be the time fixed for its enjoyment to begin,—the immediate and unconditional devotion of the fund to charity, and not the time or manner of the administration or distribution of the fund, being the test of the validity of its creation. Chamberlayne v. Brockett, 8 Ch. App. 206; Russell v. Allen, 107 U. S. 163, 2 Sup. Ct. 327. This rule is inevitable, from the nature of charitable trusts. The fund must be set aside in perpetuity, and the beneficiaries are a succession

Digitized by Google

of persons, in each of whom the beneficial interest vests from time to time, in the future, to remote ages. To apply the rule against perpetuities to such a fund would destroy the trust during the second generation. Such trusts are guarded from misuse by being placed under the special control and direction of courts of equity, and the investment of their funds and the mode of their administration may be altered, within the limits of the foundation, as circumstances require. There is no condition precedent to the legacy we are considering, except that it shall be accepted by the trustee within six months after notice. The direction for accumulation is optional, and in no sense a condition precedent. We come, then, to the vital question, whether it is a private trust, and so void, or what is called in the law a "charitable or public trust," and so valid.

It is urged that the trust is not a charity, because its benefits are not gratuitous, and its special beneficiaries are not required to be poor. But these are not necessary characteristics of a charitable trust. It is enough that the fund shall originally be a gift, if it possess the other qualities of a charity. Attorney General v. Heelis, 2 Sim. & S. 67, 77. In Attorney General v. Corporation of Shrewsbury, 6 Beav. 220, a grant of right to keep a toll bridge, and to apply the tolls to keeping up bridges, gates, towers, and wall of the town, is held a valid trust. Gifts to colleges where tuition fees are charged have been invariably sustained. The general benefit to the community derived from the diffusion of knowledge, which such institutions promote, is enough to justify their foundation and permanent endowment. So in this trust the building of a colossal fund, as a monument to the founder, is not its object; but, as he expresses it, it is, "to improve the moral, physical, and intellectual condition of the youth of this city." We cannot doubt that the erection and control of such tenements as the donor contemplates will promote the health, morality, and intelligence of those classes of citizens who are to occupy them, and, by example and competition, will tend to improve the sanitary conditions of other estates, whose accommodations are now limited by private interest to mere obedience to the compulsions of law. But the donor has seen fit to intrust this fund to the administration of a special corporation, and this is, in effect, to adopt its methods and aims. Society v. Richards, 1 Dru. & War. 258, 294. And so we are to take the provisions of the charter as amplifying and explaining the trust in the will. Various definitions, more or less exact, of the legal term "charity," have been given by courts and jurists, e. g.: by Judge Gray in Jackson v. Phillips, 14 Allen, 539, at page 556; by Mr. Binney in the Girard Will Case (Vidal v. Girard's Ex'rs) 2 How. 127, quoted with approval in Ould v. Hospital, 95 U. S. 303, and in Price v. Maxwell, 28 Pa. St. 23, 35; by Lord Camden in Jones v. Williams, Amb. 651, approved in Coggeshall v. Pelton, 7 Johns. Ch. 292, 294, and in Perin v. Carey, 24 How. 465, 506; by Sir John Leach in Attorney General v. Heelis, 2 Sim. & S. 67, 76; and by Durfee, C. J., in Pell v. Mercer, 14 R. I. 412, 444; and many others. These are all generalizations of the provisions of the statute 43 Eliz. c. 4. The 21 classes of trusts referred to in this statute have been taken by the courts as criteria in passing upon the character of trusts claimed to be charitable. But the enumeration of that statute is not exhaustive. Colleges are expressly excluded from its provision, though the courts for a long time strained its language to include them. Other trusts, with objects quite remote from any known to the subjects of Queen Elizabeth, have been sustained as analogous, or, upon general principles, have been deduced from that statute by broad generalization. And it is instructive, in the present connection, to note the principle upon which the statute of Elizabeth is taken as a guide. "It is treated," says Mr. Tyssen, "as an expression by the legislature that all such purposes are lawful charitable purposes, and a guide to the courts in deciding upon the legality of other purposes." Tyssen, Char. Bequests, 33. The trusts mentioned by the statute are charitable because they are such as public policy, expressed by the act of the legislature, allows to be sustained by a dedication of property in perpetuity. Other trusts, then, endowed by the legislature with power to accept gifts of property in mortmain for public purposes, must be considered charitable. So that a trust may be sustained as a charity by bringing itself within the statute of Elizabeth, or its generalizations and analogies, or by showing specific authority from the legislature to perpetuate itself for the public or general benefit. "Having regard to all legislative enactments and general legal principles, is it, or is it not, for the public benefit that property should be devoted forever to fulfilling the purposes named? * * * These trusts, for purposes which the law considers it for the public benefit to perpetuate forever, are called charitable trusts. This is the only general definition which can be given of the word 'charity.' If we want a more precise definition of what is and what is not a charity, we must resort to a simple enumeration of the purposes which have been included under the term." Tyssen, Char. Bequests, 5. Funds supplied from the gift of the crown or the legislature, or from private gift, for any legal public or general purpose, are charitable funds, to be administered by courts of equity. Attorney General v. Heelis, 2 Sim. & S. 67. We conclude, then, that a charitable trust, in the legal sense, is one which originates from a gift, and which limits property to any public use to which it is lawful to devote property forever. The legality of such appropriations may be established by general rules of law, or by special

Digitized by Google

act of the sovereign power. In either case, if the use is public, the trust is a charity. Instances are common where donations in trust, which would be forbidden by general law, have been upheld because made to corporations authorized by special act or license of the crown to hold property in mortmain. The institution of a perpetual trust of a public nature, by grant of the legislature, though it be not called charitable in the act, is sufficient to make it charitable in the legal sense. So a grant of right to cut turves, made by act of parliament, was held by the court of appeal in the case In re Christ Church Inclosure Act (March, 1888) 38 Ch. Div. 520, to be a charitable trust. Lindley, L. J., at page 530, says: "The trust, being created by statute, cannot be held invalid on the ground of perpetuity or on any other ground. It is a perpetual trust for the occupiers for the time being of those cottages. But such a trust, unless it is a charitable trust, is one of a very anomalous character, and one which it will be extremely difficult to give full effect to in all contingencies. * * * Now, although it is competent for the legislature to create trusts unlike any previously known, we do not think that a trust of that kind ought to be held to have been created, if it is equally consistent with the object and words of the statute to hold the trust to be one with which the lawyers are familiar, and which there is no difficulty in executing. If, therefore, this trust can be properly regarded as a charitable trust, it ought, in our opinion, to be so regarded." Lord Lindley bases this conclusion mainly upon the decision of the house of lords in Goodman v. Mayor, etc., 7 App. Cas. 633, and says further: "The trust is for a comparatively small and tolerably well-defined class of persons. The class consists of all the then and future occupiers of the cottages, and there may be several occupiers of one cottage. The class, however, though limited, is, as to its members, uncertain, and is liable to fluctuation, and the trust for that class is perpetual. This being the case, we are unable to distinguish this case from the trust which both Lord Selborne and Lord Cairns held to be a charitable trust, and therefore valid, in Goodman v. Mayor, etc. In that case the house of lords supported an ancient grant of a right of fishery as a charitable trust imposed upon the fee of the fishery held by the corporation of Saltash, in favor of certain of the inhabitants. Lord Selborne says (page 642): "A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or any particular class of such inhabitants, is, as I understand the law, a charitable trust, and no charitable trust can be void on the ground of perpetuity;" citing Wright v. Hobert, 9 Mod. 64, where Lord Macclesfield established as a charitable trust an ancient grant of land for the pasture, during three months of the year, of the cows of "as many of the inhabitants of a certain village as were able to buy three cows, and during seven months of the rest of the year to be in common for all the inhabitants,"—and also Jones v. Williams, Amb. 651; Attorney General v. Mayor, etc., 2 Sim. 437; Howse v. Chapman, 4 Ves. 542; Attorney General v. Heelis, 2 Sim. & S. 76, 77; Attorney General v. Mayor, etc., 1 Bligh (N. S.) 347. Lord Cairns, in the same case, says (page 650): "Such a condition would create that which, in the very wide language of our courts, is called a charitable—that is to say, a public—trust, or interest, for the benefit of the free inhabitants of ancient tenements. A trust of that kind would not in any way infringe the law or rule against perpetuities, because we know very well that when you have a trust which, if it were for the benefit of private individuals, or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet, if it creates a charitable—that is to say, a public—interest, it will be free from any obnoxiousness to the rule with regard to perpetuities." In the light of these cases, we have no difficulty in concluding that the trust for the erection and letting of tenements such as are contemplated by this legacy, and the charter of the residuary legatee, is a public or a charitable use. The trust here declared is not for the benefit of any persons who existed as individuals in the regard or intention of the testator. He designs them to be the objects of his bounty for no reason personal to them or to himself. They are a class of mankind comprising an undetermined number of individuals, each of whom is unknown and unrelated to him. What particular persons shall benefit by his gift, he leaves to unanticipated circumstances to determine. Here we have the indefiniteness of beneficial application, which makes the trust public. "They [i. e. charitable trusts] may, and indeed must, be for the benefit of an indefinite number of persons: for, if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity." Gray, J., in Russell v. Allen, 107 U. S. 167, 2 Sup. Ct. 327. The trust is, then, valid, because it is lawful by the terms of the charter, and charitable, because it is a lawful perpetuity for a public use, even if the special act of the legislature establishing this trust as perpetual, and calling it in terms a charity, is not binding upon the court to construe it to be charitable.

It may be useful, briefly, to mention the cases cited against the validity of this trust. The trust avoided in Hillyard v. Miller, 10 Pa. St. 326, though presenting somewhat similar characteristics to the present one, is clearly distinguishable from it. The court found that trust to be simply to create a loan office. Nothing was to be gained by the borrowers but loans of money at market rates. There was no gain or benefit to the public at all. If these loans had been required to be expended in the improvement of a specified locality, under such regulations as would pro-

Digitized by Google

mote the health and welfare of its inhabitants, it might have been held good; and in that case there was no legislative approval of the perpetuity. In Kendall v. Granger, 5 Beav. 300, no specific object of the gift was named, but it was given to charity, in its colloquial sense, or to general utility. If some specific institution of general utility had been named, such as a bridge or dyke, a house of correction, or a highway, it would have made a good charity, under the statute of Elizabeth. In Re Cullimore's Trusts, L. R. 27 Ir. 18, the master of the rolls held the gift as probably intended to benefit individuals, and not the public, and as such it was void for uncertainty; and on page 24, discussing the elements of a charitable trust, he says: "Mere kindness, generosity, or benevolence on the testator's part is not enough to constitute a charitable purpose. There must also be the element of poverty or need on the part of the object, or else the gift must be dedicated to some purpose, such as education, religion, or the like, which the law regards as charitable." He thus leaves the definition open, and the trust considered there is so dissimilar to the one we are considering that the decision is of no value here. In Thomson v. Shakespear, 1 De Gex, F. & J. 399, it appeared that the execution of the trust involved a disposition of property owned and held by private individuals, which the court could not compel, and so it failed. Lord Justice Bruce (page 408) says, "If the object of a museum could be dissociated from Shakespear's house, it might be possible to support the gift." In Re Sutton's Trusts, 48 Law J. Ch. 350, a gift to a private institution, to be held in perpetuity for the benefit of its subscribers, was held void. Kelly, C. B., says: "I think that if this institution were a charitable institution the bequest would probably be void, under the mortmain act; but, when we look to the rules, we find the institution really is a species of club, and not a charity." In Chamberlain v. Stearns, 111 Mass. 267, the question presented was whether a devise in trust to be applied "solely for benevolent purposes," in the discretion of the trustees, creates a public charity; and it was held that these words, standing alone, do not exclude objects not technically charitable and do not create a charity. Chapel of Good Shepherd v. Boston, 120 Mass. 212. This case decides that a charitable corporation, having invested its funds in lodging houses, and not occupying them for any charitable purpose, must pay taxes on such real estate, under the statutes of Massachusetts. It is no authority for holding that a corporation authorized to erect and manage tenement houses, under restrictions calculated to promote the public welfare, and for such purposes only as the legislature calls charitable, is not a charity. Donnelly v. Cemetery, 146 Mass. 163, 15 N. E. 505, decides that a cemetery corporation, not required by its charter to apply any part of its funds to charitable purposes, is not a charitable corporation. Upon the words in the will, the seven legacies in trust are affected by two contingencies,—they are made payable out of the book accounts and credits, or out of successive accumulations of income. If resort must be had to such accumulations, all after the first one, unless that one is for a charity, would be too remote, and void; but the inventory of this estate shows that the book accounts and credits alone are sufficient to satisfy all these gifts, and so these legatees take interests vested at once, and valid.

It appears from Pub. St. N. H. c. 219, § 10, that service of writs in that state is made, in cases against towns, upon one of the selectmen and the town clerk; in cases against school districts, upon one of the school board and clerk of the district. The notices required by the will to be given to the town of Meredith and to the school district should be served upon these persons accordingly. Service may be made upon these parties, by any disinterested person, by delivering to each a copy of the notice, of the will, and of the bill of complaint. Notice to the state of New Hampshire may be made by a similar service of the same papers upon the governor of the state. These services may be proved by affidavit of the person making them. Similar copies may be served upon the other legatees and service proved in the same manner.

We think that an act or resolution of the general assembly of New Hampshire, accepting the legacy given to the state, and agreeing to its conditions, will be a sufficient assurance to the executors to justify the payment of that legacy under the terms of the will.

We think the legacy to the town of Meredith and the school districts of the town is separable, as specific portions of it are given for distinct purposes, and that the separate amounts of $250, $250, $3,000, and $500 may be severally accepted or rejected by the beneficiaries, respectively. The condition annexed to the second gift of $250 may be performed either by the town or by the school districts, respectively. An appropriation by either of the amount required will be sufficient to authorize the payment of this legacy. We are not advised as to the legal capacity of the town of Meredith to take and administer the trusts annexed to the other portions of the $4,000 given them by the will. We will therefore refer the question to a master, to report whether or not some enabling act of the legislature of New Hampshire may be required in the premises. Such action was taken by the privy council in Mayor of City of Lyons v. East India Company, 1 Moore, P. C. 175. See, also, New v. Bonaker, L. R. 4 Eq. 655; Thompson v. Thompson, 1 Colly. 381; Attorney General v. Sturge, 19 Beav. 597.

As these trusts, if accepted by the town and school districts, and legally established, will be under the supervision of the equity courts of New Hampshire, we see no necessity of requiring any bond to be given.

Digitized by Google

EDDY et al. v. GRANGER.

(Supreme Court of Rhode Island. May 3, 1895.)

REVOCABLE LICENSE—CITIES—CONTROL OF STREETS.

1. Permission granted by a municipality to private parties to construct drains on highways amounts only to a revocable license.

2. Vested rights in a highway cannot be acquired by private parties, so as to compel a city to provide other drainage for that cut off by the construction of a sewer.

Action by William Eddy et al. against D. L. D. Granger for damages alleged to be caused by the construction of a sewer in the city of Providence. Demurrer sustained.

C. M. Salisbury, for plaintiffs. Francis Colwell, City Sol., and A. A. Baker, for defendant.

STINESS, J. The declaration charges that the city of Providence negligently caused a sewer to be built in South Main street, as a part of the sewerage system of the city, which cut off a drain leading from the premises of the plaintiffs and others, through Harding's alley, an accepted street, to the river, said drain having been laid by permission of the town of Providence; whereby the said drain was obstructed, and water and sewerage from estates above flowed back on to the plaintiffs' premises. Upon demurrer to the declaration, the question is whether there is any legal liability on the part of the city for cutting off the drain.

While the primary purpose of streets is for public travel, requiring only a use of the surface, yet, by immemorial custom, they have been put to other uses of a public nature, quite distinct from, but not incompatible with, their use as highways. Thus gas and water pipes, drains and electric wires, as well as other things of general convenience, by common consent find a place in our public streets. In Clark v. Peckham, 9 R. I. 455, it is said that there is an implied power in the city to build drains, and that the streets are dedicated to such necessary uses. Obviously all such constructions must be under municipal direction and control, and so, before a system of water supply and drainage was adopted, permission was granted to private parties, from time to time, to lay pipes from fountains, and to build drains, in many of the streets, of which the permission alleged in the declaration is an instance. But in granting such permission the municipality could not relinquish its control, nor confer any private rights inconsistent with its duty to secure the use of the highways for the public benefit. The permission was necessarily subject to the developing requirements of the city, and so amounted only to a license to use the street, which, from its nature, could be revoked. Otherwise the existence of private drains might prevent the building of sewers altogether. But while the plaintiffs do not deny the right of the city to remove the private drain, and to build a sewer in its place, they claim that the city was bound in so doing to provide for the drainage which had flowed through the private drain, and was negligent because it did not do so. Such a claim must rest upon a vested right to maintain the drain, or else it has no foundation in an action for damages. We think that neither the town nor the city had the power to convey such a right to private parties. The most it could do would be to grant a license to use the street in a way which should not interfere with the public interest. If the plaintiffs had no vested right in the street, then they cannot legally complain because the city did not protect them in the use of it. In Baxter v. Tripp, 12 R. I. 310, it is said: "The argument is that the city had no right to deprive the plaintiffs of the aqueduct without supplying its place with a sewer which could be used as safely and as well. If we were trying this case in a court of conscience, the argument would perhaps be valid." We do not see, however, that the plaintiffs' claim could be maintained even in a court of conscience. The fact that they were allowed for many years to carry their house drainage to the river, instead of being obliged, as most other people were, to provide for it in cesspools on their own land, had been to their advantage during that time. But how can this fact impose a moral duty on the city to continue a favor which had become inconsistent with public necessity? We are unable to see that there was either a moral or legal obligation on the part of the city to maintain the private drain, although the latter is the only question with which we have to deal. Authorities on this point are not numerous, but we find that such a conclusion is strongly supported in Elster v. Springfield, 49 Ohio St. 82, 30 N. E. 274. The court says: "The city as to its streets is a trustee for the use of the public. A trustee of property for the benefit of the public could not, any more than could a trustee of private property held for known specific and continuing uses, alien or incumber the property to the prejudice of the beneficiary; and a person dealing with the trustee, in either case, would be bound to take notice, at his peril, of the limitation of the power. 2 Dill. Mun. Corp. § 671; City of Alton v. Illinois Transp. Co., 12 Ill. 60. Hence it would follow that whatever grant may have been made by the town of Springfield to the Kills, to maintain water pipes in Center street, could have no greater operation than a temporary license, subject to be revoked at the will of the town or city, as its necessities in the future uses of the street might require. It necessarily results from this that the enjoyment of the street beneath the surface for the laying of the pipes and the flowing of the water through them was a permissive use, and that no permanent right could be acquired by long continuance." Having the right, therefore, to cut off the private drain without any obligation to provide for the sewage, it is clear that there is no cause

Digitized by Google

of action against the city for this act, which is all that is charged in the declaration. Suggestion was made at the hearing that there was no notice to the plaintiffs of the cutting off of the drain, and that as licensees they were entitled to notice, but, as no such allegation is made in the declaration, we do not pass upon the question whether there would be any liability on the part of the city if such were the fact. The demurrer to the declaration is sustained.

COLLINS v. CAMPBELL.

(Supreme Court of Rhode Island. Dec. 13, 1894.)

MALICIOUS PROSECUTION.

A declaration in an action for malicious prosecution, which fails to state positively that the proceedings on which the action is based terminated in plaintiff's favor, is bad on demurrer.

Case certified from court of common pleas, Providence county.

Action by John E. Collins against Edward T. Campbell for malicious prosecution. Demurrer sustained.

Albert B. Crafts and Charles Perrin, for plaintiff. James E. Denison, for defendant.

PER CURIAM. We think the demurrer to the declaration in this case should be sustained. The declaration nowhere alleges, except in an argumentative way, that the malicious proceeding of which the plaintiff complains had terminated in his favor before the commencement of this action. In Lauzon v. Charroux, Index NN, 83, 28 Atl. 975, which is relied on by the plaintiff's counsel in support of the declaration, it was held, in accordance with the well-settled rule in such cases, that, in order to entitle the plaintiff to recover in an action of this sort, "three things must concur, viz.: (1) The motive of the party instituting or prosecuting the suit or proceeding must have been malicious; (2) the suit or proceeding complained of must have been instituted without probable cause; and (3) the suit or proceeding must have terminated in the plaintiff's favor"; and also that the declaration must contain allegations covering each of these points. See, also, King v. Colvin, 11 R. I. 582; Newton v. Weaver, 13 R. I. 617; Gorton v. De Angelis, 6 Wend. 418; Clark v. Cleveland, 6 Hill, 344. Demurrer sustained.

REYNOLDS v. CHAPMAN et al.

(Supreme Court of Rhode Island. Dec. 14, 1894.)

NEW TRIAL—STATEMENT OF EVIDENCE—SIGNATURE OF JUDGE.

Judiciary Act, c. 31, § 7, providing that, in case the statement of evidence and the rulings thereon is not allowed and signed by the justice, the unsigned statement, supported by affidavits, may be filed, and the petition for a new trial heard thereon by the appellate division, does not authorize the hearing of such petition on a statement which was not presented to the justice, to be allowed and signed, within the time prescribed by law.

Action by Peter Reynolds, administrator against Charles P. Chapman and Charles D. Chapman. Plaintiff was nonsuited, and petitioned the appellate division for a new trial. Petition overruled.

James E. Denison, for plaintiff. Albert B. Crafts, for defendants.

PER CURIAM. At the trial in the common pleas division on May 7, 1894, the plaintiff was nonsuited. On the following day he filed his notice of intention to prefer a petition for a new trial. Time for filing a statement of evidence and rulings thereon was extended by the justice who tried the cause to May 30, 1894. A statement of evidence and rulings thereon was filed by the plaintiff May 28, 1894, which on May 2[illegible], 1894, was disallowed by the justice because it was incomplete and erroneous in many particulars. On June 8, 1894, the plaintiff filed a petition for a new trial, and, having obtained a stenographic report of the testimony at the trial, which was not presented to the justice who tried the cause for allowance within the time prescribed by the Judiciary Act, c. 31, § 6, but the correctness of which is supported by the affidavits of persons present at the trial, he now seeks to have us determine his petition on this stenographic report. We are of the opinion that the petitioner has no standing in court. He relies on the Judiciary Act, c. 31, § 7, which is as follows: "If the statement of the evidence and rulings thereon be not allowed and signed by the justice within said five days, or the further time prescribed as aforesaid, such unsigned statement shall be filed as aforesaid within the time prescribed; and on the hearing of such petition in the appellate division, the matter of such evidence and the rulings thereon may be set forth by affidavit, subject to counter affidavits, to the satisfaction of the appellate division, with the same effect as if such statement of the evidence with the rulings thereon had been allowed and signed by the justice." We think, however, that this section presupposes that the statement of evidence and rulings referred to, on which the petition is to be heard, shall be presented to the justice within the time prescribed; and that, in case the statement shall not be allowed and signed by him, it shall be filed, and the hearing on the petition for new trial in this division shall be on the statement so filed, the matters set forth in it being proved by affidavits to our satisfaction. The section does not in our opinion contemplate a hearing of the petition on a different statement from that presented to the justice. Petition denied and dismissed, and case remitted to the common pleas division.

Digitized by Google

BYRNE v. SCHUYLER ELECTRIC MANUF'G CO. et al.

(Supreme Court of Errors of Connecticut. Jan. 8, 1895.)

CORPORATIONS—VALIDITY OF CONTRACT—TRANSFER OF PROPERTY—RIGHTS OF STOCKHOLDER—ACTION.

1. A contract whereby the officers of an insolvent corporation, for the purpose of avoiding dissolution, transferred all its property to another corporation which had been organized to continue its business, and accepted in payment shares of stock in the new corporation, which were to be held by trustees named by such officers, was void, in the absence of a provision of the charter expressly authorizing such a transaction.

2. The fact that a stockholder is not injured by an ultra vires contract of a corporation, to which all the other stockholders have consented, does not prevent his maintaining an action to enjoin its performance.

3. A stockholder, having received notice too late to attend a stockholders' meeting, sent a telegram protesting against the proposed sale of the property of the corporation. Immediately upon learning that such sale had been made, he served on the directors a written demand that they institute a suit to set it aside. Upon their refusal, he presented a like demand to the stockholders at a regular meeting. *Held*, that such stockholder was not guilty of laches estopping him from bringing suit to enjoin the sale.

Prentice, J., dissenting.

Action by one Byrne against the Schuyler Electric Manufacturing Company and the Schuyler Electric Company. Judgment for defendants, and plaintiff appeals. Reversed.

Frank Sullivan Smith and Watrous & Buckland, for plaintiff. C. E. Perkins and E. Henry Hyde, for defendants.

ANDREWS, C. J. The Schuyler Electric Manufacturing Company is a corporation chartered by the legislature of this state, and is located at Hartford. The Schuyler Electric Company is a corporation formed under and pursuant to the joint-stock acts of the state, and is located at Middletown. For convenience, we may call the first-named company the "Hartford Corporation," and the other the "Middletown Corporation." The Hartford corporation was chartered "for the purpose of manufacturing, buying, selling, and dealing in all kinds of machinery, appliances, and apparatus adapted to the purposes of producing and distributing light, heat, or power by the use of electricity, and with power to manufacture and sell plants for furnishing electric light, heat, or power, and generally to manufacture such articles incidental to its business as it may deem for its interest." Its capital stock was of two kinds,—preferred stock, to the amount of $350,000, and common stock, amounting to $150,000. The common stock might be increased to an amount not exceeding $500,000, but only for the purpose of paying off and retiring a corresponding amount of the preferred stock. But no payment was to be made which should reduce the assets of the company below the sum of $150,000. The articles of agreement of the Middletown corporation are not given, but it is stated that that corporation was formed to continue the same business which the Hartford corporation was chartered to carry on. By an agreement between these two corporations, made on the 17th day of October, 1887, the Hartford corporation undertook to convey, and did, in point of form, convey, assign, and transfer to the Middletown corporation "its entire assets, including its letters patent, stock, bonds, choses in action, and property of every description," and received in pay therefor 2,000 shares of the capital stock of the latter corporation, of the nominal value of $100 each. These shares of stock were subscribed for and issued to certain persons who had been named as trustees for that purpose by the Hartford corporation, and who subscribed as such trustees, and were so named in the issue of the same. The Middletown company accepted said transfer of property as full payment for the said shares of its stock. The property so transferred consisted of the various letters patent covering the system of electric manufacture and lighting according to which the Hartford corporation manufactured its electrical apparatus, and the machinery, tools, and appliances with which it performed its work. It was the property without which it was and is impossible for that corporation to carry on its manufacture, and without which it is put entirely out of business and out of all active existence. And the Schuyler Electric Manufacturing Company, instead of being engaged in the manufacture for which it was created, has become simply a cestui que trust of 2,000 shares of the capital stock of another corporation. The case shows that the officers and managers of this corporation have made the sale and taken the stock as above mentioned, not with the intention of winding up its affairs, and dividing the stock so received among their own stockholders, nor as a temporary arrangement resorted to merely to carry the corporation over a period of distress, but with the intention to hold it as a permanent investment. To sum it all up, the result is to practically dissolve the Schuyler Electric Manufacturing Company, and to transfer its business to the Schuyler Electric Company.

The plaintiff is the owner of 250 shares of the common and 10 shares of the preferred stock of the Hartford corporation. He has at all times objected to all votes and acts of that corporation pursuant to which it transferred its assets and all its property to the Middletown corporation, and became the owner of the stock of the latter company. He brought the present action to the superior court, after the corporation and the directors had refused to take any action to rescind the said contract, averring in his complaint that the said agreement of the Hartford corporation was a fraud upon him, was ultra vires and void, and asked the court so to declare, and to afford him some remedy, either by an

Digitized by Google

injunction or by the appointment of a receiver. Both said corporations were made defendants, and they both came into court and made answer. Their second defense sets forth the several votes of the Hartford corporation according to which the Middletown corporation was organized; alleges that the Hartford corporation was insolvent; that the Middletown corporation was organized for the purpose of continuing the business of the Hartford corporation; that all the assets and property were transferred and the stock received in payment, as is hereinbefore stated; and then says that, "if the plan for continuing the business of the said Schuyler Manufacturing Company by the organization of the Schuyler Electric Company had not been carried out, the said Schuyler Electric Manufacturing Company would have been compelled to wind up its affairs either under a receiver or in insolvency, and in either case the assets of said corporation in the judgment of the directors would have yielded not much, if anything, more than enough to pay creditors, and the preferred stock would have been of little value, and the common stock of no value whatever"; and so the defendants aver that they did not act fraudulently towards the plaintiff, but in good faith, and for the best interests of the said corporation and all its stockholders. The state referee to whom the case was committed found the facts generally in accordance with the defendants' claims. The superior court accepted his report, found the facts to be as stated therein, and rendered judgment for the defendants to recover their costs. From that judgment the plaintiff appealed to this court.

Among the reasons of appeal are "that the acts of the stockholders and directors of the Schuyler Electric Manufacturing Company in authorizing the subscription to the stock of said Schuyler Electric Company were constructively fraudulent, ultra vires, and void as against a nonassenting stockholder; that the transfer of the assets of the said Schuyler Electric Manufacturing Company in the manner set forth was likewise constructively fraudulent, ultra vires, and void." These reasons of appeal present the two sides of the one transaction which is the subject of the plaintiff's complaint. Their full significance can only be appreciated when they are considered in connection with the purpose for which the property of the Hartford corporation was sold, and the stock of the Middletown corporation taken in payment, as set forth in the second defense, and found true by the referee. That purpose was to keep the Hartford corporation in nominal existence, and at the same time carry on its business through the agency of the Middletown corporation, upon the hope that the Hartford stock would become valuable by the successful operation of the Middletown company, and so, in effect, make the stockholders in the Hartford corporation stockholders in the Middletown one. A nominal corporation was to be maintained in Hartford; a real one, in Middletown. And although the entire property and assets of the Hartford corporation were thus invested in a new business, and its stockholders are to gain or lose as that business is successful or otherwise, that new business is carried on under a different charter, and under different rules, in forming which the stockholders of the Hartford company have no voice, and under the direction of officers unaccountable to them. The Hartford corporation is the beneficial owner of four-fifths of the Middletown stock, but it can have no control over its business. It cannot have any direct control, for it is not the legal owner of that stock; and there is nothing in the agreement between these corporations to show that it can have any control over the action of the trustees. A unanimous vote of the Hartford stockholders could not displace one of the trustees, and appoint another in his stead. If one of them should die, a like unanimous vote could not name his successor. This is the scope of the reasons of appeal. The plaintiff insists that this is an arrangement into which he cannot lawfully be taken against his will, and he says the superior court erred because its judgment forced him into this scheme, when he had all along protested against it. Is, then, the plaintiff correct when he says there is error in the judgment of the superior court? That is, is the agreement which the Schuyler Electric Manufacturing Company undertook to make with the Schuyler Electric Company ultra vires?

An act is ultra vires of a corporation when it is not within the power of the corporation to perform it. The charter of any corporation is its enabling act. The corporation is empowered to do those things only for which it is created, and to do them in the manner specified in the charter. This is especially the rule in the case of private trading or manufacturing corporations. "The charter is the full measure of the powers which the corporation possesses. It cannot lawfully exercise any others. In ordinary cases every corporation is just what the incorporating act has made it, and is capable of exercising its faculties only in the manner the act authorizes." Farrell v. Railroad Co., 61 Conn. 127, 23 Atl. 757; Inhabitants of Berlin v. Inhabitants of New Britain, 9 Conn. 180; Bank v. Earle, 13 Pet. 587 (Taney, C. J.) And, as charters of this kind are usually granted at the request of the corporators, they are construed most strongly against the corporation. Nothing is granted except what is given expressly or by fair implication. And no other powers can be implied except such as are necessary and proper to carry into effect the powers expressly granted. 2 Kent, Comm. 298; Insurance Co. v. Ely, 5 Conn. 560; Mechanics', etc., Ass'n v. Meriden Agency Co., 24 Conn. 159; Sumner v. Marcey, 3 Woodb. & M. 112, Fed. Cas. No. 13,600;

Digitized by Google

Franklin Co. v. Lewiston Sav. Bank, 68 Me. 43; Endl. Interp. St., § 354; Suth. St. Const. § 325.

It is not claimed that there is in the charter of the Hartford corporation any express authority to make such an agreement as it did make with the Middletown corporation. And if, upon the true construction of the charter of that corporation, it does not appear to have been the intention of the legislature, expressed or implied, that that corporation should have power to enter into such an agreement as the one now under consideration, then that agreement must be treated as illegal and wholly void. Riche v. Iron Co., L. R. 9 Exch. 262. And, as the rule of construction given in the cases we have cited is to be applied, then no such intention does appear. It is consistent, however, with these cases and the rule of construction they establish that a corporation may carry on its business in the way in which such a business is usually carried on. It would not be questioned in the case of a trading corporation that it should trade. A manufacturing corporation is, on the contrary, ordinarily expected to retain its assets in its own business, not to sell and invest in the stock of another. The legislature fixes the amount of the capital of a manufacturing corporation, because it is expected that the corporation will employ it all in its own business. The Hartford corporation or any other like corporation might sell its assets in part or in whole if it was done in the usual course of business. It might take the stock of another corporation in payment if it was done in the carrying on of its own business. But the agreement made with the Middletown corporation was not of this kind. That agreement was not the carrying on of its business, but the ending of its business. It put the Hartford corporation out of all business, and out of active existence, and undertook to embark and continue its entire capital in the business of the Middletown company. Nor do the cases cited deny that a corporation, under some circumstances, might expend its whole capital in the purchase of the stock of another corporation; as if such purchase was made for the purpose of selling the stock, and not permanently to hold it. This is what was said to be lawful in Hodges v. Screw Co., 1 R. I. 347. So, too, if such a purchase was made by a corporation in embarrassed circumstances, as the most advantageous way of closing its affairs, paying its debts, and settling with its stockholders, it would be legitimate. This was what was done, and decided to be proper, in Treadwell v. Manufacturing Co., 7 Gray, 405. This case was referred to in Evans v. Heating Co., 157 Mass. 37, 31 N. E. 698, by the court as approving it. It was held, however, that the sale in the latter case had received the implied sanction of the legislature. Easum v. Brewing Co., 51 Fed. 156, arose in Ohio. The defendant, a corporation organized under the laws of that state, had contracted to sell all its plant and assets to the plaintiff, and to take in payment the stock and bonds of another corporation to be organized to carry on the business. The corporation was solvent, and doing a profitable business. The suit was brought to recover damages of the defendants for not fulfilling that contract. It was held that the contract was ultra vires under the law of Ohio; that one corporation could not become the owner of the stock of another, unless authority to do so was conferred by its charter; citing Franklin Bank v. Commercial Bank, 36 Ohio St. 350, and Coppin v. Greenlees & Ransom Co., 38 Ohio St. 275. In discussing the case the court said: "An insolvent corporation, contemplating voluntary dissolution, by consent of its stockholders, might have the right to dispose of its property, and accept in whole or in part, for the purchase price thereof, stock in another corporation, this stock either to be sold, and the proceeds thereof distributed to its creditors, or to be apportioned in kind to such creditors or stockholders as the terms of dissolution might provide." In the case of Buford v. Packet Co., 3 Mo. App. 159, it was held that in ordinary cases the directors and the majority of the stockholders could not sell out the property of a corporation; but that the officers of a corporation which was on the eve of dissolution by operation of law might, in the exercise of a sound discretion, transfer its assets to another corporation, and take in payment the stock of such other corporation, and convert it into money for the purpose of liquidation. Miners' Ditch Co. v. Zellerback, 37 Cal. 543, was like this: The plaintiff was organized to dig and maintain ditches for the purpose of supplying water to the miners in Nevada county. It owned several ditches suitable and used for that purpose. The Eureka Lake Company was another corporation organized for a like purpose, and was doing business which was in competition with the business of the Miners' Company. These two companies, by an agreement which was intended to be only temporary, united their stock and property. The defendant was a mortgagee, and, as such, in possession of certain of the ditches of the plaintiff company. The suit was to recover the possession of the ditches, the complaint alleging that the agreement by which the two companies became united was ultra vires and void. It was held not to be so; and, whether it was so or not, the plaintiff could not, against its own mortgages, set up that the contract was illegal. Other cases bearing on this subject are People v. Ballard, 134 N. Y. 269, 32 N. E. 54; Id., 136 N. Y. 639, 32 N. E. 611; Boston & P. R. Corp. v. New York & N. E. R. Co., 13 R. I. 260; Holmes & Griggs Manuf'g Co. v. Holmes & Wessells Metal Co., 127 N. Y. 252, 27 N. E. 831; Pearson v. Railroad Corp.,

Digitized by Google

62 N. H. 537; Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475; Railroad Co. v. Collins, 40 Ga. 582; Marble Co. v. Harvey, 92 Tenn. 115, 20 S. W. 427; 25 Am. & Eng. Enc. Law, 798; Cook, Stocks & S. (3d Ed.) 64, 313; Mor. Corp. § 433.

It may be stated as a general rule, we think (subject, possibly, to some exceptions), that a corporation may not become a stockholder in another corporation for the purpose of holding the stock permanently, unless expressly authorized to do so. A solvent corporation may buy and sell the stock of another corporation if done in the usual course of business, and may become the owner of such stock if taken in payment for debts. But an insolvent corporation may take the stock of another corporation only for the purpose of closing up its business, to be divided in kind, or to be converted into money, and divided among its creditors and shareholders. The defendants, though not admitting the correctness of the rule as just stated, place the stress of their defense on other grounds. They say that the directors of the corporation and all the stockholders, except the plaintiff, consented to the agreement before it was entered into, and ratified the action taken pursuant to it after the action was had; and they say that the plaintiff is bound by such consent and ratification; that the plaintiff does not show that he is injured, or that he would be benefited if the agreement should be declared to be void; that, in fact, the action taken is advantageous to the plaintiff, and its defeat would be to the injury of all the other stockholders. And they also say that the plaintiff, by his own laches, is debarred of all right to have the agreement disturbed. These considerations are urged with great force and ability, and are entitled to careful examination. It is true that ultra vires is a doctrine which has not at all times received from the courts a perfectly consistent application. An act done or a contract entered into by a corporation may be alleged to be ultra vires of the corporation. The objection may come from the state, from a dissenting stockholder, or from the party with whom the contract is made; and the courts often give a different meaning to the term according to the source whence the objection comes. An act or a contract may be ultra vires if the state objects when it would not be so held if the objection came from a stockholder or from a contracting party. In this case we are dealing with this doctrine only as it may be invoked by a nonassenting stockholder. And this is to be determined by the obligation into which the stockholder has entered by becoming a member of the corporation.

A leading and perhaps the earliest case in which the reciprocal obligations of a corporation and its stockholders are discussed is Livingston v. Lynch, 4 Johns. Ch. 573, decided in 1820 by Chancellor Kent. He held that the charter of a corporation was a contract between the corporation and its stockholders, and that neither the directors nor a majority of the members could bind a minority without their assent in any matter not expressly or impliedly authorized by the charter. The case of Railroad Co. v. Croswell, 5 Hill, 385, is to the same effect. These cases have been followed by very many others down to the present time. Mor. Corp. § 1047; Cook, Stocks & S. § 666; and the cases cited under each of these sections. Natusch v. Irving, 2 Coop. t. Cott. 358, is an English case, which held exactly to the same results. This case was decided by Lord Eldon in 1824. Other English cases are Simpson v. Hotel Co., 8 H. L. Cas. 712; Pickering v. Stephenson, L. R. 14 Eq. 322; Lyde v. Railroad Co., 36 Beav. 16. It seems to be the settled law of America and England that any act or proposed act of a corporation, or of the directors, or of a majority of the stockholders, which is not within the express or implied power of the charter of incorporation,—in other words, any ultra vires act,—is a breach of the contract between the corporation and each of the stockholders, and that consequently any one or more of the stockholders may object thereto, and compel the corporation to observe the terms of the contract set forth in the charter. Therefore, it results that neither the directors nor a majority of the stockholders can sell the corporate property against the dissent of any stockholder. This is entirely clear in the case of a solvent corporation. Abbot v. Rubber Co., 33 Barb. 578; March v. Railroad Co., 43 N. H. 523; Lauman v. Railroad Co., 30 Pa. St. 42; Mor. Corp. §§ 521, 274, 513. And although the corporation is actually insolvent, if the purpose of the sale is not the bona fide winding up of its business, but is the continuance of the business in another corporation, the rule is not changed. A dissenting stockholder may interfere and prevent the sale. Kean v. Johnson, 9 N. J. Eq. 401; Boston & P. R. Corp. v. New York & N. E. R. Co., 13 R. I. 260. The reasons are well stated by Chief Justice Lowrie in Lauman v. Railroad Co., supra. In that case the defendant company had undertaken to consolidate with another railroad company, to transfer all its property to, and take in payment the stock of, the other corporation. The plaintiff was a dissenting stockholder. Judge Lowrie said: "The majority of the members of a corporation cannot be authorized to divest the interest of a dissenting stockholder by a transfer of the whole of its property to another company, without first giving security for the interest of such dissenting stockholder. * * * The contract of consolidation is an act of dissolution in form and substance, and the corporation cannot, in the act of dissolution, dispose of the rights of its stockholders. The act of dissolution, like the act of as-

Digitized by Google

sociation, is not a corporate act, but an act of the members of the corporation. They may commit to their officers the business of effecting it in its details, but they are not required to do so by the terms of their association, and in effecting such a purpose the officers would be rather trustees of the members than corporate functionaries. Thus, it follows quite obviously that no corporate act can settle the terms of the dissolution or distribute the effects among the members, and that the company cannot decide what the plaintiff shall take for his interest." Also, Black v. Canal Co., 22 N. J. Eq. 415; Mason v. Mining Co., 133 U. S. 50, 10 Sup. Ct. 224; Beman v. Rufford, 1 Sim. (N. S.) 564.

The state referee finds that "the plaintiff failed to show that he was in any way injured by the transaction of which he complains; nor does it appear that he will be in any way benefited if the relief is granted him." It does not seem to this court that the question of the profitableness or the unprofitableness of the transaction affects at all the plaintiff's right. In the case of Beman v. Rufford, last cited, the vice chancellor, Baron Cranworth, said: "The bill is filed by the shareholders of the Oxford, etc., R. R. Co., and the principle on which they are entitled to file it on behalf of themselves and all other shareholders is that this court will not allow any of them to say that they are not interested in preventing the law of their company from being violated. It will not allow any of them to speculate as to whether it would be more advantageous to do something which their charter does not authorize to be done; and therefore it is that a very small number, or, indeed, one of the shareholders, may file a bill on behalf of the whole body, although at a meeting a large majority of the other shareholders may have sanctioned that course of proceeding which the bill complains of. The shareholders so filing this bill say that the company, with the directors of it, have entered into a contract different from that which was contemplated by the charter, and so to apply the funds, which the plaintiffs say are their funds, in a mode in which they were never authorized to be applied; and therefore they seek to restrain them." That case was brought by the plaintiffs, three shareholders of the Oxford, etc., Railroad Company, against that company, its directors, etc., to prevent a certain agreement made with another railroad company from being carried into effect. And an injunction was granted. In the case of Railroad Co. v. Collins, 40 Ga. 582, the court, in rendering judgment, said: "We do not think the profitableness of this contract to the stockholders of the Central R. R. Co. has anything to do with the matter. These stockholders have a right, at their pleasure, to stand on their contract. If the charters do not give to these companies the right to go into this new enterprise, any one stockholder has the right to object. He is not to be forced into an enterprise not included in the charter. That it will be to his interest is no excuse; that is for him to judge. By becoming a stockholder, he has contracted that a majority of the stockholders shall manage the affairs of the company within its proper sphere as a corporation, but no further; and any attempt to use the funds or pledge the credit of the company not within the legitimate scope of the charter is a violation of the contract which the stockholders have made with each other, and of the rights—contract rights—of any stockholder who chooses to say, 'I am not willing.' It may be that it will be to his advantage, but he may not think so, and he has a legal right to insist upon it that the company shall keep within the powers granted to it by its charter." Stevens v. Railroad Co., 29 Vt. 545; Hoole v. Railroad Co., 3 Ch. App. 262.

The claim that the plaintiff is chargeable with laches, we think, is fully disposed of by the finding. The meeting of the directors of the Hartford corporation at which the agreement was made to transfer all the assets to the Middletown corporation was held on the 17th day of October, 1887. By some oversight, notice of this meeting was not sent to the plaintiff. The omission was discovered, and a notice was sent by telegram to New York, directed to the plaintiff's place of business, which he received on the 17th, but too late to attend the meeting. He telegraphed in reply, protesting against the meeting, and denying the right of the directors to hold the meeting. The finding then proceeds: "Immediately upon learning that a sale of the assets of the Schuyler Electric Manufacturing Company had taken place, the plaintiff served upon said company and upon its directors a notice requesting that suit be instituted by said corporation for the purpose of setting aside said contract, agreement, and sale, and for other purposes set forth in said notice. Said directors refused to cause the institution of said proceedings; and on the 7th day of March, 1888, the plaintiff caused to be presented to the stockholders of said company, at their annual meeting, holden on said day (and at which meeting the stockholders ratified the said agreement), a written notice and demand that a suit be brought to set aside said contract. Said stockholders neglected and refused to take the action requested by said notice, and thereupon, as soon as possible, the plaintiff instituted the present suit. I find that the failure to give seasonable notice to the plaintiff was not intentional, but accidental." Laches is defined as "inexcusable delay in asserting a right." One who acts as soon as possible after learning of his right, or that his right has been invaded, cannot be charged with delay. We

Digitized by Google

think there is error in the judgment of the superior court, and it is set aside. The case is remanded, to be proceeded with according to law. The other judges concurred, except PRENTICE, J., who dissented.

BOOMHOWER v. BABBITT'S ADM'RS.

(Supreme Court of Vermont. Franklin. March 2, 1895.)

CONSTRUCTION OF WILL—GIFT OF ANNUITY—PROVISION FOR PAYMENT — FAILURE OF SUM SET APART—RIGHT OF RECOURSE AGAINST ESTATE.

1. Testator bequeathed to his daughter an annuity of $360, and, that the payment of the annuity might be "effectually secured," directed the investment of a sum which, at the legal rate of interest, would produce the amount of the annuity, and provided that this income should be used in the payment of the annuity. *Held*, that she was entitled to a yearly sum of $360, to be made good out of the general estate upon a failure of this fund.

2. The executor under a will bequeathing an annuity, and directing the investment of a sum which would bring the amount of the annuity, invested the sum required, and rendered an account to the probate court, in which this amount was charged as "the legacy to be invested." "as provided by the will." The probate court subsequently allowed an account of the executors, based upon the balance of this prior account. *Held*, that the allowance of this account did not determine that the interest from this sum alone was to be used for payment of the annuity, so that, upon its failure, the general estate would not be liable therefor.

Exceptions from Franklin county court; Rowell, Judge.

Petition by Sarah B. Boomhower against Joshua C. Babbitt's administrators to recover an annuity under the will of defendants' testator. Judgment was rendered affirming a decree of the probate court for plaintiff, and defendants bring exceptions. Affirmed.

The defendants were the administrators of the estate of J. C. Babbitt, and the question was whether, under the terms of his will, his daughter, the petitioner, was entitled to the full sum of $360 annually, or to the income of a fund of $6,000, less taxes and the expense of caring for the same, which the executors had set apart according to the will. The probate court decreed her the $360 annually. The provisions of the will in controversy were as follows: "I give, grant, and bequeath to my daughter, Sarah Babbitt, during her life, the annuity and sum yearly of three hundred and sixty dollars, to be paid to her and for her from time to time, during each year, as may be needed and required, and to be paid by my said executors. And to the end that the payments of the annuities or yearly payments aforesaid may be effectually secured, and the same duly paid, it is my will that eleven thousand dollars ($11,000) of my estate shall not be received and divided until the said annuities or yearly payments be completed and cease to become due; but the same sum of eleven thousand dollars of my estate shall, until the same annuities cease to become due, rest in the hands and be under the management and investment of my executors, hereinafter appointed to be placed and kept at interest on what my said executors shall judge to be good real-estate security; and the interest or income therefrom to be applied and used in payment of the above-mentioned annuities for the benefit of my said wife, Cordelia E. Babbitt, and daughter, Sarah Babbitt. But at the death of my said wife, Cordelia, or daughter, Sarah, it is my will that so much of the said eleven thousand dollars resting in the hands of my executors as shall not be necessary to secure the payments of the remaining annuity to be distributed or divided as hereinafter provided. I also give authority to my executors hereinafter named and appointed, in case the aforesaid provisions made for my said wife, Cordelia, and daughter, Sarah, are not sufficient to furnish them a suitable and comfortable support, to take from the aforesaid eleven thousand dollars such sums as may be necessary and requisite to furnish them with all the necessaries and comforts during life; and the necessity of this last provision I leave to the judgment of my executors."

H. A. Burt, for plaintiff. Hogan & Royce, for defendants.

MUNSON, J. The will of Joshua C. Babbitt contains certain bequests to his wife, among which is an "annuity and sum yearly" of $300, to be paid her during life by his executors. The testator also gives to his daughter, Sarah, for life, an "annuity and sum yearly" of $360, to be paid her by his executors from time to time, during each year, as it may be needed. The will further provides, to the end that these annuities may be effectually secured and duly paid, that $11,000 of the estate shall remain undivided in the hands of the executors, and be kept by them on good real-estate security, and that the income therefrom shall be used in the payment of said annuities. It is further provided that, upon the death of either annuitant, so much of the $11,000 as shall not be necessary to secure the payment of the remaining annuity shall be distributed in accordance with subsequent provisions in the will. The testator also authorizes his executors whenever, in their judgment, these provisions are insufficient for the comfortable support of his wife and daughter, to take from this $11,000 such sums as may be necessary to give them the required support. The widow waived the provisions of the will, and received her dower and homestead and an assignment of personal property. After this, the executors set apart a fund of $6,000 to provide an annual income of $360 for the daughter. About the time this appropriation was made, the executors delivered to the judge of probate an account in which the sum of $6,000 was charged as a "legacy to be invested for Sarah Babbitt, as provided by the will." Three years later, the probate court allowed, on notice to all persons

Digitized by Google

interested, an account based upon the balance ascertained by such prior account.

This action of the probate court did not constitute an adjudication of the questions now raised. It was, at most, no more than an approval of the creation of a separate fund of $6,000. The setting apart of that sum for investment was in harmony with a distinct requirement of the will, and did not involve a determination of the exact amount the beneficiary was to receive. The questions whether the entire income of the sum set apart should be paid to the beneficiary, or whether she should in all circumstances be confined to the income received, were not necessarily raised by a consideration of the accounts. No such matter was in fact brought to the attention of the court, or passed upon by it. So the claims made by this petition remained open questions.

The testator gives the petitioner a yearly payment of $360, and directs the investment of an amount which, at the legal rate of interest, will produce that sum, and provides that the income of this fund shall be used in the payment of such bequest. The petitioner claims that this is a gift of an annuity, and that she is entitled to the payment of $360 yearly, whatever may be the expenses or receipts of the fund separately invested. The defendants insist that it is a gift of the income of $6,000, to be set apart for the petitioner's benefit, and that, when this sum is separated from the body of the estate, she is entitled only to the income of the fund so created, less the expenses of its management, and subject to such reduction as may result from a depreciation of the securities without their fault. While the provisions of the will are not entirely clear and consistent, we think it satisfactorily appears from the instrument as a whole that it was the intention of the testator to give the petitioner the full yearly sum of $360, without regard to the fate of the fund appropriated to its payment. The terms employed by the testator in directing the creation of a special fund are not consistent with their having any effect in limitation of the gift. The fund is set apart to the end that the annuity may be effectually secured and duly paid. The language points to the security and completeness of the yearly payments, rather than to the relief of the body of the estate from future contingencies. The gift falls within that class of legacies called "demonstrative," in which the sum given is to be made good out of the general estate, upon a failure of the particular fund which is primarily holden for its satisfaction. See Paget v. Huish, 1 Hem. & M. 663.

The decisions in the Navy Five Per Cent Cases in England throw light upon this subject. In those cases certain yearly sums had been given by will, and various provisions made for their payment from dividends on the navy 5 per cent annuities. By the subsequent conversion of these 5 per cents into 4 per cents, the funds became insufficient to produce the yearly sums; and, in a series of suits occasioned by this deficiency, the right of the annuitant to have the fund made good from the residue of the state was considered. In Davies v. Wattier, 1 Sim. & S. 463, the testator gave his wife £200 a year, to be paid by his executors out of his personal estate not specifically bequeathed. A decree was made that the executors transfer £4,000 of navy 5 per cent annuities and certain other stocks to a trustee, and that the annuity be paid out of the dividends accruing therefrom. The fund thus appropriated having become insufficient, it was held that, as the annuity was a charge upon the whole of the residue, the annuitant was entitled to have the deficiency made good out of the other funds. In May v. Bennett, 1 Russ. 370, the testator directed his executors to lay out in any government security they pleased as much money as would produce a certain annual interest for his wife. The executors purchased navy 5 per cent annuities to the required amount. Here it was considered that it was the testator's intention to secure to his widow a certain yearly sum, and not merely to require the setting apart of as much money as would produce that sum at the moment of appropriation, and that the difference should be made up from the general estate. In Kendall v. Russell, 3 Sim. 424 (a case relied upon by the defendants), the testator gave certain yearly sums, to issue from the dividends of a quantity of stock in the navy 5 per cent annuities sufficient to produce such sums, which stock was to be appropriated and invested in the names of his executors for this purpose. It was held that this was a gift of so much in the navy 5 per cents as would produce the annuity; that it was the intention of the testator that the appropriation of the stock designated should relieve the residue of his estate; and that the annuitants were not entitled to have the deficiency made up from the residue. It will be noticed that in Kendall v. Russell the testator designated the stock to be set apart; and the opinion in that case distinguishes it from the two prior cases by this feature of the bequest. The case may be more particularly distinguished from the one at bar by the different terms employed in making the gift and providing the fund. In that case the yearly payments were given as sums to be derived from the stock designated. In this case there is an independent gift of the yearly sums, followed by a provision in regard to their payment. There the fund was set apart to produce the annuity. Here it is set apart to better secure the payment of the annuity. The expressions most strongly indicative of the testator's intention are so dissimilar in the two cases that the disposition of the one cited cannot be regarded as at variance with the conclusion reached in this.

The bequest being an annuity, and not the income of a certain sum, the petitioner was entitled to a completed payment of $360 at the end of one year from the testator's death.

Digitized by Google

3 Redf. Wills, 184. The petition raises no question as to whether the sums in arrear should have been paid at intervals within the year, and the petitioner can have interest on such arrearages only from the end of the year. Nor does the case present any ground upon which it can now be ordered that the annuity shall hereafter be paid in quarterly installments, as requested in the petitioner's brief. In the situation of the estate at the time of the decree appealed from, as shown by the report of the referee and the papers referred to, it was not error to order that the amount due be paid by the administrators out of any funds or property of the testator in their hands as such administrators. Judgment affirmed, and order certified.

STATE v. CAMLEY.

(Supreme Court of Vermont. Washington. Jan. 29, 1895.)

PERJURY — SUFFICIENCY OF INDICTMENT — EVIDENCE—TESTIMONY ON FORMER TRIAL.

1. Under Acts 1890, No. 29, providing that an indictment for perjury is sufficient if the respondent is informed with reasonable certainty of the cause and nature of the accusation against him, an allegation in an indictment that defendant committed "perjury" sufficiently avers that defendant was legally sworn, and that he willfully testified falsely.

2. On a prosecution for perjury in a previous case the evidence in such case may be read by the court reporter who took it, in order to show the materiality of defendant's testimony.

3. In such a case the court reporter is subject to cross-examination.

Exceptions from Washington county court; Tyler, Judge.

Edwin J. Camley was convicted of perjury, and excepts. Exceptions overruled.

The indictment was as follows: "Be it remembered, that at a county court begun and holden at Montpelier, within and for the county of Washington, on the second Tuesday of September, in the year of our Lord 1893, the grand jurors within and for the body of the county of Washington aforesaid, now here in court duly impaneled and sworn, upon their oath present that Edwin J. Camley, otherwise called Ed. Camley, of Duxbury, in the county of Washington, aforesaid, on the 18th day of October, in the year of our Lord 1892, appeared and testified as a witness in a prosecution in which the state of Vermont and W. Henry Pixley were parties, the said prosecution then and there being heard and tried before the county court within and for the county of Washington, aforesaid, at a term thereof begun and held at Montpelier, aforesaid, on the second Tuesday of September, in the year of our Lord 1892, the said county court then and there being a tribunal of competent jurisdiction; and that the said Edwin J. Camley, otherwise called Ed. Camley, then and there before said county court being sworn to tell the whole truth, and nothing but the truth, relative to the said prosecution then and there being tried, then and there committed the crime of perjury, and then and there falsely testified in answer to interrogatories substantially as follows: 'Question. Whereabouts do you live, and did you live last April? Answer. In Stowe. Q. With your brother Will Camley? A. Yes, sir.' [Here is set forth in the form of questions and answers the stenographic transcript of the testimony.] Which said testimony was material to the issue then and there pending in said prosecution; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state."

Geo. W. Wing and W. A. Lord, for respondent. Zed S. Stanton, State's Atty., for the State.

START, J. This cause comes to this court on exceptions taken by the respondent to the overruling of his demurrer to the indictment, and to the admission of certain evidence. The indictment is drawn in compliance with No. 29 of the Acts of 1890, entitled "An act to simplify indictments for perjury," and is sufficient, provided the respondent is informed with reasonable certainty of the cause and nature of the accusation against him. By the indictment the respondent is informed that on the 18th day of October, 1892, he appeared as a witness in a proceeding in which the state of Vermont and W. Henry Pixley were parties, then and there being heard before a tribunal of competent jurisdiction; that he then and there committed the crime of perjury by testifying, in answer to interrogatories, in substance as is set forth in the indictment; and that his testimony was material to the issue then and there pending. By these allegations the respondent is informed of the cause and nature of the accusation against him. He is informed that he committed the crime of perjury by giving certain testimony set forth in the indictment, before a tribunal of competent jurisdiction, at a certain time and place, in a specified cause, and that his testimony was material to an issue then and there being tried. This is all that is required by the act of 1890 or the constitution. Under this act it was not necessary to allege that the respondent was legally sworn, that his testimony was false, or that he willfully testified falsely. These are included in the allegation that he committed the crime of perjury by giving the testimony set forth in the indictment. The word "perjury" has, by the common law, a well-defined legal meaning, and the respondent is charged with knowledge of its meaning, and, when he is informed that he is charged with the commission of the crime of perjury by giving certain testimony, he is sufficiently informed that it is claimed that he was lawfully sworn, that his testimony was false, and that he willfully and corruptly testified falsely. In State v. Corson,

Digitized by Google

59 Me. 137, under a statute like our own, it is held that an indictment like the one under consideration is sufficient. It is claimed that the crime of perjury is defined by the Maine statute; that in this state we have no statute defining the crime; and that, for this reason, the case under consideration should be distinguished from the case above cited. Perjury, as defined by the Maine statute, is substantially the same as defined by the common law. There being no statute in this state defining it, we are referred to the common law for its meaning. Rev. Laws, § 689. The common-law definition is as binding as it would be if it were a legislative enactment. When the act of 1890 was passed, the common-law definition of the crime of perjury was its definition in this state, and the legislature had the power to provide a form of indictment without further defining its meaning.

For the purpose of showing the materiality of the respondent's testimony upon the issues in the case in which it was claimed that he gave false testimony, the court, subject to the respondent's exception, allowed the evidence taken on that trial to be read by the court reporter who took the same. It was permissible to show what the respondent's testimony was in the cause in which it was claimed he testified falsely, and it does not appear that more than this was done. The testimony is not referred to, and there is nothing before us from which we can determine what evidence was read to the jury. Only the respondent's evidence may have been read. We cannot presume that other evidence was read. The testimony of the respondent on the former trial could be shown, as well by the court reporter as by any other person. He heard the testimony, and had taken it down, and it was not error to allow him to read from his minutes. The respondent was confronted by a witness who was narrating his testimony given on the former trial. He had a right to cross-examine the witness, and it does not appear that the right was denied. Exceptions not sustained; judgment on the verdict; sentence passed, and execution thereof ordered.

FOSTER'S EX'X v. STONE et al.

Supreme Court of Vermont. Franklin. Feb. 16, 1895.)

SETTLEMENT OF ADMINISTRATOR'S ACCOUNT—CONCLUSIVENESS ON DISTRIBUTEES — MISAPPROPRIATION OF FUNDS — EFFECT — COMPENSATION FOR SERVICES.

1. Where the parties interested in a decedent's estate knew that the special administrator allowed a set-off against an account due intestate, and approved of the adjustment when such administrator's account was settled, they cannot, after his death, deny his power to allow the set-off, and charge the same to his estate.

2. Where a lump sum was allowed to and taken by an administrator for services rendered mainly in regard to funds which he appropriated, and no part of the services was shown to be legitimate, the whole amount must be disallowed and charged against the administrator as an appropriation.

3. The fact that during the latter part of his administration an administrator appropriated funds of the estate is no ground for disallowing him compensation for services rendered during his faithful administration, and refusing him reimbursement for attorney's fees paid during that time, and for fees paid for storing goods of the estate during his entire term of office.

4. Where the court found that attorney's fees for services relating mainly to funds appropriated by the administrator were necessary for a proper accounting, the account being intricate; that the necessity was not due to the administrator's delay in settling the estate, nor to his appropriation of the funds; and that the charges were reasonable,—the item should be allowed.

5. Where, upon the death of an administrator, who unreasonably delayed settling the estate, and appropriated funds thereof, his executrix finished his accounting, and the court found that attorney's fees for services rendered her therein were reasonable, and that the services were necessary to her in the accounting, the fees should be allowed against intestate's estate.

6. An administrator who appropriated funds of the estate is chargeable therewith with compound annual interest from the several dates of the appropriations.

Exceptions from Franklin county court; Taft, Judge.

In the matter of the estate of George W. Foster, deceased. On appeal from the probate court there was a judgment rendered on the report of a commissioner settling the account of George B. Foster, administrator, since deceased; and George B. Foster's executrix and H. M. Stone, administrator de bonis non, and others, except. Modified.

Wilson & Hall and F. W. McGettrick, for plaintiff. Hogan & Royce, J. Noble Hayes, and H. A. Burt, for defendants.

TYLER, J. The commissioner reports that George W. Foster died November 1, 1885; that on or about November 15th George B. Foster was appointed special administrator of his estate, and on the 30th he was appointed administrator. George W. had transacted business with two firms of brokers in New York City, one of which at once paid to the special administrator the amount due the estate, $4,540.79. The other firm refused to pay over unless one Davis, who was an occupant of its office, and claimed to have a demand against the estate, was settled with and paid. Davis claimed to have rendered services for George W. in taking charge of his account with the firm, and placing orders with it for the purchase and sale of stocks. Mr. Cross, who was counsel for the special administrator and for Mrs. Foster, widow of the deceased, examined this claim, and the evidence in support of it, and was of the opinion that it had merit, and should be adjusted, and under his advice it was submitted to the arbitrament and award of two men, who were

Digitized by Google

respectively chosen by the special administrator and Davis, and who awarded Davis $2,406 of his claim. Two of the heirs in this state approved of the submission, and advised the payment of the award. The brokers paid it by direction of the special administrator, and then paid him the remainder in their hands, $6,836.50. It is found that the special administrator and Mr. Cross acted in good faith, and did what they believed was for the interest of the estate in making the settlement. The account of the said George B. was presented to the probate court December 1, 1885, and was considered; all the heirs of the estate being present or represented. Mrs. Foster was present with her counsel. The Davis claim, and the manner of its adjustment, were discussed and explained. No objection was made to the allowance and approval of the account as presented, and it was allowed by the court, "with the consent or acquiescence of all interested," and no appeal was taken. The defendants claimed that the sum paid to Davis should be charged to the account of the special administrator. The commissioner found that it should not be so charged, unless it was held by the court to be chargeable as matter of law. It is true, as argued by the defendants' counsel, that it was no part of the duty of the special administrator to pay or compound the debts of the deceased. His duty, as defined by the statute, was to collect and preserve the assets of the estate for the general administrator when he should be appointed, though the statute authorizes a special administrator to commence and maintain suits for the collection of debts. But though he assumed to act outside of the scope of his duty, and to settle a claim in another jurisdiction, it appears that he acted with the knowledge of the heirs, and that the adjustment of the claim had the approval of all the parties interested in the estate when he settled his special administration account. The $2,406 had never come into his hands, and, if the heirs had desired to stand upon the ground that he had not strict legal authority to make the settlement, they might then have repudiated it, and insisted on the collection of the full amount due from the brokers. Their acquiescence in the settlement, and their silence until after the special administrator's decease, should estop them from asserting this claim. Williams, Ex'rs, p. 1800, says that though, generally speaking, an executor compounding or releasing a debt must answer for the same, yet, if it appears to have been for the benefit of the trust estate, it is an excuse. Other authorities cited on the defendants' brief are to the effect that the release or compromise of a claim by an administrator will not be upheld if it appears to have been prejudicial to the interests of an estate, or not to have been beneficial to it. But here it must be assumed that all the persons interested adjudged that the settlement was beneficial, and it should be treated as if they themselves had effected it.

The commissioner reports that for the year ending December 1, 1886, the administrator was chargeable with receipts from the special administrator and from other sources to the amount of $20,009.51; that his disbursements were $3,410.32, leaving in his hands $16,599.19. August 10, 1887, the administrator filed an account in the probate court, in which he made a charge of $900 for his services to that date. August 27th he distributed to the heirs about $20,000, and on December 1, 1887, after the payment of certain debts and expenses, he had remaining in his hands $2,375.13. Thence, until July 24, 1888, he kept the funds of the estate intact, and performed all his duties with fidelity. The commissioner finds that $900 was a fair, reasonable, and legal charge, as of that date, for services rendered as administrator down to that time." July 24, 1888, he appropriated to his own use $900 of the funds of the estate, and thereafter, at different times prior to his death, on July 28, 1893, he had appropriated in all the sum of $5,429.87, which included the balance of $2,375.13 in his hands December 1, 1887, and nearly all his net receipts after that date. Some assets that had not been converted into money, and about $300 found on deposit in banks, were taken possession of by the administrator de bonis non. On application to the probate court the administrator was cited to render his account, and in August, 1892, he filed an account supplemental to that rendered in August, 1887, and on December 2, 1892, he filed a further supplemental account. The commissioner found that the estate should have been closed by November 30, 1890, that delay after that date was through the fault of the administrator, and that compensation thereafter should be denied him. The administrator charged $12.50 a month for his services from August 10, 1887, till the filing of his final account. The commissioner allowed the charge per month to November 30, 1890, making $495.83, and $65 for storing the goods of the estate to that date. The administrator charged in his first account $25 amount paid as counsel fees, and in his supplemental account further sums amounting to $323.93, all of which the commissioner found were reasonable, and for necessary legal services about the estate, and, if proper to find as a matter of fact, that the administrator was entitled to have them allowed. The defendants conceded that the charges were reasonable and proper for the services rendered. It is found that after George B. Foster's decease, his executrix, Frances E. Foster, became a party in the accounting before the commissioner; that counsel who had acted for the said George B. then acted for the executrix, and rendered services for which they charged $162, which the commissioner found

Digitized by Google

reasonable, and for necessary services. The defendants excepted to the allowance by the commissioner of the $900 and $495.83 for the administrator's services, the $65 for storage of goods of the estate, all the items for counsel fees and the $2,406 for the settlement of the Davis claim. The county court held that the items for the administrator's services and all the items paid counsel for services rendered in the hearings and otherwise in the settlement of the administrator's account in the probate court should be disallowed, but allowed counsel fees for services rendered in collecting the assets, the item for storage, and the Davis claim. Both parties excepted to the judgment. The defendants claim that none of the charges for services and counsel fees should be allowed because of the appropriation of funds by the administrator as above stated.

As most of the assets had been collected and distributed by the administrator prior to December 1, 1887, it seems from the report that his services, for which $495.83 was allowed, were mainly about the funds which he appropriated. As the charge is in gross, and as it does not appear that any part of it was legitimate, it must be disallowed. Farwell v. Steen, 46 Vt. 678; In re Hodges' Estate, 66 Vt. 70, 28 Atl. 663. The charge of $900 for services should be allowed. The rule that only the faithful trustee is entitled to compensation applied to this administrator during this period. The funds were kept intact, and no claim is made that the services were not beneficial, and the charges reasonable. The items of $32 and $200 for attorneys' fees stand upon the same ground. It is within the rule given in Williams on Executors that an executor or administrator is entitled to be allowed all reasonable expenses which have been incurred in the conduct of his office, except those which arise from his own fault. Shaw v. Bates, 53 Vt. 660. In Jennison v. Hapgood, 10 Pick. 77, it was alleged that the executor had come into possession of assets for which he had never accounted, that his accounts rendered contained gross errors, and that fraud had been practiced by him in stating and settling his accounts in the probate court. Upon an issue joined the jury found that the executor's accounts were fraudulent, and that the several decrees of the probate court allowing them "were obtained by the false affirmations and oaths of the executor, and not honestly and in good faith." The supreme court said: "The appellants contend that no compensation ought to be allowed, because the appellee has been found guilty of unfaithful administration. This consideration, however, ought not to be blended with the claim for compensation, so far as the services of the appellee have been beneficial to the heirs." In the notes to Williams, Ex'rs, p. 1853, the same rule is stated, with the qualification that compensation will be denied where the administrator's willful default or gross negligence has occasioned loss to the estate. This is illustrated in Re Brennan's Estate, 65 Pa. St. 16, where the administrator wrongfully gave up a promissory note of the value of $500, so it was lost to the estate. His commission of $484 was denied him. In 2 Woerner, Adm'n, § 526, the rule is laid down that compensation must be refused if the administrator has been guilty of willful default or gross negligence in the management of the estate, whereby it has suffered loss. This is deduced from the cases cited by the author in the notes, and applies where there has been a general mismanagement of the estate. In the same section he says that to the extent to which the estate has been properly administered, and on the amounts which the administrator or his sureties pay to make up for the losses by devastavit or maladministration, the administrator should be allowed such commission as the statute provides, when the statute fixes the compensation, and cites Jennison v. Hapgood, among other cases. The subsequent items for attorneys' fees, amounting to $323.93, were for services rendered to the administrator from December 1, 1892, to July 28, 1893, and should be disallowed, but for the finding that the charges were reasonable, that the services rendered to the administrator were necessary for a proper accounting, and that the necessity was not created by the administrator's delay in settling the estate, nor by his appropriation of the funds. "The accounting related to a wide variety of matters of considerable intricacy, to transactions with reference to property in different parts of the Western states, to the history of different suits and causes of litigation, and to the transactions with reference to the Davis claim." Upon the finding this item should be allowed. The report lacks this express finding in respect to the legal services rendered to George B. Foster's executrix, but it is found that the charges were reasonable, "and that the services rendered were necessary to the executrix in the accounting." It was her duty to finish the accounting, and the $162 should be allowed. The commissioner found that the charge of $15 a year for the storage of goods was reasonable and proper. It had no connection with the administrator's wrongdoing, and should be allowed. The $900 appropriated July 24, 1888, was the amount found due the administrator for services to August, 1887.

Hill on Trustees (page 522 et seq.) says that the court will endeavor, as far as possible, to replace the parties in the same situation as they would have been if no breach of trust had been committed. Where the property has been improperly disposed of, and can be followed in specie, the trustee will be compelled to reconvey it for the purposes of the trust. In taking the account against the trustee, he will be charged with the amount of principal and income which might have been received from the trust es-

Digitized by Google

tate if no breach of trust had been committed. Where a strong case of corrupt or improper conduct is established against the trustee, or if he has acted in direct contravention of an express trust to accumulate, he will be charged, in addition to the usual rate of interest, with annual or half-yearly rests, in the nature of compound interest. In Farwell v. Steen the guardian received some securities bearing annual interest and some simple interest, converted them into money, mingled it with his own, and invested the commingled funds where he received more than 6 per cent. interest. Held, that he was chargeable with annual interest on the whole trust fund, and was disallowed compensation. Shaw v. Bates. The subject of interest on appropriated funds is well discussed by Walker, J., in Perkins' Estate v. Hollister, 59 Vt. 348, 7 Atl. 605. In McCloskey v. Gleason, 56 Vt. 264, the court said: "Instead of relaxing the rule charging the trustee who so intermingles the trust estate with his own that he cannot tell what property belong to the estate, nor what gains he is making thereon, with the highest legal rate of interest, and allowing him nothing for his services, it should be made more stringent." Schouler, Ex'rs, § 538. Upon the facts disclosed there is no occasion to apply a different rule in the present case from the one adopted by this court in the cases above cited. The general debit balance when George B. Foster died, July 28, 1893, was $5,722.46. Deducting $292.66, the amount found in banks, leaves $5,429.80, which is the aggregate of the appropriations. The several sums appropriated, except the $900, are chargeable to George B. Foster's estate, with annual interest from their dates to the first day of this term. As the account is stated, the item of $495.83 was an appropriation, and must be charged at the same rate of interest, making in all $6,199.54, from which should be deducted $162, allowed the executrix for counsel fees, and interest. Judgment reversed, and judgment that the plaintiff account for $6,018.10, to be certified to the probate court.

STATE v. PERRIGO.

(Supreme Court of Vermont. Chittenden. Feb. 21, 1895.)

CRIMINAL LAW—NEW TRIAL—PRESUMPTIONS—ASSAULT WITH INTENT TO KILL.

1. Unless the record shows the contrary, it will be presumed that a motion for a new trial was properly overruled.

2. A request to instruct as to respondent's right to shoot as long as he thought he was in danger of being shot is properly refused when the evidence shows there was no reasonable ground for him to fear being shot.

Exceptions from Chittenden county court; Thompson, Judge.

Indictment of Wibur E. Perrigo for an assault with intent to kill. Verdict, guilty. Judgment and sentence on verdict. The respondent excepts. Affirmed.

The respondent was indicted for shooting at one McElliott while McElliott and another police officer were attempting to arrest him. He claimed that the attempted arrest was unlawful, for the reason that the officer making it had no warrant, and asked the court to so instruct the jury. This the court declined to do, and the respondent excepted. The respondent also claimed that he was justified in making the assault for which he was indicted, and upon this subject requested the court to instruct the jury as follows: "That if, at the time Officer McKenzie took hold of the person of respondent, saying that he arrested him, respondent believed that Officer McElliott had drawn his revolver, with the purpose of assisting McKenzie in arresting respondent, and with the intent to shoot respondent if he resisted arrest, he was not obliged to retreat, or go to the wall, but had the right to shoot McElliott, and to continue to shoot him so long as McElliott continued to handle his revolver in a manner causing respondent to think that he intended to shoot respondent." This the court declined to do, and the respondent excepted.

R. E. Brown, State's Atty., and J. E. Cushman, for the State. Chas. T. Barney, for respondent.

ROSS, C. J. 1. It is not contended that there is, on the face of the indictment, any insufficiency which is reached by the respondent's motion in arrest of judgment and sentence. The respondent claims that his motion for a new trial ought to have been granted. The motion is unsupported by oath, affidavit, or deposition, and the county court has not placed on the record a statement of the facts which were found by it on the hearing upon this motion. Nor has it found that the statements embodied in the motion are true. Primarily, such motions are addressed to the judicial discretion of the county court. Its decision is not revisable, unless in passing upon it that court reserves a question of law for the consideration of this court. The record does not reserve any such question. It is to be presumed that the county court properly and legally overruled the motion until something on the record makes the contrary appear. The exceptions to overruling these motions are not sustained.

2. The charge in respect to the amount of force which the respondent might use in resisting his arrest, if unlawful, short of taking life, or assaulting with intent to kill, was satisfactory to the respondent, and was not excepted to. The respondent's counsel does not now claim, if the arrest were unlawful, that the respondent could justify the taking life, or an assault with intent to take life, unless Officer McElliott first made such an assault upon the respondent that he had reason to believe, and did believe, that his life

Digitized by Google

was endangered, or that he was in danger of grievous bodily harm, and honestly judged it necessary to draw his pistol and discharge it at McElliott to protect himself against such assault. This would be the law if the testimony tended to establish a state of facts which rendered it applicable. The arrest by Officer McKenzie was made by taking hold of the respondent, and saying, "I arrest you." The respondent knew that McKenzie and McElliott were officers, and had come to have him go with them to the office of the chief of police, where a charge of petit larceny had been lodged against him. All the evidence—there was no conflict in it—tended to show that the respondent, when told he was arrested, instantly drew his pistol from his hip pocket, and thrust it in McKenzie's face, saying with an oath, "You let me go." McElliott, who had been watching the respondent while he was covering his pistol, in his pocket, with his handkerchief, at the instant the respondent thrust his pistol in McKenzie's face, cried out, "Hold on, Perrigo," and drew his revolver from his pocket. Thereupon the respondent turned and fired his pistol at McElliott. McElliott retreated, trying to but not succeeding in getting his pistol so he could discharge it. The respondent pursued, and fired two more shots at McElliott. All that McElliott did was in assisting McKenzie in arresting the respondent. There was no testimony tending to show any different state of facts. On this statement the respondent had no reasonable ground to believe that he was in danger of great bodily harm from the arrest by McKenzie, nor from any assistance which McElliott offered in making the arrest. On the contrary, the respondent first began the use of the pistol, to resist a gentle arrest by McKenzie, and McElliott, seeing it, called to him to hold on, when the respondent turned and discharged his pistol at McElliott, and pursued him, discharging his pistol at him. The testimony did not tend to establish any such facts as entitled the respondent to have his request on this point complied with. A request may be good law, if the testimony tends to establish the facts embodied in or assumed by it, yet it would be the duty of the court to refuse to comply with it, if there was no testimony tending to establish the facts assumed or embodied in it. This is the inherent defect in the respondent's request and contention on this branch of the case. This exception is not sustained. This was the most favorable light for the respondent in which the testimony could be considered. On this view, except in the particular just disposed of, the charge of the court was satisfactory to the respondent.

Inasmuch as the uncontradicted testimony in the case did not tend to show a justification of an assault with his pistol upon McElliott, if the respondent made the assault, and if his arrest was without lawful authority, much more did it not tend to show such justification if the arrest was made with lawful authority. Hence we need not, and have not, decided the other question discussed,—whether the crime for which the arrest was made was of such a character that Officer McKenzie had the right to arrest him, under the circumstances disclosed, without a warrant therefor. The respondent could not have been harmed by the charge on that subject, for, on any state of facts which the testimony tended to establish, the respondent could not justify his assault with a deadly weapon upon McElliott. Judgment: There is no error in the proceedings, and that the respondent take nothing by his exceptions.

STATE v. GORHAM.

(Supreme Court of Vermont. Orange. Feb. 4, 1895.)

PROSECUTION FOR ARSON — EVIDENCE — CONFESSIONS—INSTRUCTIONS—OPINION OF WITNESS.

1. The voluntary confession of one accused of arson, though made while in custody, without counsel, and expecting to die from the effects of poison, is admissible against him on the trial.

2. The ruling of the lower court as to the admissibility of a confession, where the evidence of the circumstances under which the confession was made is conflicting, will not be disturbed.

3. Testimony of a witness that he had advised the prisoner to confess, introduced after the confession had been given in evidence,—the court not being asked, after the introduction of such testimony, to exclude the confession, and the prisoner's own evidence tending to show that he was not influenced by the advice,—was not ground for questioning on appeal the admissibility of the confession.

4. The opinion of an officer, on cross-examination, as to whether certain facts to which he had testified in chief on trial of one he had arrested were suspicious circumstances, was properly excluded, in the absence of evidence that he had acted by reason of suspicion.

5. Where one count in an indictment charged the burning of certain buildings, and another count charged the burning of such buildings with intent to defraud the insurance company, it was not error for the court to state to the jury that, if they found the accused guilty on the first count, they would probably find him guilty of the second also.

6. When undisputed testimony showed that one accused of arson had tried to sell the property to different persons, a charge reciting that there seemed to be no controversy that the prisoner, previous to the burning, was anxious to dispose of the property, was not error.

7. A charge that the jury, when considering a confession which the prisoner admitted having made while in jail, and expecting to die from the effect of poison, but the truth of which he denied, had the right to say whether, under such conditions, he would have been likely to construct a false story fitting the circumstances of the alleged crime, as shown by the undisputed evidence, was not error.

8. A statement by the court to a jury upon their being sent back after disagreement, to further consider the case, that the trial had been "quite expensive to the state, and the expense ought not to be thrown away," accompanied by reasons showing that the prisoner's interests would be served by a determination of the case, was not erroneous, as attempting to induce an agreement on account of the expense to the state.

Digitized by Google

Exceptions from Orange county court; Ross, Chief Judge.

W. M. Gorham was convicted of arson, and excepts. Affirmed.

R. M. Harvey and J. K. Darling, for respondent. Geo. L. Stowe, State's Atty., for the State.

ROWELL, J. The prisoner's confession to Mrs. Parish was made when he was shackled and in custody, without counsel, and expecting to die from the effects of poison taken after his arrest. Testimony was introduced by both sides on the preliminary inquiry whether the confession was voluntary, or whether Mrs. Parish held out inducements to the prisoner, and thereby obtained it. The court found that the confession was made of the prisoner's own motion, without any inducement, and admitted it in evidence. The prisoner excepted to its admission, and especially because it was made when he was without counsel, and also excepted to the court's determining from the testimony whether it was voluntary or obtained by inducements, and to be admitted or rejected accordingly. It will be seen from the cases cited in the note to Daniels v. State, 6 Am. St. Rep. 243, and from State v. Patterson, 73 Mo. 695, 707, and Jackson v. State, 69 Ala. 249, that none of the circumstances in which the confession was made, it being voluntary, rendered it inadmissible. In the case last cited, confessions were admitted that were made while the accused were in prison, to an officer in authority, in the absence of friends and counsel, it appearing that no threats nor promises were made. There are some cases to the contrary, but we are not inclined to follow them, as we regard them opposed to the weight of authority and to the reason of the thing. But, of course, the circumstances in which a confession is made are always to be considered, in determining its weight as evidence, although they do not make it incompetent testimony. It is for the trial court, and not for the jury, to say whether a confession is admissible or not; and if the testimony on that preliminary inquiry is conflicting, the decision of that court is final, but, if not conflicting, its decision admitting the confession is revisable here. This is not denied, but it is strenuously claimed that this case comes within the latter part of this rule, for that the undisputed testimony of the witness Hyzer shows that he had a talk with the prisoner just before he confessed to Mrs. Parish, wherein he told the prisoner that, if he did it, it would be very much better for him to make a clean breast of it. This point was argued by both sides as though Hyzer testified on the preliminary inquiry, whereas the fact is, as shown by the testimony, that he did not testify on such inquiry, nor testify at all until he was called by the prisoner, when putting in his testimony on the main case; and the prisoner's testimony does not show that he claimed to have been influenced in the least by what Hyzer said to him. Besides, it does not appear that the court was asked, when Hyzer's testimony came in, to then exclude the confession, nor to take any other action in view of his testimony. It appears, therefore, that the matter of Hyzer's testimony on this point affords no ground for the argument based upon it.

On cross-examination of the officer who arrested the prisoner, and who hoped for the rewards that had been offered, the prisoner's counsel were not permitted to ask the witness whether he thought certain things to which he had testified, mostly in chief, were suspicious circumstances. It does not appear that the witness had testified to having had his suspicions aroused, nor to having done anything by reason of his suspicions, nor that he characterized as suspicious anything to which he had testified, but rather the contrary appears. The matter falls, therefore, within the rule that a witness is not to give his opinion nor to characterize his testimony, because it is irrelevant.

The court told the jury that if one purposely burns his own buildings, or the buildings of another, designing it to be shown to be an accidental fire, and the insurer made to pay the loss, he intends to defraud the insurer. It then went on to say that if they found the prisoner guilty under the first count, which was for burning the barn and outbuildings, they would probably be pretty likely to find him guilty under the fourth count, also, which was for burning said buildings with intent to defraud the insurance company. To this last statement the prisoner excepted, but it was not error. It can scarcely be conceived that the jury would not do that, but it was left wholly to them to say whether they would or not.

The testimony tended to show that the prisoner had tried to sell the farm and personal property to two or more persons, and he admitted on the stand that he had tried to sell it to two of those persons. The court told the jury that there seemed to be no controversy but that the prisoner, at the time in question, was anxious to dispose of the property, to which he excepted. While the court should not in its charge assume as true matters that are in dispute, yet it may assume as true matters that are not in dispute or matters that were at first in dispute, but in the course of the trial have come not to be in dispute, but to be tacitly or otherwise treated as true by both sides, and the case thereafter tried on that theory. When a change of the kind takes place, as often happens, the court may treat the case, in this regard, as the parties have treated it, and charge accordingly. It does not appear that the court did more than that in this case. Indeed, it is to be assumed that what the court said in this regard was true, it not appearing to be untrue. The testimony is not made a part of the exceptions on this point.

Digitized by Google

The prisoner admitted on the stand that he made the confession testified to by the witnesses on the part of the state, but said it was all false. At the time he made the confession, there had been no examination before the magistrate, and it did not appear that he knew what evidence the state claimed to have against him. The court told the jury that when considering the confession they had a right to say whether it was probable that at that time the prisoner, in his condition and prospects, would have gotten up and concocted a false story that would fit right into all the surrounding circumstances, as this one did,—whether he could in that short time have concocted this story, and had it fit in to the burning, to hearing the team go by, going to bed, and staying till his sister called him up, spilling the kerosene oil, carrying off his clothes, making tracks, and all those things, just what they found he did say, and yet it all be false. The prisoner excepted to this, and says that the "surrounding circumstances" were neither admitted nor agreed upon, and that, therefore, the court could not say that the confession fitted into them. This criticism might have force if it appeared that the circumstances alluded to by the court were not practically undisputed; but, as it does not thus appear, it is without force.

The jury, after being out all night, came in, disagreed, but wanted no further instructions. The court, however, said to them that they had some occasion to inquire whether there might not possibly have been some other party around there, but that that was not the question to be tried; that the only question to be tried was whether the fire was a criminal fire, and the prisoner the criminal; that the other question, that there was some suggestion of by some of the testimony, had not been investigated, and could not be investigated, except to say that it showed that it might be probable or possible that it was a criminal fire, and some one else had to do with it. If this amounted to charging the element of another's guilt out of the case, or if there is fair ground for thinking that the jury may have so understood it, it would be error. But it is considered by a majority of the court that it did not amount to that, and that there is no fair ground for saying that the jury may have thought it did. It is to be presumed that proper instructions had been given on this point before; and this additional instruction put the matter in its true light when it said that the scope of that inquiry was, if the fire was criminal, whether some one else had to do with it. It was not necessary for the jury to be told, in order to know, that the more the testimony showed against another the less it showed against the prisoner; but, if it was necessary, it is to be presumed that they had already been told that. There was no error here.

The court returned the jury for further consideration, and in doing so said to them, lest they should think its action unreasonable, that the trial had occupied five days; that the testimony was lengthy, covered a good many points, had been fully discussed, and could be looked at in many different lights; that it was important to the prisoner and to the state that the case should be determined; that it had been quite expensive to the state, and that that expense ought not to be thrown away, if it could be avoided; that the court had to have these considerations in mind when a jury asked to be discharged, and that the court thought the jury should have them in mind. It is claimed that by this the court injected into the case the element of expense to the state as a proper matter to influence an agreement. But we do not so regard it. It is manifest that the court intended merely to reconcile the jury to a return, and to quicken them to a renewed effort to make true deliverance between the state and the prisoner according to the evidence and the laws, as they had sworn to do; and there is no fair ground for supposing that they understood it otherwise, as a majority think. There is no error in the proceedings, and the prisoner takes nothing by his exceptions.

TOWN OF FAIRFAX v. TOWN OF WESTFORD.

(Supreme Court of Vermont. Franklin. Feb. 25, 1895.)

SUPPORT OF PAUPER.

J., a pauper, who, owing to his mental condition, was incapable of supporting himself or exercising a choice of residence, lived with his family in defendant town from 1883 to 1890, when he removed with them to plaintiff town, where he came to want, his father having died in 1888. *Held*, in an action under Act 1892, No. 55, providing that the town furnishing assistance may recover the expense of the same from the town where the person last resided "for the space of three years supporting himself," that J. had not resided or maintained himself in defendant town, within the meaning of the act.

Exceptions from Franklin county court; Taft, Judge.

Assumpsit by town of Fairfax against town of Westford for the support of a pauper. Heard upon an agreed statement of facts. Judgment for the defendant. The plaintiff excepts. Affirmed.

Watson & Flinn, for plaintiff. D. J. Foster, for defendant.

START, J. It appears from the agreed statement of facts that Joseph Rousseau, the pauper in question, was born in the plaintiff town in 1869, where his father then lived and had his home. In 1878 the father moved from the plaintiff town to the defendant town with his family, including said Joseph, and lived there until 1881, when he and his family went to Massachusetts. In 1883 the whole family returned to the defendant town, and

Digitized by Google

continued to live there until 1888, when the father again went to Massachusetts; leaving his son Felos, a young man about 24 years of age, in charge of the property and family, including said Joseph. The father went to Massachusetts for a temporary purpose, intending to return, but died while there, in June, 1888. After the father's death, Felos, as head of the family, continued to live in the defendant town, in charge of the property and family, including said Joseph, until May 24, 1890, when the family, including Joseph, moved to the plaintiff town, where they have since lived and had their home. Owing to the mental and physical condition of Joseph, he has ever been, and still is, incompetent and incapable of taking care of himself, or of exercising any choice or intention as to residence. While the father was alive, and up to the time of his death, Joseph was supported by him; and since his death Joseph has continued to live in and been supported by the family, until he came to want May 6, 1893, in the plaintiff town. From this statement, it is clear that Joseph never resided in the defendant town for three years, supporting himself, within the meaning of No. 55 of the Acts of 1892. This act provides that if a person is poor, and in need of assistance for himself or family, it shall be the duty of the overseer of the poor of any town, when application for such assistance is made, to relieve such person or his family; and if such person has not resided in such town for three years, supporting himself and family, and is not of sufficient ability to provide such support, the town so furnishing assistance may recover the expense of the same from the town where such person last resided for the space of three years, supporting himself and family. If the father had continued to live, and Joseph had continued unemancipated and a member of the father's family, and the father had been poor and in need of assistance for Joseph, as a member of his family, and the plaintiff had furnished the assistance, it could probably recover the expense incurred in furnishing such assistance of the town where the father last resided for three years, supporting himself and family. In that case the father would have been the poor person in need of assistance for a member of his family. The assistance would be furnished to the family of a poor person in need. But the father is not a poor person in need of assistance for himself or his family. He is dead. Joseph is the poor person in need of assistance for himself. It is not shown that he is a member of the family of a poor person in need of assistance for himself or his family. There is no head of a family through whom the defendant can be made chargeable for Joseph's support. The assistance was furnished directly to Joseph, and not through the family of a poor person in need of assistance for himself or his family. He must be regarded as disconnected from any family, and as a poor person in need of assistance for himself. In order to maintain an action under this act, the plaintiff must show that the poor person to whom, or to whose family assistance has been furnished, last resided in the defendant town, for three years, supporting himself and family. In this case, the father of Joseph being dead, the assistance was not furnished to a member of the family of a poor person in need of assistance for himself or his family, but was furnished to a poor person in need of assistance for himself. The plaintiff was called upon to show that Joseph last resided in the defendant town for three years, supporting himself. This it has not done. Joseph has never resided in any town, supporting himself. He does not take his father's residence. To maintain an action under the act, it must appear that the poor person to whom, or to whose family, assistance has been furnished, has a residence in the defendant town, in his own right. The act does not provide for a derivative residence. In this respect the act is not unlike the act of 1886. That act was construed in Marshfield v. Tunbridge, 62 Vt. 455, 20 Atl. 106, and it was there held that an unemancipated minor, while he lives with and is maintained wholly or in part by, his parents, does not reside or maintain himself, within the meaning of the act. Judgment affirmed.

BLANCHARD v. BOWERS.

(Supreme Court of Vermont. Washington. Feb. 22, 1895.)

LANDLORD AND TENANT — STOREHOUSE ON LAND OF ANOTHER—TENANCY AT WILL.

1. A storehouse built by the owner thereof upon the land of a railroad company under a written license providing that it should be removed upon request of such company, was, as to a tenant occupying it, real property.

2. A tenant occupying, under a parol lease for 15 years, a house built by the landlord on the land of another under an agreement to remove it whenever requested to do so, is a tenant at will, and entitled to notice to quit.

Exceptions from Washington county court; Tyler, Judge.

Trespass by Fred Blanchard against R. C. Bowers. Plea, the general issue. Verdict and judgment for the plaintiff. The defendant excepts. Affirmed.

The injuries complained of were to a certain building standing upon the land of the Central Vermont Railroad Company, in Montpelier, and which the plaintiff claimed the right to occupy as the tenant of one Carl Bancroft. The defendant justified his acts as the owner by purchase from this same Bancroft. The plaintiff claimed that, upon the facts stated in the opinion, the building was real estate, and he, as a tenant from year to year, entitled to six months' notice to quit. The defendant insisted that the building was personal property. The court held with the plaintiff, and so instructed the jury, to which the defendant excepted.

Digitized by Google

S. C. Shurtleff, for plaintiff. Dillingham, Huse & Howland, for defendant.

THOMPSON, J. The evidence does not disclose under what arrangement, if any, with the Central Vermont Railroad Company, Arthur D. Bancroft's storehouse was erected and maintained on its land in his lifetime. But it does appear that, after his death, Johonnot, the guardian of Bancroft's children, in March, 1885, made an arrangement with the railroad company by which it gave him a written license "to erect or construct or repair the old Bancroft storehouse," then on its land, upon the condition, among others, that he should remove all structures made by him on this ground, and surrender up the premises, whenever required to do so by the railroad company. This created a tenancy at will in the land, and Johonnot and Carl Bancroft, his assignee, by the plaintiff, as their tenant, have ever since had possession of the premises under this arrangement; and it does not appear that they have ever been disturbed in their possession, nor called upon by the railroad company to surrender it. The plaintiff was in possession of the storehouse at the death of Arthur D. Bancroft, under, as he claimed, an oral lease thereof for the term of 15 years, and attorned to the administrator of Arthur D. for the rent until 1882, when he commenced to pay it to Johonnot, as guardian, and paid the same to him annually until 1888, at the rate at which he had paid the administrator, and thereafter at double that rate until July, 1892, and thereafter, at the last-named rate, to Carl Bancroft. The court below held that, as to the plaintiff, the storehouse was real estate, and that he was tenant at will, and as such was entitled to six months' notice to quit, looking to the end of the year; and the question of damages was submitted to the jury on this basis. The defendant contends that in this there was error. Stafford v. Adair, 57 Vt. 63, was a bill to foreclose a mortgage. The property described in the mortgage was a shop erected by Adair upon the land of the Bennington & Rutland Railroad Company under a parol arrangement that if, at any time in the future, it should wish to resume possession of the lot, it might give Adair 30 days' notice, within which time he should be at liberty to move off the structure, if he desired. Subsequent to the execution of the mortgage, Adair was adjudged an insolvent debtor, and his property assigned, under the statute, to an assignee. The controversy was between the mortgagee and the assignee; the latter claiming that the shop was personal property, and passed to him by virtue of the assignment. It was held that the estate which Adair acquired in the land under his arrangement with the railway company was that of tenant at will, and that his estate came within the definition of the words "land, lands and real estate," under R. L. c. 1, § 9. Under this decision, we think the court below was correct in holding that the storehouse was real estate, as to the plaintiff, and that he was a tenant at will. This is the only question now raised by the defendant. Judgment affirmed.

JOHNSON v. KELLEY et al.

(Supreme Court of Vermont. Caledonia. Feb. 4, 1895.)

CLAIM OF SET-OFF—BREACH OF WARRANTY.

In an action on a note against two defendants for horses sold to one of them, breach of warranty cannot be pleaded as a set-off, being purely a matter of defense, and defendants cannot recover on such plea, beyond the amount of the note.

Exceptions from Caledonia county court; Tyler, Judge.

Assumpsit on a promissory note by W. B. Johnson against W. M. Kelley and another. From a judgment that defendants recover their costs, defendants except. Affirmed.

The plaintiff brought suit on a note for $50 signed by the defendants. This note, and two others for $100 each, were given in payment for a pair of horses sold by the plaintiff to the defendant Kelley. The other two notes were not due when the action was begun. Kelley claimed a warranty in this sale, and pleaded a breach of it in offset, without also pleading the general issue. Upon this state of the pleadings the defendants claimed the right to begin and close, which the court denied, subject to their exception. They also took certain exceptions to the admission of evidence during the trial. The defendants claimed that, if the jury found a warranty and its breach, the entire damages for the breach should be assessed, and that they were entitled to a judgment for the balance, if any, after deducting the amount of the plaintiff's note. The court held that the defendants could only recover damages to the amount of the note, to which the defendants excepted. The jury found for the plaintiff in the amount of the note, and for the defendants in the same amount.

W. P. Stafford, for plaintiff. Bates & May, for defendants.

TAFT, J. Is it necessary to examine the questions presented by the record? The plaintiff sought to recover the amount of a promissory note given, with other notes, for two horses, sold by him to defendant Kelley. The defendants admitted the execution of the note, and pleaded in set-off a claim against the plaintiff in favor of the defendant Kelley based upon a breach of warranty of said horses, and said Kelley filed a declaration in set-off, claiming to recover for the same breach. The jury returned a verdict for the plaintiff for the full amount of the note in suit, and found damages for the defendants under the plea in set-off equal to the amount of the note. The defendants' claim, although under the form of

Digitized by Google

set-off, was clearly mere matter of defense to the original cause of action, and not a distinct claim against the plaintiff, which could be pleaded in set-off in this action by one of the two defendants. The breach of warranty of the horses for which the note was given was a proper matter of defense to the note, either upon the ground of failure of consideration or by way of recoupment. But, no objection being made to a recovery under the plea in set-off, it was immaterial whether the claim of the defendants was allowed as a defense to the note for want of consideration, or by way of recoupment, or under the form of a plea in set-off. The amount allowed the defendants under the plea extinguished the full amount of the plaintiff's claim. Such being the fact, the defendants were not harmed, if any or all of the rulings of the county court were erroneous, unless the defendants could recover, under the declaration in set-off, an amount in excess of the damages awarded the plaintiff. It is claimed by the defendants that such recovery can be had, citing Ashley v. Willard, 2 Tyler, 391, which holds that the individual demand of either of two defendants can be set off against the demand of the plaintiff against the two defendants. To the same effect is Brundridge v. Whitcomb, 1 D. Chip. 180; but it was said in Leavenworth v. Lapham (1832) 5 Vt. 204, that the latter case was overruled in Chittenden county the preceding year. There are other cases which may tend to support this rule, but they are exceptional in their facts (see Meader v. Leslie, 2 Vt. 569; Mott v. Mott, 5 Vt. 111), and are of doubtful authority upon this question. The statute of set-off reads: "If the plaintiff, in an action founded on contract, express or implied, is indebted to the defendant in such action on contract express or implied, the defendant, after pleading the general issue, or confessing the plaintiff's cause of action, may plead such indebtedness in set-off." Under this law, it has long been held that the demands which can be set off must be mutual, and cannot embrace any other than those between the nominal parties, and that the right to file claims in set-off can never be maintained and pursued to any practical purpose, in an action at law, unless the demands are legally mutual. Leavenworth v. Lapham, 5 Vt. 204; Phelps v. Bulkeley, 20 Vt. 17; Bragg v. Fletcher, Id. 351; Clough v. Clough, 55 Vt. 360. Independently of the statute, the court can set off mutual judgments at law and in equity. Conable v. Bucklin, 2 Aiken, 221; Rix v. Nevins, 26 Vt. 384. The defendants requested the court to instruct the jury that, if they found the warranty and the breach, the defendants were entitled to such damages as they had sustained by reason of the failure of the warranty. The court declined so to charge, but rendered judgment for the damages found under the plea in set-off, equal to the damages found for the plaintiff. As the defendants prevailed to the full extent of their rights in this action, and as the defendant Kelley could not recover under the declaration in set-off, they were not harmed by the rulings of the court, if erroneous. It is unnecessary to examine the questions for that reason. Judgment affirmed. All concur.

KENNEY et al. v. HOWARD.

(Supreme Court of Vermont. Windsor. Feb. 22, 1895.)

PLEADING—SUIT BY EXECUTOR—PLEA TO JURISDICTION—COUNTY COURT—PREVIOUS JUDGMENT IN PROBATE COURT—SUFFICIENCY OF PLEA.

1. A plea to the jurisdiction of the county court of a claim in favor of the estate of a decedent, alleging that the probate court has jurisdiction of the cause, but stating no facts which oust the county court of jurisdiction, and confer it upon the probate court, is bad on general demurrer.

2. A plea to the jurisdiction must be signed by defendant in person, and not by his attorney.

3. A plea in bar to an action by an executor on a claim in favor of decedent's estate, setting out a judgment rendered by the probate court on the claim, need not allege that such judgment is still in force.

4. Where the allegation, in a plea in bar, that a judgment had been rendered on the claim in suit by the probate court, was one of a series of allegations introduced by the phrase, "Long before the beginning of the suit," and connected by the conjunction "and," such phrase, being the only allegation of time in the plea, applied to each of the several allegations in the series, and showed with sufficient precision when the judgment was rendered.

5. A plea alleging that defendant had presented certain claims against the estate of plaintiffs' decedent to the commissioners, to offset which plaintiffs had presented claims in favor of the estate, and that upon the report of the commissioners the probate court had rendered judgment, need not state that such judgment included the claim sued on, nor that it was rendered on the merits of the case.

6. A plea in bar in an action by an executor on a claim in favor of the estate, alleging that defendant had presented to the commissioners claims against the estate, in offset to which the claim in suit should have been presented; that plaintiffs had contested such claims; that the commissioners had acted thereon; and that the probate court had rendered judgment on their report before the beginning of the suit,—was good against a general demurrer.

Exceptions from Windsor county court; Start, Judge.

Assumpsit by A. W. Kenney and Frances E. Downer, executors of Chester Downer, deceased, against Austin Howard. The defendant filed two pleas. Heard upon general demurrer to each plea. Demurrers sustained, and defendant excepts. Affirmed in part and reversed in part.

The first plea was to the jurisdiction, and was as follows: "And the said defendant, by his attorneys, D. C. Denison & Son, comes and says that the court here ought not further to take cognizance of or sustain the action aforesaid, because he says that the cause of action aforesaid, if any ever ac-

Digitized by Google

rued to the plaintiffs, is solely within the jurisdiction of the honorable probate court within and for the district of Hartford, in said county of Windsor, and is not within the jurisdiction of said court, and this he is ready to verify. Wherefore he prays judgment if the court here will take further cognizance of or sustain the said action, and for his costs. By his Attys., D. C. Denison & Son." The second plea was in bar, and its substance is stated in the opinion.

J. J. Wilson, for plaintiffs. D. C. Denison & Son, for defendant.

THOMPSON, J. The first plea to which the plaintiffs demurred is to the jurisdiction of the county court. It only alleges that the cause of action, if any, is solely within the jurisdiction of the probate court within and for the district of Windsor, and not within the jurisdiction of the county court. The probate court, by the appointment of commissioners to receive, examine, and adjust all claims and demands of all persons against an estate, and all claims and demands exhibited in offset thereto, does not thereby acquire jurisdiction of claims in behalf of the estate, except as offsets to adversary claims; and if a creditor of the estate who has presented his claim before the commissioners withdraws it, as he may, before the commissioners have acted upon it, their jurisdiction over any claim presented in offset thereto by the executor or administrator is taken away. Allen v. Rice, 22 Vt. 333; Moore v. Bachelder, 51 Vt. 50. If a creditor of the estate presents his claim to the commissioners for allowance, and the estate has claims or demands at law against him which accrued to the deceased in his life, and the executor or administrator has not commenced an action thereon against the creditor, as permitted by R. L. § 2131, the probate court then, and not until then, has jurisdiction of claims or demands at law in behalf of the estate against such creditor. Before the probate court has thus acquired such jurisdiction, the county court has jurisdiction of claims in behalf of the estate, if they are of the character and amount to bring them within its general jurisdiction; and it retains such jurisdiction until commissioners have been appointed and the creditor has presented his claim against the estate for allowance, and they have acted thereon. In other words, to oust the county court of such jurisdiction, commissioners must have been appointed on the estate, and the creditor of the estate must have presented his claims against the estate to them for allowance, and they must have acted thereon, before the commencement of an action in the county court by the executor or administrator, as permitted by R. L. § 2131. Sabin v. Kelton, 54 Vt. 283; Martin v. White, 58 Vt. 398, 3 Atl. 498. In the opinion of the court in the last-cited case, delivered by Ross, J., it is said that R. L. § 2131, provides that the administrators or executors may commence a suit on such a claim, and attach property, at any time before such party shall have presented his claim to the commissioners." It is sufficient to say that this language of the court in that case is not the language of this section, nor of the context, of the Revised Laws. However, that case is not to be taken as in conflict with the rule which we have stated, as that suit was commenced before the defendant therein presented his claim against the estate to the commissioners, and the language of the court is to be taken as intended to apply to the facts in that case. If an executor or administrator commences an action to recover a debt or claim in favor of the estate, against a person having a claim or demand against it, either before or after such person has presented it to the commissioners for allowance, and before they have acted thereon, the jurisdiction of the probate court in respect to the claims or demands of either party is ousted by the commencement and pendency of such action; and all proceedings thereafter in the probate court during the pendency of such action, in respect to the claims or demands of either party, are absolutely void. Martin v. White, 58 Vt. 398, 3 Atl. 498; Sabin v. Kelton, 54 Vt. 283.

The county court is a court of general jurisdiction. In the case at bar it primarily had jurisdiction of the parties, the process, and the subject-matter, from which it could be ousted only as before stated. It is a general rule that a plea to the jurisdiction of a court of general jurisdiction must not only show that it has not jurisdiction, but must also show that another court has jurisdiction. Doe v. Roe, 2 Burrows, 1047; Gould, Pl. c. 5, § 26. Under our peculiar system of probate law, and the special jurisdiction thereby conferred, under certain circumstances, upon the probate court to try and determine claims in favor of the estates of deceased persons against persons presenting claims against such estates before commissioners, we think a plea of this kind should allege such facts as show that it has such jurisdiction, and that, failing to do this, it is bad for want of substance. The plea under consideration contains no such allegations.

This plea is also bad for the reason that it is signed by the defendant's attorney, and not by the defendant in person. "A plea to the jurisdiction must be signed by the defendant in person, for if signed by an attorney, who is an officer of the court, he is supposed to have signed by leave of the court, and the asking of leave is considered as a tacit admission of the jurisdiction." Gould, Pl. c. 5, § 27.

It is not necessary for us to consider the other grounds of objection urged against this plea, as it already appears that the court below properly sustained the demurrer to it.

2. The second plea to which the plaintiffs demurred professes to be a plea in bar. It alleges that, "long before the beginning of

Digitized by Google

this suit," Chester Downer deceased, and that the plaintiffs were duly appointed administrators of his estate, and accepted the trust and gave bonds; that commissioners were then and there duly appointed to receive, examine, and adjust all claims and demands of all persons against the estate, and all claims and demands exhibited in offset thereto; that the commissioners gave due notice of the time and place when and where they would hear such claims; that the defendant appeared before the commissioners, and exhibited his claim against the estate, and that the plaintiffs contested the same, and presented large claims in offset thereto; that a large balance was allowed the defendant against the estate by the commissioners, and by them reported to the probate court, and judgment was rendered thereon by it against the estate, in favor of the defendant.

It is urged that this plea is bad because it does not allege that the judgment of the probate court still remains in full force, and not reversed, satisfied, or made void. Such an allegation is not necessary. If a judgment set out in a plea does not remain in full force, the other party may show it in the replication. 1 Saund. (6th Ed., by E. V. Williams) 330, note 4.

It is further contended that the plea is bad because it does not state with sufficient precision the time when the judgment was rendered. After the formal part of the plea, the first allegation is that of time, viz. "long before the beginning of the suit"; and then follow the other allegations, all of which are connected by the conjunction "and." This is the only allegation of time in the plea, and applies to each fact alleged, "according to the rule that when several facts are stated in one continuous sentence, or in several sentences connected by the conjunction 'and,' time, though alleged but once, applies to every fact." Taylor v. Welsted, Cro. Jac. 443; 1 Chit. Pl. 258; Royce v. Maloney, 58 Vt. 437, 5 Atl. 395. This is sufficient on general demurrer.

The plaintiffs also insist that this plea is bad because it does not allege that the judgment was recovered for the nonperformance of the same identical promises or undertakings named in the declaration, and because it does not allege that the judgment was recovered on the merits of the case. In thus arguing, the plaintiffs mistake the nature and effect of this plea. It is not a plea of a former recovery by the plaintiffs on the same identical causes of action, but it is more far-reaching than such a plea, because it goes to their right of recovery, without regard to whether there has been a former recovery or not. There are no pleadings nor forms of actions in proceedings before commissioners, and there is no way in which a judgment can be rendered by them, except upon the merits of the claim or demand. Commissioners having been appointed upon an estate, if a creditor thereof exhibits his claim against it to them for allowance, the executor or administrator must present all claims at law against such creditor, in favor of the estate, to the commissioners, for allowance in offset, or must commence and prosecute an action to recover the same against such creditor, as permitted by R. L. § 2131, before the commissioners have acted upon the claim of the creditor against the estate; otherwise such claims of the estate against him are forever barred. R. L. §§ 2125, 2127; Probate Court v. Gale, 47 Vt. 473; Sabin v. Kelton, 54 Vt. 283; Spaulding v. Warner, 59 Vt. 646, 11 Atl. 186; Bliss v. Little's Adm'r, 63 Vt. 86, 22 Atl. 13. The plaintiffs' declaration is in general assumpsit, with special counts on notes, and sets forth causes of action predicated upon claims against the defendant which should have been presented to the commissioners in offset, unless this suit was commenced before the commissioners had acted upon the defendant's claim presented against the estate. This plea alleges that the entire proceedings before the commissioners and in the probate court, in respect to the defendant's claim, were had before the beginning of this suit, and the demurrer admits the truth of all the allegations of the plea well pleaded in substance. If the claims upon which the plaintiffs seek to recover in this action were presented before the commissioners, and allowed in offset, they were then adjudicated, and this action cannot be maintained for their recovery; and if they were not thus presented they are forever barred, by reason of the failure to so present them. Hence the plea sets forth a good defense to the plaintiffs' action.

Judgment as to the first plea affirmed. Judgment sustaining the demurrer to the defendant's second plea, filed February 17, 1891, is reversed, and demurrer, as to that plea, overruled, plea adjudged sufficient, and cause remanded.

COX v. BRYAN, Registration Officer, et al.

(Court of Appeals of Maryland. April 25, 1895.)

APPEAL—FROM OFFICER OF REGISTRATION—TIME OF TAKING.

1. The jurisdiction of a court to entertain appeals from the officer of registration under Act 1890, c. 573, § 21, being special and limited, proceedings on review must show on their face that everything was done which the law required as the basis of the court's authority.

2. The provision of Act 1890, c. 573, § 21, that an appeal from the officer of registration must be within one week after the last day of the October sitting, is mandatory.

On rehearing. Overruled.

For prior report, see 31 Atl. 447.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

PAGE, J. The appellant, in support of his motion for a reargument, assigns as his first

Digitized by Google

reason that the judgment of this court was based "upon a point not raised in the pleadings below, the exceptions taken, or the briefs of argument submitted by either of the parties to the cause, but solely by an inspection by the court of certain indorsements upon the petition, set forth in the record, whereas, by an inspection of the docket entries in the case, it appears that our petition and affidavit was filed in the court below on the 20th day of October, 1894, which was within one week after the 15th day of October, 1894,—the final day of the October setting of the officer of registration." It is true, the words, "Filed Oct. 20th, 1894," do appear among the docket entries, but they cannot be held to designate the time of the filing of the petition, which forms the basis of the appellant's complaint. The record clearly shows that on the 26th October, 1894, the state's attorney agreed that no advantage should be taken "of the fact that the foregoing petition [that is, the appellant's] was not filed within one week from the last day of the sitting of the registration officer." On the 27th October the judge ordered that the petition be filed as of the 22d October, and on the 30th October it was actually filed. If "our petition" was actually filed on the 20th October as the appellant seems to desire us to determine, it is not in the record, forms no part of this proceeding, and this court can take no notice of it whatever. We are unable to determine upon what ground the action of the learned judge below was based. The record only discloses the fact that the petition was "dismissed,"—whether because the appeal was not in time, or for other reasons, it does not appear. Certain it is that one B. F. Dement, who appears to have been summoned, moved to dismiss because the appeal was not taken in time. The state's attorney and the petitioner entered objection to the leave granted by the court to Dement to file this motion, but this was overruled, and thereupon the petition was dismissed. So that, whether the court committed an error in permitting Dement to file his motion or not, it appears the point was raised below, and, for all that the record shows, might have formed the sole reason which induced the learned judge to dismiss the petition. However this may be, we do not think it was necessary, in order to maintain the judgment in this court, to determine whether the point was raised below, or by counsel in argument here. The jurisdiction of the judge to entertain appeals from the officer of registration is special and limited, and distinct from and not embraced by, his general authority; and, where such jurisdiction is conferred by act of assembly on any tribunal, its power to act as it has done must appear upon the face of the proceedings. If these proceedings are brought to this court for review, it must appear that everything has been done "which the law required as the basis of the authority that has been exercised," and to such an inquiry the ninth section of article 5 of the Code has no application. Boarman v. Patterson, 1 Gill, 381; Coward v. Dillinger, 56 Md. 61.

2. The appellant, in his motion, strenuously insists that the time prescribed in the act of 1890 for appealing from the register is directory, and not mandatory, and, not being jurisdictional, can be waived. We have examined all the authorities to which we have been referred. They announce a principle often maintained by this court, and one which we do not, in this case, in any wise mean to impugn. It was clearly stated in the case of State v. Commissioners of Baltimore Co., 29 Md. 522, in these words: That "where the duty prescribed is of a public nature, and intended for the public benefit, and is directed to be performed within a specified time, courts have adopted as a general rule in the construction of statutes that they are, in respect to the time, to be regarded as directory merely, unless, from the nature of the act to be performed, or the language employed in the statute, it plainly appears that the designation of time was intended as a limitation of power." Now, we are of the opinion that both from the nature of the act to be performed, and from the language of the twenty-first section of chapter 573 of the Acts of 1890, the time prescribed within which appeals from the register must be taken is a limitation upon the right of the party appealing, and upon the judge to whom the appeal is taken. The registration laws passed in pursuance of the fifth section of article 1 of the constitution of the state have a far wider scope than simply to conserve private rights. They are of the utmost importance to all the citizens of the state. One of the great objects sought to be attained, as well by the framers of the constitution as by the legislature, manifestly, was the securing of fair and honest elections by means of a system of registration of voters. This statute must, "then, be construed by the courts in the light of this manifest legislative intention, and all its directions to and requirements of the officers who are to execute it must be regarded as important, and as having this object in view." Mincher v. State, 66 Md. 227, 7 Atl. 451. In order to secure this object, the legislature, by this twenty-first section, has thrown wide open the right of appeal from the action of the register. Not only is it given to the person applying for registration, but to "any person who thinks himself aggrieved,"—that is, to any person who thinks the register has acted improperly,—and the applicant himself need not be made a party. But while, by the terms of the act, the right of appeal is thus made so extended, and, in consequence, likely to become a means of oppression and wrong in the hands of designing persons, whereby citizens could be deprived, at particular elections, of their right of franchise, the legislature has carefully and wisely ex-

Digitized by Google

pressed the terms upon which the appeal may be taken. It must be after the final day of the October sitting (Ticer v. Thomas, 74 Md. 345, 22 Atl. 402), and within one week thereafter. The clause is not thrown in "parenthetically," but is in the very paragraph and sentence by which the right is conferred, and forms one of the terms upon which it may be exercised. It is not a model regulation, as was the case in Ayers v. Watson, 113 U. S. 594, 5 Sup. Ct. 641, but is so interwoven with the authority granted as to form, in itself, a part of it. It was intended for the protection of the public, as well as of the rights of the individual citizen, and such requisitions are always construed to be mandatory. French v. Edwards, 13 Wall. 511; Lyon v. Alley, 130 U. S. 177, 185, 9 Sup. Ct. 480. In Plummer v. Wilson, 73 Md. 474, 21 Atl. 322, it was held that "an exception prepared and signed, with appeal taken long after the expiration of the five days, gives this court no jurisdiction to hear and decide the case." There the words of the statute are, "All such appeals shall be taken within five days." In this case the words are, "He shall have the right to appeal forthwith," etc., "by petition," etc., "within one week after the final day of the October sitting for revision." In the Southerland Case, 74 Md. 326, 22 Atl. 137, no question as to time within which the appeal should be taken was raised in, or considered by, this court. In Ticer v. Thomas, 74 Md. 345, 22 Atl. 402, it was held that an appeal taken prior to the final day for revision was premature, and the circuit court was without jurisdiction to hear it. In the opinion filed in that case are these words: "Now, whilst the clause providing for an appeal authorizes the appeal to be taken forthwith, it must, in ordinary fairness to the officer of registration, have meant forthwith upon a final decision or action, and within one week after the last sitting in October."

There is no error in the form of the judgment of this court. The judge below dismissed the petition, and, being of opinion he was correct in so doing, we affirm his judgment. Motion for rehearing overruled.

PRESIDENT, ETC., OF BALTIMORE & F. TURNPIKE ROAD v. BALTIMORE, C. & E. M. P. R. CO.

(Court of Appeals of Maryland. April 19, 1895.)

EMINENT DOMAIN—CONDEMNATION OF FRANCHISE.

Act 1894, c. 162, authorizing a street-railway company to acquire by condemnation an easement in the roadway of a turnpike company, for the operation of its railway, is not unconstitutional, in that it violates the obligation of contracts, as corporations hold their franchises subject to the right of eminent domain.

Appeal from circuit court, Baltimore county.

Action by the president, managers, and company of the Baltimore & Frederickstown Turnpike Road against the Baltimore, Catonsville & Ellicott's Mills Passenger Railroad Company. There was a decree for defendant, and plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, BRISCOE, and ROBERTS, JJ.

David G. McIntosh and Arthur W. Machen, for appellant. E. I. D. Cross, Milton W. Offutt, and Geo. D. Penniman, for appellee.

BRYAN, J. By the act of 1894 (chapter 162), the legislature granted to the Baltimore, Catonsville & Ellicott's Mills Passenger Railroad Company the right to use electricity as a motive power on its railway between Baltimore city and Catonsville, and on an extension of it thereafter to be made to Ellicott City. By the same act this corporation was empowered to construct and operate double passenger railway tracks on the turnpike of the president, managers, and company of the Baltimore & Frederickstown Turnpike Road, with power to alter its grade, and to change the location of the tracks which it already had on the turnpike. And the two corporations were authorized to agree upon the terms and conditions on which these rights should be exercised; and, in case they should fail to agree, the railroad company was empowered to acquire the necessary easement and estate by condemnation proceedings. It is well known and it is stated in the proceedings in this case that, by virtue of a contract with the turnpike company, a passenger horse railway had been maintained and operated for many years on the bed of the turnpike between the city of Baltimore and Catonsville. It does not seem to be controverted that the property of the corporation which originally owned this horse railway was sold under a foreclosure proceeding, and that the present appellee (under a slight change of name) has been invested with all its rights, property, and duties, and subjected to all its obligations. The appellee has prosecuted condemnation proceedings; and, in due course, the jury have found and assessed damages under their inquisition. Without entering minutely into details, it is sufficient to state that the appellant filed a bill in equity, in which it alleged that the above-mentioned act of assembly is contrary to the constitution of the United States; and it prayed that the appellee should be enjoined from proceeding under the inquisition, and from prosecuting any proceedings whatsoever by way of condemnation to acquire any easement or estate in the turnpike road. The circuit court sustained the right of condemnation, and the appellant took its appeal.

The turnpike company was chartered by the act of 1804 (chapter 51); and, under this act, it constructed its turnpike road, and has operated and maintained it from the time of its construction to the present day. There can be no doubt that the charter is a contract

Digitized by Google

between the legislature and the corporation, which is under the protection of the constitution of the United States; and the same may be said of the contract made with the predecessor of the appellee in reference to the construction of the horse railroad. The legislature has no power to amend, alter, or impair any stipulation in either of these contracts. They must all be preserved inviolate in their original integrity. If the act of assembly infringes any right granted by the appellant's charter, or releases any stipulation contained in the contract, it must to that extent be declared null and void. And it has been declared by this court that there is no difference in principle between a law that in terms impairs the obligation of a contract and one that produces the same effect in the construction and practical execution of it. Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. 109. In the same case, at pages 144 and 145, it was said that a franchise, a corporate right to select and acquire land for the authorized purposes of the corporation, is property. "It is an incorporeal hereditament, not a legal title to the land itself, not a mere capacity or faculty to acquire and hold land, such as every individual possesses; but, in addition to such capacity, it is a right or privilege—a portion of the eminent domain vested in the corporation—to acquire the legal title to land subjected by the grant to its will, and thus to convert the incorporeal into a corporeal hereditament, and, after the franchise, to choose and condemn land for any particular public purpose, that portion of the eminent domain granted and subsisting in one corporation cannot be bestowed upon another, to the prejudice of the former grant; nor can any other legally acquire any such right of way or title to the land over which the franchise extends, as will hinder the former corporation in the exercise and enjoyment of its franchise." Therefore the legislature could not take away from the appellant the unrestricted right to the control and use of its road, and donate any portion of this right to the appellee. But there is a vital essential and paramount power belonging to the state which has never been surrendered to the general government, and which is not limited or embarrassed by any considerations inferior to a regard for the public welfare. It is the right of eminent domain, or the right to take private property for the public use, with just compensation previously paid or tendered to the owner. The legislature has the right to determine when private property shall be thus taken; and the duty devolves on the courts to protect the rights of the owner by enforcing just compensation before it is taken. Whatever doubts may have existed at one time on the question, and it is probable they did not exist when the case of the canal company was decided, it is now settled by authority which this court is bound to obey that "the grant of a franchise is of no higher order, and confers no more sacred title, than a grant of land to an individual; and, when public necessities require it, the one as well as the other may be taken for public purposes on making suitable compensation; nor does such an exercise of the right of eminent domain interfere with the inviolability of contracts." Bridge Co. v. Dix, 6 How. 507; Richmond, F. & P. R. Co. v. Louisa R. Co., 13 How. 83. As was natural and proper, these decisions have been followed in the opinions delivered by the state courts. We forbear to cite any of them, inasmuch as we consider that the federal authority marks out the course for us to follow, independently of any other consideration. It has been said by the supreme court that the power to take private property for public use "reaches back of all constitutional provisions." Pumpelly v. Green Bay Co., 13 Wall. 178. It has also been said on this subject that a grant made for one public purpose must yield to another more urgent and important. Of course, it rests with the legislature to determine when the necessity arises for making one public purpose subordinate to another which it regards as of a higher degree of utility. It is, of course, not held by any court that the legislature can bestow the property of any person, natural or corporate, upon another, but that private property cannot be exempted from the supreme right of eminent domain, on the ground that it is held by a chartered right. And, of course the same must be said in cases where it is held by virtue of a private contract. We therefore feel obliged to hold that the act of 1894 (chapter 162) constitutionally conferred on the appellee the right to condemn the corporate property and franchises of the appellant, including such as were embraced within the scope of the contract in reference to the horse railway.

The statute law prescribes the mode in which the condemnation must be pursued. After the inquisition has been reduced to writing, and signed and sealed by the jury, it is required to be returned to the circuit court of the county, which is invested with the jurisdiction to confirm it or to set it aside. The value of the appellant's property and franchises will be very greatly diminished by the proceedings under this act of assembly; but for the injury thus done, including all damage which may be sustained by the seizure of its property, and any loss which may arise from an impairment of the value of its contract rights, it is the duty of the jury of inquisition to assess adequate compensation. The whole proceeding is subject to the power and control of the circuit court, which is the tribunal appointed by the law to afford redress where injustice has been committed by the jury. It is also its duty to see that the inquisition is regularly and properly conducted, and that the rights of the parties are duly protected. It is not competent for any other court to exert this jurisdiction. It is held that, where the law is

Digitized by Google

constitutional under which condemnation is sought, a court of equity has no power to arrest the proceedings by injunction; because a special tribunal, established for supervising the exercise of the right of eminent domain, to which alone the power has been granted to hear and determine all questions which can arise regarding the inquisition. Railroad Co. v. Patterson, 37 Md. 125; unreported case of Same v. Keerl, decided at the same time; Cumberland & P. R. Co. v. Pennsylvania R. R., 57 Md. 267. We think that the decree below ought to be affirmed. Decree affirmed.

YOUNG et al. v. CORAY et al.

(Supreme Court of Pennsylvania. April 29, 1895.)

POWER OF ATTORNEY—RELEASE OF JUDGMENT.

Judgment creditors gave a letter of attorney authorizing the execution for them of releases of their judgment liens on certain of their debtor's land, whenever he desired to sell the same, providing the proceeds should be applied on a mortgage debt prior to their judgment liens. *Held*, that where the price of the land paid by a purchaser was applied on the mortgage debt, and the attorney agreed to release the land from the liens, the lienors cannot have the land subjected to their liens on the ground that no release was in fact executed, and that the attorney's parol agreement to release was not authorized by the letter.

Appeal from court of common pleas, Luzerne county; Charles E. Rice, Judge.

Action of scire facias by Young Bros. & Co., now assigned to John S. Jenkins, against E. A. Coray, Jr., and another, executors, with notice to All Lamoreux and others, terre tenants, to revive a judgment. From a judgment for All Lamoreux and others, terre tenants, plaintiff appeals. Affirmed.

This case was referred to a referee, who found that certain judgment creditors of the defendant executors' testator, including the plaintiff's assignors, executed a letter of attorney authorizing their attorney "for us and in our name to execute releases of the lien of our respective judgments" upon certain lands of their debtor, whenever he should desire to convey the same, on condition that the proceeds of the conveyances should be applied upon a mortgage debt on the lands prior to their judgment liens; that the terre tenant All Lamoreux purchased and entered a part of the lands in good faith; that the price paid by him was applied to the payment of the mortgage, and that the attorney agreed that the judgment liens should be released; and the referee found as a matter of law that plaintiff was not entitled to have his judgment revived against the land bought by the tenant Lamoreux, and that judgment should be entered in that tenant's favor. Exceptions were taken to the report, which were overruled by the court, and judgment directed in accordance with the referee's findings.

Plaintiff assigned as error: First, that the court erred in overruling plaintiff's exception to the referee's report; that the referee erred in not finding as a matter of law that under the letter of attorney the land could not be released from the lien of plaintiff's judgment unless a written release was executed in due form by the attorney, and delivered to Lamoreux; and, second, that the court erred in overruling plaintiff's exception to the referee's report; that the referee erred in concluding as a matter of law that if the proceeds of the sale of the lands were in fact applied in payment of the mortgage, the purchasers of the land thereby became entitled to hold the same released from the lien of the judgments.

R. D. Evans and E. S. Osborne, for appellant. G. R. Bedford, for appellees.

PER CURIAM. An examination of this case has satisfied us that there was no error in overruling exceptions to the report of the learned referee, and confirming the same. The assignments of error are all dismissed. Judgment affirmed.

EDISON GENERAL ELECTRIC CO et al. v. THACKARA MANUF'G CO.

(Supreme Court of Pennsylvania. April 29, 1895.)

PATENTS—LICENSE—FAILURE OF CONSIDERATION—JUDGMENT—ASSESSMENT OF DAMAGES—VARIANCE.

1. A judgment for want of sufficient affidavit of defense will be reversed, for variance between the averment and assessment of damages, where the statement sets out that there is due plaintiff 8 per cent. on the amount of sales made by defendant, which he believes to be $4,000, and therefore claims on that account the sum of $571.43 (more than 14 per cent.), and judgment is entered for the latter sum.

2. Though one who is given a license to manufacture a patent is not released from paying royalty merely because the patent is void, yet he has a defense of failure of consideration where the licensors fail to keep their agreement that he and certain others shall have exclusive rights to manufacture the patented article, and other persons are manufacturing without paying a royalty.

Appeal from court of common pleas, Philadelphia county.

Action by the Edison General Electric Company and George Maitland against the Thackara Manufacturing Company for royalties. Judgment for want of a sufficient affidavit of defense, and defendant appeals. Reversed.

John R. Read, Silas W. Pettit, and H. B. Gill, for appellant.

MITCHELL, J. The plaintiffs' case comes before us in an exceedingly unfavorable light, from the apparent recklessness with which facts are sworn to which they should have known to be untrue. Plaintiffs, in their statement, "aver that there is justly due to them by defendants the sums of $571.43, with interest from October 1, 1891; $571.43, with interest from January 1, 1892; $571.43,

Digitized by Google

with interest from April 1, 1892,"—and four other similar quarterly sums with interest from later dates, and this statement is sworn to. The affidavit of defense avers explicitly that the defendant "has paid plaintiffs in full, by check which was duly paid, for all royalties due up to the 1st day of April, 1892, and has plaintiffs' receipt therefor," and plaintiffs have apparently conceded the truth of this defense by taking judgment for the later sums only. Such looseness is not to be commended. When the procedure act of May 25, 1887 (P. L. 271), substituted "a concise statement of the plaintiff's demand" for a common-law declaration, and the rule of the court below required the statement to be sworn to, and, where damages are capable of liquidation, to contain "an explicit averment of the amount claimed to be justly due," these matters ceased to be merely formal, and became substantial, with a resulting necessity to follow the truth of the actual facts. This judgment must be reversed for the variance between the averment and the assessment of damages. The statement sets out that there is due, under the agreement sued on, "three per centum of the net wholesale selling price of the fixtures, etc., manufactured and sold by defendants," etc., and that plaintiffs are "unable to state the exact amount of royalties due, * * * but believe that the net wholesale selling price * * * of the devices covered by the patents made and sold during each of these seven periods amounts to $4,000 and upwards, and plaintiffs therefore claim to recover on this account the sums of $571.43, with interest" from each of the seven quarterly periods named. The amount claimed is certainly not 3 per cent. of the alleged selling price, but more than four times that much, and the principle upon which such result was reached nowhere appears. But plaintiffs, upon the rule being made absolute for judgment, abandoning, as already said, the first three items of their claim, assessed the damages on the other four at the full sums claimed, with interest. There is nothing on the record to sustain such an assessment.

Coming now to the substantial matters of defense to the whole claim, the affidavit avers that defendant has paid all royalties due up to April 1, 1892, and has not since that date incurred any liability for royalties, or manufactured any of the articles named in the agreement, except electric light fixtures claimed to be covered by patents Nos. 259,235 and 294,697, and, as to these, that the said patents are wholly void and invalid, and defendant has refused to pay royalty, repudiated the license, and manufactured in hostility thereto; and, further, that there has been a failure of consideration, in that the agreement was made on the inducement, at the time of signing, that plaintiffs would prevent all other parties, not members of the Gas & Electric Fixtures Association (of which defendant covenanted that it was and should continue a member), from manufacturing or selling the articles named, and that plaintiffs have not done so, but that said articles are made and sold by other parties named, not members of the said association, and not paying royalty, and thereby defendant has been unable to compete in its business with such others selling without the payment of royalty. The merits of such a defense by a licensee have been settled by this court in Angier v. Eaton, Cole & Burnham Co., 98 Pa. St. 594, where it was said by the present chief justice: "The right was in the nature of a monopoly, and, so long as it was enjoyed, the defendant was bound to pay the consideration therefor; but when, by reason of something beyond the company's control, it was deprived of that exclusive right,—in other words, when the consideration failed,—why should it be compelled to pay? * * * The recognized principle applicable to such licenses is that while the patent is apparently valid, and the licensee is enjoying the benefit of its supposed validity, he is bound to pay the stipulated royalty, and cannot set up as a defense the actual invalidity of the patent; but when, in addition to the invalidity of the patent, by reason of a prior, outstanding patent, it is shown that the owner of the prior patent is asserting his exclusive rights thereunder by supplying the market with the patented article, and the licensee under the invalid patent is deprived of the monopoly for which he contracted, and in consideration of which he agreed to pay the royalty, he may defend on the ground of actual failure of the consideration." In the present case the monopoly is not exclusive in the defendant, but was to be enjoyed with others, who were also members of the association, and who also paid royalty. The difference is one of degree only, not of principle. Subsequent cases have not disturbed these well-settled principles. In Hardwick v. Galbraith, 147 Pa. St. 333, 23 Atl. 451, it was held that a license does not, of itself, import a monopoly; but in the present case it is expressly set up in the affidavit that there was to be a monopoly among the members of the association, all of whom paid royalty. In Jarecki Co. v. Hays, 161 Pa. St. 613, 29 Atl. 118, the pith of the decision (page 617) is that a licensee receiving the benefits must pay the fees, without regard to the validity of the patent; and in Hardwick v. Galbraith, supra, and Patterson's Appeal, 99 Pa. St. 521, it was held that the licensees could not set up the invalidity of the patent as a defense, because they had agreed that the test on that point should be an adverse decision by a court of competent jurisdiction. All these cases are in entire harmony with Angier v. Eaton, Cole & Burnham Co., supra.

The defendant was entitled to go to a jury on the defense set up in his affidavit. Judgment reversed, and procedendo awarded.

Digitized by Google

PENNSYLVANIA S. V. R. CO. v. SCHUYLKILL NAV. CO. et al.

(Supreme Court of Pennsylvania. April 29, 1895.)

RAILROADS—APPROPRIATION OF LAND FOR DOUBLE TRACK—DISMISSAL OF BILL WITHOUT PREJUDICE.

A bill by a single track railroad company, which seeks to appropriate, for the purpose of double tracking its road, a strip of land belonging to a navigation company, and leased to a railroad, to enjoin defendants from interfering with plaintiff's entry thereon, should be dismissed, without prejudice, where it was filed when plaintiff was not engaged in laying a second track, and no necessity for its occupancy of the land for that purpose is averred or shown.

Appeal from court of common pleas, Berks county.

Suit by the Pennsylvania Schuylkill Valley Railroad Company against the Schuylkill Navigation Company and the Philadelphia & Reading Railroad Company for injunction. The bill was dismissed, and plaintiff appeals. Modified.

Plaintiff sought to appropriate, for the purpose of double tracking its road, a strip of land along its single track, belonging to defendant navigation company, and by it leased to the defendant railroad company. The bill alleged the tender and filing of a bond for condemnation of the land, and asked that defendants be restrained from preventing plaintiff's entry on the land. The court below, though finding that necessity for the occupancy of the land for the purpose of double trackage was not shown, stated that it would not say that the time might not come when, under a proper showing as to the necessities of the original location of plaintiff's railroad, its growing requirements of additional track room, defendant railroad company's continued failure to make use of its right to construct a proposed branch on the property in dispute, or an actual abandonment of the public uses to which it had theretofore been subjected, plaintiff might become entitled to a right of way over it.

Cyrus G. Derr, for appellant. Geo. F. Baer, for appellees.

PER CURIAM. The bill in this case was filed more than 10 years ago. The plaintiff was not then engaged in laying a second or double track along the line of its railroad, nor does the bill aver a necessity for the occupancy of the land in controversy for that purpose. The learned judge of the court below held that no such necessity was alleged in the pleadings or made to appear in the evidence. He further held that the occupancy of the land was important to the defendants, in order to the proper exercise of their corporate powers and privileges, upon the facts as then presented. We are not disposed to disturb the decree resting on these conclusions further than to make the following modification: The decree is modified by adding thereto the words, "without prejudice to the right of the plaintiff to renew its effort to enter, under the right of eminent domain, at such time as such entry shall be deemed necessary for the purpose of making a continuous double track through the city of Reading, upon so much land as may be necessary for the purpose." As so modified, the decree is affirmed.

In re INGERSOLL'S ESTATE.

Appeal of THOMAS et al.

(Supreme Court of Pennsylvania. April 29, 1895.)

WILLS—CONSTRUCTION—POWERS.

Under a will giving C. and F. each an eighth of testator's estate, to be held in trust during minority, with certain remainders if either or both died during that time, the estate of each on his reaching majority to go to him in severalty, and giving power to H. to revoke the devises and bequests to them, and to appoint trusts for either or both, deferring the time for receiving the principal, or reducing the estate to one for life, with or without testamentary power of appointment, "and with remainders to the persons who would be entitled if the child as to whose estate this power is exercised died owner of the same," the last clause determines the person to whom the remainder shall pass, where H. revokes the devise to C., and declares a trust for life for him, without giving him power of testamentary appointment, or without his exercising any such power given him; and any limitation placed on the remainder by H. is void.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of Charles Ingersoll, deceased. John M. Thomas and Arthur Amory, surviving trustees under the will of said Ingersoll, appeal from so much of the decree on the account of John M. Thomas, acting trustee, as to share for the benefit of Charles Ingersoll Maury for life, as awards the real estate owned by said Maury at the time of his death to his brother, F. F. Maury, absolutely and in fee. Affirmed.

George W. Biddle, for appellants. William M. Meigs and John Samuel, for appellee.

MITCHELL, J. It is conceded that the interest of Charles Ingersoll Maury in his grandfather's estate did not pass to him directly in fee on coming of age, under the devise in the latter's will, but was changed under the proviso giving Mrs. Hutchinson the power to revoke the devise, and make new appointments or trusts as to the shares of the two grandsons. The simplest way, therefore, of getting to the question raised in this case is to ascertain—First, what was the state of facts or circumstances existing at the death of C. I. Maury; secondly, what was Mrs. Hutchinson authorized by her father's will to do in such contingency; and, thirdly, what had she actually done.

First. C. I. Maury was of full age, unmarried, and without descendants. His heir and next of kin, who, in the language of his

Digitized by Google

grandfather's will, "would be entitled if he had died owner of the estate," was his brother, Francis. C. I. Maury left a will, which was held by the learned court below to be a valid exercise of a power of appointment as to personalty; and this adjudication, not being objected to, must be taken to be correct for the purposes of this appeal. None of these facts is disputed.

Secondly. Mr. Ingersoll's will gave each of his grandsons a fee in one-eighth of his estate, the two parts to be held together in trust during the minority of the grandsons, with cross remainders in case of the death of either during minority and without issue, and remainder over if both so died, but, as each arrived at 21, his estate was to go to him in severalty. It is important to observe that there is no indication anywhere in the will that the estates were to be joint or in common. But, as the testator was somewhat advanced in years, and his grandchildren infants, he gave his daughter Mrs. Hutchinson power to revoke the devises and bequests to them, and to appoint trusts for either or both,—first, deferring the time for the receiving of the principal; or, secondly, reducing the estate to one for life without right of anticipation or subjection to creditors; and, lastly, with or without testamentary power of appointment. There is a further power of revocation and new appointment, which is not material to this case. These are all the powers that are given to Mrs. Hutchinson, and, while they are very large, they do not include any authority to direct the disposition of the estate of either grandson after his death. On the contrary, this is expressly provided for by the testator himself in the next part of the same sentence, when, after giving his daughter power to grant or withhold a testamentary power of appointment, he continues, "And with remainders to the persons who would be entitled if the child as to whose estate this power is exercised died owner of the same." It is manifest that the testator did not intend that the estates of his grandsons should be fettered beyond their respective lives. As they were young when his will was written, and their future development and circumstances uncertain, he delegated his discretion during their infancy to his daughter, in whose judgment he had confidence. If she should not exercise this discretionary power, each grandson, on attaining his majority, would come into full possession of his estate at once, under the direct gift of the testator's will. If, however, the time of enjoyment was deferred, or a trust created by Mrs. Hutchinson as to either (and it is to be noted, as already said, that they are treated throughout both the will of Mr. Ingersoll and the deed of Mrs. Hutchinson as separate), then the remainder was to go to the persons who would be entitled if the child died owner of the estate. Such remainder would become effective only in case Mrs. Hutchinson withheld the power of testamentary appointment, or in case such power, though given, was not exercised. In either contingency the testator himself directed to whom the remainder should go. He was an experienced lawyer, and he had probably observed that, while the prudence and foresight of age are a valuable protection to the young, yet the wisest can see but a little way into the future, and the attempt to guide the course of events too far ahead not infrequently causes more loss than letting the future take care of itself. Whether this was the testator's thought or not, it is plain that he did not contemplate that his control, either direct or delegated, should continue beyond the life of each grandson.

Thirdly. Mrs. Hutchinson, in the exercise of her power under the will, revoked the devise to her nephew C. I. Maury, and declared a spendthrift trust for life for him, with a power of testamentary appointment in case he left no descendants surviving, and, if he should leave descendants, or fail to exercise his power of appointment, then remainder, in the language of her father's will, to the persons who would be entitled to take if said child died owner thereof. To this declaration of trust, however, she added a proviso "that to the extent it is lawful for me to do so, and only to that extent, I direct that any share of said principal passing by virtue of said child's decease to his brother, Francis F., shall be held by said trustees upon the same trusts * * * hereinafter directed by me as to the original share of said Francis F." From what has been already said under the second head, it follows that this limitation was in excess of the power given by testator's will. C. I. Maury having exercised his power of testamentary appointment as to his personalty, only his real estate, at his death, passed to his brother, Francis, directly, under his grandfather's will, free of all trusts. Decree affirmed.

In re INGERSOLL'S ESTATE.

Appeal of MAURY.

(Supreme Court of Pennsylvania. April 29, 1895.)

CONVERSION—BY ACTS OF TRUSTEE.

Sales and purchases of real estate by trustees who are given power by testator to sell and convey all or any part of his estate or property which they may hold under his will, and to purchase real estate, and sell it, work conversions from realty to personalty, and vice versa.

Appeal from orphans' court, Philadelphia county.

In the matter of the state of Charles Ingersoll, deceased. From so much of the decree on the account of John M. Thomas, acting trustee, as to the share for the benefit of Charles Ingersoll Maury for life as held that money invested by the trustee in real estate sale remained personalty, Francis F. Maury appeals. Modified.

Digitized by Google

William M. Meigs and John Samuel, for appellant.

MITCHELL, J. The will of Charles Ingersoll gave his trustees very ample control over the estate committed to their charge, including power to "sell and convey all or any part of my estate or property which they may hold under this will," and, with the consent of the cestui que trust, to "purchase real estate, and sell and convey the same." These words show his intention. The trusts he had particularly in contemplation were for his two grandsons during their minority, and for three married daughters. The latter had the prospect of many years of life before them, and the trusts, as to them at least, were, therefore, likely to be of long duration. His intent was manifestly to commit the estate as amply as possible to the management and discretion of the trustees, and in so doing he directed that they should not be restricted to such securities as trustees may be restricted to by law, and intended that they might convert from one kind of property to another. Mr. Ingersoll's will also gave power to his daughter Mrs. Hutchinson to revoke the devises to his grandsons, and to declare trusts for their lives. In the exercise of this power, Mrs. Hutchinson gave to the same trustees "power to retain all investments legal or otherwise, and to invest and change investments whenever they shall think advisable, without being restricted to what are known as 'legal securities,' and to sell and convey real estate now held or hereafter acquired." This language, as emphatically as that of her father's will, shows Mrs. Hutchinson's intention that the trustees under her appointment should have a power of conversion between real and personal estate. The power to sell the realty is express, and the power to purchase is necessarily implied in the phrase "hereafter acquired." The will of Mr. Ingersoll, being concerned only with the limitations on the estates and trusts to be declared by her, does not in terms give his daughter authority to direct the trustees whom she may appoint as to their investments. Whether it should be implied from the large powers given for the creation of the trusts it is not necessary to decide; for, whether the authority of the trustees of C. I. Maury's estate over investments be considered as arising from the terms of Mr. Ingersoll's will, or from the language of Mrs. Hutchinson's deed, in either case their powers are derived from the testator, and are ample to change investments from personalty to realty, and vice versa, and whatever they did in this respect worked an actual conversion as effectually as if it had been done by the testator himself. This result not only follows from the intention of the testator and the transmission of powers from him to the trustees, but is also in acord with the decisions. In Wharton v. Shaw, 3 Watts & S. 124, the rule was thus expressed by Kennedy, J.: "The estate, though real at the time of the making of the will, as also at the death of the testator, was certainly changed afterwards, by the sale made of it into personal estate. And being so changed by an authority given by the testator himself in his will to his executors, it can no longer be considered real estate, unless from his will it clearly appears to have been his intention that the money which might arise from the sale should be considered real estate, or be again invested in the purchase of other real estate." See, also, Lackey's Estate, 149 Pa. St. 7, 24 Atl. 78. The conversions, therefore, made by the trustees from real to personal estate, or vice versa, in pursuance of their powers, during the life of C. I. Maury, were actual and legal, and upon his death such property passed according to its actual status at that time. The decree is directed to be modified in accordance with this opinion.

In re INGERSOLL'S ESTATE.

Appeal of LINDENBERGER.

(Supreme Court of Pennsylvania. April 29, 1895.)

CONVERSION—WILLS—ACTS OF THIRD PERSONS.

1. A will which merely gives trustees power and discretion to convert real estate into personalty, and vice versa, without giving any direction to sell, does not of itself work a conversion.

2. Where a ground rent is paid off to trustees, not by their choice, but by that of the ground tenant, acting on his legal right, there is no conversion to personalty, though the trustees had a discretion to sell, there having been no exercise of discretion and intention on their part.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of Charles Ingersoll, deceased. From so much of the decree on the account of John M. Thomas, acting trustee, as to share for the benefit of Charles Ingersoll Maury for life, as held that certain real estate had not been converted into personalty, Lillian Lindenberger, in whose favor said Maury had exercised his power of appointment as to personalty, appeals. Affirmed.

Frank R. Savidge, for appellant. William M. Meigs and John Samuel, for appellee.

MITCHELL, J. The first assignment of error, that the learned court below erred in not finding that the whole estate over which C. I. Maury had a power of appointment passed by his will, rests on the argument that by the will of Charles Ingersoll, or the deed of declaration of trusts by Mrs. Hutchinson, one or both, the whole share of C. I. Maury in his grandfather's estate had become personalty. There is nothing in either of these papers which will sustain such contention. The estate of Mr. Ingersoll at his death consisted of both realty and personalty, and his will not only treats it as such, but contemplates that it shall continue in both forms as he left it, unless changed by the trustees un-

Digitized by Google

der the powers given them for that purpose. The will gives and devises all his "estate, real and personal," on an active and continuing trust, with authority to "make partition," to buy and sell real estate, and "convey" the same. The testator was a lawyer, and must be presumed to have used these terms in their proper legal sense, as applicable to real estate. There is nowhere any direction to sell, but only a discretionary power to do so. Nothing in the will indicates an equitable conversion, either by operation of law or by the intention of the testator. Nor is there any such effect to the deed of appointment of trusts by Mrs. Hutchinson, even supposing she had authority to direct a conversion. The estate as to which she appointed the trusts under the power in her father's will consisted of both realty and personalty, and her intent was to pass it under the trust just as it was, with large discretionary powers of management and conversion. These powers have been discussed in Appeal of Maury (opinion filed herewith) 31 Atl. 859, and need not be enlarged upon here.

The other assignment of error is to the refusal of the learned court below to treat the money representing the principal of a ground rent paid off as personalty. The subject of the conversion of the estate of C. I. Maury from realty to personalty, or vice versa, by the trustees, has been considered in Appeal of Maury, supra, and all we need do here is to point out the distinction which produces different results in the two cases. It was there held that a sale and conversion by executors or trustees, under an authority in the will, even though merely discretionary, was equivalent to a sale by the testator, and worked an actual and legal conversion, unless the will showed the testator's intention to the contrary. In the present case the element of the trustees' discretion and intention is wanting. The ground rent was paid off, not by choice of the trustees, but by the ground tenant, by virtue of his legal right. The change, therefore, was not the act of the testator, or his representatives. The act of a stranger cannot change the property's heritable qualities. It was real estate in the testator's hands, and passed as such by his will. There was no conversion by the exercise of the powers of the trustees, and the money came into their hands, as trustees for C. I. Maury, with the quality of real estate, as the rent had been which it represented. It remained so until the time of his death, and was real estate for the purposes of his will. This, however, was the first devolution, and ended its temporary quality as real estate. When it passes under the will of his grandfather to Francis F. Maury (see Appeal of Thomas, opinion filed herewith, 31 Atl. 858), it resumes, in his hands, its normal character of money. The principle of this case, the controlling effect of the absence of the trustees' exercise of their delegated power, distinguishes it from the line of cases of which Wharton v. Shaw, 3 Watts & S. 124, and Lackey's Estate, 149 Pa. St. 7, 24 Atl. 78, are types, followed in Appeal of Maury, supra. Though we have not reached it by the same process, we are of opinion that the result arrived at by the learned court below was right. Decree affirmed, at the costs of the appellant.

ROAT v. FREAR et al.

(Supreme Court of Pennsylvania. April 29, 1895.)

MECHANICS' LIENS—CLAIM.

Where a mechanic's lien was filed against "a double dwelling house" as one building, and the evidence showed the structure to be a block of two buildings, separated from cellar to roof by a brick wall, and without internal connection, the lien was not enforceable.

Appeal from court of common pleas, Luzerne county; Charles E. Rice, Judge.

Scire facias on the application of A. J. Roat against George Frear, owner, and Lemuel Garrison, contractor, upon a mechanic's lien. From a judgment for defendants, plaintiff appeals. Affirmed.

The following is the agreement of counsel:

"Now, February 12th, 1895, it is agreed that the following be filed in this case, and be printed in the paper book of the appellant, in lieu of the evidence taken at the trial:

"First. Extract of testimony of George Frear: 'Q. Whether this was a single building, or whether it is a block of two buildings. A. It is a block of two buildings. Q. Whether the buildings are separated from the cellar to the roof from each other. A. They are, by a solid brick wall and cellar. Q. No internal connection between the two buildings? A. No, sir. Q. How may stories is it? A. Well, I should say three; that is, including the third story finished in the roof.—the rooms finished. Q. Is the roof what is known as a "Gothic Attic Roof"? A. I think it is. Q. Are there inhabitable rooms in that third story? A. There are. Q. Are there windows facing on the street? A. Yes, sir.'

"Second. The lien filed was not apportioned, and is in the form following, to wit: 'Mechanic's Lien. A. J. Roat vs. Geo. Frear, D. D., Owner, and Lemuel Garrison, Contractor. In the Court of Common Pleas of Luzerne County. The above-named A. J. Roat hereby files this, his claim or statement of demand for the sum or amount of three hundred and forty dollars and sixty-three cents ($340.63), with interest from June 29, A. D. 1886, against the building hereinafter described, the ground covered by the said building, and so much other ground adjacent thereto, belonging in like manner to the owner of said building, as may be necessary for the ordinary and useful purposes of said building; said amount being for materials, to wit, doors, sashes, blinds, windows, hardware, etc., furnished by the said A. J. Roat within six

Digitized by Google

months last past, for and about the erection and construction of said building; the particular items, amounts, and dates when said materials were furnished as aforesaid being specifically set forth in a bill hereto annexed, and made part of this claim. The owner, named George Frear, is the owner or reputed owner of said building, and the said Lemuel Garrison is the contractor and architect or dealer at whose instance or request the said materials were furnished as aforesaid. Said building is a two-story double brick dwelling house, with attic, and is forty feet in width by thirty feet in depth, with an addition twenty-eight feet by eighteen feet, and is situate on a lot of ground in the city of Wilkes Barre, county of Luzerne and state of Pennsylvania, bounded and described as follows, to wit: Beginning on the southeasterly side of West River street at a corner of lot of Catharine Bergmar, thence along the said line of land south, thirty-nine degrees thirty-eight minutes east, about thirty-seven feet, to a corner in line of land of E. P. Darling and L. D. Shoemaker, known as the "Old Railroad Lot"; thence along the said lands north, fifty-four degrees and fifteen minutes east, forty-eight feet, to a corner; thence north, twenty-nine degrees twenty-eight minutes west, about ninety-seven feet, to West River street; thence along said West River street south, thirty-two degrees west, forty-eight feet, to the place of beginning,—containing 4,656 square feet of land, more or less.' "

William R. Gibbons and William S. McLean, for appellant. Edmund G. Butler, for appellee.

PER CURIAM. The only specification of error is an extract from the learned trial judge's charge, directing a verdict in favor of defendant. By agreement of counsel for the parties, the statement signed by them, embracing an extract from defendant's testimony, etc., has been printed in appellant's paper book "in lieu of the evidence taken at the trial." That necessarily excludes from consideration any evidence or allegations of fact not contained in the agreement. In view of the facts thus agreed upon, there appears to be no error in directing a verdict for defendant. Judgment affirmed.

FENNER v. LUZERNE COUNTY.

(Supreme Court of Pennsylvania. April 29, 1895.)

JUSTICES OF THE PEACE—FEES.

Act May 23, 1893 (P. L. 117), reciting the absence of uniformity in the fees of justices of the peace throughout the commonwealth, and specifying the fees to be thereafter allowed, and excepting certain counties (not including Luzerne county) from the operation of the act, repealed so much of Act April 2, 1868 (P. L. 3), as relates to fees of justices of the peace in Luzerne county subsequent to the passage of the later act.

Appeal from court of common pleas, Luzerne county; John Lynch, Judge.

Case stated by J. K. P. Fenner against the county of Luzerne. From a judgment for plaintiff, defendant appeals. Affirmed.

Following is the opinion of the lower court: "The only question to be decided in this case is, does the act of May 23, 1893 (P. L. 117), repeal the act of April 2, 1868 (P. L. 3), so far as it relates to the fees of justices of the peace elected in Luzerne county subsequent to the passage of the later act? A reading of the act of 1868 and its title leaves little doubt that it was intended by the legislature to make the law general and applicable to all counties of the commonwealth, but three provisos added to the last section limit its operation to all but six of the counties. It would seem, therefore, under the decision in Davis v. Clark, 106 Pa. St. 377, and many other cases since, that the act of 1868 is local. Still it provided for the fees of officers in nearly every county in the state, including Luzerne. The tenth section fixes the fees to be received by justices. The preamble in the act of 1893 declares: 'Whereas, no general fee bill for justices of the peace has been enacted since the act increasing the jurisdiction of justices. And whereas, no uniform fee bill for the several counties throughout the commonwealth of Pennsylvania now exists relating to justices of the peace, magistrates, aldermen and constables.' The first section provides 'that there shall be uniformity throughout the commonwealth in the charges of justices,' etc. The act then specifies the fees, in nearly all cases differing from the act of 1868, allowed for services rendered. 'A preamble is said to be the key of the statute, to open the minds of the makers as to the mischiefs which are to be remedied, and the objects which are to be accomplished, by the provisions of the statute.' 2 Bouv. Law Dict. (11th Ed.) 364. The mischief which the legislature intended to remedy by the act of 1893 was the want of uniformity in fees charged and received for the same service in different parts of the state. Why should there not be the same fee for the same service in the whole commonwealth? If the preamble, a consideration of the whole act, and the good sense of the thing are to prevail, the act of 1893 must be held to have repealed the earlier act. In other words, the act gives compensation for services, rather than for ability to successfully lobby a local bill for increase of unearned fees. Again, the last section of the act of 1893 repeals all acts or parts of acts in force at the date of its passage inconsistent with its provisions. The provisos of the act of 1868 do not include Luzerne county. If, therefore, the act of 1893 does not apply to this county, and to that extent repeal the earlier act, to what part of the state is it made applicable? Any other construction than that here given would nullify the act entirely. There is no

Digitized by Google

necessity or excuse for such extreme and technical views. If authority is deemed necessary for what seems so plain, it will be found in Quinn v. Cumberland Co., 162 Pa. St. 55, 29 Atl. 289; Com. v. Weir, 165 Pa. St. 284, 30 Atl. 835; Com. v. Schnelpp (Pa. Sup.) 31 Atl. 118. It being the opinion of the court that the act of April 2, 1868, is repealed by the act of May 23, 1893, so far as it relates to the fees of justices of the peace elected in the county of Luzerne subsequent to the passage of the act of 1893, judgment is now entered in accordance with the provisions of the case stated, in favor of the plaintiff and against the defendant, for $3.-10, being the amount to which he is entitled for services rendered by him, as set out in the bill under the act of 1893."

Among plaintiff's assignments of error was the following, viz.: "(3) The court erred in holding as a matter of law that the act of May 23, 1893, repealed this act of April 2, 1868, so far as relates to justices of the peace elected in the county of Luzerne subsequent to the passage of the act of 1893."

Joseph Moore, for appellant. Hart & McGroarty, for appellee.

PER CURIAM. The question presented by the case stated was whether the act of April 2, 1868 (P. L. 3), was repealed by the act of May 23, 1893 (P. L. 117), so far as relates to the fees of aldermen, justices of the peace, and constables elected or appointed in Luzerne county subsequent to the passage of the last-mentioned act. The learned judge of the court below held that it was, and he accordingly entered judgment against the defendant for fees under said act of 1893. For reasons given in his opinion we are satisfied there was no error in so doing, and the judgment is therefore affirmed.

RINGROSE v. BOROUGH OF BLOOMSBURG.

(Supreme Court of Pennsylvania. April 29, 1895.)

DEFECTIVE SIDEWALKS—DIRECTING VERDICT.

Where the evidence was conflicting as to whether the defects in a sidewalk were observable from the side of the street, which plaintiff was accustomed to use, and whether plaintiff knew, or ought to have known, of them, and as to whether the sidewalk over which plaintiff usually passed was safe, it was proper to refuse to direct a verdict for defendant.

Appeal from court of common pleas, Columbia county; E. R. Ikeler, Judge.

Action by W. R. Ringrose against the borough of Bloomsburg, in trespass, to recover damages for personal injuries sustained by reason of a defective sidewalk. From a judgment for plaintiff, defendant appeals. Affirmed.

The defective sidewalk in question lay on the south side of a street in the defendant town. The town had actual notice of the defects, and had ordered a new sidewalk built, before plaintiff received his injuries. On the night of the accident, plaintiff passed down the north side of the street, and upon returning, some time later, walked up the south side, with which he was unfamiliar; and the night being dark, and he being unaware of any defect, as he testified, he was injured. He testified that his reason for taking the south side on his return was that the sidewalk on the north side, over which he first passed, was out of repair. Defendant claimed that the north side was safe, as plaintiff knew, and that plaintiff was negligent in abandoning it, on his return, for the south side, with which he was unfamiliar. The defects in the south sidewalk were patent, and had existed for several years, and during that time plaintiff lived around the corner of the street, within 100 feet of the sidewalk. His work lay in another direction, however, and he had no occasion to pass down the street, except on Sundays, when he passed thereover at least four times. On those days, however, he always used the north sidewalk. The evidence as to whether the defects were observable from the north side of the street was conflicting. The only assignment of error discussed was as follows, to wit: "The court below erred in refusing to charge as requested in the defendant's eighth point, which point and answer are as follows: '(8) That, under all the evidence in the case, the verdict must be for the defendant. Answer. This point is refused. Under all the circumstances, we have decided to submit the questions of fact involved in this issue to you for your determination, and, under the rules of law, you must decide this important case.'"

Fred Ikeler, Grant Herring, and W. H. Rhawn, for appellant. James Scarlet and Robt. R. Little, for appellee.

PER CURIAM. This case depended on questions of fact arising out of the testimony, which were for the exclusive determination of the jury. They were fairly submitted to them, with instructions which were fully adequate, and at the same time free from substantial error. The only subject of complaint is the refusal of the learned judge to withdraw the case from the jury by binding instructions to find for the defendant. To have done that would have been manifest error. Judgment affirmed.

BENSCOTER v. LONG.

(Supreme Court of Pennsylvania. April 29, 1895.)

WRIT OF RESTITUTION — REVERSAL OF JUDGMENT.

Where defendant paid the judgment against him pending his appeal therefrom, and

Digitized by Google

the judgment was subsequently reversed, and the record remitted, it was proper to award defendant a writ of restitution for the amount paid.

Appeal from court of common pleas, Luzerne county.

Trespass by John Benscoter against Clinton H. Long. There was a judgment for plaintiff, which was reversed on appeal, and from a decree awarding defendant a writ of restitution plaintiff appeals. Affirmed.

Q. A. Gates, for appellant. Lyman H. Bennett, for appellee.

PER CURIAM. In an action of trespass for illegal fishing, etc., brought against defendant, a verdict for $100 was rendered in favor of plaintiff, on which judgment was entered June 27, 1892. On July 20, 1892, execution was issued for debt, interest, and costs, amounting to $164.48, which sum was paid to the sheriff by defendant on August 12th, following. In the meantime, on August 10, 1892, defendant appealed from the judgment aforesaid; and his appeal was so prosecuted that on November 1, 1893, the judgment was reversed by this court, and the record remitted. Thereupon, at the instance of defendant, a rule was granted on the plaintiff to show cause why a writ of restitution should not be awarded against him for the above stated sum. That rule was made absolute, and the writ awarded; hence this appeal, in which the sole complaint is the decree awarding the writ.

In the circumstances disclosed by the record, the action of the court below was so manifestly just and proper that plaintiff should have recognized its correctness, and complied with the mandate of the writ. There is no merit in his appeal, nor does it involve any question that requires discussion. Decree affirmed and appeal dismissed, with costs to be paid by appellant.

LANE et al. v. NELSON.

(Supreme Court of Pennsylvania. April 29, 1895.)

LANDLORD AND TENANT—SURRENDER OF LEASE—EVIDENCE OF ACCEPTANCE — PROVISION AS TO RENT—CONSTRUCTION—TENANT'S REMOVAL FROM PREMISES—EFFECT.

1. A lessee removed before the expiration of the term, without notice, and left the key with a neighbor for the lessors. The lessors notified the lessee that he would be held for the rent for the whole term unless the premises were re-rented, that they would try to re-rent the same, and that the lessee might aid in procuring a tenant; and the lessors thereupon placed the premises with a rental agent. *Held*, that there was no acceptance of a surrender of the premises.

2. A lease provided that it should continue for one year, and that at the end of that term either party might determine the lease by giving three months' notice thereof, but that, in default of the notice, the lease should continue for another year, and so on until determined by such notice, and also provided that the lessee should pay a certain rental so long as he should "occupy" the premises. *Held*, that the provision as to occupancy meant tenancy under the lease, and that the lessee was liable for rent for the entire term, though he removed before the expiration thereof.

Appeal from court of common pleas, Luzerne county; Charles E. Rice, Judge.

Action by W. B. Lane and W. S. Lane against Charles M. Nelson. From a judgment for plaintiffs, defendant appeals. Affirmed.

Following is the opinion of the lower court (Rice, P. J.):

"This action was brought to recover a balance of rent alleged to be due under a certain lease hereafter referred to. The case was tried by the court without a jury. The following are our findings of fact and conclusions of law:

"(1) The terms and covenants of the lease in question, so far as they are material here, are as follows: 'This agreement witnesseth that *I, Samuel L. White, agt. for W. S. & W. B. Lane, No. 719 Walnut St., city of Philadelphia*, do hereby let unto *Charles M. Nelson house and lot of ground situated a No. 220 N. 17th St., 28th ward, city of Philadelphia, and state of Pennsylvania*, for the term of *one year* from the *ninth* day of *October*, A. D. one thousand eight hundred and *ninety*, at the rent of *thirty-three dollars per month*, *the same* to be paid *monthly in advance, on the ninth day of each month, so long as he shall occupy the said house and lot of ground*, the *first* payment thereof to be made on the *ninth* day of *October*, Anno Domini *1894*. And the said lessee do*th* hereby agree to pay said rent to the lessor on the day and time aforesaid. * * *' The defendant further covenanted to keep the premises in good condition 'during said term,' and 'at the termination of said term' to deliver the same in as good condition as they now are. The lease also contained the following agreement: 'And it is hereby mutually agreed that either party hereto may determine this lease, at the end of said term, by giving the other notice thereof at least *three months* prior thereto, but, in default of such notice, this lease shall continue, upon the same terms and conditions as are herein contained, for a further period of *one year*, and so on from year to year, unless or until terminated by either party hereto giving to the other *three months'* notice for removal previous to the expiration of the then current term. Provided, however, that if the lessor shall have given *three months'* notice previous to the expiration of said term, or any extension or renewal thereof, as above, of *his* intention to change the terms and conditions of this lease, and the lessee shall hold over after such notice, he shall be considered lessee, under the terms and conditions mentioned in such notice, for such further period as he may remain in possession of said premises, and until this lease is terminated by notice as hereinbefore provided.' The lease was duly executed by the defendant, and by

Digitized by Google

Samuel L. White, the plaintiffs' agent. We have underscored the written portions of the extracts above quoted, the major portion of the lease being printed.

"(2) The defendant occupied the premises, under the lease, from October 9, 1890, until some time in February, 1891, and paid five months' rent as it came due. On the last-mentioned date he removed from the premises, and gave the key to a neighbor for delivery to the plaintiffs' agent. Prior to removal, he did not notify the plaintiffs of his intention to remove, or to terminate the lease, and has not since paid any rent accruing thereunder.

"(3) Shortly after his removal as aforesaid, the plaintiffs notified the defendant that he would be held for the rents for the remainder of the year, unless or until the premises could be re-rented, that they would endeavor to re-rent them as soon as it could be done, and that, if he desired, he could aid in procuring a proper tenant. They put the premises in the hands of an agent to rent the same, and caused a rent notice to be put thereon, but did not succeed in procuring a tenant during the year. The plaintiffs did not take possession, except in the manner above stated, and, so far as appears, did nothing to indicate that they accepted a surrender of the lease. A surrender of demised premises by the tenant during the term, in order to be effectual, so as to release him from liability for the rent, must be accepted by the lessor, and the burden of proof is on the lessee. It is well settled that acceptance cannot be implied from such acts of the lessor as have been shown here. They are in the interest, and for the benefit, of the tenant, and do not discharge him from his covenant to pay rent. Pier v. Carr, 69 Pa. St. 326; Breuckmann v. Twibill, 89 Pa. St. 58; Ader v. Penn, 99 Pa. St. 370; Feller v. Boyle, 132 Pa. St. 56, 18 Atl. 1069.

"The decision of the only serious question in the case depends on the construction of the words, 'so long as he shall occupy the said house and lot of ground.' The defendant urges that the lease was made for one year to avoid uncertainty,—to mark the extreme limit of the term,—but these words imply that it was subject to determination on a collateral event, to wit, the tenant's ceasing to occupy the premises. In other words, the lease was for a term of one year, but the lessee had the option to terminate it sooner, by simply removing from the premises, and without notice to the landlord, and was only liable for the rent during the time he actually lived upon or used them. In deeds, as in wills, the intention of the parties is to be taken as the cardinal rule of construction, and, if this was the intention of the parties, it must control. But inasmuch as the lease contains all the requisites of a valid lease for years, including a term with a certain beginning and ending, granted by the lessor to the lessee, and as the right of the tenant to terminate it at his will is not given in express terms, but depends, at best, on implication, it will be necessary to examine the instrument as a whole before adopting the defendant's interpretation. 'The intention of the parties is to be ascertained from the entire instrument, not from particular words or phrases without reference to the context, and the instrument shall operate according to the intention, unless it be contrary to law.' Berridge v. Glassey, 112 Pa. St. 455, 3 Atl. 583. A deed must be so construed, if possible, that no part shall be rejected. Tyler v. Moore, 42 Pa. St. 387; Watters v. Bredin, 70 Pa. St. 238. 'The object of all constructions is to ascertain the intent of the parties, and it must have been their intent to have some meaning to every part. It never could be a man's intent to contradict himself; therefore we should lean to such a construction as reconciles the different parts, and reject a construction which leads to a contradiction.' Tilghman, C. J., in Wager v. Wager, 1 Serg. & R. 374. Having these well-understood principles in view, we think the covenant as to notice must have an important bearing on the interpretation of the clause under consideration. In Pennsylvania the tenant is not required to give notice of his intention to quit at the end of any quarter, or month, or year, as the term may be (Cook v. Neilson, 10 Pa. St. 41; Brown v. Brightly, 14 Wkly. Notes Cas. 497), whereas, if the landlord desires to regain the possession summarily at the end of the term, he must give three months' notice. Undoubtedly one purpose of this covenant was to put the landlord and the tenant on equal footing, so that the former should know a reasonable time before the end of the year whether he must seek another tenant, and the tenant should know whether he must seek another habitation. But nothing could be more absurd than a covenant that if either party desired to terminate the lease at the end of the term he must give the other party three months' notice prior thereto, and that, in default of such notice, the lease should continue upon the same terms and conditions for another year, if the parties had supposed that they had already provided that the lessee could terminate the lease at any time, without notice of any kind. If he had a right to terminate it at any time during the term, a fortiori he had the right at the end of the term, and hence the covenant, so far as binding the lessee was concerned, was of no effect. This cannot be what the parties intended.

"The rule of construction which attaches more relative importance to the written than to the printed part of a contract is often a very useful one, and is recognized in many of our cases. Grandin v. Insurance Co., 107 Pa. St. 26; Haws v. Association, 114 Pa. St. 431, 7 Atl. 159; Duffield v. Hue, 129 Pa. St. 94, 18 Atl. 566. But neither this rule, nor the rule that every man's grant is to be taken most strongly against himself, relieves the court from the duty of reconciling the different parts of the contract if it can reasonably be done.

Digitized by Google

And, where the interpretation and effect of the written portion are themselves in question, the other portions of the contract, although printed, cannot be disregarded. The lessee's option to terminate the lease at any time during the term by simply removing from the premises is not expressly given. It is sought to be implied from a written clause, which, even standing by itself, would not necessarily have that meaning; and therefore, in determining what the meaning of the parties was, it is proper to consider the agreement as to notice, and our duty to endeavor to reconcile and harmonize all the provisions of the lease. Furthermore, the agreement as to notice is not wholly printed, and the blanks are filled in writing in such a manner as to indicate that the parties understood its provisions. But it is argued that there is no other possible construction that will give meaning to the words, 'the same to be paid monthly in advance so long as he shall occupy the said house and lot of ground,' except that which the defendant puts upon them. We are unable to assent to this. It seems to us that the parties had in view precisely what was provided for in the agreement as to notice, namely, a possible continuance of the lease beyond the term specified in the habendum, and intended to provide that the lessee should pay the same rent, in the same way, so long as he should continue to be the tenant of the premises. Such a provision might be unnecessary, but it was not absurd. The defendant construes the word 'occupy' to mean actual use of the premises, as a residence or as a place to store his goods. It is by no means clear that, even giving to the word its most restricted meaning, the lessee did not occupy the premises during the whole year, for until the key was surrendered and handed to the landlord he could have returned. Pier v. Carr, 69 Pa. St. 326. If he had returned, would he not have been liable for the rent during the period of his absence? The tenant, though absent, is, speaking generally, the occupier of the premises, but a servant is not. Rex v. Poynder, 1 Barn. & C. 178. But, without putting the decision on the narrow ground that the defendant did not surrender the key, we remark that the meaning of the word suggested by the defendant is one, but not the only, meaning in which it is used. 'In the primary and most familiar sense of the word "occupy," it is the equivalent of the word "possess." It implies the conception of permanent tenure for a period of greater or less duration.' Lacy v. Green, 84 Pa. St. 520. Lord Denman said: 'The meaning of the word "occupied" may vary according to the occasion or the subject-matter. The meaning, therefore, which it has received in considering what occupation was necessary to constitute a mansion house, in which burglary might be committed, or to give a right of voting, or to make a party ratable to the relief of the poor, is no test of its meaning in this particular case.' Rex v. Inhabitants of St. Nicholas, 5 Barn. & Adol. 227. That the meaning of the word may vary according to the occasion, the subject-matter, or the context is shown in a number of decided cases. Two of these which have come to our attention seem to be in point. Where, in a conveyance from A. to B., there was reserved to A. the right 'to live in, inhabit, dwell in, and occupy the said cottage with the appurtenances, as he heretofore has done, and now does, for and during the term of his natural life,' it was held that an estate for life was reserved. Kenyon, J., said: 'If this question had depended on the first words of the proviso, I should have thought they would have been satisfied by determining that only a liberty to inhabit the cottage was given to A.; but the word "occupy" carries the interest reserved still further, and shows that the whole estate was intended to be reserved to him.' Rex v. Inhabitants of Eatington, 4 Term R. 181. B. guarantied the payment of A.'s rent 'so long as said A. shall occupy the premises.' It was held that the word 'occupy' was used, not simply in the narrower sense of actual or personal occupancy, but the larger sense of tenancy actually existing under the lease. Such use of the word is not uncommon.' Morrow v. Brady, 12 R. I. 131. We are of opinion that it was used in that sense in this lease, and therefore hold that the defendant is liable for the rent for the remainder of the term, namely, from March 9, 1891, until October 9, 1891. The plaintiffs are entitled to judgment for the sum of two hundred and sixty-four and $^{62}/_{100}$ dollars ($264^{62}/_{100}$), the same being the amount of rent due and unpaid ($231), and interest on each month's installment from the time it was due until the present time.

"Now, November 13, 1893, the prothonotary is directed to give notice to the parties or their attorneys of the filing of this decision, and, if no exceptions are filed within thirty days after service of such notice, to enter judgment in favor of the plaintiffs for the sum of two hundred and sixty-four and $^{62}/_{100}$ dollars, together with interest thereon from this date."

The defendant excepted to the following conclusions of law in the opinion, viz.: First, to the conclusion of the court that the meaning of the word "occupy," as written in the lease, was not simply in the sense of actual or personal occupancy, but in the larger sense of tenancy actually existing under the lease. Second, to the conclusion of the court that the "defendant is liable for the rent for the remainder of the term, viz. from March 9, 1891, until October 9, 1891." Third, to the conclusion of the court that the "plaintiffs are entitled to judgment for the sum of two hundred sixty-four and sixty-two one-hundredths dollars, the same being the amount of rent due and unpaid and interest on each month's installment from the time it was due until the present time." All of which exceptions were overruled, and judgment entered for plaintiffs.

J. B. Woodward and W. S. McLean, for appellant. John M. Garman and Theorus D. Garman, for appellees.

Digitized by Google

PER CURIAM. The facts being agreed upon, the questions arising thereon were submitted to the court, and judgment was entered in favor of the plaintiffs. The record discloses no error. Little, if anything, can be added to what has been so well said by the learned president of the common pleas. On his clear and concise opinion we affirm the judgment. Judgment affirmed.

In re TURNER'S ESTATE.

Appeal of WHITNEY.

(Supreme Court of Pennsylvania. April 29, 1895.)

LEGACY — PAYMENT BEFORE TESTATOR'S DEATH — EVIDENCE — COMPETENCY OF WITNESS — COMMUNICATIONS TO ATTORNEY — TRANSACTIONS WITH DECEDENT.

1. On an issue whether a legacy was paid during testator's lifetime, where it appeared that the bequest was made as compensation for services, and that the legatee had expressed her intention of getting the money at once, and that while the bulk of testator's estate was in litigation, and when his bank account was very low, he gave the legatee a check for an amount covering the bequest, which check was paid, it was proper to find that the legacy was satisfied by the check.

2. A legatee stated to her testator's regularly employed attorney, knowing him to be such, that she wanted to get the amount of her bequest during testator's lifetime, and desired the attorney to aid her. The attorney refused to do so, and there was no employment in the matter. *Held*, that the fact that the attorney had previously been occasionally employed by the legatee did not render her communication privileged.

3. Under P. L. 1887, § 5, subd. e, providing that, when any party to a thing or contract in action is dead, no person whose interest is adverse to the decedent's rights therein shall be a competent witness to any matter occurring before decedent's death, unless the issue relate to the property of a decedent, and the controversy be between parties respectively claiming such property by devolution on the death of the owner thereof, a legatee who received the amount of her legacy from testator after the making of his will, but before his death, is incompetent to testify that testator told her that the payment was a gift, and should not affect her legacy.

Appeal from orphans' court, Luzerne county.

In the matter of the estate of Edward I. Turner, deceased. From the decree overruling the exceptions of Virginia Whitney to the audit of distribution, and disallowing her claim as legatee, she appeals. Affirmed.

The item of decedent's will involved in this appeal is as follows, viz.: "Item. I give, devise and bequeath to Virginia Preston the sum of two thousand five hundred dollars, to be paid by my executor within one year after my decease; and I also give, devise, and bequeath to Mary Preston, my housekeeper, the sum of two thousand five hundred dollars, to be paid to her by my executor within one year after my decease." So much of the report of audit as is material to this matter is as follows: "(6) The payment of the legacies to Virginia Preston, now Mrs. Virginia Whitney, and to Mrs. Preston, are objected to on the ground that said legacies had been adeemed or satisfied by the decedent during his lifetime. We find as a matter of fact that the legacy to Mrs. Virginia Whitney was paid by check of the decedent during his lifetime, dated 15th December, 1891. This fact is established by the testimony of the executor and of Mr. Creveling. The executor, Mr. De Witt, says 'that after the will was made Virgy Preston said to him that Mr. Turner had remembered her in his will, and that she had a notion to get her money now.' A few days afterwards she presented that check (this referring to the $5,000 check) at the bank. Mr. Creveling's testimony is that she said to him that she was to have some money under Mr. Turner's will, and she wanted him to help her get it at that time. She said she thought if she did not get the money now she never would get it, giving her reason for thinking so. From the testimony of other witnesses it appears that the legacy named in the will was by way of compensation for services rendered by Miss Preston, and not by way of a gift or by reason of kinship. Miss Preston did not explain or deny this testimony, although she was permitted to do so. She got $5,000 very soon after the making of the will, and at a time when Mr. Turner's bank account was very low, and when the bulk of his estate was in litigation. We cannot presume it was a mere gift, in addition to the legacy so recently named in the will. We think Mr. Creveling was a competent witness, although, as she said, he had previously been her counsel in small matters. It appears from the testimony that Mr. Creveling had been counsel for Mr. Turner for many years, and had written his will. He says he went to Mr. Turner's home to see him about some business, and met Miss Preston at the front door; that is, he was not sent for by Miss Preston, was not employed by her, and was not then engaged by her, and all that she wanted of him was that he should use his influence with Mr. Turner as his confidential legal adviser to assist her in getting the money, which he then promptly declined to do. These facts do not make her communications to him confidential. Heaton v. Findlay, 12 Pa. St. 304. Bouv. Law Dict. 'Confidential Communications.' We further conclude that the fact of payment of the legacy is sufficiently established without Mr. Creveling's testimony. This payment was the satisfaction of an obligation which Mr. Turner seems to have recognized, and not a technical ademption of a legacy as between a parent and child. As to the legacy to Mrs. Preston, we conclude there has been no payment to her, and that she is entitled thereto with interest from one year after the death of the decedent. It is not shown that she authorized her daughter to collect her legacy, or that any part of it has ever been paid her."

Digitized by Google

Following, among others, are appellant's assignments of error, to wit: "(2) The learned court erred in dismissing the exception to the finding of fact in the distribution of audit, as follows: 'Exception 2. The said Virginia Whitney excepts to the following finding of fact: That the legacy to Mrs. Virginia Whitney was paid by check of the decedent during his lifetime, dated 15th December, 1891. By the Court: This exception is overruled and dismissed.'" "(4) The learned court below erred in dismissing the exception to the audit of distribution to the finding of law, as follows: 'Exception 4. The court erred in finding as a matter of law that D. L. Creveling was a competent witness. By the Court: This exception is overruled and dismissed.'" "(8) The learned court below erred in refusing to permit Mrs. Virginia Whitney, née Preston, to be sworn as a witness under the following offer: 'Mrs. Virginia Whitney called and sworn. Mr. Davenport: We offer to prove by the witness that the $5,000 which she received from Mr. Edward I. Turner prior to his death was a gift given her in consideration of services to Edward I. Turner, viz.: In securing the signature of James Turner to the will, which will devised all of his property to Edward I. Turner, and in consideration of other services and the love he bore Miss Preston at that time. And, further, that after the receipt of the money by her she went to Mr. Turner, and had a conversation with him about this money, and he said it was a gift to her, and he didn't intend it should affect her legacy under his will. Mr. Wheaton: We object to the witness as incompetent to testify, by reason of the act of 1887,[1] to any matter or thing which took place prior to the death of Edward I. Turner, the deceased, and seeking to establish her right to the legacy under his will, except only (I speak for myself and my own client in the rest of this objection) I think she is competent to testify as to any relevant matter concerning which D. L. Creveling has already been called and testified to on the other side, under the act of 1891, as I understand it. Further than that, anything else we object to. By the Court: This testimony is admitted to be limited to that of rebutting the testimony produced this morning by the witnesses on the other side, to be held under advisement.'"

G. L. Halsey, for appellant. William S. McLean, Frank Wheaton, George K. Powell, and J. Q. Creveling, for appellee.

[1] P. L. 1887, § 5, subd. e, provides, in effect, inter alia, that, where any party to a thing or contract in action is dead, no surviving party thereto, or any other person whose interest is adverse to the right of the deceased, shall be a competent witness to any matter occurring before the death of said party, unless the issue relate to the property of a decedent, and the controversy be between parties respectively claiming such property by devolution on the death of the owner thereof.

PER CURIAM. An examination of this record has satisfied us that the learned judge's findings of fact, rulings on questions of evidence, and conclusions of law, complained of in the assignments of error, are substantially correct. There is nothing in either of the specifications that requires a reversal or modification of the decree, and they are therefore dismissed. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

McGONIGLE v. SUSQUEHANNA MUT. FIRE INS. Co. (No. 455.)

(Supreme Court of Pennsylvania. April 29, 1895.)

INSURANCE—PROOFS OF LOSS—WAIVER—INCREASE OF RISK—INCUMBRANCES.

1. One who solicited insurance at the local insurance agent's instance, took applications therefor, and delivered them to the local agent, who reduced them to the proper form and forwarded them to the company, which issued policies thereon, was the agent of the company as to effecting such insurance.

2. Upon assured's property being wholly destroyed, he notified the company, and its secretary, general manager, and adjuster at once arranged for arbitration as to amount of loss, and promised to pay upon the making of an award. After the award was made, the company delayed payment on various grounds, but nothing was ever said as to assured's furnishing proofs of loss. *Held*, that such proofs were waived.

3. The fact that assured furnished proofs of loss after the same were waived did not resubject him to the provision in the policy that suit should not be brought within 90 days after furnishing such proofs.

4. An insurance company, in order to avoid a policy on the ground that the premises were put to a use not represented when the insurance was made, whereby the risk was increased, must show that the assured knew that such use increased the risk and the rate, and that he concealed it from the company.

5. Where assured, on applying for insurance, informed the agent that there was a lien against his property, and a policy was issued which failed to note that fact, it is presumed that the company waived the condition in the policy as to liens, though the agent reported the property as unincumbered, and the policy provided that no provision thereof could be waived except by express indorsement thereon.

6. A waiver of the condition in a policy of insurance against incumbrances may be inferred from the appointment of appraisers, and an adjustment of loss, the negotiations as to which lasted five months, though the policy provided that no condition thereof could be waived except by special agreement indorsed thereon.

Appeal from court of common pleas, Luzerne county; Charles E. Rice, Judge.

Action by Patrick McGonigle against the Susquehanna Mutual Fire Insurance Company on a policy of fire insurance. From a judgment for plaintiff, defendant appeals. Affirmed.

This case was referred to a referee, whose report is as follows:

"This case having been referred to me under the act of March 23, 1870, and its supple-

Digitized by Google

ment of June 22, 1871, I now submit my report thereon:

"The proceeding is an action of assumpsit on a policy of insurance issued by the Susquehanna Mutual Fire Insurance Company to Patrick McGonigle, dated April 13, 1892, insuring $1,300, on his two-story frame building and additions thereto, with shingle and tin roof, while occupied as a saloon, storeroom for liquors, and dwelling, situate on the west side of, and known as, Orchard or Second street, Plumbtown, Luzerne county, Pa., including foundations, gas and water pipes, and fixtures for heating and lighting as part of the building; $1,000 other insurance permitted Aurora Fire Insurance, Harrisburg, attached to policy No. 12,319 of the Susquehanna Mutual Fire Insurance Company agency at Wilkes Barre.' The evidence elicited at the trial was not free from conflict, but after full consideration I find the facts to be as follows:

"First. The Susquehanna Mutual Fire Insurance Company established an agency at Wilkes Barre, Pa., and appointed Mr. I. W. Miller as agent. Mr. Miller, besides personally soliciting insurance for his principal, accepted the assistance of one George W. Thomas, who seems to have been a sort of itinerant solicitor of insurances in the near vicinity of Wilkes Barre. He looked up properties to be insured, took verbal applications from the owners, brought them to Mr. Miller, who, after reducing them to writing, forwarded them to his company at Harrisburg, and when they were accepted, and policies issued thereon and sent to him, he usually delivered them to the assured, but sometimes he handed them to Mr. Thomas, to be delivered to the assured on the receipt of premiums. In the present instance, however, both Mr. Miller and Mr. Thomas had solicited the insurance from Mr. McGonigle, both had been on the premises, and the former had been through the house. They seem to have had a conference on the subject later, and Mr. Miller directed Thomas to take the insurance. Accordingly, the latter, after obtaining from McGonigle, at another interview, further information concerning the premises, and after a satisfactory inspection of them himself, communicated to Miller the result. Miller reduced the same to writing, and, signing it himself, forwarded it as an application to his company. It was accepted, and a policy of the character and extent as before indicated was issued and sent to Miller. He delivered it himself to McGonigle, at the home of the latter in Plumbtown. McGonigle paid to him a part of the premium, and a part of it to Thomas. That the defendant company in due time subsequently received the amounts thus paid is not denied.

"Second. The valuation put upon the property at the time the application was made out by Miller was fixed by Thomas. He was upon the premises many times, and during his negotiation for the insurance McGonigle told him what he had paid for the property originally, land included, and also what amount of insurance he wished put upon it. He made known to him the fact that there was an incumbrance on the premises, held by the executor of an estate. Thomas communicated the knowledge thus obtained to Miller, and fixed the valuation at $3,500. Miller was satisfied, and, indeed, according to his own testimony, he had 'dropped in to see McGonigle' whenever he went down to Plumbtown before the insurance was taken. And after it was taken, and before the loss occurred, he further testified that he 'was down there and looked the building over. It looked nice, and I thought everything was all right, and Mr. McGonigle a very nice man.' In reference to the incumbrance, his testimony was that 'Thomas said he didn't ask McGonigle if the property was mortgaged, or, if so, to what extent'; and, further, that Thomas said: 'That's a good property down there at McGonigle's. He's making lots of money, and I don't believe he's got anything on it.' Miller says he replied: 'Well, mark it, "No incumbrances."' McGonigle himself testified that he had put improvements on the property since he purchased it, and that it was worth $5,000. This valuation, as I understood it, related to the property as a whole, land included. Under all the testimony in this connection, the referee cannot escape the conclusion that an insurance of $2,300 was not an overinsurance on the building proper. It was at least within the limit of two-thirds of the value of the building at the time the policy was issued.

"Third. On the morning of August 30, 1892, before daylight, a fire broke out in the village of Plumbtown, in a house but a few doors distant from the premises of the plaintiff. The intervening buildings were of wood, built close together, and of course readily inflammable. Awakened dwellers, having only the few facilities for quenching fire common in a country village, were powerless to stay the flames. The plaintiff's insured property was soon reached and burned up.

"Fourth. On the day following the morning of the fire, McGonigle notified Miller, the local agent at Wilkes Barre, of the loss, and the latter presumably notified his principal forthwith, for about ten days afterwards Mr. B. K. Huntzinger, who, besides being secretary of the defendant company, seems to have been the general manager of its affairs, and especially the adjuster of its losses, appeared on the ground at Plumbtown, accompanied by Miller, the local agent. Mr. Huntzinger was also president of another insurance company,—the Aurora Insurance Company, of Harrisburg, Pa.,—which likewise had issued a policy on Mr. McGonigle's property, and hence was interested in the results of the fire. He seems to have occupied a relation to this company altogether similar to that occupied by him in respect to

Digitized by Google

the defendant company, at least as far as the adjustment of losses was concerned. The loss in this case having been total, Mr. Huntzinger declined to exercise the right to build, but desired that the extent or measure of the loss, as respected each of the companies named, be appraised in accordance with the provisions of the policies, promising that each could pay its proportionate amount just as soon as appraisers should reach a finding in the premises. He made no demand whatever for proof of loss at this time. The ashes and debris seemed to furnish all the evidence required upon this point. Some difficulty or difference, however, occurred between the plaintiff and himself in the selection of appraisers satisfactory on the one side and the other, but this was shortly overcome and an agreement reached in this respect. It was as follows: 'It is hereby agreed by Patrick McGonigle, of the first part, and the Susquehanna Mutual Fire Ins. Co., of Harrisburg, Pa., and the Aurora Fire Insurance Company, of Harrisburg, Pa., of the second part, that William Griffith and L. H. Hahn, together with a third person to be appointed by them, if necessary, to act as umpire, shall appraise and estimate at the true cash value of, and damage by fire to, the property belonging to Patrick McGonigle, as specified below, which appraisement and estimate made by them, or any two of them, in writing, as to the value and amount of such loss or damage, shall be binding on both parties; it being understood that this appointment is without reference to any other question, matter, or thing contained in the terms and conditions of the policy of insurance, and is of binding effect only so far as regards the actual cash value of, or damage to, such property covered by policies No. 12,819 and No. 2,409 of said companies, issued at Wilkes Barre, Pa. The property on which damage is to be estimated and appraised is a two-story frame building, and additions thereto, with shingle and tin roof, including foundations, gas and water pipes and fixtures, and all permanent fixtures for heating and lighting. And it is expressly understood and agreed that said appraisers are to take into consideration the age, condition, and location of the property just previous to the fire, and also the value of any portion of the property saved, and, after making an estimate of the cost of replacing the property on which this appraisal is made, a proper deduction shall be made for the difference, if any, between the value of said property, when replaced new, and the said destroyed property at the time of the fire, and it being expressly understood and agreed that, in case of the depreciation of the property from age, location, use, or any cause whatever, the said appraisers shall make a suitable deduction from the cash cost of replacing the same, and to ascertain the actual cash value of said property immediately previous to the time of the fire. This agreement is made in presence of, and in conformity to the provisions to that effect in, the conditions of insurance attached to said policies. And it is expressly understood and agreed that this appraisal and agreement does not waive, and is without prejudice to, any of the other terms and conditions of the policy of said companies. Witness our hands at Wilkes Barre, Pa., this 14th day of September, A. D. 1892. [Signed] Patrick McGonigle. B. K. Huntzinger, for Susquehanna Mutual Fire Insurance Company. In presence of I. W. Miller.' The appraisers thus agreed upon, before entering upon the duties of their appointment, took and subscribed the following oath: 'State of Pennsylvania, Luzerne County, ss.: —We, the undersigned, do solemnly swear that we will act with strict impartiality in making an appraisement and estimate of the value and the actual loss or damage to the property of Patrick McGonigle insured by the Susquehanna Mutual Fire Insurance Company, of Harrisburg, Pa., and the Aurora Fire Insurance Company, of Harrisburg, Pa., agreeably to the terms of the foregoing appointment, and that we will return to said companies a true, just, and conscientious appraisement and estimate of loss or damage on the same, according to the foregoing appointment, and to the best of our knowledge, skill, and judgment, hereby appointing Jas. Woolsey as umpire. Witness our hands this 14th day of September, A. D. 1892. [Signed] L. H. Hahn, Wm. Griffith, Appraisers. Sworn and subscribed before me this 14th day of September, A. D. 1892. John A. Davison, Notary Public. [Seal.]' The appraisers at once commenced their investigation, and on the succeeding day reached and delivered an award, as follows: 'To the Susquehanna Mutual Fire Insurance Co., of Harrisburg, Pa., and the Aurora Fire Ins. Co.: Having carefully estimated and appraised the property, also the loss and damage by fire to the hereinabove described property, of Patrick McGonigle, agreeably to the foregoing appointment, and having carefully examined all the property referred to, we hereby report that after taking into consideration the age, condition, and location of the property at the time of the fire, and making proper deductions for all property saved in a damaged condition, also making suitable deductions for depreciation on account of age, use, and otherwise to said property, we have appraised and determined, and do report, the actual cash value to be one thousand eight hundred and ninety-one $^{25}/_{100}$ dollars, and the actual cash loss on same to be seventeen hundred and eighty-five and $^{52}/_{100}$ dollars. Witness our hands this 15th day of September, A. D. 1892. [Signed] L. H. Hahn, Wm. Griffith, Appraisers.'

"Fifth. A few days after the completion of the appraisement, Mr. Huntzinger had an interview with the plaintiff. The former did not carry out the promise to pay to the latter the proportionate amount found to be

Digitized by Google

chargeable under the award to the defendant company. On the contrary, Mr. Huntzinger then set up as a cause of delay, and as a reason why the company would not pay, the fact that 'a man named Jones had an attachment on the place.' At a still later day he called at the house of Mr. McGonigle, in Plumbtown, and invited him to come to Wilkes Barre, saying that 'he would settle the loss.' Indeed, on several occasions subsequent to the award of the appraisers, Mr. Huntzinger assured the plaintiff that 'he was willing and satisfied to pay the loss.' Payment, however, was not made. Some months of further delay intervened. Mr. Huntzinger added to the reasons already made for nonpayment the declaration that the defendant company 'was short of funds.' Along in December of that year, Hon. W. H. Hines, at that time counsel for the plaintiff, wrote directly to the defendant company at Harrisburg, Pa., asking for compliance with the promises made on their behalf. To that letter, which appears in the attached exhibits, Mr. Huntzinger returned the following reply, which also appears in the attached exhibits: 'Susquehanna Mutual Fire Insurance Company. Incorporated 1873. Charter Perpetual. Harrisburg, Pa., Dec. 10th, 1892. W. H. Hines, Esq., Wilkes Barre, Pa.—Dear Sir: Replying to your letter of the 9th inst. touching loss of Pat McGonigle, will say that you are misinformed both as to promises of payment and as to time when losses are payable. All promises made in this case are what the policy sets forth, and, as they are conditional, the time has not yet arrived to say anything about payment other than what the policy itself contains. As I am also interested in the Aurora Fire Ins. Co., the above applies to your letter of the same date to it. Yours, truly, B. K. Huntzinger, Secy.'

"Sixth. A short time after the correspondence above noted, Mr. Hines called personally at the office of the defendant company in Harrisburg, with a view to aid the interests of Mr. McGonigle in respect to his loss. Mr. Huntzinger, speaking for the two companies hereinbefore named, did not predicate the delay of adjustment on the fact that no proof of loss had been furnished, but stated that attachments had been served, and that the claim on the building could not be adjusted until the attachments were released, and, further, that this was the cause of the delay. The public duties of Mr. Hines as a member of congress obliged him to forego further professional effort in Mr. McGonigle's behalf, and thereupon John McGahren, Esq., was employed by the plaintiff as counsel.

"Seventh. There was no dispute on the trial as to the existence of an incumbrance on the property at the time I. W. Miller, the local agent, formulated the application for insurance, nor that it continued at the date of the issuing of the policy. Nor was it denied that the plaintiff informed Thomas of the incumbrance when the latter solicited the insurance. It was further conceded that on the 3d of September following an attachment execution was issued on the incumbrance, and service of the same was had four days afterwards on the defendant company, as a garnishee.

"Eighth. In January following, Mr. McGahren, counsel for the plaintiff, wrote to Mr. Huntzinger in behalf of Mr. McGonigle. This letter appears in the attached exhibits. Inclosed therein was forwarded to the defendant company a certificate from the proper record in Luzerne county showing that the attachment in question had been dissolved. Replies of Mr. Huntzinger to several letters written by Mr. Hines and Mr. McGahren to the defendant company directly, and to Mr. Huntzinger himself, as the recognized agent, appear in the attached exhibits. All promises of payment other than those conditioned in the policy seem to have been unrecognized by Mr. Huntzinger. At a later date, or on the 13th of February, 1893, proofs of loss were duly made and forwarded to the defendant company. Payment of the claim was nevertheless still refused, and on the 23d of the same month this action was instituted. John McGahren, Esq., counsel for the plaintiff, claims that under the facts as developed in the trial, and under the law, Mr. McGonigle is entitled to recover the sum of $1,009.20, the proper amount due from the defendant company under the terms of the policy, based on the finding of the appraisers, together with the interest on the same from the date of such finding. Hon. Henry W. Palmer, counsel for the defense, insists that there should be a general finding, under the facts and the law, in favor of the defendant company. He further requests the referee to find the following facts: 'First. That the representations upon which the policy in this case was issued were made to the agent of the company by George W. Thomas, an insurance broker, who was not an agent of the defendant company. Second. That Thomas represented the property to be worth $3,500, when in fact it was not worth more than $1,895. Third. That Thomas represented that he did not know whether the property was incumbered, but told the agent of the defendant to put it down as unincumbered, and it was so represented to the defendant company. Fourth. That the action of the secretary of the defendant company in viewing the premises and having appraisers appointed to estimate the loss is not sufficient to show a waiver of the proofs of loss. Fifth. That under all the evidence the defendant company did not waive proofs of loss. Sixth. That plaintiff furnished proofs of loss February 13, 1893, and brought suit in less than ninety days thereafter. Seventh. That the property was represented as a dwelling house and saloon and store-

Digitized by Google

room for liquors, when in fact it contained a hall used for public entertainments, shows, theaters, and suppers. Eighth. That the rate charged by insurance companies on property used for purposes of public entertainments is higher than the rate charged plaintiff.' As to questions of law Mr. Palmer desired the referee to find as follows: 'First. The plaintiff is not entitled to recover in this case, because, by the terms of his policy, all representations made before the insurance was effected are warranted to be true, and certain ones have been found to be false; therefore, the plaintiff cannot recover. Second. Because the suit was brought before the money was due under the terms of the policy.'

"In support of the views thus entertained of the facts and the law in the premises, Mr. Palmer directed the attention of the referee to the following provisions in the policy, and desired that they should be considered in disposing of the case:

"No. 1—Duty of secretary: 'He shall, upon the occurrence of any loss, view the premises as soon as practical, investigate the cause of the loss, and make report to the board at their next meeting, or may appoint some other competent person to act in his stead.'

"No. 1½—Duty of agents: 'It shall be the duty of local agents or surveyors to make surveys and receive applications for insurance, to transmit the same to the secretary, to receive the cash premiums for the same, the reward thereof, and the interest payments, when furnished with proper receipts therefor, and, in case of any loss occurring within his agency, he shall as soon as possible go to the place of such loss and examine into the circumstances attending the same, and report to the secretary the result of such examination. But no agent is to be empowered to make insurance, nor to waive any condition of the policies or by-laws, either before or after a loss, without special authority from the company in writing.'

"No. 1¾—Who is an agent: 'In any matter relating to this insurance, no person unless duly authorized in writing, shall be deemed an agent of this company.'

"No. 2—Time limit for bringing suit: 'Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers as hereinafter provided; and the amount of loss for which this company shall be liable pursuant to this policy shall not be payable until ninety days after the notice, verification, and delivery of the proof and claim at the office of the company in the manner and time herein required.'

"No. 3—Appointment of appraisers: 'In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the assured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit the differences to the umpire; and the award of any two shall determine the amount of such loss. The parties thereto shall pay the appraisers respectively selected by them, and shall bear equally the expense of the appraisement and umpire.'

"Nos. 4 and 5—Waiver by company—Appraisal—Proofs of loss—Time for bringing suit limited: 'This company shall not be held to have admitted any liability, or to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal, or to any examination herein provided for; and the loss shall not become payable until ninety days after the notice, ascertainment, estimate, and satisfactory proofs of the loss herein required have been received by this company, including an award by appraisers, when appraisal has been required. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within eight months next after the fire.'

"No. 6—Warranty—No waiver by agent: 'The insured, by the acceptance of this policy, hereby warrants that any application, survey, plan, statement, or description connected with the procuring of this insurance, or contained in or referred to in this policy, as well as all representations made by the insured, or the representative of the same, are true, and shall form a part of this policy, whether signed by the insured or not; also, that the property herein described has not been overvalued, and that no fact or circumstance concerning this insurance or the subject thereof has been concealed or omitted to be made known to said company. And this company shall not be bound under this policy by any act of or statement made to or by any agent or other person which is not contained in this policy, or in any other written paper above mentioned.'

"No. 7—Amount of insurance allowed: 'The aggregate amount of insurance in this and other companies shall not exceed two-thirds of the actual value of the property insured. This limit may, however, by special indorsement on the policy, be extended to three-fourths of the real value.'

"No. 8—Policy subject to conditions: 'This policy is made and accepted subject to the foregoing stipulations, conditions, and by-laws, together with such other provisions, agreements, conditions, or statements as may be indorsed hereon or added hereto, whether signed by the assured or not; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto. And, as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived

Digitized by Google

such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto by the secretary of the company, or by an agent authorized thereto in writing by the president or secretary of this company; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.'

"No. 9—Policy void if premises used for anything but dwelling house and hotel: 'This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any fact or circumstance concerning this insurance, or the subject thereof; or if the interest of the insured in the property be not truly stated therein; or if, during this insurance, the above-mentioned premises shall be used for any trade, business, or vocation, or for storing, using, or vending therein any class of article, other than those named; or if the occupation of such premises be changed except as herein specially agreed to in writing upon this policy.'

"To the first request of the counsel for the defense as to the finding of facts, the referee cannot yield unqualified assent as a whole, and therefore must deny it. It is true that Mr. Thomas was not the appointed local agent of the defendant company at Wilkes Barre, but he was a solicitor of insurance for Mr. Miller, the duly-appointed agent at that place. He looked up properties to be insured, took applications, verbal and otherwise, for such insurance, brought them to Mr. Miller, who, after reducing them to writing or putting them in proper form, forwarded them to the companies for which he was agent. In the present case both Miller and Thomas were solicitors for this particular insurance, both examined the property, both were satisfied with it in every respect. Miller himself was shown through the house. He instructed Thomas to take the insurance, thus, apart from what he himself did directly in the premises, making the act of Thomas his own act. His principal recognized his work, issued a policy in conformity with it, received the premium therefor, never challenging any part of the preliminary transactions until the day of trial, upwards of seventeen months thereafter. The features of the case in some respects are closely analogous to those of Insurance Co. v. Eshelman, 30 Ohio St. 647, where it was held, substantially, that where an agent, in the due prosecution of the business of his principal, employs another in a branch of the business, the acts of the subagent have the same effect as if done by the agent himself. This doctrine was quoted approvingly by our supreme court in Swan v. Insurance Co., 96 Pa. St. 37. The second and third requests on the part of the defense must be denied also, except in so far as relates to the voluntary and unauthorized representation as to incumbrances made by Miller, the local agent himself, to his principal. And denial must likewise be had of the fourth and fifth requests. Where there is a total loss of the insured building, and the insurance company has been immediately notified, as was done in this case, no further technical proof of loss is necessary. Besides, when an insurance company bases its neglect or refusal of payment on the ground that attachments of the claim have been served upon it, or that it is short of funds, or, indeed, on any ground other than the absence of technical proof required by the policy, particularly when the loss has been total, and notice of it has in due time been given to the company, such conduct amounts to a waiver of technical proofs of the loss. Roe v. Insurance Co., 149 Pa. St. 94, 23 Atl. 718; Insurance Co. v. Dougherty, 102 Pa. St. 568; and many other authorities which the referee does not deem necessary to mention herein. Again, an insurance company may waive a condition requiring proof of loss by notifying the insured, in case of a total loss, that the insurance would be paid in full. Stauffer v. Insurance Co., 150 Pa. St. 531, 24 Atl. 754. The present case differs from this immaterially. Here the loss was total, notice was given to the insurance company at once, the adjuster (secretary) and general manager of the company—all in one—was promptly on the ground, had appraisers appointed according to the terms of the policy, and promised payment forthwith on the finding of the appraisers. This finding having been reached, delay of complainee was not predicated upon a want of proofs of loss, but upon the fact that the claim had been attached in the company's hands. Indeed, the mutual appointment of appraisers to adjust the loss, and they having made their finding, which was not objected to by the company's recognized adjuster and agent, is competent evidence to submit to a jury or a referee whether the provision in the policy requiring proof of loss to be furnished within a certain specified time had been waived. Fritz v. Insurance Co., 154 Pa. St. 384, 26 Atl. 7. The sixth request of the defense is accorded. The hope of realizing for his loss without litigation, induced, perhaps, by the contemporaneous letters of the secretary of the company hereinbefore referred to, may have led the plaintiff to furnish proof of loss at the late date indicated. It is immaterial, however, what the reason was. We have already seen that, under the law and the evidence, the company had, upwards of four months previously, waived this provision of the policy. The plaintiff's action was therefore not premature. Nor can the seventh and eighth requests on the part of the defense be favorably entertained. Certainly, if the plaintiff had made false representations at the time the insurance was solicited as to the condition of his property, or its surroundings, or the uses to which it was then, or was to be in future, subjected, or had concealed any matter material to the risk, a different view might well be taken. The evidence, however, exhibits the contrary. He made no representations whatever in the respects referred to. His building was free to the inspection of both Miller and

Digitized by Google

Thomas, and one of them, at least, was shown through the house. Nothing was said on either side at any time about a hall in the house, or its uses, but the general use of the premises as a whole was apparent to any ordinary observer. So far as the hall was concerned, the evidence shows that its size was 22 by 56, in the second story of the building, and that it was used, as occasion offered, for church suppers, church festivals, amateur performances, and dances. Even though such uses might increase the risk, and be cause for a higher rate of insurance ordinarily, still there is no evidence of concealment on the part of the plaintiff as respects the hall, no evidence that he knew such use did increase the risk, and no evidence that he knew that a higher rate of insurance was chargeable where buildings of this character were used for the purposes last mentioned. Knowledge as to both these particulars must be brought home to the insured before his recovery for a loss, otherwise well founded, can be defeated. Insurance Co. v. Losch, 109 Pa. St. 100; Rife v. Insurance Co., 115 Pa. St. 530, 6 Atl. 65.

"As already stated, Mr. Palmer, for the defense, further requested the referee to find the following conclusions of law (repeating the same for convenience): 'First that the plaintiff is not entitled to recover in this case, because, by the terms of his policy, all representations made before the insurance was effected are warranted to be true, and certain ones have been found to be false; therefore, the plaintiff cannot recover,'—and, 'second, because the suit was brought before the money was due under the terms of the policy.' These requests must be denied. That the policy contains conditions of a very stringent character as to liability on the part of the company in case of loss must be admitted, but to say that these conditions, or any of them, can only be waived as prescribed in the policy, would be an assertion not warranted under the law. For example, a policy providing that it should be void if the property be sold, conveyed, incumbered, or mortgaged is not rendered invalid by the existence of liens against it when the policy was issued, about which no questions were asked and no statements made. Insurance Co. v. Hoffmann, 125 Pa. St. 626, 18 Atl. 397. In the present case the unauthorized statement of Miller, the local agent, respecting liens, cannot affect the insured, who answered truthfully upon this point. It was not competent evidence, even though admitted at the hearing to save time, but under the protest of plaintiff's counsel. Act 11th May, 1881 (P. L. 20). And again, if the insured informed the agent that there was a lien against the property, and a policy was subsequently issued which failed to note that fact, it will be presumed that the company waived the condition in the policy as to the lien. Gould v. Insurance Co., 134 Pa. St. 370, 19 Atl. 793. And, further still, a waiver of the condition in a policy against incumbrances may be inferred from the appointment of appraisers after the fire and an adjustment of the loss, the negotiations lasting nearly five months; and this, too, though the policy contained a condition that nothing less than a specific agreement, clearly expressed and indorsed on the policy, should be construed as a waiver of any of its conditions. McFarland v. Insurance Co., 134 Pa. St. 590, 19 Atl. 733. Conditions in a policy of insurance are not meaningless, however. They may all be enforced, under proper circumstances. As a general proposition, they all stand practically upon a common plane, no one of them being more sacred or binding than another. And in the case at hand, if the company had remained passive after the fire had occurred, waiting full compliance on the part of the insured with the conditions contained in the policy very likely there would have been no cause of action against them. But such was not the case. The company did not remain passive. Their action in the premises, through their recognized agent, after the fire, as disclosed by the evidence in the case, is competent for a jury, or for a referee standing in the place of a jury, and warrants the inference of a waiver on the part of the company of all the conditions in the policy to which attention has been called by the counsel for the defense, and which are hereinbefore noted at length. Hence, a finding accordingly must follow. Whereupon judgment is directed to be entered against the defendant company, and in favor of the plaintiff, for the sum of eleven hundred and thirty-six dollars and sixty-nine cents, that being the proportionate amount based on the finding of the appraisers as returned, together with interest up to October 23, 1894."

Following, among others, are defendant's assignments of error, viz.:

"First Specifications.

"Fourth. In not finding the facts as requested by the defendant in his first, second, third, fourth, fifth, sixth, seventh, and eighth, which were as follows: 'First. That the representations upon which the policy in this case was issued were made to the agent of the company by George W. Thomas, an insurance broker, who was not an agent for the defendant company. Second. That Thomas represented the property to be worth $3,500, when in fact it was not worth more than $1,895. Third. That Thomas represented that he did not know whether the property was incumbered, but told the agent of the defendant to put it down as unincumbered, and it was so represented to the defendant company. Fourth. That the action of the secretary of the defendant company in viewing the premises and having appraisers appointed to estimate the loss is not sufficient to show a waiver of the proofs of loss. Fifth. That, under all the evidence, the defendant company did not waive proofs of loss. Sixth. That the plaintiff furnished proofs of loss on February 16, 1893, and

Digitized by Google

brought suit in less than ninety days thereafter. Seventh. That the property was represented as a dwelling house and saloon and storeroom for liquors, when in fact it contained a hall used for public entertainments, shows, theaters, and suppers. Eighth. That the rate charged by insurance companies on property used for purposes of public entertainments is higher than the rate charged plaintiff.' Fifth. In not finding conclusions of law as requested as follows: 'First. The plaintiff is not entitled to recover in this case, because, by the terms of his policy, all representations made before the insurance was effected are warranted to be true, and certain ones have been found to be false; therefore, the plaintiff cannot recover. Second. Because the suit was brought before the money was due under the terms of the policy.' Sixth. In finding that the conditions of the policy with respect to furnishing proofs of loss were waived by the conduct of the secretary. Seventh. In not finding that this policy was avoided for the reason that the premises were used for a purpose different from that expressed in the policy and more hazardous.

"Second Specification.

"The court erred in affirming the report of the referee, as follows: 'Now, March 7, 1895, the exceptions are overruled, and judgment is directed for the plaintiff in accordance with the referee's findings.'"

H. W. Palmer, for appellant. John McGahren, for appellee.

PER CURIAM. There appears to be no substantial error either in the learned referee's findings of fact or in his conclusions of law. His very able and exhaustive report is an ample vindication of his rulings. There was, therefore, no error in overruling the exceptions and directing judgment for plaintiff in accordance with the referee's findings. Judgment affirmed.

McGONIGLE v. AURORA FIRE INS. CO.

(Supreme Court of Pennsylvania. April 29, 1895.)

Appeal from court of common pleas, Luzerne county.

Action by Patrick McGonigle against the Aurora Fire Insurance Company on a policy of fire insurance. From a judgment for plaintiff, defendant appeals. Affirmed.

H. W. Palmer, for appellant. John McGahren, for appellee.

PER CURIAM. By writing signed by counsel for the parties and filed in this case, it was agreed that the decision to be rendered in McGonigle v. Insurance Co. (No. 455, January term, 1895) 31 Atl. 868, shall control and determine the appeal in this case, and be decisive of all questions arising out of the same. In an opinion just filed in that case, the judgment has been affirmed, and, pursuant to the terms of said agreement, the judgment in this case should also be affirmed. Judgment affirmed.

REYNOLDS et al. v. HOWELL.

(Court of Errors and Appeals of Delaware. April 19, 1895.)

GARNISHMENT—DEATH OF DEBTOR—ABATEMENT—DESCENT OF PERSONALTY.

1. Rev. Code, p. 840, § 45, expressly provides that attachment in garnishment proceedings shall be governed by the laws relating to foreign attachments; and, since the lien by attachment is dependent on the subsequent recovery of a judgment therein, the death of the debtor after process has been served on the garnishee, but before answer made or plea entered, dissolves the attachment.

2. The property held thereunder by the garnishee passes to the personal representatives of decedent, to be administered with the other assets.

Case reserved from superior court, Newcastle county.

Action by Samuel M. Reynolds and another against William D. Howell, garnishee of John Appleton. Judgment for defendant.

J. F. Biggs, for plaintiff. Harry Emmons, for defendant.

CULLEN, J. The above case comes up for hearing on a case stated filed in the superior court of the state of Delaware in and for Newcastle county, and the said court, having considered that the questions of law therein contained ought to be decided before all the judges, did, upon the application of the parties, order and direct that the same should be heard in the court of errors and appeals. From the case stated, it appears: That there was a judgment recovered in the superior court of the state of Delaware in and for Newcastle county, on the 21st November, 1891, at the suit of Samuel M. Reynolds and Edward Reynolds, trading as S. M. Reynolds & Co., against John Appleton, for the sum of $373.93, with interest from September 1, 1891; said judgment being No. 426, to September term, 1891. That on the 12th day of July, 1892, the plaintiffs in said judgment sued out a fi. fa. attachment against said defendant, returnable to the September term, 1892, and that on the 14th day of July, 1892, the said William D. Howell, the defendant in case stated, was duly summoned to answer as garnishee of John Appleton, defendant. That the said William D. Howell, so as aforesaid summoned as garnishee, was a tenant of John Appleton, the defendant in said judgment, residing on a farm situate in Newcastle county, for the year commencing March 25, 1892, and ending March 25, 1893; the rent reserved being one-half part of the grain produce, payable in kind, which consisted of corn and wheat. That the said John Appleton died on the 18th of July, 1892, and letters testamentary upon his estate were duly granted by the registry of wills in and for Newcastle county unto Henry H. Appleton and John H. Hoffecker on the 15th of August, 1892. That on the 30th of November, 1892, at the November term, 1892, and after the death of the said John Appleton, the said William D. Howell, the said gar-

Digitized by Google

nishee, entered a plea of nulla bona to the said attachment, on the records in said court. That at the time of said attachment the said William D. Howell, as tenant on said farm, had a crop of corn which was sold and delivered prior to the 30th of November, 1892, and the proceeds thereof amounted to $222.34; that the crop of wheat also was sold by said garnishee some time prior to March 25, 1893, and proceeds of sale amounted to $314.79, and that said proceeds of corn and wheat, amounting to $537.13, are now in the hands of William D. Howell, the said garnishee, all of which came to his hands after the death of the said John Appleton.

The question submitted for our decision upon the foregoing facts, as set forth in the case stated, is as to the effect of the death of John Appleton, the said defendant in said judgment, upon said attachment, he having died before answer made or plea entered. Did the death occurring before plea or answer dissolve the attachment, or did the service of the attachment, in the lifetime of John Appleton, on the said garnishee, create or cause a lien similar to that of an execution, which is not affected by the decease of the defendant? It is contended on the part of S. M. Reynolds & Co., the attaching creditors, that upon the service of said attachment on William D. Howell the goods, chattels, money, etc., in his hands at the time of service of attachment, and up to the time of answer or plea, belonging to the said John Appleton, were alike bound as if an execution had been levied thereon, and the said lien thus created did not abate by reason of the death of John Appleton, and that the same could be prosecuted to judgment after his death, and said attachment is in no way dissolved; while, on the contrary, it is contended by the said garnishee that, by reason of the death of the said John Appleton before answer or determination of a trial on said plea of nulla bona, said attachment was dissolved, and the proceeds of the sale of the goods and chattels of said John Appleton remaining in the hands of said garnishee belonged to the representatives of the said John Appleton, to be paid over and distributed as assets belonging to his estate, under the provisions of the act of assembly.

The proceeding by garnishment, in cases of this kind, originated under the custom of London, and it is expressly provided by our statute as follows: "The plaintiff in any judgment in a court of record or any person for him lawfully authorized, may cause an attachment as well as any other execution to be issued thereon containing an order for the summoning of garnishees to be proceeded upon and returned as in cases of foreign attachment." Rev. Code (as amended) p. 840, § 45. The law, therefore, as applicable to the decision in this case, may be considered the same as the proceedings governing a case of foreign attachment under the statutes of our state.

The remedy by attachment arises entirely under the statute of our state, and hence all proceedings in relation thereto must conform to, and be consistent with, the provisions of such statute. It furnishes a summary remedy, while in most, if not all, the states of this country, the proceeding by attachment is governed and controlled by statutes which differ more or less in very many material respects; hence we find a great variety of conflicts of decisions upon the subject of attachment proceedings, by reason of the different provisions in their statutes, apart from some general provisions governing the law of attachment which prevail generally, alike in this country and in England. The object in foreign attachment is to compel an appearance, and when that object is obtained the property attached is discharged; and though the seizure of the officer holds the property, and may be said to place the same in custodia legis, yet such seizure does not constitute a lien such as is made by execution process founded on a judgment, which is absolute,—dependent on no contingency or condition. The lien by attachment process is wholly dependent upon the subsequent recovery of a judgment on said attachment process in accordance with the provisions of the statute, and upon execution sued out on such judgment the same may be levied upon property so attached, and the lien of said execution goes back, and holds said property as of the date of said attachment. In other words, the attachment holds the property subject to be taken in execution upon a judgment subsequently recovered in said attachment proceeding, and not till then becomes a fixed and permanent lien. If no judgment can be obtained, by reason of any matter which defeats or prevents the legal recovery, then such conditional lien is at once dissolved, but no fixed lien can be had until judgment and execution. If the debtor of the defendant be summoned as garnishee, he is restrained from paying over the debt or property to the defendant in the attachment. It is a notice to him to retain the property in his hands until the determination of the legal issue of the proceedings on the attachment process; hence the garnishee, being free from fraud and neglect, is not liable for interest, nor in such case should the garnishee pay over to the plaintiff the property attached until compelled by process of execution. The attachment proceedings must be perfected by judgment; otherwise the lien existing by attachment of property or summoning garnishees is dissolved. The proceedings under the attachment laws of Pennsylvania, though in many respects differing from the laws in this state, yet in others, in a great measure, conform to ours. There it is laid down in Parker v. Farr, 2 Browne, 332, cited in Sergeant on Attachment, as given in text by Mr. Sergeant: "A foreign attachment gives the attaching creditor a lien on a debt due

Digitized by Google

by the garnishee to the defendant, so far as to restrain the garnishee from paying it over to his creditors, but no further. It creates no lien on the real or personal estate of the garnishee. Therefore, where the garnishee dies intestate before trial or judgment on the sci. fa., and without leaving assets to pay all his debts, the plaintiff in the foreign attachment has no preference over the other creditors, if the subject of the attachment is a debt due by the garnishee to the defendant in the attachment." Had the garnishee answered in this case, and judgment on answer been rendered, or had trial been had on plea of nulla bona, and judgment recovered, then a different case would have been presented for our consideration. The attaching creditor declined to take answer, and elected that the garnishee should plead, and a plea of nulla bona was entered; and at that time the defendant was dead. There must be a party defendant when answer is made, else how could the garnishee answer? To whom,—the defendant? There is none. He is dead. The process of attachment, being a personal action, cannot survive, save by express statute, and we have none; hence no judgment could be rendered on the answer of the garnishee by making executors parties. No legal judgment on these attachment proceedings could, under the circumstances, be rendered, even if answer had been made. The case is now pending on a plea of nulla bona, and the defendant is dead. There is no party in court. The executors and administrators are not liable to enter special bail; and, again, no writ of foreign attachment can issue against executors or administrators. Hence we cannot see how any legal judgment could be recovered by the plaintiff on a trial on this plea. Under the provisions of our foreign attachment laws, the defendant may put in bail at any time before judgment, but in no case can judgment be had until the second term after attachment issued; whereas it appears from the case stated that the defendant in attachment died some six days after attachment issued, and by reason thereof the right or privilege existing for and in behalf of a defendant could not be exercised. Does not this fact, standing alone, present an impassable barrier, over which the attaching creditors could not pass to obtain a legal judgment? Therefore, at the decease of John Appleton there ceased to be any party defendant in court; and, if so, how could judgment be recovered, and execution issued thereon, to make fixed and permanent the lien obtained by said attachment process?

The principles involved in this case, as to the answer of a garnishee, wherein the defendant dies before answer, appear to have been decided by our own courts, from which I quote, in 5 Har. (Del.) 254, Wooten v. Harris (two cases). Two writs of fi. fa. attachment were issued (one to April term, 1849; the other to October term, 1849) at the suit of Edward Wooten v. Nathaniel P. Harris; and the attachments were laid in the hands of David R. Smith on the 27th of November, 1848, and 10th of April, 1849. On the 20th of April, 1849, a rule was laid on Smith to answer or plead, but before answer he died. An alias fi. fa. attachment was issued to April term, 1850, and laid in the hands of his executor on the 1st day of November, 1849. "Nathaniel P. Harris obtained a judgment against David R. Smith, and issued execution on the 26th of October, 1849. This judgment was assigned to Minos P. Conoway on the 3d of April, 1850. The plaintiff Edward Wooten now elected to take the answer of Smith's executor, and had a rule to show cause why he should not be compelled to answer. Conoway, as assignee of Harris, moved to discharge the executor of Smith from the attachment," etc. In the argument of this case, the question, as argued by counsel, was whether the attachment lien on the funds in the hands of Smith, or of his executor, had a preference to the execution of Conoway; and it was contended by counsel for attaching creditors that the lien of the attaching creditors, being made in the lifetime of the garnishee, was in no way different from a lien upon goods by execution, and that the subsequent execution took the goods, or the same went into the hands of the executor subject to the attachment lien; in other words, that the lien by attachment and the execution were of the same and equal validity. Counsel for execution creditor contended: That the case had been argued as if the attachment creditor had a judgment lien against defendant, whereas the garnishee was only summoned and had never answered. That, inasmuch as no answer of garnishee was ever taken, no lien as against him was ever acquired. That the attachment process was dissolved by defendant's death. An executor or administrator cannot be summoned as garnishee (Fitchett v. Dolbee, 3 Har. [Del.] 267), on the ground that it disturbs the course of administration. That the debt of Conoway was then a judgment and execution against Smith's executor, levied on Smith's goods; yet the object is, and the effect would be, to make this attachment, not yet having gone to judgment, have preference to this execution. That if the executor, by leave of the court, should come in and answer to the attachment, how could the judgment on that answer protect the estate against the judgment of Conoway? That the sheriff who had the execution in hand could not be relieved from collecting the money on the execution. That it would be the same on a plea of nulla bona and trial. The facts in this case, though different from the one before us, yet involve the same principle. I have cited thus fully the arguments of counsel, inasmuch as the case cites no opinion by the court, only that the rule was discharged, thereby virtually deciding the question of law submitted in this case, viz. that the attachment process was dissolved by reason of the fact that

Digitized by Google

no judgment had been recovered on said attachment in the lifetime of the defendant; hence the lien obtained by attachment was gone.

We find further, from the case stated, that at the time of service of attachment on said garnishee there were no property, goods, chattels, money, etc., in the hands of the said garnishee, and the wheat and corn growing on the lands of said John Appleton (said defendant in the attachment) came to the hands of said garnishee long after the decease of said defendant, and could not be the subject of attachment, so as to create a lien, since the same was not in existence until after death of defendant, and hence passed, as assets of the estate of said defendant, to his executors, to be administered according to law. True it is, the garnishee, at the time of answer, should, in his answer, cover all the goods, chattels, money, and effects, etc., which were in his hands at the time of the service of the attachment, or at any time since up to date of answer. But in this case the defendant in attachment died a few days after attachment issued. The said garnishee owed said defendant nothing in his lifetime, and his indebtedness accrued when crops matured, and by law was due and payable to the executors of defendant's estate, and was never the subject of attachment. If so, the property of a deceased party would be the subject of attachment, which is a clear violation of law. No lien can exist upon that which is in expectancy, but the same must be in esse at the time; and the wheat and corn, in this case, never existed until after defendant died. Hence the garnishee could not owe said proceeds of wheat and corn to defendant at time of attachment, or at any other time since, up to date. The defendant was dead. There was no party defendant in court, and the attachment was dissolved for want of parties.

We are therefore of the opinion, after a careful review of the question of law submitted for our decision in the case stated, that the attachment issued by Samuel M. Reynolds and Edward Reynolds, trading as S. M. Reynolds & Co., under which the said William D. Howell was summoned as a garnishee of John Appleton, was by the death of John Appleton before answer of said garnishee, or trial on the issue of the plea of nulla bona, dissolved; and the court do therefore order that judgment be entered for the defendant, with costs, in accordance with the agreement in case stated.

CONNER v. REARDON.

(Superior Court of Delaware. Nov., 1887.)

JURISDICTION OF JUSTICE — PRACTICE ON APPEAL.

1. An action for the destruction of fruit in baskets, by being run over and crushed by the wheels of defendant's wagon, does not involve consequential damages, and may be tried as an action of trespass before a justice of the peace.

2. Under Rev. Code, p. 648, § 11, providing that it shall be no objection to maintaining actions on the case "that, but for this section, the form therefor should have been trespass, and in all actions of trespass it shall be no objection to maintaining such actions that, but for this section, the form thereof should have been case," an appeal from a judgment of a justice court in an action of trespass may be brought in the form of trespass or case.

Appeal from the justice of the peace.

Action of trespass by James A. Conner against John P. Reardon for the destruction of fruit.

Plaintiff filed the following declaration: "(1) For that the said defendant, on the 4th day of September, and on divers other days and times before the commencement of this suit, with force and arms, to wit, at New Castle county aforesaid, seized, took, and carried away certain goods and chattels of the plaintiff, to wit, thirty-three baskets, each containing about five-eighths of a bushel of peaches, of great value, to wit, of the value of fifty dollars, and converted and disposed of the same to his own use. (2) For that the said defendant, on the day and year aforesaid, with force and arms, to wit, at New Castle county aforesaid, seized and took certain other goods and chattels of the said plaintiff, to wit, thirty-three other baskets, each containing about five-eighths of a bushel of peaches, and overturned, bruised, damaged, and destroyed the same, and also drove a certain wagon through, upon, and over the said goods and chattels, so that the wheels of said wagon crushed, broke, damaged, and destroyed the said goods and chattels of the said plaintiff, of great value," etc. To said declaration the defendant demurred on the ground that the justice had no jurisdiction, because consequential damages were sought, and on the ground that there was a misjoinder of a count on trespass and one on trespass on the case. Demurrer overruled.

Henry C. Conrad, for appellant.

HOUSTON, J. The case below was an action of trespass before a justice of the peace for direct and immediate injury for destroying certain goods and chattels of the plaintiff below named in the statement filed before the justice, and in the declaration here, and, as alleged in them, it clearly imports a direct and immediate injury, and not a consequential injury, to the goods and chattels mentioned, which were directly destroyed by the wrongful act alleged in the declaration, and not indirectly, as the necessary consequence of the act merely. At common law, therefore, as stated and alleged, it was a proper case for an action of trespass vi et armis, and not an action of trespass on the case for consequential damages. But the distinction between the actions at common law has long since been abolished by statute in this state, which provides that, "in all actions on the case, it shall be no objection to maintaining such actions that, but for this section, the form thereof should have been trespass;

Digitized by Google

nd in all actions of trespass it shall be no bjection to maintaining such actions that, ut for this section, the form thereof should ave been case." Rev. Code, p. 648, § 11. nd, this case having come up in this court n appeal from an action of trespass before a ustice of the peace, it can be no objection o maintaining the action on the appeal wheth- r the form of it here is in trespass or is in ase. The demurrer is overruled.

MATHEWS et al. v. SMITH.

(Superior Court of Delaware. Nov., 1887.)

CONDITIONAL SALE—BONA FIDE PURCHASER—LACHES.

Where property is sold on conditional ale, and the vendor delays, for nine months fter default in payment has been made, to en- orce his rights thereunder, he is precluded from ecovering the property as against a bona fide urchaser.

Replevin by Elizabeth Mathews and oth- rs, trading as John Mathews, against Gar- ett S. Smith.

Henry C. Conrad, for plaintiffs. Lewis C. Vandegrift, H. H. Ward, and William S. Prickett, for defendant.

COMEGYS, C. J. (charging the jury), cited he contract under which the soda-water pparatus was sold by the plaintiff to Col- quhoun. Conditional contracts did not riginate in this state, and had only been ecognized by the court here after consid- rable hesitation. A strict construction had een placed upon them whenever brought efore the court, because they were consid- red dangerous, the danger arising from heir secrecy. This arose from the fact hat there was no possible way by which he public might be made aware of the po- ition occupied by property involved, so far s its actual ownership was concerned. The law in all cases protects a bona fide urchaser. When, under the terms of one f these conditional contracts, the vendor as a right to proceed and enforce it, that ight must be exercised within a reasona- le time. The vendor cannot lie by, but must esort to his remedy within the passing of he first term of court subsequent to the fail- re of payment, or at least by the second erm after the default has been made. In he case under consideration fully nine nonths had elapsed after default of pay- nent on the last note, and upon this ground he defendant is entitled to a verdict.

FARMERS' BANK v. TATNALL.

(Superior Court of Delaware. Sept., 1885.)

GUARANTY—WHAT CONSTITUTES.

One who offers to guaranty the debt of a hird person, to be contracted in the future, is ot bound thereby unless the offer is accepted, nd notice of such acceptance is given him with- in a reasonable time, in the absence of excuse for failure to give such notice. Houston, J., dissenting.

Action by the Farmers' Bank against Henry L. Tatnall on a written guaranty. Heard on demurrer to the declaration. Demurrer sustained.

Plaintiff declared on the writing set out in the opinion, and alleged that it discounted certain notes of H. L. Tatnall & Co. between the dates of February 14, 1882, and December 23, 1882, and that such notes were not paid on maturity, of which it gave defendant notice on the 1st day of April, 1883. There was no averment of notice by plaintiff of the acceptance of the offered guaranty, nor of any demand on H. L. Tatnall & Co., other than the presentment for payment of the paper at the times and places specified therein.

George H. Bates and Walter H. Hayes, for plaintiff. Benjamin Nields, for defendant.

COMEGYS, C. J. After having bestowed a great deal of reflection upon the question raised by the demurrer, and having considered the authorities and weighed the arguments of counsel, I have arrived at the conclusion that the declaration is defective in not averring notice to the defendant, or excuse for want of it, of acceptance of his proposal by the plaintiff. I think that no greater variety can be found in any class of legal contracts than those of guaranty. The one which is the cause of action in this suit is different in its language from any other that I have seen; but nevertheless it is, in its quality and effect, like a great many others which have undergone judicial examination. It is in these words: "I, Henry L. Tatnall, of the city of Wilmington, Delaware, do hereby request that the Farmers' Bank, of the state of Delaware, at Wilmington, do from time to time discount, to the credit of the firm of H. L. Tatnall & Co., such negotiable paper as they may offer to said bank, whether as maker or indorser; and, in consideration of the discounting by the said bank at any time hereafter of any such negotiable paper, I do hereby, for myself, my executors and administrators, guaranty to the said bank the prompt and full payment at maturity of any and all such paper so to be discounted as aforesaid. Witness my hand and seal this 14th day of February, A. D. 1882. [Signed] H. L. Tatnall. [Seal.] Signed, sealed, and delivered in presence of Wm. P. Taylor."

There is a consideration stated in the paper which renders unnecessary the presumption of valuable consideration the law would raise from the existence of the seal. We must therefore take the expressed consideration as the only one existing. It was the future credit desired to be given the firm of H. L. Tatnall & Co. In like cases, the writing is to be treated as an offer to become bound. Until it is accepted, it is not binding upon the offerer. He may recall it before it is acted upon, but not afterwards, for it has

Digitized by Google

then been accepted, and is a valid agreement binding the guarantor. The consideration stipulated for has been performed. It is thus like the case of one who calls upon another to sell goods (for example) to a third person; promising, in legal form, that if he should do so he (the promisor) will guaranty him against loss in so doing. Such an agreement means that the promisor undertakes to pay the debt contracted at his request, if the principal debtor should not do it. As it is not a complete contract in the beginning,—it being a proposal or offer proceeding from one person to another,—if it should be accepted by such other he ought to give notice to that effect, in a reasonable time, to the proposer. Until this be done, there cannot be said to be that aggregatio mentium, or consensus, necessary for any valid contract. The right to recall an offer until accepted is conclusive of the duty of notice. It would be worth nothing otherwise. This duty is reasonable, that the party making the offer may know that he may be looked to, and take means to protect himself against the consequences of his undertaking. He cannot know this without notice in some way. Where the act is to be simultaneously performed, the performance is itself notice of acceptance. Where it is to be done futurely, other notice of it must be given to show acceptance. The cases cited to us on both sides are in accord with these views. It would be an unnecessary consumption of time to go through them again. The question with respect to notice, in the case of guaranty, is this: Is the writing an offer or incomplete engagement, or is it absolute? If the latter, then no notice of acceptance is required. An absolute guaranty is one simultaneously acted upon, as in the case of goods then sold and delivered to a third party on the credit of the guaranty, or that has no element of futurity in it. The other is a proposition or offer to become responsible, which, if not accepted and acted upon at the time as an engagement of present operation, is subject to be recalled at any time before the consideration arises which was stipulated for in it. Until recalled, it may be accepted, but notice of acceptance must be given. The simple receipt of a proposition to guaranty future credit is not the kind of acceptance contemplated in law; otherwise no notice would be required. The foregoing is the view substantially as taken by the supreme court of the United States from the case of Russell v. Clark, in 7 Cranch, 69, downwards, and which has been followed by a very large majority of the courts of this country. It is also recognized in McIver v. Richardson, 1 Maule & S. 557, and not impugned, as is believed, by any English case, since that case was decided. But, in support of the view taken, we have the case of Taylor v. McClung's Ex'r, 2 Houst. 24, which, of itself, would remove any doubt we might feel. In that case this court, speaking through the late chief justice, said, upon a review of the cases mentioned, "These cases clearly show that the party tendering a guaranty for future and prospective credits is entitled to notice of acceptance, and the party receiving it is bound to give notice in a reasonable time after acceptance, or the party offering will not be bound by it." We are therefore of opinion that the demurrer should be sustained, and we so adjudge, and order the proper judgment to be entered.

HOUSTON, J., dissenting.

HANSON et al. v. COCHRAN.

(Superior Court of Delaware. Feb., 1890.)

CERTIFICATE OF ACKNOWLEDGMENT — JURAT IN AFFIDAVIT—CHATTEL MORTGAGE—EFFECT OF RECORD—LIEN.

1. A notary public may correct a certificate of acknowledgment to a mortgage, after its execution, by inserting words to show that the parties were personally known to him.

2. An affidavit before a notary public need not have a jurat at the foot, it being sufficient if the body of the affidavit shows that the affiant was sworn.

3. Under Act 1875, § 1 (15 Del. Laws, p. 616), providing that a chattel mortgage, duly acknowledged, shall be a lien on the property, if it be filed for record within 10 days from the time of acknowledgment, the mortgage lien attaches, if the mortgage is filed for record within such time as of the date of its execution, as against everybody.

Petition by Sarah A. Hanson, in an action by herself and Martin B. Burris against Ellie E. Cochran, to take money out of court, the proceeds of property sold under an execution issued on a judgment in the action. The petition was resisted by Burris.

Alexander B. Cooper and Edward G. Bradford, for execution creditor. Charles B. Lore and Harry Emmons, for petitioner.

COMEGYS, C. J. The contention in this case with respect to the priority of claim upon the money arising from the sale of the personal property of Mrs. Ellie E. Cochran under execution process issued against her at the suit of Sarah A. Hanson and Martin B. Burris, presents for the first time the question of the effect of a chattel mortgage, where an execution intervenes between the time of its acknowledgment and that of lodging it for record. The statute, with respect to chattel mortgages, was passed by the general assembly at the January session, 1875, and so much of it as it is necessary to quote is in these words:

"Section 1. A bona fide mortgage of personal property, if duly signed, sealed and delivered by the party making it, and acknowledged as mortgages of real property are, shall for the space of three years be a valid lien upon such personal property, though the possession remain in the mortgagor, if it be lodged for record in the recorder's office of each county where any of the mortgaged property is held, within ten

Digitized by Google

days from the time of the acknowledgment thereof."

"Sec. 4. No mortgage made under the provisions of this act shall be valid, unless there be indorsed upon or annexed to it, and to be recorded with it, an affidavit that the said mortgage was made for the bona fide purpose of securing a debt or making indemnity, as the case may be, and was not made to cover the property of the mortgagor, or protect it from his creditors, or to hinder or delay them in the collection of their debts. * * *"

15 Del. Laws, p. 616.

The facts appear to be that the mortgage was made by the said Ellie E. Cochran to Sarah A. Hanson, and executed and acknowledged, according to law, on the 3d of June, 1889, and lodged for record on the 10th of the same month. It was taken to the recorder's office to be recorded a day or two before; but when it was handed by the mortgagee, or her agent, to the recorder, he discovered that the notary public had omitted to insert, in the form of acknowledgment prescribed by the statute on that subject for deeds acknowledged before notaries, the words necessary to show that the parties to the acknowledgment were personally known to the notary. Upon that he gave it back for the necessary correction, which was duly made by the notary, and then the paper was returned to the recorder, and was by him recorded. Before record was made, the said Sarah A. Hanson and Martin B. Burris, on the 8th of June, 1889, caused a judgment bond they held against the mortgagor, made on the 16th of June, 1888, for the real debt of $2,000, with interest from said day, to be entered in the superior court of New Castle county, and a fi. fa. issued; upon which writ the property of the mortgagor, conveyed in mortgage to her, the said Sarah A. Hanson, was levied upon, and afterwards sold under a venditioni exponas following said fi. fa., and the money arising from the sale of said mortgaged property was paid to the sheriff, but, it being claimed by the mortgagee and the execution creditors adversely, it was brought into court by the sheriff, by virtue of the statute in the case of disputed rights to sales of goods and chattels. The question above stated is therefore before the court for decision.

Three points were made by the counsel for the execution creditors in the argument before the court: (1) That the acknowledgment of the mortgage was insufficient, on account of not being in conformity with the law for such at the time it was presented for record; and that the correction afterwards made in it by the notary was unavailable without re-acknowledgment, which did not take place. The effect, therefore, of this objection is, if a valid one, that no record of the mortgage was ever made, in legal effect. (2) That there is no jurat to the notary's certificate of acknowledgment, and therefore there is no valid certificate. (3) That the lien of the mortgage—treating the record of it as valid—did not attach to the property mortgaged until the instrument itself was lodged for record, which was not till the 10th of June, 1889.

With respect to the first point, or objection, it seems sufficient to say that it was entirely competent for the notary to perfect his certificate of the acknowledgment by making it comply with the requirements of the statute. As no suggestion was made to impugn the act of the notary in making the alteration, we must suppose that the act was done bona fide, and that he had personal knowledge of the mortgagor. There can be no question of the right of an officer to supply any clerical omission made by him, where there is no mala fides.

As to the objection (the second) that there is no jurat to the affidavit accompanying the mortgage (which is admitted to be valid in other respects), it appears to be without any force; for it is clearly shown, by the language of such affidavit, that, on the day mentioned therein, the affiants appeared before a person described as a notary public, and that they were sworn or affirmed on the Holy Evangels, etc., and that they did severally depose and say, etc. The certificate closes with the form or attestation given in the Revised Code for acknowledgments before a notary. Chapter 36. The only difference between the certificate and the ordinary jurat is that the essential characteristic of the latter, as commonly understood and used,—that is, that the affiant swore before the notary,—is embodied in the certificate itself, and not added at the foot of it by the officer. A jurat means that the affiant swore before the officer taking the affidavit. This can be as well certified in the body of the certificate, as in the case here, as at the foot of it; for here, as in most cases, the affidavit and certificate are united. The closing words, "Given under my hand and seal of office on the day and year aforesaid. W. N. Wilson, Notary Public,"—is the declaration of the officer, under his hand and seal, that what is before stated is true as a fact, which includes all stated before by him. Then we have the notary's statement that on the day and time mentioned the affiants appeared before him, a notary of the state, and that being sworn, or affirmed, they deposed and said; that is, they swore, etc. We have, then, the jurat required for affidavits, when the officer's certificate is perfected by the writing at the foot of the affidavit, and his official seal is annexed. The court notices, judicially, all public officers,—notaries being very ancient ones; and unless there be evidence in some form, to the contrary, presumes that they act legally in their office, which would warrant the presumption that, in this case, the parties making the acknowledgment and affidavit were personally known to the notary.

The third point, or objection, is that the

Digitized by Google

lien of the mortgage (supposing it entitled to be recorded) did not attach to the property until it was lodged for record on the 10th of June, 1889. This involves inquiry into the object of the law. Before the passage of the chattel mortgage act, there was no other way of acquiring a lien upon chattels than through the instrumentality of a fi. fa. issued upon a judgment and placed in the hands of the sheriff for execution; at least, that was the usual mode therefor. A different mode is that provided by the chattel mortgage act. By its provisions, one can be created without judgment and execution, and all the injury suffered by an execution defendant (including expense) by the exposure the writ creates is avoided by resort to the simple means of a mortgage made and recorded in pursuance of that statute. Its provisions are perfectly simple, only requiring the usual formal acts to make valid ordinary deeds, together with affidavit to attest the bona fide character of the instrument. The evident purpose of the act was to enable a mortgagor to secure the debt of the mortgagee, or give indemnity to him against some liability he might incur in a suretyship, for example, for such mortgagor, while at the same time the former should run no risk by leaving the property in the hands of his debtor to be used and dealt with as his own, which, without the provisions in that respect in the act, could not be done so as to make the transaction a valid one against creditors. Chattel mortgages have always been valid, though the mortgagee did not take possession of the property mortgaged; but, according to our decisions, no sale of chattels is good without actual delivery to the vendee as a bona fide transaction, to perfect an absolute purchase, according to the requirements of our statute about bills of sale; and from the language of the learned chief justice in his charge to the jury in the case of Bowman v. Herring, 4 Har. (Del.) 458, mortgages of personal property stand upon the same footing as bills of sale, where, in either case, possession of the property is not taken by the mortgagee or vendee. In the case before us, that decision has no bearing; for the reason that, by the terms of the chattel mortgage act, possession by the mortgagee is not necessary to validate the transaction. The mortgage, then, from Mrs. Cochran to the claimant, Sarah A. Hanson, was not only good as against the former, but also everybody else. Now what, in this aspect of the case, was the effect, with respect to making the mortgage upon the property mentioned in it? The same precisely as a mortgage of real estate would be as to the land included in it. By the common law the legal estate in mortgaged land passes, subject to the right of redemption by the mortgagor upon paying the mortgage money, or complying with the condition of the instrument. But the title acquired by the mortgagee was never absolute until a decree in equity of foreclosure, which takes away the right to redeem, and the mortgagee's title is then perfect. A court of equity, however, looking at substance rather than form, treats the mortgage as accessory of the debt or principal; and while it does not deny to the deed its qualities as a legal instrument, with the effect it has in law, yet it regards it also as an incident only of the transaction of loan, and the estate made by it, as revesting in the mortgagor, upon the loan being paid by operation of law,—thus bringing the retransfer within the exceptions in the seventeenth section of the English statute of 29 Car. II. In this state, by our usage and practice, and the uniform action of the courts in upholding such course, mortgages of real estate are treated as mere securities for money, in no sense depending for their validity against subsequent purchasers and creditors upon possession of the land. It is expressly provided, however, by the statute that they shall be liens from the time of recording them, and not before. But, when such mortgages are for purchase money, they have preference, with respect to the land mortgaged, of any judgment or other lien created or suffered by the mortgagor although it is of a prior date to such mortgage. They are thus treated as liens like other liens, the conveyance form of the mortgage imparting no interest in the land, transferable to a purchaser, devisable, or descendible. Still, and this is the strange thing about mortgage security of land, that if the mortgagee be in possession in pursuance of his mortgage, and obtain decree of foreclosure in equity, his mortgage operates a title to him, free from the equity of redemption, of all the estate conveyed by it, and he need not resort to any further steps to secure it; in other words, the decree bars the mortgagor's equity of redemption, and the mortgagee being in and having the legal conveyance formally passing the title, such title unites with the estate he already enjoys through the mortgage, and makes him the absolute owner. Such is the nature of a mortgage of real estate, and the mortgagee's rights under and by virtue of it.

So far as the effect of a mortgage is concerned, there is no difference between that of lands and one of goods and chattels, irrespective of local laws of registration. Possession of the mortgaged premises by the mortgagee is notice to everybody; and in equity, where a mortgage can be made by deposit of the title deeds alone, the custody of them is notice also. Before such laws were made, possession of title deeds was the evidence of ownership of land; and no prudent man loaned his money on mortgage without obtaining and keeping the custody of them. Now there are no mortgages by deposit of title deeds, but conveyances in fee are usually made, with condition that if the money be paid according to the terms

Digitized by Google

of the bond recited in it, the mortgage and the estate conveyed by it shall cease and become void; otherwise shall remain in force. Notwithstanding the doctrine that a mortgage is a mere lien, the old idea of estate conveyed still remains; and it must exist in fact, else it would be senseless to say that the effect of a decree of foreclosure in equity is to make the title absolute when the mortgagee is in possession. No estate can be made absolute which did not exist before with a qualification or in an imperfect condition. With us, since the statute putting mortgages on a footing with judgments, with respect to the provision for scire facias to obtain execution of the former, no bills in equity are filed for foreclosure; but the judgment on the sci. fa. is equivalent to a decree in that respect, and takes away the right to redeem. But it does not, like a decree, operate to perfect title to the land; for the notion of lien merely forbids the idea of any practical conveyance of estate by the mortgage deed, though, theoretically, one passes. So much upon this subject.

With the foregoing statement of the law of mortgages, it is easier than it would otherwise have been to treat the question raised by the third point, or contention, of the argument, made for the priority of the execution over the mortgage. The two questions here arise: First. What was the effect of the making of the mortgage from Mrs. Cochran to Mrs. Hanson, as a single act? Second. When did the lien provided by the act of assembly attach?

By the first section of the statute under consideration, possession by a mortgagee of the property mortgaged, as said before, is not necessary to its validity; it may remain in the mortgagor. The consequence of this would be, but for another provision in the same section, that the mortgagee would stand exactly as if he had actual possession himself, and no lien against the mortgagor by execution made after the transaction of mortgage could affect the mortgagee's interest. That provision is, in effect, that the lien, which the statute declares shall exist by reason of the mortgage, shall be upon the condition that it shall be recorded within 10 days from the time it is acknowledged. The counsel for the execution argued that, as no particular time is given when the lien shall take effect, it can only be when it is delivered to the recorder for record,—likening such a mortgage to the ordinary one of real property, which is a lien only from the time it is lodged with the recorder for that purpose. If this be the correct view to take, then the mortgage here was no lien, by force of the statute, when it was lodged for record; but if the true construction to give the clause in the act be that the lien was intended to be created from the time of the transaction between the parties, provided record was made of the mortgage within 10 days thereafter,—that is, 10 days after it is signed, sealed, delivered, and acknowledged, which was on the 3d of that month,—then the lien of the execution was subsequent to that of the mortgage.

In considering this question we must keep in mind the fact that the statute did not create or make valid chattel mortgages; for such forms of security are very old in the law, though not always so comprehensive in their subjects as they have been for many years. They were originally chiefly, if not entirely, of terms for years. Now they embrace chattels of every kind, movable and immovable. What would seem to have been the purpose of the legislature in passing the act was to put them upon the footing of a fieri facias in the respect of making them liens before the act of notoriety performed with respect to them. In the case of a fi. fa., this act is by seizure of the goods (theoretically now by the mere levy, though practically originally), which, if made within 60 days of the time when the writ is delivered to the sheriff to be executed, binds the goods of the defendant from the time of such delivery; that is, it binds from the delivery all such goods as are levied on before the expiration of 60 days. As suggested heretofore, a motive for passing the act (and the supposition that such existed, is not at all unreasonable) may have been to enable one owning personal property to make safe a loan to him, by giving the lender the security of such property by way of a lien, so as to render unnecessary a change of possession. In fact, it is difficult to imagine any other motive for the act; as mortgages were not authorized by it, they being existing forms of security. Instead of the requirement of taking possession to make the mortgage bind at once as against subsequent liens (which would deprive the owner of the use of his property), the legislature must, we think, have intended to make the lien created by the act bind from the time the mortgage was perfected, if the mortgagee placed it upon record within 10 days thereafter. By such construction, a mortgagee, if the security were good, would be safe in parting with his money; and no creditor, prior or subsequent, could be postponed to the mortgagee, in the way of lien, for more than 10 days from the time the mortgage lien was created. The 10 days allowed to record the mortgage so as to make it a lien was no doubt provided to require that the mortgage should be recorded as soon as convenient, for public information, and that a false credit should not be given to the mortgagor by reason of his continued possession of the mortgaged property. Besides, it might happen that the transaction was made by parties at a distance, who by this provision were put upon a footing with those whose mortgage could be lodged for record at once. If the object of the legislature was, as it would seem to have been, to encourage the loaning of money to needy borrowers

Digitized by Google

owning no real estate, by other means than the security of an execution levy,—that is, by chattel mortgage,—then, as the lender is by the act told, in effect, that he may leave it in the hands of the borrower without risk (which, if he were to do without the act, his mortgage would be unavailing to him), provided he should record his mortgage within 10 days of the time of the transaction, it would surely defeat this beneficent object in many cases (and that before us is one of them) if an execution levied, or other mortgage made and put upon the record within the 10 days allowed the first mortgage, and before he had put his there, could have priority over it. A mortgagee who sells land is allowed 60 days from the time of making it to put his purchase-money mortgage upon record in order to secure him in his lien for the purchase money against all other liens created or suffered by the mortgagor prior or subsequent to it. But this lien, without such provision, would only exist from the time the mortgage was recorded. Wherein is the creditor for unpaid purchase money of land more meritorious than one who, for example, lends the purchaser the money to make the cash payment with, when part of the purchase money is paid in cash? The latter may choose, instead of taking a subsequent lien on the land, to have a mortgage on personal property. He ought to have priority with respect to the goods, the same as a mortgagee with a purchase-money mortgage of land has. And the similarity of language with respect to lien in the chattel mortgage act with that in the chapter about conveyances in the Revised Code (chapter 83, § 21) strongly supports the view that the chattel mortgage was intended to be a lien from the completion of the transaction, if recorded in 10 days. The language of that section is, "if recorded within 60 days." Again, by the same chapter (section 17), a purchaser of real estate had a whole year (now three months) in which to record his deed, to protect him against subsequent creditors, mortgages, or purchasers for valuable consideration. During that whole year the vendor might remain in possession, and obtain credit upon his apparent ownership. How much more unreasonable this provision than a 10-days lien on personal property without notice, when the mortgagee is encouraged by the statute to leave the property mortgaged in the hands of the mortgagor. It does seem that, to make the statute of chattel mortgages valuable to needy men, it must be read as intending to make their creditors by mortgage, who record their mortgage in 10 days, as safe as those by judgment, when they have the debtor's property levied on by the sheriff; which they would not be, unless the making of the mortgage, if the condition of the act is complied with, is to have the same effect as the levy of an execution. The duration of the lien is the same in both cases, which strengthens the argument that they were to be assimilated in treating the making of the mortgage and recording it in time as the same, in effect, as to lien, as an execution levy.

SOMMER v. GILMORE.

(Supreme Court of Pennsylvania. May 13, 1895.)

INSTRUCTIONS—CORRECTION OF ERROR.

Where the court corrected an erroneous statement of fact in the charge before the jury retired, plaintiff was not prejudiced by the mistake therein.

Appeal from court of common pleas, Philadelphia county.

Garnishment by Andrew Sommer, to the use of Mary F. Lathrop, administratrix of John Lathrop, deceased, against William J. Gilmore, garnishee of Ransom Rogers. From a judgment for the garnishee, plaintiff appeals. Affirmed.

On November 26, 1870, Andrew Sommer obtained a judgment against Ransom Rogers, which was afterwards assigned to John Lathrop. On June 26, 1875, a judgment was entered in favor of Ransom Rogers, against William J. Gilmore. On October 10, 1882, Mary F. Lathrop, the administratrix of John Lathrop, the owner of the Sommer judgment against Rogers, learning of the judgment in favor of Rogers against Gilmore, attached the debt which, according to the records, appeared to be due by Gilmore to Rogers. In the following December, Gilmore took a rule to show cause why the judgment against him should not be opened, and subsequently that rule was made absolute. A trial was then had between Rogers and Gilmore, which resulted in a verdict for the latter. On the trial of the issue between plaintiff and the garnishee, plaintiff claimed that the judgment in favor of Rogers against the garnishee was reopened through fraud and collusion between the parties thereto, and that a bona fide indebtedness existed in favor of Rogers against Gilmore, on which the judgment was founded. The court charged, through mistake, that, on the trial of the issue between Rogers and Gilmore, certain attaching creditors of the former were present, and took part in the proceedings, which was not the fact; but, upon his attention being called to the error, he corrected the statement before the jury retired.

Plaintiff assigned error as follows: "(1) The learned judge erred in charging the jury as follows: 'Mr. Gilmore, who was the defendant in the suit of Rogers against Gilmore, in which a judgment was entered, filed a petition in the court of common pleas No. 2, alleging that, while the judgment appeared to be good on its face, yet it was not, and that the note was not given for a bona fide debt, but was given as security to Rogers for the faithful conduct of Rogers' business by Gilmore, in the management of the

Digitized by Google

theater at Tenth and Callowhill streets.' (2) The learned judge erred in charging the jury as follows: 'The record of that suit has been offered in evidence, and it shows that the issue came on to be tried before Judge Hare and a jury, all the parties being represented; that is to say, Rogers had a lawyer there, Gilmore had a lawyer, and the firm of Reeve L. Knight & Son, who were also interested in holding the judgment, were represented in that court.' (3) The learned judge erred in charging the jury as follows: 'As I have stated to you before, when the case was tried in common pleas No. 2, three parties were represented,—Rogers, the plaintiff of record, Gilmore, the defendant, and other attaching creditors, to wit, Reeve L. Knight & Son. They were present, and were parties in that suit admitted to prosecute, and were there during the trial.' (4) The learned judge erred in charging the jury as follows: 'The case was there tried [in common pleas No. 2], the testimony of witnesses being taken, and, as I said before, it was found that Mr. Gilmore did not owe Rogers anything, and a verdict was found in his favor.' (5) The learned judge erred in charging the jury as follows: 'To overcome that verdict [in common pleas No. 2], and to prove that it was not a bona fide verdict rendered upon a bona fide trial, but was obtained by collusion and combination, the plaintiff has offered in evidence a certain letter written by Ransom Rogers to David B. Taylor, dated December 5, 1881.' (6) The learned judge erred in not calling the attention of the jury sufficiently to the evidence of the plaintiff, showing collusion between Rogers and Gilmore, to have the judgment in common pleas No. 2 opened. (7) The learned judge erred in giving undue prominence to the evidence of Gilmore, to the detriment of the evidence presented by the plaintiff. (8) The learned judge erred in attaching an importance and value to the trial and verdict in common pleas No. 2, favorable to Gilmore, that is not warranted or justified by the evidence. (9) The learned judge erred in not calling the attention of the jury to the conflicting statements made and sworn to by Gilmore as to his reasons for giving the judgment to Rogers, and in not calling the jury's attention to the meagerness and insufficiency of the evidence given by Gilmore to warrant the opening of the judgment. (10) The learned judge erred in not presenting all the evidence in the case to the jury in a fair and impartial manner."

John F. Keator, J. S. Freemann, and O. B. Jenkins, for appellant. John H. Shakespeare, for appellee.

PER CURIAM. We see no reason for reversing this case. The learned court below followed our decision when it was last here (28 Atl. 654, 160 Pa. St. 129), and all testimony offered was admitted. There was nothing involved in the controversy but matters of fact, which had to be submitted to the jury, as was done. The jury has found for the garnishee, as two other juries had done before. There certainly should be an end of such litigation. We do not think the charge is fairly subject to the criticisms made upon it. The mistake in the statement as to the presence of the other creditors at the trial was fully corrected before the jury retired. Judgment affirmed.

In re PALETHORP'S ESTATE.

(Supreme Court of Pennsylvania. May 13, 1895.)

ACCOUNTING BY EXECUTOR—ACQUIESCENCE.

1. The widow of an heir and devisee, who for 16 years, and ever since the death of his ancestor and testator, participated in the family settlements of the estate, and took an equal share therein, and made distribution of the estate as executor, cannot avoid such settlements.

2. Where family settlements of an estate were continued for 16 years after the death of the decedent, without interruption, and were participated in by all interested, they can be set aside only for gross fraud.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of John H. Palethorp, deceased, sur account of Robert Palethorp, surviving executor. In the matter of the estate of Angelina Palethorp, deceased, sur account of Caroline A. Palethorp and Henry B. Palethorp, surviving executors. From a decree of distribution in the matter of the latter estate, Harriet Palethorp, administratrix of the estate of Edward J. Palethorp, deceased, appeals. Affirmed.

The opinion of the auditing judge (Ferguson, J.) is as follows, viz.:

"And now, June 11, 1894, the above accounts having been called for audit, Robert Palethorp, Esq., appeared for the accountants, and William A. Manderson, Esq., for Harriet Palethorp, widow of Edward J. Palethorp, deceased, son of decedents. The accounts and restated accounts, as filed at the audit, were duly vouched. The objections thereto will be hereafter considered. John H. Palethorp died in November, 1860, more than 30 years ago, having first made his will, dated the 30th day of August, 1854, whereby he left part of his estate to his wife, Angelina, absolutely, and the balance to her for life, to support herself, and to support, maintain, and educate their children during minority; and, if she should save out of the same any money, it was to be for her own use and benefit to do as she pleased. There was no inventory or appraisement or account in this estate ever filed until this present one, which was filed under the pressure of a citation. Angelina Palethorp, the widow, died in 1877, more than seventeen years ago, having first made her will, dated the 30th day of August, 1873,

Digitized by Google

whereby she, first, gave all her estate to be divided equally among all of her children. She desired that her children would continue to live as they then did. She gave them authority to sell all or any portion of her real and personal estate. If her daughter Angelina becomes a widow, she desired that she should avail herself of the home she in her said will provided for the single children. If her daughter Caroline remains unmarried, and desires to keep house, 'I give her all my household goods, furniture, etc., of every description, to keep house with, and my house, No. 1931 Arch street, where we now reside, at an annual rent of $700 per one year, commencing one month after my death. Each of my children not living at home is to have her or his share of said rent. If my daughter Caroline dies before my daughter Angelina W. Hey, all my silver and plated ware, coffee and tea sets, waiters, goblets, boxes, dinner and tea knives, are to be given to my daughter Angelina, also the cake baskets. The old family silver is to be divided among all my children. I further give my daughters all my wardrobe, to be equally divided, velvets, India shawls, jewelry, and diamonds, except those diamonds which I direct all my children to share.' To her son Henry B. she gave all the property in her stable and coach house, except the family coach, phaeton, and sleigh, which were to be sold, and proceeds divided. She directed that her children should have no arbitration in their accounts but themselves, and the majority of her children to have full power to rent or sell her estate. The inventory and appraisement of this estate was as follows: * * * [amounting to $52,490.26]. This appraisement appears to be a very extravagant one, but, as almost all the articles mentioned in it were specifically bequeathed, this fact does not make much difference, as the articles were long ago delivered to the legatees. The furniture, silverware, diamonds, and jewelry, wardrobe, and contents of stable, etc., were all specifically bequeathed. This suit for rent, appraised at $20,000, realized only $8,848. This practically left only a few items to be accounted for, and these, Henry B. Palethorp, one of the executors, testified, were divided equally among all the children within a year after their mother's death. During their mother's lifetime, she took the whole of the income of the father's estate, and, when she died, it went to the children. They, with one exception (a daughter, who was married), continued to live together in the premises No. 1931 Arch street; Edward J., the brother, whose widow has raised this controversy, living with them. When their mother died, they divided their father's personal estate between them, and, when they sold a piece of real estate, the proceeds were also divided; so that whatever came into their hands in the way of cash, whether it was principal or income, was forthwith divided. There was put in evidence the receipts, showing 46 settlements of this kind since the death of the mother, in 1877, in every one of which Edward J. Palethorp participated and took the same share of cash as the other children. Besides, he was one of the executors of his mother's estate, and one of the persons who made the distribution. Certainly, if he were alive, he could not gainsay or dispute these forty-six settlements made by him during a period of seventeen years; much less can his widow now do so. These settlements were of the affairs of both the estates of John H. and Angelina Palethorp, because they have both been run together during all this time, and wherefore this adjudication is made to cover both, as it is impossible to adjudicate them separately. The receipts were in this form: 'Received from the executors of John H. Palethorp's estate and Angelina Palethorp's estate the sum of —— dollars, being 39th settlement, in full for my share of money for both estates from July 20, 1890, to October 20, 1890, inclusive. [Signed] Edward J. Palethorp.' If there was a special dividend from the sale of a property, or the verdict in the suit against Bergner, it was so specified.

"Now, while the accounts of these two estates have not been kept separately, and perhaps, have not been kept with the skill and accuracy of an accountant, yet it must be borne in mind that these children of John H. and Angelina Palethorp were only accounting to each other without any expectation of any interference from any outside source. They were entirely satisfied with the accounts. They made their settlements for forty-six times, the last of which was only a few weeks before Edward J. Palethorp's death. Now, there is nothing which the law regards as more sacred than these family settlements; and it would have to be a very strong case, indeed, which would justify any court in setting them aside, particularly where they have been continued uninterruptedly for so many years,—nothing short of gross fraud, of which there is no evidence in this case. In the opinion of the auditing judge, everything connected with the management of these estates shows, undoubtedly, honesty and integrity and a desire to carry out the wish of the mother to settle everything among themselves. As before stated, the account shows that everything which came into the hands of the accountants, whether principal or income, or whether belonging to the estate of John H. or Angelina Palethorp, has been distributed down to the 20th April, 1891, when the 46th settlement was made. The account has since been brought down to the date of the death of Edward J. Palethorp, July 1, 1893, and shows a balance for distribution of $1,971.74. * * *

"And now, June 18, 1894, it is ordered and decreed that the balance in the hands of ac-

Digitized by Google

ɔuntant be distributed and paid as above warded, and the annexed account be con- rmed nisi upon payment of the clerk's ɔst."

W. A. Manderson, for appellant. Robert alethorp, for appellees.

PER CURIAM. The decree of the court elow in this case is affirmed, on the opin- ɔn of the learned auditing judge. If the 'ennessee bonds have not been accounted ɔr, they can be reached by a supplemental ccount to be hereafter filed.

HUGHES v. KEICHLINE.

(Supreme Court of Pennsylvania. May 13, 1895.)

CLAIMS AGAINST DECEDENT.

Where the evidence in support of a claim under a contract for nursing a decedent during ıer lifetime consisted of loose declarations of de- eased to compensate plaintiff, the will was ad- nissible to show that plaintiff took a bequest hereunder.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by Rebecca Hughes against Caroline Keichline, executrix of the estate of Mary Louisa Buechle, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

The plaintiff brought this action to recover wages and compensation, at the rate of $20 per week, for services as nurse and attendant rendered Mary Louisa Buechle in her lifetime, and at her request, during a period of 372 weeks. Plaintiff's assignments of error are as follows, viz.: "(1) The learned judge erred in overruling the objection of the plaintiff to the offer in evidence by the defendant of the will of Mary Louisa Buechle, and the letters testamentary issued thereupon, because the showing of the will itself was not a purpose relevant to the issue, which offer was as follows: 'Mr. Jenkins: I offer in evidence the will of Mrs. Buechle, and the letters testamentary. The will is dated June 7, 1886, and the codicil is dated July 2, 1886. I offer this will in evidence for two objects. One object is for the purpose of showing the will itself.' (2) The learned judge erred in overruling the objection of the plaintiff to the offer in evidence by the defendant of the will of Mary Louisa Buechle, and the letters testamentary issued thereupon, because a remembrance made by this woman of this young girl, the plaintiff, was not a fact relevant to the issue, which offer was as follows: 'Mr. Jenkins: I offer in evidence the will of Mrs. Buechle, and the letters testamentary. The will is dated June 7, 1886, and the codicil is dated July 2, 1886. I offer this will in evidence for two objects. One object is for the purpose of showing the will itself; the other object, to show that there was a remembrance made by this woman of this young girl, the plaintiff, which answers the suggestion made here that Mrs. Buechle would remember her, or give her some compensation.'"

John F. Keator and William W. Wiltbank, for appellant. Theodore F. Jenkins and George Peirce, for appellee.

PER CURIAM. The learned court below fairly submitted the question of employment and payment of wages on the basis of a quantum meruit to the jury, and the jury has found against the plaintiff on these questions of fact. The will of the testatrix was clearly admissible, because the evidence in support of the plaintiff's claim under a contract consisted merely of loose declarations of the deceased; and as we held in Barhite's Appeal, 126 Pa. St. 404, 17 Atl. 617, such declarations may mean a provision by will. It was competent for the jury to know what had been given to the plaintiff by the deceased, whether during her life, or by her will, to take effect after her death. It was not conclusive upon the plaintiff, but it was for the jury to say what effect should be given to it. Judgment affirmed.

PLUMMER v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court of Pennsylvania. May 6, 1895.)

ACTION AGAINST RAILROAD COMPANY — HORSE FRIGHTENED BY HAND CAR—EVIDENCE.

Just before reaching a railroad crossing, plaintiff's horse took fright at an approaching hand car, veered to one side, and threw plaintiff out. The car was ascending a sharp grade, and was brought to a stop 12 feet short of the crossing. The track in the direction from which the car came was visible for several hundred feet at a point on the road 55 feet from the crossing, and the only place plaintiff stopped to look was 293 feet from the crossing, and was not the usual point for travelers to stop to look, and from it an approaching hand car could not be seen within a quarter of a mile of the crossing. *Held*, that the railroad company was not liable.

Appeal from court of common pleas, Clearfield county; Cyrus Gordon, Judge.

Trespass by Agnes Plummer against the New York Central & Hudson River Railroad Company for damages resulting from personal injuries. From a judgment for defendant, plaintiff appeals. Affirmed.

As plaintiff was about to drive over a crossing her horse took fright at an approaching hand car, and threw her from the buggy, giving her the injuries complained of. She assigned as negligence on the part of the railroad company that the hand car was operated at a great speed, and that the men running it did not heed the warning to stop which she gave upon seeing the car, but came on and frightened the horse. The track was visible for several hundred feet in the direction from which the hand car came, at a distance of 55 feet from the crossing on the

Digitized by Google

highway over which plaintiff was driving. The car was being run up a grade of 1½ feet to the hundred, and was stopped 12 feet short of the crossing; but in the meantime plaintiff's horse had taken fright, and veered off the road, which crossed the track diagonally, and onto the track on the side of the crossing opposite the car, and had thrown plaintiff out. Plaintiff did not stop to look and listen at the point 55 feet from the crossing, but did so at the next nearest point where an approaching locomotive could be detected, which was 293 feet from the crossing. From this point, however, a hand car could not be seen on account of an embankment, and an approaching train nearer than a quarter of a mile to the crossing was not discoverable, and it did not appear that such point was the usual place for travelers familiar with the road, as plaintiff was, to stop and look and listen for approaching trains.

Plaintiff assigned as error that the court erred in overruling the plaintiff's motion to take off the compulsory nonsuit. The motion and ruling of the court are as follows: "And now, 20th February, 1895, plaintiff moves the court to take off the compulsory nonsuit. Krebs & Paterson, for Plaintiff." "And now, 8th March, 1895, motion of the plaintiff's attorney to take off the compulsory nonsuit is hereby denied, and application overruled. Bill sealed for plaintiff. By the court, Cyrus Gordon, P. J."

David L. Krebs and Wm. Paterson, for appellant. M. E. Olmsted, Thomas H. Murray, and Allison O. Smith, for appellee.

PER CURIAM. The learned court was clearly right in refusing to take off the judgment of nonsuit. Viewing the evidence in its most favorable light for the plaintiff, there is nothing in it that would justify a jury in finding that defendant's alleged negligence was the proximate cause of her unfortunate injury. Judgment affirmed.

MACK v. LEWIS.

(Supreme Court of Vermont. Caledonia. March 9, 1895.)

APPEAL FROM JUSTICE—FILING IN COUNTY COURT—WAIVER.

The failure of plaintiff to file in the county court an appeal from a justice's judgment within the 21 days allowed by Acts 1892, No. 28, § 18, is waived by the defendant entering a general appearance after filing of the appeal, and then allowing the time allowed for dilatory motions to pass without raising the objection.

Exceptions from Caledonia county court; Tyler, Judge.

Action by A. H. Lewis against Annie Mack. There was a judgment in justice's court for defendant, and from an order overruling defendant's motion for dismissal of plaintiff's appeal defendant brings exceptions. Affirmed.

The judgment was rendered January 17th and entered June 2d. The defendant entered a general appearance June 15th. June 16th the plaintiff filed specifications, and July 17th the defendant filed this motion to dismiss.

J. P. Lamson, for plaintiff. Albert Perley, for defendant.

MUNSON, J. It is provided by section 18, No. 28, Acts 1892, that an appeal from the judgment of a justice shall be entered and docketed in the county clerk's office on or before 21 days from the time such appeal is taken. This appeal was not entered within the time limited, and the question is whether the county court should have dismissed the appeal on motion. Before the passage of this act an appeal could be entered only in term time; and it was provided that, if the appellant failed to enter the appeal at the next stated term of the county court, execution might issue on the justice's judgment after the county court adjourned. The requirement that all cases should be entered by the second day of the term was merely a provision of the rules, and an entry could be had at any time during the term by special leave of the court. We think the present law is intended to limit the time within which the appeal must be docketed to be of any avail. As to all original process it is provided, in terms, that, if not filed in the clerk's office within the prescribed time, the process shall be of no avail. The purpose of each requirement is to bring the case to a speedier determination by affording an opportunity for completing the pleadings in vacation. We think it would be inconsistent with the spirit of the act, and a serious interference with its beneficial design, to give this provision a different construction.

But the appellant contends that, whatever construction be given the statute, the refusal of the county court to dismiss this appeal was correct, because the motion to dismiss was not filed at the earliest opportunity, nor within the time limited by the rule. It was within the discretion of the court to permit the filing of the motion out of time as regards the rule; and the court, having passed upon the motion, must be held to have permitted its filing. But the motion was then to be overruled if not seasonably made, according to the principles of pleading. It is well understood that a defect of process that can be waived will be treated as waived if not complained of. The requirement is that the objection shall be taken at the earliest opportunity. The time available for this purpose does not necessarily extend to the taking of a continuance or the filing of some other plea. It is clear that this objection was not taken at the earliest opportunity if not taken within the time allowed by the rules of court for the making of dilatory motions. An entry out of time will not prevent an application of the rules if the defendant

Digitized by Google

ees fit to appear. The appellee's entry of n appearance must be held to have subject- d him to the running of the periods limited, t least upon a calculation made from the ate of his appearance. Treating this ap- earance as entered upon the first day of the 4 allowed by the statute, the motion was ot made within the rule. This delay was a raiver of the defect in the appeal if the de- ect was one that could be waived. This olding is but the application of an ancient loctrine to modern practice. All dilatory leas were held to be waived by the general mparlance of the old law. A general im- arlance was the time allowed a party for leading upon an application in which no ight of exception was reserved. The gen- ral rules fixing periods for the filing of pleas ave taken the place of these special leaves. f the allowance of a general imparlance on pplication was a waiver of the right to file ilatory motions, the running of the entire ime allowed by rule for that purpose must ave the same effect. Gould, Pl. §§ 16, 17; Pollard v. Wilder, 17 Vt. 48. The defect was one that could be waived. It was not nything affecting the jurisdiction of the ourt over the subject-matter of the suit. The appeal was not absolutely void, but void until confirmed. The appellee could concur in submitting the case to the decision of the court, although not regularly entered. He did this by appearing and permitting the time allowed for dilatory motions to pass without raising the objection. Huntley v. Henry, 37 Vt. 185. Judgment affirmed, and cause remanded.

CRAMPTON v. SEYMOUR et al.

(Supreme Court of Vermont. Franklin. Feb. 16, 1895.)

EXECUTORS AND ADMINISTRATORS—COLLECTION OF ASSETS—ACCOUNTING BY TRUSTEE.

1. Where a husband bequeaths his property absolutely to his wife, with the right to dispose of it by will, providing that out of the remainder, at her death, a legacy shall be paid, and the wife, after his death, takes possession of all the property, her administrator is the proper person upon her death, intestate, leaving his estate unsettled, to sue for money due his estate.

2. Where an action is brought to recover moneys which one has received as trustee, but failed to account for, it must be shown that the moneys actually came into his hands.

3. An account rendered by a trustee is conclusive only as to the items therein contained, and will not estop the cestui que trust from showing that the trustee received moneys which he has not included in his account.

Exceptions from Franklin county court; Taft, Judge.

Action by C. A. Crampton, administrator, against Mary L. and Julia L. Seymour, administrators. From a judgment for plaintiff, defendants bring exceptions. Reversed.

The plaintiff brought suit as the administrator of Emeline Hawkins, and the defendants were the administrators of H. P. Seymour. Emeline Hawkins was the wife of Alfred Hawkins, who died in January, 1885, leaving a farm and considerable personal property, all of which he bequeathed, upon certain conditions, to his wife, Emeline. The will was probated in March, 1885, and no further steps were ever taken in the settlement of the estate, or the distribution of the property. Mrs. Hawkins took possession of it, and managed it as her own down to her death. In this she was guided by the advice of Mr. Seymour, who, on account of his intimate personal relation with Mr. Hawkins while alive, continued to act as her adviser and manager, to a great extent, after his death. Mrs. Hawkins, with advancing years, became very feeble in both mind and body; and the conduct of her affairs fell more and more into the hands of Mr. Seymour, until during the few years which preceded his own death, in 1892, he transacted practically all her business. He kept an account of certain matters between Mrs. Hawkins and himself from 1886 to 1889, and from the latter date until his death he kept an accurate account, in detail, of all matters between them. Copies of these accounts were from time to time furnished her. No one of the items allowed by the court, as hereinafter stated, was embraced in these accounts. The plaintiff claimed to recover for various sums of money which Mr. Seymour had received on account of Mrs. Hawkins, and had not accounted for. The court charged him with the following items, as of the dates named: February, 1885, $120; February, 1885, $90; April 3, 1889, $650; July 6, 1889, $480.43. The court gave judgment for these sums, with interest, less the balance found due Mr. Seymour from year to year. The defendants objected that the title to this property in Mrs. Hawkins was not such, under her husband's will, that her administrator could maintain this suit. Those portions of the will material to a decision of this question are fully stated in the opinion. The defendants further objected that there was no evidence tending to show that Seymour had the various sums with which his estate was charged by the judgment. The evidence upon these several points is stated in the opinion. The defendants presented a claim in offset for the services of Mr. Seymour, but the court found that he had never made such a charge in his lifetime, and had said that he did not intend to, and disallowed the claim.

Hogan & Royce, for plaintiff. Wilson & Hall, for defendants.

TYLER, J. The plaintiff, as administrator of Emeline L. Hawkins' estate, seeks in this action to recover moneys of the estate, which it is claimed Mr. Seymour received in his lifetime, and for which he never accounted. Said Crampton was duly appointed guardian of Mrs. Hawkins soon after the death of Seymour, and during her life brought this suit as her guardian. After

Digitized by Google

her death, by leave of court, he entered to prosecute. The interest which Mrs. Hawkins had in the estate of her husband was derived from the following clauses in his will: "I give and bequeath to my well-beloved wife, Emeline L. Hawkins, all my property, both real and personal, to be hers absolutely and forever, to use and dispose of during her life for her own benefit; and of what remains of said property, at my said wife's decease, I give to my beloved niece, Martha Smith, five hundred dollars, and the remainder of said property, my will is, that my said wife may dispose of as she may prefer. It is my intention, by the foregoing provisions, to give my said wife the right to use for her own support and comfort, during her life, all of said property, if needed by her for that purpose, and that if not so needed the remainder, to the extent of five hundred dollars, shall go to the said Martha Smith before any of said property shall be given to any other person." The will was proved and allowed March 27, 1885, but no further proceedings were had under it. The estate was never settled, and no decree was made by the probate court respecting it. No executor or administrator was appointed. Mrs. Hawkins took possession of the farm and personal property, and treated them as her own, acting under Mr. Seymour's advice in the management thereof until his death, on March 17, 1892.

It is contended by the defendants' counsel that, as Mrs. Hawkins did not dispose of the estate by will, she took only a life interest therein, and that no action, therefore, can be maintained by her administrator. The will gave her the possession and control of the estate during her life; the right to use it all, if necessary for her support and comfort, and to dispose of whatever was left at her decease, except $500. Her duty was to collect the assets, pay the debts and expenses, and hold the remainder in trust for her own support during life, and for the niece's legacy. Whatever part of this duty remained unperformed at her death clearly devolved upon her administrator. It is difficult to see how it could have devolved upon any other person. As Seymour received the money as Mrs. Hawkins' agent, neither he nor his administrator could dispute the right of the plaintiff to sue for it. There was evidence tending to show that Finn paid Seymour $90 for cows that came from the Hawkins place; that, on one occasion, Seymour went upon the porch of the Hawkins house, and exhibited $120 or more to a witness, and said it was "Hawkins money," and asked the witness to count it, so that some one would know how much there was of it; that at another time, in the presence of other witnesses, he searched Mrs. Hawkins' trunk, and found therein $650, which he carried away, after giving her a receipt. The finding of the county court in relation to these three items cannot be revised here, as there was some evidence to support them, and its weight was for that court to determine.

The evidence in relation to the item of $480.43 tended to show that after her husband's death Mrs. Hawkins was physically and mentally feeble, and that Seymour took the principal management of her affairs, carried on the farm, and took the income from it, collected and invested money due the estate, and said he did not intend to leave money or notes in her house; that he did this because he and her husband had been friends, and the latter had done him favors; that he called on one Whittemore, who owed the estate, and requested him to pay his note, unless he would pay 6 per cent. interest; that Whittemore decided to pay the note; that the interest was then reckoned, and an indorsement made; that Whittemore soon after paid the amount of the note to Mrs. Hawkins; that two or three weeks after he saw Seymour, and told him he had paid her; that Seymour seemed surprised, and said he should go and get the money, and loan it to another man who had applied for it. Every presumption will be made in favor of the judgment of the court below, but in this case the evidence on which the judgment was based is before us, and it does not tend to show that Seymour took this money from Mrs. Hawkins. If it were a part of the $650, the defendant estate is charged with it in that item. The evidence tended to show that Seymour thought Mrs. Hawkins incapable of doing any business; yet this and other money was paid to her, and she may have disposed of it herself. We think the court was not justified in inferring from the relations that existed between the parties that Seymour had this money, and it was therefore error to charge it to his estate. Seymour acted in a trust capacity, and, as he and Mrs. Hawkins both received funds, it should appear that the Whittemore money actually came into his hands, before his estate should be charged therewith.

The plaintiff is not barred from recovering the $90, $120, and $650 by the doctrine of account stated. The court below found that from January, 1886, until the spring of 1889 Seymour "kept an account with Mrs. Hawkins of certain matters," and that copies thereof were furnished her; that there was a balance due him of $36.71, which he charged in the beginning of a new account, June 17, 1889, after which, until within five days of his death, he kept a full and accurate statement of items furnished her. An inspection of this account shows that he charged her with items for taxes, insurance, repairs of buildings and fences, for labor on land, family supplies, and other similar items, and that he credited her with receipts for farm produce and rent of pasture. At the end of the first year there was a balance of $14.06 due Mrs. Hawkins, which he says, in a memoran-

Digitized by Google

lum at the foot of the account, he paid to her. At the end of the next year a balance of 41.94 was due him, of which he notes payment. After that the balances were in his favor, and not settled, but were carried forward to new accounts. In Holmes v. De Camp, 1 Johns. 34, the court said that formerly the stating of an account was considered so deliberate an act as to preclude any examination into the items, citing Trueman v. Hurst, 1 Term R. 40, but that of late greater latitude had prevailed, and that any errors may be shown and corrected. The accounts rendered by Seymour were, at most, conclusive only as to the liability of the parties with reference to the transactions included in them. 1 Bouv. Law Dict. 86, defining "account stated at law." Acceptance must be by a competent person, excluding infants and those of unsound mind. Trueman v. Hurst. The plaintiff's evidence tended to show that Seymour considered Mrs. Hawkins incompetent to transact business. If this were true, no acceptance of the accounts rendered could be predicated by her. The court made no finding on this subject, nor does it appear that any question in respect to Mrs. Hawkins' acceptance of or acquiescence in the accounts, or her competency to accept or acquiesce, was raised. This subject is discussed in the notes to Phillips v. Belden, 2 Edw. Ch. 1, where cases are cited, and the doctrine stated that in no case has an implied admission of the correctness of an account from lapse of time and failure to object been held to be an estoppel, but that these facts merely make a prima facie case, so as to cast the burden of proof on the party who thus remains silent: Example, writing up a bank book, and depositing in it forged checks, and returning the book and vouchers which constituted a statement of an account by the bank; but as the bank had taken no action, and lost no rights, in consequence of the depositor's silence, the only effect of the depositor's omission to examine the account and make objection was to cast the burden on him to show the fraud or mistake. Brown v. Kimmel, 67 Mo. 431; Perkins v. Hart, 11 Wheat. 256; Wiggins v. Burkham, 10 Wall. 129. An account stated as settled is a mere admission that it is correct. It is not an estoppel. It is still open to impeachment for errors or mistakes. Hutchinson v. Bank, 48 Barb. 324; Young v. Hill, 67 N. Y. 176. Other cases cited in these notes are to the effect that an account stated may be impeached for fraud or mistake. It was held in Manhattan Co. v. Lydig, 4 Johns. 377, that where an account has been settled it may be opened for the purpose falsifying particular items, though it cannot be opened generally. Tharp v. Tharp, 15 Vt. 105, is in consonance with this rule. One rule is clear in regard to these accounts: that they are not conclusive upon what they do not contain upon items which Seymour did not charge himself with, and which the court below found, upon sufficient evidence, came into his possession. The defendants do not claim that there was any express contract between Mrs. Hawkins and Mr. Seymour by which the latter was to be compensated for the services which he rendered, but they contend that there was an implied promise on the part of Mrs. Hawkins; that, as Seymour never said to her that he was performing the services gratuitously, she should have presumed that they were to be paid for. The law would not imply a promise in Seymour's favor, against his own declared intention not to charge. Therefore, his declarations, even to third persons, had some tendency to show what his intention was in this respect, and were properly admitted. The charges in favor of Seymour's estate for services were properly disallowed.

The judgment of the court below was correct, except in allowing the plaintiff the item of $480.43. Judgment reversed, and judgment for the plaintiff for $653.52, to be certified to the probate court.

TOWN OF SOUTH BURLINGTON v. TOWN OF WORCESTER.

(Supreme Court of Vermont. Chittenden. Feb. 22, 1895.)

PAUPERS—LIABILITY FOR SUPPORT—IMPLIED CONTRACT—CHANGE OF RESIDENCE.

1. After defendant town had contracted with a pauper's father to pay him for taking care of his son till termination of a suit between defendant and the town of E. to determine liability for his support, the father removed to plaintiff town, taking the son, against the objection of defendant. *Held*, that there was no implied contract by defendant to pay the father for the son's support after the termination of the suit between defendant and E.

2. Evidence that the father knew that the suit between defendant and E. was decided against defendant, and that the father commenced an action against defendant for the support of the son from the time of such decision, is not admissible in an action for the support of the son, as a pauper, after the father's death, to show an implied contract of defendant to pay the father for the son's support after such decision, while in plaintiff town.

3. While a pauper, who had no home but with his father, was being cared for by the father under an agreement by defendant town to pay the father therefor till decision of a certain case, the father removed to plaintiff town, taking the son, and resided there till his death. After the decision the son, with the aid of his father, supported himself in plaintiff town till the father's death, when plaintiff assumed his support. *Held*, that at that time he was a resident of plaintiff town, and not transient therein, whatever may have been his intention as to residence at any prior time.

Exceptions from Chittenden county court; Rowell, Judge.

Assumpsit by the town of South Burlington against the town of Worcester for the support of a pauper. A special verdict was taken, and judgment given thereon for plaintiff. Defendant excepts. Reversed.

D. J. Foster, for plaintiff. S. C. Shurtleff, for defendant.

Digitized by Google

THOMPSON, J. This is an action to recover for the support of Daniel Durfee, a pauper, from December 23, 1890, to January 18, 1893. The plaintiff's evidence tended to show that Milo Durfee, the pauper's father, formerly lived in East Montpelier, and moved from there to Worcester. When Daniel was a little past 24 years old, he was so hurt that it made him a helpless cripple for life. When he was thus hurt his father was living in Worcester, and had then lived there about six years. Daniel had always made his home at his father's, although he had worked out more or less, and had his wages after he became of age. He had a little property at the time he was hurt, and for the first year thereafter his father took care of him without aid from the town, but was paid therefor by Daniel; but at the expiration of that year, Daniel's property having been exhausted, East Montpelier was applied to for his support, and assumed it, and continued to support him until the passage of St. 1886, No. 42, when it withdrew its support, and refused further aid. Thereupon, Daniel still residing in Worcester, with his father, where they had both continued to live, Worcester was applied to for Daniel's support, and assumed it for the time being, at the same time claiming that East Montpelier was still liable for his support, notwithstanding that law, and brought suit against it to test the question; and such proceedings were had therein that it was finally decided that East Montpelier was not thus liable, but that the burden of such support was cast by that law upon Worcester. While that suit was pending, and before December, 1888, Worcester, by its overseer of the poor, agreed with the pauper's father to pay him five dollars a week to take care of him until that suit terminated; and the father took care of him under such contract, for which Worcester paid him quarterly, before the December last named, the sum called for by the contract. About December 1, 1888, Milo Durfee prepared to move his family and Daniel to South Burlington; and the overseer of the poor of Worcester, hearing of it, objected to Daniel's being removed from the town, and told Milo Durfee that he must not take him out of town, and that if he did the town would not thereafter pay anything for his support, and that he himself would take Daniel, or get a place for him, but that he must not be taken out of the town. Thereupon Milo Durfee told the overseer that he should take Daniel with him, if he went, whether the town paid him anything for his support or not; and about that time Milo Durfee moved to South Burlington, taking Daniel with him, and thereafter continued to reside there until his death, in November, 1890, and Daniel remained in his family all the time, and was supported by him. After Milo Durfee's death the family continued to reside in South Burlington, and Daniel still remained in the family until his death, which occurred March 25, 1893. After the death of Milo Durfee, application was made to South Burlington to aid Daniel, who was poor and in need of relief; and that town thereupon assumed his support in December, 1890, and immediately thereafter gave Worcester the necessary notice that he was chargeable to South Burlington, and that that town would look to Worcester for reimbursement in the premises. The plaintiff continued to support the pauper until his death at an expense of five dollars per week, paid quarterly. The defendant conceded that that was a reasonable sum, and that the plaintiff was entitled to recover it, with interest thereon, if entitled to recover at all. It appeared that the suit between Worcester and East Montpelier terminated in June, 1889, and the plaintiff's evidence tended to show that soon afterwards Milo Durfee learned of its termination. The defendant controverted the contract between Worcester and Milo Durfee, in respect to the time which the plaintiff claimed it was to continue, and introduced evidence tending to prove that it was for no specified time. At the close of the evidence the defendant waived going to the jury on any questions except two, viz. (1) whether the town of Worcester made such a contract with Milo Durfee as the plaintiff claimed, and its evidence tended to show; and (2) what the character of Daniel's removal to South Burlington, and of his subsequent stay there, was, the defendant claiming that thereby he became and was a resident of that town, and was not a transient therein at the time that town assumed his support, and for that reason, if for no other, recovery could not be had; and the case was submitted to the jury accordingly. No general verdict was returned, and three questions only were submitted to the jury, which, with the answers thereto, are as follows: "(1) Did the town of Worcester contract with Milo Durfee to pay him five dollars per week for supporting Daniel until the suit then pending between Worcester and East Montpelier was terminated, as the plaintiff's evidence tends to show? Answer. Yes. (2) Did Daniel Durfee move from the town of Worcester to South Burlington in December, 1888, with the intent of residing at South Burlington, as his home? Answer. No. (3) Did Daniel Durfee at any time subsequent to June, 1889, and before December, 1890, intend to make South Burlington his home? Answer. No." The court found all the things to be true that the plaintiff's evidence tended to prove concerning matters on which the defendant did not desire to go to the jury, and on such findings of the court and the special verdicts, rendered judgment for the plaintiff for the amount claimed, to which the defendant excepted, and insisted that the judgment ought to be in its favor.

1. The plaintiff contends that the judgment of the county court in its favor can be sustained under the holding of this court in Leicester v. Brandon, 65 Vt. 544, 27 Atl. 318. Whatever may be said of the soundness of that decision, which was rendered by a divided court, it is clear that the case at

Digitized by Google

case does not come within the reasoning adopted by the court in that case. There, as reported, Brandon, while supporting the pauper in Brandon, made arrangements with a person then residing in Leicester, by which the pauper was to be kept by him in the latter town, both parties reserving the right to have her removed from Leicester at any time. While the pauper was being kept in Leicester under this arrangement, she became chargeable to that town; and it was held that "in legal contemplation her actual residence was in Brandon, while she was transient in Leicester." In the case at bar the pauper was never kept in the plaintiff town with the consent, nor by the procurement, of the defendant. The special contract with Milo Durfee for the pauper's support terminated, by its own limitation, in June, 1889. As between the defendant and Milo Durfee, the defendant was not bound to follow the pauper to South Burlington, and retake him, at the expiration of the contract. If Milo Durfee desired to charge the defendant with the pauper's further support, he should have returned him to it at the expiration of the contract. Under the facts stated there was no implied contract on the part of the defendant to pay Milo Durfee for the support of the pauper. Baldwin v. Town of Worcester, 67 Vt. —, 31 Atl. 413; Newton v. Town of Waterford, 67 Vt. —, 31 Atl. 782. At the expiration of the special contract the pauper was of full age, and from June, 1889, to November, 1890, he, with the aid of his father, supported himself in South Burlington. Thus, in law, the pauper supported himself during this time. Craftsbury v. Town of Greensboro, 66 Vt. 585, 29 Atl. 1024. When he came to want in South Burlington, he was not then being supported there by the defendant, and hence the case does not fall within Leicester v. Brandon.

2. Daniel Durfee's home was always with his father. The father's home, wherever it was, was his home. He never had any other place he could call his home. When he moved from Worcester to South Burlington, he left there no place nor home to which he had a right to return, nor did he leave any personal effects in Worcester. From June, 1889, to November, 1890, he resided with his father at that father's home, in South Burlington; supporting himself, within the meaning of the law. He was unmarried, and had no family of his own. It is true that usually intention is an important element in determining the question of residence, but in this case the court below erred in its instructions to the jury, in making that question turn solely upon whether Daniel moved to South Burlington in December, 1888, with the intent of residing there, and whether subsequent to June, 1889, and before December, 1890, he intended to make South Burlington his home. It also erred in its instructions in respect to the pauper being transient, as to Worcester, subsequent to June, 1889. Under the undisputed facts, as shown by the plaintiff's evidence, the jury should have been instructed that at the time the plaintiff assumed the pauper's support he was not transient in South Burlington, and that a verdict should therefore be returned for the defendant. Jericho v. City of Burlington, 66 Vt. 529, 29 Atl. 801. The plaintiff does not contend that any part of its claim is covered by St. 1892, No. 55, but puts its right of recovery upon the ground that the pauper was transient, under St. 1886, No. 42.

3. Against the exception of the defendant, the plaintiff was permitted to show that Milo Durfee learned that the suit between Worcester and East Montpelier was terminated in favor of East Montpelier. This evidence was admitted as tending to prove that Milo Durfee thereafter kept the pauper under such circumstances as to constitute an implied contract on the part of Worcester to pay for such support. Against the defendant's exception, and as tending to prove such an implied contract on the part of Worcester, the plaintiff was also permitted to show that Milo Durfee commenced suit against it, returnable to the September term, 1890, of Chittenden county court, to recover for the support of Daniel from the time of the termination of the suit between it and East Montpelier; that the death of Milo Durfee was suggested in the case at the April term, 1891, and his administrator entered to prosecute the suit; and that it was then pending. The evidence had no tendency to prove an implied contract on the part of Worcester, and it was error to admit it for that purpose. We must assume that the county court considered it for the purpose for which it was admitted, in finding the facts which it found; and, from the judgment rendered, it is to be inferred that it must have found that the pauper was kept after June, 1889, until Milo Durfee's death, under such an implied contract, so that the case fell within the rule laid down in Leicester v. Brandon. If such a finding was made, there was no evidence to support it. Judgment reversed, and cause remanded.

NEW JERSEY TRACTION CO. v. GARDNER.

(New Jersey Court of Errors and Appeals. May 13, 1895.)

STREET-CAR COMPANIES — DUTIES TO PASSENGERS.

In stating to the jury the degree of care owed by a horse-railway comapny to a passenger who alights from a moving car, it is error to charge that "the defendant was bound to so control the speed of the car as to insure" the safety of the passenger.

(Syllabus by the Court.)

Error to supreme court.

Action by John Gardner against the New Jersey Traction Company. Judgment for plaintiff, and defendant brings error. Reversed.

Digitized by Google

Depue & Parker, for plaintiff in error. R. H. McCarter and Saml. Kalish, for defendant in error.

GARRISON, J. The injury for which the plaintiff was awarded damages by the verdict below was received by him while stepping from the front platform of a moving horse car. In his testimony at the trial the plaintiff thus describes his accident:

"I told him to stop, and, as soon as he got near the corner, he put the brake on, and slacked pretty near to a stop. When I got off with my left foot, and was getting the other off, the car shot right ahead, and ketched me by the left shoulder, and held me up against the car until I got in the middle; and then it threw me, and, as it threw me, my left leg went over, and I went over. That is the last I remember about it."

On this verdict we must assume that the jury believed that the driver, either from notification or by his own observation, knew that the plaintiff was about to alight, and that the speed of the car did in point of fact increase in such a manner as to cause the plaintiff's fall; and, further, that the accident thus resulting was solely due to the failure of the driver to exercise that degree of care that the defendant, under these circumstances, owed to the plaintiff.

The high degree of care for the safety of passengers imposed upon common carriers was, of course, greatly modified by the fact that the plaintiff did not wait for the car to stop in obedience to his request before attempting to leave it. Inasmuch, however, as this was not necessarily negligence upon the part of the plaintiff, the court below left to the jury the question whether, in the juncture thus presented, the driver of the car failed to exercise such residuum of care as the defendant still owed to the plaintiff under the circumstances.

The nature of the duty thus remaining was stated to the jury by the trial court in the following language, to which exception was taken, and upon which error is specifically assigned:

"My charge to you, gentlemen, is that if the request was made of the driver to stop that car at First street, and, in seeming obedience to such request, the driver did slow up the car in such a manner as to induce the plaintiff to believe that the car was to be held in check for him to alight, and he acted in accordance with such invitation, then the defendant was bound to so control the speed of the car as to insure his safety. This was a duty imposed on the defendant. Failure to perform it—proof of failure to perform it—is proof of negligence."

In this use of the term "insure" there is legal error, so patent that it appears to us in the light of a chance misuse of a word, rather than as a misconception of the law upon the part of the trial judge. This is made still more clear by the fact that in stating generally the duty of the defendant the correct rule had been laid down in apt and unexceptionable language. The instruction in question, however, occurring, as it did, at the critical point of the charge, cannot be deemed to have been ignored by the jury, and it certainly was legally injurious to the defendant, in that it increased its duty from that of reasonable caution, under circumstances imposing, at best, one of the lower degrees of care, to the highest degree known to law, viz. that of an "insurer," if such a term, aside from express contract, finds any place in the ordinary relations existent between a common carrier and its passengers.

There must be a venire de novo.

DENISON et al. v. FOSTER et al.

(Supreme Court of Rhode Island. Dec. 13, 1894.)

APPEAL FROM DISTRICT COURT—RULINGS ON PLEADINGS—REVIEW—RECORD.

1. Under Judiciary Act, c. 30, § 12, a party aggrieved by a ruling of a district court overruling a demurrer is entitled to have the question determined by the appellate division of the supreme court, but is not entitled to have the same heard by the common pleas division.

2. Where the statement of evidence has not been presented to or allowed by the trial justice, it forms no part of the record on appeal.

3. A mere assertion that plaintiffs were forced to trial without preparation, without showing a sufficient reason for not being prepared, is no ground for a new trial.

Action of trespass and ejectment by Denison and McKenna, trustees, against Walter P. Foster et al. Plaintiffs were nonsuited in the common pleas division, and petition for a new trial. Petition denied.

James E. Denison, for plaintiffs. Albert B. Crafts, for defendants.

TILLINGHAST, J. The plaintiffs in this case petition for a new trial on the grounds—First, of error of law in the rulings of the justice who presided at the trial thereof in the common pleas division; and, second, that by reason of accident, mistake, and misfortune, they did not have a full, fair, and impartial trial. The case, which was an action of trespass and ejectment, was brought in the district court of the Third judicial district, wherein the defendants severed in their pleas, each filing the general issue, and the defendant Walter P. Foster also filing a special plea in bar. To this plea the plaintiffs demurred, but upon trial thereon the demurrer was overruled, whereupon the plaintiffs submitted to judgment for the defendants, and claimed a jury trial, and the case was duly certified to the common pleas division. When said case came on for trial the plaintiffs insisted that the first question to be determined was whether the ruling of the court below in overruling the demurrer, and thereby sustaining said special plea in bar, was error. But the

Digitized by Google

ourt ruled that the plaintiffs were not entitled to a hearing thereon, their claim for a ury trial being the only thing which was roperly before the court, and that the judgment of the district court, on the pleadings led therein, could not be reviewed by that ribunal. The plaintiffs thereupon went to rial under the pleadings as they stood, and, fter submitting their testimony, were, upon notion of counsel for the defendant Ellen M. 'oster, nonsuited.

The first and principal question raised by he plaintiffs' petition is whether the ruling f the common pleas division upon the matter of pleading was correct. We are clearly f the opinion that it was. Under the provisions of the judiciary act (chapter 30, § 2), a party aggrieved by any ruling or decision of a district court on any matter of law raised by the pleadings is entitled to have the question at issue heard and decided by the appellate division of the supreme court on a bill of exceptions properly brought, but he is not entitled to have the same heard by the common pleas division. The evident purpose of the statute is to have all questions of law raised by the pleadings in a case finally settled and determined before a jury trial is had therein, which, were it otherwise, might be rendered useless and nugatory. The plaintiffs in this case, having neglected to take any exceptions to the ruling of the district court, as they might have done, must bear the consequences of their mistake in supposing that the common pleas division could give them relief if the ruling below was erroneous.

As to the second ground upon which the plaintiffs ask for a new trial, we find nothing in the record to sustain it. The only accident, mistake, and misfortune of which they especially complain are the rulings of the court as to the effect of the decision of the district court on the pleadings, and as to the evidence offered to show that the defendants were jointly liable in said action, notwithstanding the fact that one of them, viz. Walter P. Foster, had successfully pleaded in bar thereto. This being so, he was, of course, as effectually out of the case as if he had never been made a party thereto, and no evidence as to his liability was admissible. It is true, the petitioners make the bald assertion that they were forced to trial in a hasty and discourteous manner, that they were not prepared for trial, and that they did not have a full, fair, and impartial trial. But they fail to show any sufficient reason for not being ready for trial, nor do they show any reason whatsoever for the making of the other allegations; and counsel ought to know that the mere making of such general statements, without specification thereunder, even though sworn to, as these are, does not entitle the petitioner to a new trial, or even to any consideration at the hands of the court. The statement of evidence submitted with the papers in the case, not having been presented to or allowed by the justice presiding at the trial, and no reason being shown for the noncompliance with the statute in this regard, forms no part of the record, and we cannot, therefore, consider the same. See chapter 31, §§ 6, 7, of the judiciary act. Petition denied and dismissed.

GUM v. ADAMS.

(Superior Court of Delaware. April, 1890.)

APPEALABLE JUDGMENT.

No appeal lies from a judgment by a justice on confession of defendant.

Appeal from justice court.

Action in a justice court by William A. G[illegible] against William D. Adams, assignee of Charles H. Richards. There was a judgment for plaintiff on confession by defendant, and defendant appeals. Motion to dismiss appeal on the ground that no appeal lies from a judgment rendered by a justice on confession of defendant. Dismissed.

Robinson & Boyce, for defendant.

PER CURIAM. Appeal dismissed.

ENGLAND v. FORBES et al.

(Superior Court of Delaware. Nov., 1885.)

SALE—WHEN TITLE PASSES—FRAUD OF PURCHASER.

1. Where goods sold to be paid for on delivery by a secured note are delivered without obtaining the note, the title passes to the buyer.

2. Where, after a buyer obtains possession of goods purchased under fraudulent representations, the goods are levied upon by a bona fide judgment creditor of the buyer, the execution lien is good as against the seller.

Replevin by Aaron C. England against William Forbes and others. Verdict for plaintiff.

Defendants bought a lot of spokes of plaintiff, agreeing to pay for them upon their delivery, in a note with an approved indorser. After the spokes were delivered, defendants were levied upon under a judgment in favor of a creditor rendered before the spokes were bought, and immediately thereafter, upon defendants' refusal to give him the promised note, plaintiff replevined the goods.

Anthony Higgins and J. H. Hoffecker, Jr., for plaintiff. Thomas Davis and Benjamin Nields, for defendants.

COMEGYS, C. J. (charging jury). Wherever there is a sale of personal property, where nothing remains to be done by the seller before it is delivered, the property passes to the buyer without delivery; and, if injured or destroyed after the sale, the loss falls upon the purchaser, and the seller is entitled to payment of the price. The

Digitized by Google

right of property and the right of possession are distinct. The former may be in one person, and the latter in another. A seller may have a qualified right to retain the goods sold until payment is made, and yet the property in the goods may be in the purchaser. Where there is an immediate sale, and nothing remains to be done by the seller as between him and the buyer, the property in the thing sold vests in the buyer, and all the consequences resulting from the vesting follow. When there is a sale of goods generally, no property in them passes until delivery, because until then the very goods sold are not ascertained; but when, by the contract itself, the seller sets apart, or appropriates to the vendee, a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after delivery of goods in pursuance of a general contract. The appropriation of the chattel is the same as delivery by the seller, and the assent of the buyer to take the specific chattel and pay the price is equivalent to his accepting possession. Where there is a sale of personal property to be paid for in cash, the property in the things sold passes to the buyer, but the seller has the right to repossession until the money is paid. This is because of his lien for the purchase money. But, if he deliver the possession to the buyer without such payment, his lien is gone, and the title of the buyer is complete. His remedy is an action on the contract of sale. So where goods are sold to be paid for on credit, whether generally, or upon notes, bills, bonds, or the like, to be given, and they are delivered to the buyer upon such general credit, or before the security is given, where it is stipulated for, the property and title to them against the seller is complete; his remedy is on the agreement, or by reason of it. Where goods are sold to a person upon a false representation as to his solvency or ability to pay, and it does not appear from the evidence, either directly, or by reasonable inference, that the sale was made, in whole or in part, under the influence of such representation, the seller cannot rescind the contract of sale on the ground of false representation, and retake the goods if they have been delivered to the buyer. But if the sale were made by reason of such representation, it may be avoided, and the goods, if they have been delivered, retaken from the custody of the buyer. He may likewise refuse to deliver the goods bought, where they have not been delivered, upon the same ground. The reason is because the fraudulent representation, in virtue of which the contract of sale was made, vitiated such contract, and made it voidable, at the option of the seller. But if, in the case of such vitiated contract of sale, the goods sold have been delivered to the buyer, who sells them to another, who buys them bona fide, without any notice or knowledge on his part of the fraudulent features of the sale, such innocent purchaser acquires a valid title to them, which cannot be defeated by the original seller. Likewise where, after possession has been obtained by a party who purchases under a fraudulent representation as to his solvency, they be levied upon by an execution issued at the suit of a bona fide judgment creditor having no notice or knowledge of any such representation, his execution lien cannot be disturbed by, but will hold good against, the defrauded seller. It is the law of this state as decided in the case of **Mears v. Waples**, that mere insolvency of the buyer, well known to himself and concealed from the seller, does not in itself furnish sufficient grounds for rescinding a contract of sale. Nor will the fraudulent purchasing and obtaining of goods, with an intention of never paying for them, of itself render the contract of sale absolutely void, even as between the seller and buyer, yet it will render it voidable at the election of the seller; but, if the goods are sold by such fraudulent buyer to an innocent purchaser for value, the latter will take and hold them by a valid title. 3 Houst. 621, 4 Houst. 62. In order to entitle the plaintiff to recover at all, you must be satisfied, from the proof in the cause, of two things: (1) That he made the sale to Forbes & Banks upon or by reason of a false representation made at the time of their financial condition; in determining this, you must take the evidence given you by the defendant Banks, as well as that of the plaintiff, and the evidence also of the actual condition of Forbes & Banks; and (2) that the execution of Edwin R. Banks was issued upon a judgment entered on a bond made fraudulently, and not bona fide. In any event, if the plaintiff with his replevin took any property other than the spokes shipped by him, the defendants are entitled to a verdict for their value, although you may decide to give the plaintiff a verdict for the value of the spokes remaining at the time the sheriff served the replevin.

Verdict for plaintiff.

RICHARDSON v. HORN.

(Superior Court of Delaware. Nov., 1887.)

PLEADING NIL DEBET—EVIDENCE OF FRAUD—RESCISSION OF LEASE.

1. Under the plea of nil debet, no objection being made to the admission of evidence of fraud, the fraud may be relied on as a defense.

2. The lessee of a mill, after remaining in possession for a year, cannot rescind the lease for fraudulent representations as to the condition and capacity of the mill.

Debt by Joseph S. Richardson against Charles W. Horn, for rent.

Anthony Higgins, for plaintiff. Charles B. Lore, for defendant.

Digitized by Google

COMEGYS, C. J. (charging jury). This is an action of debt, brought by the plaintiff, Joseph S. Richardson, to recover from the defendant, Charles W. Horn, two installments, of $100 each, of the rent of certain mill premises in this county, just beyond the limits of the city of Wilmington, secured by a lease thereof executed by the parties on the 12th day of June, 1885, which installments fell due, respectively, by the terms of the lease, on the 12th day of March and the 12th day of July, 1886. By those terms the rental per year was to be $300, two installments of which ($100 each) were to be paid at the execution of the lease. This would cover eight months. The others were to be paid, respectively, in advance. Therefore, as before stated, according to the lease, which was for three years, an installment of $100 became payable on the 12th day of March, 1886, and another on the 12th of July, following. Payment of them not having been made, this action was brought on the 17th day of September, 1886, to recover them. The defendant duly appeared to the suit, and, in his defense, filed two pleas, one nil debet (that is, that he did not owe the plaintiff anything); the other, payment (that is, that whatever he owed had been paid). As no evidence of any payment has been offered, if the case stood upon that plea alone, the plaintiff would be entitled to a verdict for the amount claimed by him; but his other plea denies any indebtedness, and, by a liberal course on the part of the plaintiff's counsel, no formal objection was made by him to the introduction of evidence on the part of the defendant to support a defense of fraud in the making of the lease, which is his sole reliance for defeating the plaintiff's action. The plea of nil debet, where issue is taken upon it, as in this case, opens a wide field, into which a defendant is allowed to enter, and usually to select whatever defense he may choose, and produce it before a court and jury, without any specific notice to the plaintiff. The equitable rules of the common law with respect to defenses under the plea on non assumpsit are well established and known; and they have been frequently produced and allowed, in actions of debt, as authority for defenses under the plea of nil debet. We do not, by this, mean to say that fraud may be always set up by proof in actions of debt, although it may not have been pleaded specially, but only that, according to a not very uncommon usage, it is often allowed. The defense, then, in this case, is fraud,—that is, that the lease was signed by the defendant by reason of certain false representations made by the plaintiff to him while they were in treaty for a lease; that those representations were known to the plaintiff to be false; and that they were made to the defendant with intent to deceive and mislead him. Much evidence has been offered by the defendant in support of his plea of fraud, which the plaintiff has offered evidence on his side to rebut. The value of this testimony, on the one side or the other, it is for you to judge of. It is not the province of the court to decide between conflicting witnesses—which class of them, those for the plaintiff or defendant, is entitled to the greatest weight—on consideration of value. That is for the jury alone. The court gives the jury the law, and they apply it to the facts, when they have determined what facts they adopt as the true ones by which their judgment should be formed.

Fraud, if one party to a contract practices it upon the other to induce him to enter into such contract, is a good defense to an action upon it. As a general proposition, this is indisputable. It "vitiates the contract," as it is said, and, if properly taken advantage of when discovered, is a complete defense to a suit to recover damages for breach of it, or money secured by it. Cases upon which the question of fraud has been made are by no means uncommon. Three of them have been cited from our own Reports, and many from reports of cases tried elsewhere. The law is recognized as the same in every one of them, when the court has felt called upon to express their opinion concerning it. It is that the kind of representation necessary to make the conduct of a vendor of property, for example, fraudulent in law, is this: His representations with respect to the value or quality of it must have been false; that they were made with a fraudulent design,—that is, to deceive the vendee with respect to such quality or value; and that the vendee was deceived by them, and entered into the contract because of them. All these circumstances must concur, in order to justify a vendee in rescinding—that is, putting an end to or avoiding—the contract. In order, however, to rescind a contract, the party desiring to do so must take his steps for that purpose within a reasonable period from the time when he discovers the alleged fraud; otherwise his right to rescind will be treated as waived, or given up. He will not, however, be without remedy. Although the fraud be known to him, he may still retain the possession of the property purchased, and bring an action of deceit against the vendor, and recover against him damages for the fraud practiced upon him. Such a contract, therefore, is not void utterly. It may be made such, if the vendee repudiate it in time; that is, in a reasonable time after he discovers the supposed fraud, as has been before said. But if this be not done it will be taken to be ratified. The vendee, however, may still sue for the wrong done by the fraudulent deceit of the vendor, and have recovery, if the fact of his case warrant it. It is more correct, therefore, in treating of such contracts, to say they are voidable by the vendee for fraud. Vitiation is not avoidance. It is, under circumstances, ground for it.

Although fraud practiced upon a party to induce him to enter into a contract, and contract made in virtue of such practice, will entitle the defrauded party to repudiate and rescind, or get rid of and annul, it, yet, to

Digitized by Google

avail himself of this relief, he must, in a reasonable time after the discovery of such fraud, return to the vendor the property purchased, or offer to return it to him; signifying to him, in some intelligible way, that his object in so doing is to avoid the contract altogether. This court has passed on the question of reasonable time in the case of the fraudulent sale of a horse, and held that in such case, where the vendor and vendee resided within 15 miles of each other, the notice of rescission of the contract should be given the day after the fraud was discovered. In the case before the jury, the lessee of the property—who is grantee of a term of years, and stands, therefore, for the purposes of this charge, in like situation to a vendee of land—entered into possession of it under the lease, and remained in possession, by those holding under him, for a period of nearly 12 months from the time when the lease began to operate. In fact, there does not seem to be any proof before the jury that he may not now be in possession of it. But, paying no attention to that suggestion, he certainly held the possession, by his own alleged declaration to the plaintiff in front of his office in Wilmington, down to some day (not given) in the month of May, 1885. Now, while the defendant had the right to remain in the occupation of the premises rented long enough to ascertain whether the representations made by the plaintiff as to the character or quality of the property leased were true, yet he had no privilege of taking more time than was necessary for that purpose. It therefore becomes important to determine what, in the case of such property, it would be necessary to do to test its condition. What would a reasonable man have done, in the premises? What would you, as reasonable men, have done, under similar circumstances, if you wished to be able to exercise the right of avoiding the contract and giving up the property, in case it was not what the plaintiff represented it to be, and upon whose representations you took it? I think I may venture to say that a man of reasonable prudence (and the law supposes all men to be such) would have set himself to work in due time—not immediately, but as soon after his possession of such leased property as this was—to ascertain its true condition, and that, if he felt himself incompetent to make a proper judgment upon examination by him to be made, he would employ a person of the necessary skill and experience to assist him. In this case it would be reasonable to expect that the defendant, as he was neither millwright nor miller, would have procured the services of such persons to make examinations of the mill, its water-power machinery, its steam power, and everything else which goes to make up a good mill property of the kind he leased. But he seems to have done nothing of the kind. On the contrary, although he contends he soon discovered that in consequence of the defective or misplaced boiler and engine and other defects, the mill was not at all what he bargained for, as lessee, yet he went on to repair what was needed in that respect, and removed both the engine and boiler to other places than those where they were planted. Still he found, as he claims he has shown before you, that the mill had not the power he was led to expect, and from the plaintiff's alleged representations he supposed it had; but yet, after all this trial, he continued to keep possession of it, and actually hold it, as before mentioned, for almost a year after he took possession under his lease, and, so far as there is any proof before you, he never opened his mouth to the plaintiff to make any complaint of false representation until the time of the referee meeting,—at least four months from the time the lease was signed. But then he did not make any claim of right to rescind or give up his lease. He only complained of, or charged, a particular representation as to quality, which the plaintiff denied. It is impossible to contend, with any reasonableness, that the defendant required four months to ascertain the condition as to repair and efficiency of that mill property. It surely cannot take any such length of time to determine, when one has rented a mill, whether it corresponds, upon examination, with what the lessor assured him it was. He is bound, for his own interest, to use no delay which a reasonable man would not need or practice, in finding out all he needs to know to decide whether he will keep the property or not. We feel justified in saying to you that, if there were no obstacle in the way, a man ought to be able to find out in a week or two, at most, whether a boiler and engine in a mill were in the right place, whether they were of sufficient power to drive efficiently the machinery with which they were connected, and whether the water portion of the machinery or attachments were adequate for its purpose, and whether all together were in a proper state of repair or fitness to run the establishment for three years. Raising steam and letting on the water would have shown the adequacy or inadequacy of the power. Inspection by an engineer, a boiler maker, and a millwright and miller, would have shown the state of repair. It is unnecessary to say any more upon the question what are representations upon which a defendant, under circumstances like the present, has a right to rely in purchasing property, more than this: that they must be something more than mere commendations such as venders usually make; they must be such as are not only calculated to assure the vendee that the property for which he is in treaty is of a particular quality, for instance, but were designedly made to impress the vender with their truth, and thus induce a reliance upon them. It is well known that sellers of property are generally unstinted in their praises

Digitized by Google

of what they have to dispose of. It would be an anomaly for a suit to be brought or defended upon such puffing. Besides, a man must, to some extent, at least, use his own eyes, where the property is before him when he is in treaty for it. When they will not give him the necessary knowledge, he ought to employ those of some person who is capable of giving him the necessary knowledge,—in cases like this, machinists, engineers, millwrights, millers.

In this view of the law, it is our duty to say to you that the defense made in this case is not sufficient to defeat the claim of the plaintiff for the installments under this lease of $100 each, which respectively became payable on the 12th day of March and on the 12th day of July, 1886. He is therefore entitled to your verdict for them. And this instruction does not in any respect affect the defendant's right to sue the plaintiff for the alleged deceit and false representation, if any were made.

Verdict for the plaintiff.

LEIGHTON et al. v. OSSIPEE SCHOOL DIST. et al.

(Supreme Court of New Hampshire. Carroll. July 31, 1891.)

LOCATION OF SCHOOLHOUSE — FAILURE TO FILE — APPEAL TO COUNTY COMMISSIONERS — WAIVER OF OBJECTIONS.

1. Where a district committee fails to file a location for a school in writing, and parties appealing from the location in their petition recite the location, and all parties agree that the recital is correct, the records of the district may be corrected by filing the written location.

2. Where parties on appeal to the county commissioners have waived objection to the location made by the district committee for a schoolhouse because the written location was not filed, they will be estopped from raising this objection at a subsequent proceeding to enjoin the building of a schoolhouse upon the location.

3. Where county commissioners describe land selected for a schoolhouse as belonging to A., when in fact it belongs to A.'s mother, but subsequently the district committee obtain a deed from the owner and a quitclaim deed from A., and a release from a mortgagee, the objection that the return of the county commissioners is indefinite cannot be raised.

4. A void location by county commissioners of a schoolhouse may be validated by vote of the district "to build a schoolhouse on said location by said county commissioners."

Bill by one Leighton and others against the Ossipee school district and others to restrain the erection of a schoolhouse. Bill dismissed.

F. Weeks, for plaintiffs. Jewell & Stone, for defendants.

ALLEN, J. The defendant school district, at its annual meeting in March, 1889, under articles in the warrant for the meeting, appropriately specific, "voted to build a suitable schoolhouse in what is known as Fogg's Ridge and Leighton's Corner districts, also to build a suitable schoolhouse in what is known as West Ossipee district," raised the sum of $1,800 for building the schoolhouses and other purposes named, and designated the school board as a committee to purchase the necessary land and build and repair the schoolhouses. The sum of $1,800 was assessed and collected, of which about $800 remains unexpended, but no schoolhouse has been built in Fogg's Ridge and Leighton's Corner districts. At the annual meeting of the school district in March, 1890, under appropriate articles in the warrant, it was "voted that the school district accept the report of the repairing and building committee, and that the school board be a committee to locate and build schoolhouses for the district of Ossipee for the ensuing year, the same as last year." June 9, 1890, the school board, acting as a committee, located a schoolhouse lot at Leighton's Corner, and staked it out, intending to make a written return of the location, which they did not do, in consequence of an appeal to the county commissioners. On the 10th day of June, 1890, an appeal by two or more voters of the district was taken from the district committee's location to the county commissioners, who, after hearing the parties, who appeared by counsel, located a lot specifically described "in the field of Abner P. Gibson." No schoolhouse was built during the school year of 1890, and at the meeting of the district in March, 1891, articles in the warrant to see if the district would indefinitely postpone building a schoolhouse on the location made by the commissioners, would repair the schoolhouse in Leighton's Corner district, choose a committee for the purpose, and see if the district would limit to the sum of $400, or some other sum, the cost of the schoolhouse to be built, were indefinitely postponed, and the school board was designated as a special committee to build a schoolhouse upon the location made by the county commissioners, of such size as they may deem necessary, and use for the purpose so much of the $1,800 raised in March, 1889, as might be necessary, and that they sell the schoolhouse in that district. The bill prays for an injunction against building a schoolhouse, and against the sale of the old schoolhouse there, because of uncertainty in the location made by the commissioners, and because the district committee, from whose location the appeal was taken, made no location by written designation.

It appears that at the trial of the appeal all the parties interested in this proceeding—the school district on the one hand, and the petitioners on the other—were represented by counsel, and before the hearing proceeded, on inquiry made, it was distinctly stated and understood that no objection would be made by reason of the failure of the district committee to file its location in writing. That location was set out in the petition for appeal, and due notice of the pendency of

Digitized by Google

this petition being given, and at the time of the hearing attention being called to the committee's omission, and all objections distinctly waived, the plaintiffs cannot now claim any advantage from the omission. Voluntarily choosing to go forward in spite of a defect in full view, and with their eyes open, they are now estopped from complaining. If the question is one affecting the public interests, and there can be no waiver on that account, the records of the school district may be amended according to the fact. The case shows that the committee made a location of a schoolhouse lot and staked it out. They can make written return of their action in the matter, and of what they did prior to the appeal, and the district records can be made to show it. In the petition to the county commissioners the location made by the district committee is recited, and all parties agreed that that statement is correct, and upon the basis of that statement the committee can file a written statement of what they did, and the same can be recorded in the records of the district. Records and returns relating to school districts may be amended like those of towns. Harris v. School Dist., 28 N. H. 58, 66; Bean v. Thompson, 19 N. H. 294. The amendment must be made by the committee who acted in the matter, though now out of office. Gibson v. Bailey, 9 N. H. 176; Cass v. Bellows, 31 N. H. 509; Pierce v. Richardson, 37 N. H. 311.

The county commissioners described the land taken by them for a schoolhouse as belonging to Albert E. Gibson, when in fact it was owned by his mother, Julia, and they assessed damages at $20. There being a sufficiently definite description without including the ownership, and the district committee having for the district obtained a deed of the lot laid out from the rightful owner, with a quitclaim of all his rights by Albert, and a release by the mortgagee, no question can be raised upon the action and return of the county commissioners. If the location by the county commissioners was void for any reason, the vote passed by the district March 17, 1891, "to build a schoolhouse on said location made by said county commissioners," is a location by the district, and a sufficient answer to the bill. Bill dismissed.

DOE, C. J., did not sit. The others concurred.

HICKEY v. DOLE et al.

(Supreme Court of New Hampshire. Coos. July 31, 1891.)

CONTRIBUTION BETWEEN DEFENDANTS.

The question of contribution arising upon a joint decree against several defendants may be settled in the same suit in which the decree was rendered.

Bill by Edward Hickey against Charles E. Dole and others. There was a decree for plaintiff against the several defendants jointly, and the defendants now seek to have the question of contribution among them determined in the same suit. Decree for defendants.

Drew & Jordan, for plaintiff. E. A. & C. B. Hibbard and W. & H. Heywood, for defendants Dole and Stuart. Drummond & Drummond, for defendant Soule's administrator and heirs.

DOE, C. J. A defendant may have affirmative relief against the plaintiff. Clark v. Clark, 62 N. H. 267, 268, 272; Cox v. Leviston, 63 N. H. 283, 287. Both parties are entitled to just and convenient procedure. Pearson v. Railroad Co., 63 N. H. 534, 4 Atl. 388; Boody v. Watson, 64 N. H. 162, 171–174, 178, 179, 9 Atl. 794. The defendants' situation is such that justice and convenience require, in this suit, an adjustment of their conflicting claims in regard to contribution. It is not suggested that the plaintiff has any interest in their controversy. If they ask delay in the enforcement of his decree, the reasonableness of delay will be considered at the trial term; where an additional decree will be made when the question of contribution is tried. All concurred.

EDGERLY et al. v. BARKER et al.

(Supreme Court of New Hampshire. Strafford. July 31, 1891.)

CONSTRUCTION OF WILL—PROVISIONS FOR GRANDCHILDREN—RIGHTS OF CHILDREN OF DECEASED GRANDCHILDREN — INVALID DEVISE — RULE AGAINST PERPETUITIES—DOCTRINE OF CY PRES.

1. Testator devised his property in trust to pay certain legacies and annuities to his son and daughter, his only children, and, after providing for the education of his grandchildren and payment to them of certain legacies, provided that, "when the youngest of said children [of the testator's son and daughter] shall arrive at the age of 40 years, then all my estate shall be theirs, to have and to hold the same to them and their heirs," with a proviso for the protection of those "who are not then possessed" of good habits and business capacity, by which those who were of good habits and business capacity were directed to manage the property for them. *Held* that, though the estate did not vest in the grandchildren until the time of distribution, yet the children of deceased grandchildren took the interest their parents would have received, as testator evidently intended to include in the word "children," as applied to his grandchildren, the issue of any deceased grandchild.

2. Testator devised his estate in trust, and, after providing for his own children by annuities and otherwise, provided that when the youngest of his grandchildren, born and unborn, should arrive at the age of "40 years," the residue of the estate should be theirs. *Held*, that the invalidity of such devise to the grandchildren, as violating the rule of perpetuities, would not defeat the devise to them, but, under the doctrine of cy pres, the estate would be allowed to vest in them when the youngest reached the age of 21 years.

Digitized by Google

Bill of interpleader by James B. Edgerly and others, executors of Hiram Barker, deceased, against Clara Barker and others, to determine the construction of a will.

The following are the material provisions of the will:

"Eighth. I give, bequeath, and devise all the rest, residue, and remainder of my estate, real, personal, or mixed, of every name, nature, and description, and wherever found or situate, to James B. Edgerly and John F. Cloutman, both of said Farmington, Nathaniel Stevens, of Alton, in the county of Belknap, in said state, Henry R. Parker and Reuben G. Hayes, both of Dover, in said county of Strafford, and their successors and their heirs, in trust for the following purposes, to wit: First. To carry on, manage, and improve all my real estate to the best advantage, and take care of my personal estate, and invest the proceeds of all my said estate, with power to sell at private or public sale any of my real estate whenever, in the best judgment of said trustees, it is most expedient and for the interest of my estate so to do, and make the money received from such sale or sales a part of said investment. Secondly. To pay out of and from the net income of my said estate to my daughter, Clara Barker, during her life yearly, the sum of two thousand dollars, in such sums and at such times as she shall request; and, if said sum is not sufficient for her ample and comfortable support and suitable manner of living, such further and additional sums of money shall be paid her by said trustees and their successors as shall, in their best judgment, be just, sufficient, and proper for such purposes. Thirdly. To pay out of and from said net income of my estate to my son, Hiram H. Barker, during his life, yearly, the sum of one thousand dollars, in such manner and at such times as he shall request, for the proper and reasonable support of himself and his wife and children, if, in the best opinion of said trustees, he shall, from his habits and mode of life, prove himself to be safe and competent to have the use and expenditure of said money for said purposes; and if said sum of one thousand dollars shall not, in the best judgment of said trustees or their successors, prove sufficient for said purposes, then said specified sum shall be increased to such an amount as shall in their best opinion be sufficient for said objects; and said trustees, in case my said son shall prove incapable or unfit from any cause to manage and pay out said money for said purposes, then my said trustees shall manage and expend the same money, and more, if need be, all at their best judgment, and all for said purposes; that, also, out of said income of my said estate, means shall be furnished and provided for the education, at home or abroad, at proper institutions of learning, of each and all of said children; and any other child or children of my said son, if any, hereafter born, shall have and receive all the rights and benefits from my estate that such child or children would have if living at my decease. And I hope that said children, each and all, will avail themselves of this opportunity to acquire a good education. And, if my said son shall become and remain temperate, sober, and correct in his habits for the entire space of five years together, he shall have five thousand dollars, and be added to the number of the trustees, and be of equal power with any other one of them in the control and management of my estate; and he shall be of said trustees, after becoming such as aforesaid, so long as he shall remain temperate, sober, and correct in his habits, and no longer, and ten thousand dollars more shall, at the expiration of ten years from and after the expiration of said five years, he paid him if he shall remain during all said last-named time perfectly temperate, and of good and regular habits, and fifteen thousand dollars more shall be paid to him at the expiration of ten years more after the end of said last-mentioned ten years if he shall remain during all said last-named ten years perfectly temperate and of good and regular habits. Fourthly. To pay out of and from said funds, after the death of my said son, if his wife shall survive him, to her, yearly, money for her sole, proper, and sufficient support and maintenance, not, however, exceeding five hundred dollars, unless more is needed by her, and then such an amount as said trustees shall regard as proper and necessary, all so long as she remains his widow, and no longer. Fifthly. To pay out of and from said estate to each of said children when said child shall reach the age of twenty-one years, and to each of the children of my said daughter if she shall marry and have a child or children, the sum of from three thousand dollars to five thousand dollars, if such child shall then be temperate and of good capacity to manage said money, all in and according to the opinion of my said trustees; and from time to time thereafter, as their wants and necessities shall require, to pay out of and from said estate such further sum or sums of money as may be necessary, all under the conditions aforesaid respecting temperance and capacity; and, when the youngest of said children shall arrive at the age of forty years, then all my estate shall be theirs, to have and to hold the same, to them and their heirs, those of them of good and regular habits, and of capacity to do business and manage property, to take care of and manage as trustees the portion or portions thereof belonging to those, if any, who are not then possessed of such habits and capacity; but, before said property shall vest in and be theirs, proper, suitable, and sufficient bonds or other security must be given by them for the payment of said sum or sums to my said daughter, if living, so long as she shall live, to my said son's widow, if she shall then be living, so long as she lives and remains his widow, and also for the good and sufficient support of my said son so long as he shall live. And, lastly, I hereby constitute and appoint all the said trustees to

Digitized by Google

be also the only executors of this, my last will and testament; and I direct that said executors and trustees and those hereafter appointed under this will shall each be exempt from giving bond, or from giving a surety or sureties on his or their bond; and in case any of said executors or trustees, or both, shall at any time decline to act as such, or die, then application shall be made by him or them who are willing to act or are acting as such to the supreme court in and for said county of Strafford to fill the vacancies so caused."

J. G. Hall, for executors. W. L. Foster and Jeremiah Smith, for trustees. G. E. Cochrane, Worcester & Gafney, and Frink & Batchelder, for Hiram H. Barker.

DOE, C. J. The construction of the will, including the question whether the testator intended the remainder, which he devised to his grandchildren, should vest in them before they became entitled to a distribution of it, is determined as a question of fact by competent evidence, and not by rules of law. Rice v. Society, 56 N. H. 191, 197, 198, 203; Brown v. Bartlett, 58 N. H. 511; Kimball v. Lancaster, 60 N. H. 264; Goodale v. Mooney, Id. 528, 534, 535; Sanborn v. Sanborn, 62 N. H. 631, 643; Kennard v. Kennard, 63 N. H. 303, 310; Bodwell v. Nutter, Id. 446, 3 Atl. 421; Kimball v. Society, 65 N. H. 139, 150, 23 Atl. 83–85; Doten v. Doten, 66 N. H. 331, 333, 20 Atl. 387. "Good and regular habits" are a condition on which he directs that more than one right shall depend. His solicitude on this subject is significant. It is traceable, in the will, to a probable cause, and is the motive of several of his arrangements. The proviso that, when the time arrives for the distribution of the remainder among the grandchildren, "those of them of good and regular habits, and of capacity to do business and manage property," shall "take care of and manage as trustees the portion or portions thereof belonging to those, if any, who are not then possessed of such habits and capacity," is evidence on the question whether he intended the remainder should vest in the grandchildren before the time of distribution. If their interest is vested, they can sell it when they severally come of age. If they can sell it, they can consume the proceeds. He did not intend they should have power to squander it before "those of them of good and regular habits" and competent were authorized to save the portions of the others. When he fixed the day on which "all my estate shall be theirs to have and to hold the same, to them and their heirs," with the proviso for the protection of those "who are not then possessed of" good habits and business capacity, and another proviso that, "before said property shall vest in and be theirs, * * * security must be given by them," he meant that, before it became "theirs," it should not be theirs in a sense that would enable the intemperate, incapable, or improvident (if such there should be), or any others, to sell or incumber an interest in it.

The trustees contend that, if the remainder does not vest in the grandchildren before the time of distribution, the children of a grandchild who is then dead will take nothing; that their disinheritance was not intended by the testator; and that, consequently, the remainder vests before that time; and this position is sustained by many authorities. Of various words and phrases, there is, in reported cases, a construction that would disinherit the descendants of deceased donees, contrary to the donor's intent; and the consequence of this error is often avoided by holding that an estate vested in deceased donees, contrary to his intent. When the second error merely corrects the first, the result is the same as if the will were read as he understood it. If a will cannot be conformed to the law unless devised property vests sooner than the testator intended, the inquiry may be whether his intent as to the time of vesting is qualified by his intent that the devisees shall have the property, and that the devise shall be carried into effect cy pres. The construction that gives to A. an estate which the testator gave to A.'s children is far from the intent on that subject; but, if it is as near as possible, it may accord with the intent on the subject of approximation. Barker's intention not to disinherit the children of grandchildren who die before the time of distribution would not be properly carried out by unnecessarily vesting the property in the grandchildren before that time, contrary to his intent. Under such a variation of the will, the orphans might not receive what he meant they should have. His design might be frustrated by the construction adopted to give it effect. If his intent not to cut them off could be executed in no better way than vesting the property in their parents before the intended time, there would be a question which the case does not present. In proprietary rights, children are regarded by the people of this state as the natural representatives of their deceased parents; and the general meaning of testators and the general understanding of wills are that the principle of lineal representation is accepted and acted upon as an implied basis of distribution, except so far as a purpose to set it aside is clearly expressed. The popular construction is strengthened by the common knowledge of the law of inheritance. The act of 1718 provided that the judge of probate should order and make distribution of the real and personal estate of an intestate in manner following: A portion to the widow, and the residue to the "children, and such as shall legally represent them, if any of them be dead; * * * and in case there be no children, nor any legal representative of them, then" a larger portion to the widow, and the residue equally to the next of kin in equal degree, "and those who legally represent them, no representatives to be admitted among collaterals after brothers' and sisters'

Digitized by Google

children; and, if there be no" widow and no child, "to the next of kin, "and their legal representatives, as aforesaid." Laws 1726, pp. 102, 103. "We often mistake for nature what we find established by long and inveterate custom." 2 Bl. Comm. 11. When this will was made, the rule of representation, enacted as a natural order of succession, had been in force 164 years. Its constant operation had confirmed the instinctive idea of right, and exerted the influence of immemorial and familiar usage in defining the language of the people, raising an implication in many forms of testamentary expression that materially affects their sense, and indicating a testamentary intent to be assumed if not rebutted by convincing proof.

The prevailing view that lineal representation is a natural right, and its known operation as a legal right when not superseded by an exercise of testamentary power, is evidence that the will means that the remainder shall go, in equal shares, to the devisees living at the time of distribution, and to the children of such of them as are then dead. Pinkham v. Blair, 57 N. H. 226, 242–244. The testator's language is: "When the youngest of said children [of the testator's son and daughter] shall arrive at the age of forty years, then all my estate shall be theirs, to have and to hold the same, to them and their heirs." This would not be commonly understood to be an expression of an intent to disinherit the descendants of a deceased devisee. The generally accepted meaning would be that such descendants are to stand in the place of the parent, and take as devisees. The competent evidence does not show that the meaning is to be found in any other than the ordinary and popular sense in which the terms of every written instrument are to be understood when a peculiar sense is not proved. 1 Greenl. Ev. § 278. The ordinary and popular sense being the legal sense, lineal representation is a part of the devise of the remainder to the testator's grandchildren. Correct construction is not insured by correct views of the law. A testator's right to use words in the sense in which they are commonly understood may be infringed when that sense is not known to his judicial interpreters, or is disparaged by their educational bias. The professional and official sense sometimes introduced by construction is in effect a scholastic dialect, not used by the mass of the people. "The bulk of mankind act and deal with great simplicity; and on this is founded the rule that 'benignae faciendae interpretationes cartarum propter simplicitatem laicorum.' Words are to be taken in their popular and ordinary meaning, unless some good reason be assigned to show that they should be understood in a different sense. * * * Si nulla sit conjectura quae ducat alio, verba intelligenda sunt ex proprietate, non grammatica sed populari ex usu." 2 Kent, Comm. 555. The construction is "favorable"; "for the maxims of law are that 'verba intentioni debent inservire'; and 'benigne interpretamur chartas propter simplicitatem laicorum.' And therefore the construction must also be reasonable and agreeable to common understanding." 2 Bl. Comm. 379; Co. Litt. 36a; Broom, Leg. Max. 413; Hill v. Grange, 1 Plow. 164, 170; Williams, J., in 6 Man. & G. 314, 336; Chit. Cont. 79, 81; Perkins v. Mathes, 49 N. H. 107, 110. "The peculiar indulgence extended to testators, who are regarded as inopes consilii, has exempted the language of wills from all technical restraint, and withdrawn them in some degree from professional influence." 2 Jarm. Wills, 737; 2 Bl. Comm. 381; Bac. Abr. "Legacies and Devises," C; Root v. Stuyvesant, 18 Wend. 307. "Words of limitation shall operate as words of purchase. Implications shall supply verbal omissions. The letter shall give way. Every inaccuracy of grammar, every impropriety of terms, shall be corrected by the general meaning, if that be clear and manifest." Chapman v. Brown, 3 Burrows, 1626, 1634, 1635. In this state a peculiar want of advice or learning in drafting wills is not presumed. The common understanding of all written instruments is their legal construction, if a different meaning is not proved. One of the instances in which the authorities that defeat intention by adhering to technical rules and technical definitions are disregarded is a devise, with a remainder over if the devisee dies without issue. Hall v. Chaffee, 14 N. H. 215, 218–222, 226–240; Bell v. Scammon, 15 N. H. 381, 390, 391; Eaton v. Straw, 18 N. H. 320, 325, 327, 328–330; Downing v. Wherrin, 19 N. H. 9, 84–86; Ladd v. Harvey, 21 N. H. 514, 526; Pinkham v. Blair, 57 N. H. 226, 237, 239; Kimball v. Penhallow, 60 N. H. 448, 451.

The limitation over is not based on an indefinite failure of issue, and is not prohibited by the rule against perpetuities. "The context may show clearly that the testator meant to put two different senses upon the same word." Best, J., in Murthwaite v. Jenkinson, 2 Barn. & C. 357, 387; 2 Jarm. Wills, 842. The word "children" has several ordinary and popular significations. One includes all descendants; another is limited to descendants of the first degree. In this case the objects at which the testator was aiming are evidence that he used the word in both senses. As a description of persons, the youngest of whom (at the age of 40) he selected for the purpose of fixing the time of distibution, it was used in its limited sense. The youngest of all future generations was not the individual named for that purpose; and, as he used the word "children" in the limited sense before he said his estate should be "theirs," a literal reading would disinherit the children of deceased children. But the general and substantially universal understanding that, as a description of legatees and devisees, "children" includes the issue of those who die after the will is made, is sufficient evidence that the devise to children expresses an intent to include such issue. "Up-

Digitized by Google

on the reason of the thing, the infant is the object of the testator's bounty; and the testator does not mean to deprive him of it, in any event. Now, suppose that this object of the testator's bounty marries, and dies before his age of 21, leaving children; could the testator intend in such an event to disinherit him? Certainly he could not." Goodtitle v. Whitby, 1 Burrows, 228, 234. "The disinheritance of issue of any child who may marry and die before the expiration of the trust period" is "a consequence which no one can doubt the testator never intended." Goebel v. Wolf, 113 N. Y. 405, 415, 21 N. E. 388. "We cannot presume such to have been the intention of the testator." Dale v. White, 33 Conn. 294, 297. "In ninety-nine cases out of a hundred it is the intention of the testator that his bounty should be transmitted to the children or family of the beneficiary; otherwise, indeed, full effect is not given to it." Chess' Appeal, 87 Pa. St. 362, 365. Their disinheritance "would not be presumed to be intended by the testatrix unless such intention is clearly manifested." Teele v. Hathaway, 129 Mass. 164, 166; Collier's Will, 40 Mo. 287, 325. "The testator could not have intended such a result." Doe v. Considine, 6 Wall. 458, 478; Cropley v. Cooper, 19 Wall. 167, 175; Buller, J., in Doe v. Perryn, 3 Durn. & E. (3 Term R.) 484, 495; Perry v. Rhodes, 2 Murph. 140, 142. Barker's intention that, at the time of distribution (determined by legal construction), the children of deceased grandchildren should take as devisees, is not modified by conflicting intent or by law.

By annuities and otherwise, the testator, a widower, made what he considered suitable provision for C. and H., his only children. He clearly expressed his purpose that the remainder of his estate should not vest in them, but should vest in their children "when the youngest of said children shall arrive at the age of forty years." If he had said "when the youngest of said children shall arrive at the age of twenty-one years," the validity of the devise to them would not have been questioned. H. contends that the remainder may not vest within a period prescribed by law; that the devise is void for remoteness; and that the remainder vested in C. and H. at the testator's death, as intestate property. It is not now necessary to determine the legal possibility of knowing, during the lives of C. and H. (Gray, Perp. § 215), who will be the youngest of their children. Without considering that question, it is assumed that during the lives of C. and H. the remainder will not vest in their issue. A dominant idea of the residuary clause and of the whole will is that the testator's grandchildren shall have the bulk of his estate. Not less dominant or less manifest is his determination that C. and H. shall not have it. His intent would not have been plainer if he had inserted a declaration that the grandchildren's remainder should not be transferred from them to C. and H. by judicial construction. The question is whether his appointment of the time of vesting in the grandchildren is wholly or partially void for remoteness because he said "forty" instead of "twenty-one," and whether his inability to postpone the vesting as long as he wished is a reason why the property should not go to those to whom he gave it. Could he suspend the grandchildren's ownership beyond the time when the youngest of them would arrive at the age of 21 years? If he could not, does their title fail? He willed that the remainder should be theirs. When it should be theirs was another point for him to decide. Upon consideration of such matters of law and fact as were within his knowledge, he chose the time when the youngest would be 40 years old. He did not know that, on a judicial view of public policy, they should have it 19 years sooner. Is this a ground on which it can be held that they shall not have it at all? There is no evidence, direct or inferential, and no reason to believe, that the testator regarded his grandchildren's title as inseparably connected with his appointment of the time of vesting, or as resting upon the validity of that appointment. In his mind, the main point evidently was the extent to which he disinherited C. and H., and put their children in their places. The time when the property, after supporting the first generation of his heirs, should pass to the second, must have been, in his estimation, a matter of less consequence. His understanding is a question of probability. Rice v. Society, 56 N. H. 191, 197, 198, 203. It is not probable that he understood the change he made in the natural and legal order of succession would depend upon the property's being withheld from the grandchildren 19 years after the youngest came of age. The will, made in 1882, bears marks of deliberation. It cannot be assumed that the testator ever forgot the circumstances of his family, or his reasons for making a will. His deliberation would not be likely to cease in 1882. In 1886 he added two codicils, increasing the provision for C. and H., but making no change that affects the present inquiry. The will he had made, and his reasons for making it, were still in his mind. He died in 1887. At that time his only daughter, C., was about 45 years old and unmarried. His only son, H., was 35 years old, had been married 15 years, and had 5 children, and his wife was 32 years old. There might be a failure of issue, and the remainder might go to collateral heirs. The testator acted upon the presumption that there would not be an early failure of issue, and that the remainder would go to his descendants. He had reason to expect, and the provision for the education of grandchildren shows he did expect, his only issue, after the death of C. and H., would be the issue of H. The care with which he studied

Digitized by Google

the interests of both generations is evinced by the elaborate details of the will and codicils, and the natural anxiety of a person in his situation. Whatever doubts may be entertained of the wisdom of his conclusions, they were presumably reached and held upon all the painstaking he was capable of in weighing the evidence of his duty. After years of observation and reflection, his unchanged judgment was that the welfare of his issue required an absolute provision for the comfort of C. and H. during their lives, a conditional appropriation of $30,000 for H., other special appropriations (including one for education), and a devise of the remainder to the grandchildren. In this manner and to this extent, he was convinced it was his duty to modify the operation of the statutory rule of distribution. His exercise of testamentary power to this end was his primary and leading purpose. He looked upon the postponement of the grandchildren's title 19 years after the youngest came of age as comparatively unimportant. Taking his view of the condition and prospects of his children and grandchilden, as that view is disclosed in the will, and considering his manifest reasons for disposing of his property as he did, there is no doubt on the question of what is called primary and secondary, or general and particular, intent.

The justice and necessity of withholding the control of his estate from C. and H., and settling nearly the whole of it in trust for their benefit and the benefit of their children, is a question on which there is no appeal from his decision. He may have had reason to fear that, without such a settlement, the support of C. and H. and their children would soon become a public charge. Root v. Stuyvesant, 18 Wend. 276, 309, 310. The legislature had authorized him to guard his issue and the public against that misfortune, and had not fixed a time beyond which an estate could not be vested by an executory devise. "A great proportion of the rules and maxims which constitute the immense code of the common law * * * was the application of the dictates of natural justice and of cultivated reason to particular cases." 1 Kent, Comm. 471. "The common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy. * * * It has its foundations in the principles of equity, natural justice, and that general convenience which is public policy." Norway Plains Co. v. Boston & M. R. Co., 1 Gray, 263, 267, 268. "It is the great merit of the common law that it is founded upon a comparatively few broad, general principles of justice, fitness, and expediency." Com. v. Temple, 14 Gray, 69, 74; Jones v. Randall, Cowp. 37, 39. In the absence of statutory regulation, the inability of a testator or grantor to suspend the vesting of a legal or equitable title for an unreasonable time is a portion of a mass of common law that consists of what is judicially recognized as convenient, expedient, and required by the common welfare. A requirement that titles shall vest in a reasonable time is readily accepted as a rule dictated by public interests, clear enough and strong enough to determine public policy, and to be classed with moral right as evidence of law. The rule against perpetuities and unreasonable remoteness "was created to effect a general end of public policy, and there is no reason in history or policy why all future interests should not fall within it." Gray, Perp. § 298; Wood v. Griffin, 46 N. H. 230, 235. "The necessity of imposing some restraint on the power of postponing the acquisition of the absolute interest in or dominion over property will be obvious if we consider * * * what would be the state of a community in which a considerable proportion of the land and capital was locked up. * * * Such a state of things would be utterly inconsistent with national prosperity; and those restrictions which were intended by the donors to guard the objects of their bounty against the effects of their own improvidence, or originated in more exceptional motives, would be baneful to all. Perhaps these restrictions most frequently spring from the desire to exert a posthumous control over that which can be no longer enjoyed." 1 Jarm. Wills, 250, 251. "On the same reason with bonds and contracts in restraint of trade stand perpetuities, attempts to create which are never permitted by the law to succeed, on account of the tendency of such limitations to paralyze trade by shackling property and preventing its free circulation for the purposes of commerce. * * * This doctrine of 'perpetuities,' as it is called, is of comparatively modern introduction. Its objects were, indeed, at a very ancient period of English law, in some degree accomplished by a maxim * * * that property has certain inseparable incidents, among which is the right of aliening it." 1 Smith, Lead. Cas. 183d. "If a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void." Litt. Ten. § 360. "And the like law is of a devise in fee upon condition that the devisee shall not alien. The condition is void. * * * And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel, real or personal, and give or sell his whole interest or property therein upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him, so as he hath no possibility of a reverter, and it is against trade and traffic, and bargaining and contracting between man and man." Co. Litt. 223a; Gray, Rest. Alien. § 279. "These executory devises * * * have some of the inconveniences of estates tail, as they lock the property up during the period that the contingency may happen, with-

Digitized by Google

out any power of alienation. * * * This operation of executory devises, or, in other words, of contingent estates created by will, tended to fetter real estates by a species of perpetuity, and prevent them from circulating from owner to owner, as the ends of commerce or the exigencies and wants of families might require. The courts of justice have therefore wisely and steadily determined that they would not permit these executory devises to tie up property beyond a moderate and reasonable period." Anderson v. Jackson, 16 Johns. 382, 398, 399.

"The history of executory devises presents an interesting view of the stable policy of the English common law, which abhorred perpetuities, and the determined spirit of the courts of justice to uphold that policy, and keep property free from the fetters of entailments, under whatever modification or form they might assume. Perpetuities, as applied to real estates, were conducive to the power and grandeur of ancient families, and gratifying to the pride of the aristocracy; but they were extremely disrelished by the nation at large, as being inconsistent with the free and unfettered enjoyment of property. 'The reluctant spirit of English liberty,' said Lord Northington, 'would not submit to the statute of entails; and Westminster Hall, siding with liberty, found means to evade it.' Common recoveries were introduced to bar estates tail; and then, on the other hand, provisos and conditions not to alien * * * were introduced to recall perpetuities. The courts of law would not allow any such restraints * * * to be valid. * * * Executory limitations were next resorted to, that men might attain the same object. * * * This species of limitation * * * was slowly and cautiously admitted, prior to the leading case of Pells v. Brown" (1620) Cro. Jac. 590, which "established the legality of an executory devise of the fee upon a contingency not exceeding one life, and that it could not be barred by a recovery. * * * The limits of an executory devise were gradually enlarged. * * * In 1736 * * * the addition of twenty-one years to a life or lives in being was held to be admissible. * * * A devise of lands in fee to such unborn son of a feme covert as should first attain the age of twenty-one was held to be good; for the utmost length of time that could happen before the estate would vest was the life of the mother, and the subsequent infancy of the son. * * * When an executory devise is duly created, it is a species of entailed estate." 4 Kent, Comm. 264, 265, 267, 270. "All these perpetuities [of entailment] were against the reason and policy of the common law; for at common law all inheritances were fee simple. * * * The true policy and rule of the common law in this point was in effect overthrown by the statute de bonis conditionalibus made anno 13 Edw. I., which established a general perpetuity by act of parliament, for all who had or would make it, by force whereof all the possessions of England in effect were entailed accordingly, which was the occasion and cause of the said and divers other mischiefs." Mildmay's Case, 6 Coke, 40. "It was adjudged by Beresford that the issues in tail should not alien no more than they to whom the land was given, and that was the intent of the makers of this act." 2 Inst. 336. "The nobility, in order to perpetuate their possessions in their own families, procured the statute * * * to be made." By allowing estates to be entailed, the law "made it impossible to diminish the property of the great families, and at the same time left them all means of increase and acquisition. * * * The impossibility of obtaining a legislative repeal of the statute de donis induced the judges to adopt various modes of evading its effects, and of enabling tenants in tail to charge or alien their estates." 1 Cruise, Dig. 77, 78, 101, 102. "The inconvenience of these fettered inheritances is as strongly described, and the policy of them as plainly condemned, in the writings of Lord Bacon and Lord Coke as by subsequent authors, and the true policy of the common law is deemed to have been overthrown by the statute de donis, establishing those perpetuities. Attempts were frequently made in parliament to get rid of them, but the bills introduced for that purpose * * * were uniformly rejected by the feudal aristocracy, because estates tail were not liable to forfeiture for treason or felony, nor chargeable with the debts of the ancestor, nor bound by alienation. They were very conducive to the security and power of the great landed proprietors and their families, but very injurious to the industry and commerce of the nation. It was not until Taltarum's Case, 12 Edw. IV. that relief was obtained against this great national grievance, and it was given by a bold and unexampled stretch of the power of judicial legislation. The judges, upon consultation, resolved that an estate tail might be cut off and barred by a common recovery. * * * The desire to preserve and perpetuate family influence and property is very prevalent with mankind. * * * If the doctrine of entails be calculated to stimulate exertion and economy, by the hope of placing the fruits of talent and industry in the possession of a long line of lineal descendants, undisturbed by their folly or extravagance, it has a tendency, on the other hand, to destroy the excitement to action in the issue in tail, and to leave an accumulated mass of property in the hands of the idle and the vicious. Dr. Smith insisted, from actual observation, that entailments were unfavorable to agricultural improvements. * * * Some of the most distinguished of the Scotch statesmen and lawyers have united in condemning the policy of perpetual entails, as removing a very pow

Digitized by Google

erful incentive to persevering industry and honest ambition. They are condemned as equally inexpedient and oppressive. * * * Entailments are recommended in monarchical governments as a protection to the power and influence of the landed aristocracy; but such a policy has no application to republican establishments, where wealth does not form a permanent distinction, and under which every individual of every family has his equal rights, and is equally invited by the genius of the institutions to depend upon his own merit and exertions. Every family, stripped of artificial supports, is obliged, in this country, to repose upon the virtue of its descendants for the perpetuity of its fame." 4 Kent, Comm. 13, 19, 20; Anderson v. Jackson, 16 Johns. 382, 435.

The act of parliament allowing estates tail to exist in England had no effect in the colonies as a statute, and did not become common law in this province by implied adoption. "Our ancestors brought with them only such parts of the laws of England as were adapted to their new condition, and, we may add as quite important, such only as were conformable to their principles. * * * Not only in regard to the common law, but as to the statutes in force at the time of their settlement, some parts were adopted, some entirely rejected, and some adopted with important modifications." 1 Bl. Comm. 108, Sharswood's note; 1 Kent, Comm. 173; Manufacturing Co. v. Robertson, 66 N. H. 1, 6, 7, 15, 17, 19, 25 Atl. 718; State v. Saunders, 66 N. H. 39, 72, 73, 25 Atl. 588; In re Ricker, 66 N. H. 207, 226, 29 Atl. 559. The ancient policy of the common law that inheritances should be vested, alienable, and unfettered was the policy of the New Hampshire colonists. They were not members of the ruling class who introduced the grievance of perpetual entails. The statute de donis, not being conformable to their principles or adapted to their institutions and wants, was a part of a great body of law from which they liberated themselves by migration. The act of 1837 (Rev. St. c. 129, § 1; Id. c. 340), authorizing tenants in tail to convey by deed, was declaratory of the common law (Welles v. Olcott, Kirby, 118; Chappell v. Brewster, Id. 175; Hamilton v. Hempsted, 3 Day, 332), and was designed to remove the doubt which naturally existed in the absence of explicit legislation (Jewell v. Warner, 35 N. H. 176, 177, 180), and which had been a reason for resorting to the collusive fiction of a common recovery (2 Bl. Comm. 357-361) in some conveyances of New Hampshire land. A rule against perpetuities, applicable to entails and the creation of estates at future times unreasonably remote, is a doctrine of the common law that "grows out of the situation and circumstances of the people" (Brown v. Langdon, Smith [N. H.] 178, 182); in other words, out of that general convenience which is public policy. The question of policy necessarily relates to the community whose interests are concerned. In 1699 the court "held that an executory estate to rise within the compass of a reasonable time is good; that 20, nay, 30, years has been thought a reasonable time. So is the compass of a life or lives; for, let the lives be never so many, there must be a survivor, and so it is but the length of that life (for Twisden used to say the candles were all lighted at once); but they were not for going one step further, because these limitations make estates unalienable, every executory devise being a perpetuity as far as it goes,—that is to say, an estate unalienable, though all mankind join in the conveyance." Scatterwood v. Edge, 1 Salk. 229. "At first it was held that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years. At length it was extended a little further, viz. to a child en ventre sa mere at the time of the father's death; * * * and the rule has, in many instances, been extended to 21 years after the death of a person in being." Goodtitle v. Wood (1740) Willes, 211, 213. "The number of contingencies are not material if they are all to happen within a life in being, or a reasonable time afterwards." Gulliver v. Wickett, 1 Wils. 105, 107. "The only question is whether they are to happen within a reasonable time or not." Buller, J., in Thellusson v. Woodford, 4 Ves. 227, 328. "The contingencies ought to be such as may happen within a reasonable time; as within one or more life or lives in being, or within a moderate term of years, for courts of justice will not indulge even wills so as to create a perpetuity, which the law abhors, because by perpetuities (or the settlement of an interest which shall go in the succession prescribed without any power of alienation) estates are made incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established." 2 Bl. Comm. 173, 174. "Such contingency must happen within a short space of time, such as a life in being or some few years after; otherwise it would be in a testator's power to limit an estate unalienable for generations to come,—a power which the law very wisely denies to every man, as the exertion of it would tend to render property in great measure useless to the general purposes and calls of a commercial society." Fearne, Rem. 314, 315. "The object of the rule against perpetuities was to prevent property's being tied up for a longer time than was deemed reasonable, so that it could not be alienated absolutely by the owners." 14 Am. Law Rev. 237. "The object of the rule against perpetuities cannot be simply to prevent the tying up a particular parcel of land, or other specific thing, as would seem from the language of many of the books; * * * for it is applied to a legacy of money, and

Digitized by Google

also when the trustees * * * have power to change the investment. In such cases no specific property is rendered inalienable. * * * A perpetuity of this sort is necessarily created when a fund is devoted to a charity absolutely. Even if specific property is not rendered inalienable, the proceeds of the fund can only be applied in one way forever." 4 Kent, Comm. 283, note by Holmes. "It has been * * * said that, if future interests can be alienated or released, they cannot be too remote, and that the rule against perpetuities is aimed only at such limitations as tie up property and take it absolutely out of commerce. * * * The rule applies to cases where there is no tying up of property. For instance, suppose real and personal property are given to trustees and their heirs, with full power of changing investments, but upon trusts which may arise more than twenty-one years after lives in being; such trusts are void, yet no property is tied up. But, further, conditional limitations may be bad for remoteness, though they are releasable or alienable. * * * The true object of the rule against perpetuities is to prevent the creation of interests on remote contingencies. Its effect in removing restrictions on the immediate conveyance of property is only an incident. * * * It is not the alienability of an interest dependent on a remote contingency, but its utterly uncertain value, which furnished the sufficient justification, if it was not the original ground, of the rule against perpetuities. If there is a gift over of an estate on a remote contingency, the market value of the interest of the present owner will be greatly reduced, while the executory gift will sell for very little; or, in other words, the value of the present interest plus the value of the executory gift will fall far short of what would be the value of the property if there were no executory interest." Gray, Perp. §§ 268, 269, 140, 141, 159, 236, 241.

The alienable character of property is not usually understood in a sense large enough to bring a case of this kind (a trust with full power of changing investments) within the operation of the rule against remoteness. The reasons of the rule are not fully stated in the authorities. Its application may require a wide view of public policy, including the legal nature and design of property, the reasonable extent of an owner's posthumous control, and the economic and moral effects of realty and personalty being largely held in trusts of long duration for mere accumulation, or for purposes of entailment. Divers evils could be materially increased and unduly perpetuated if the law allowed long-continued accumulations of estates in trust for future private use, or appropriations to maintain grantees or legatees, and their heirs, forever or for many generations, without effort or care on their part, and without ability to waste or lose the capital devoted to their support. "The most universal and effectual way of abandoning property is by the death of the occupant, when, both the actual possession and intention of keeping possession ceasing, the property which is founded upon such possession and intention ought also to cease, of course; for, naturally speaking, the instant a man ceases to be, he ceases to have any dominion; else, if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him, which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society." 2 Bl. Comm. 10. Whatever may have been the origin of proprietary rights, the power of grantors and testators to control the tenure, possession, use, and alienation of property after it ceases to be theirs is one of the subjects on which the interests of society are sufficiently clear and strong to be evidence of common law. By that law an owner's imposition of unreasonable restrictions upon the legal and equitable titles of his successors is not one of the rights of which property consists; and the common-law elements of ownership are not extinguished by a statute conferring or regulating the power of alienation by deed or will. An inability to postpone the vesting of an estate for an unreasonable time is one of many instances of a proprietor's loss of control when he parts with his title. The rule against remoteness is not a detached doctrine, but a broader principle, applied to the creation of remote interests. "The policy of the law, where a man dies leaving an infant son, restrains alienation until such infant attains twenty-one; and, as such infant may not be born until nine or ten months or perhaps a further period after the death of its father, the power of alienation is, of course, suspended during that period; and, as the law imposes such suspension of the power of alienation on the infant, so it will permit such suspense by the owner for a like period, for, whether it arises from the act of the law or of the party, the effect will be the same in relation to the interest of the public in property, which is what is consulted in the doctrine of perpetuities." Fearne, Rem. 521, Powell's note; 2 Fearne, Rem. (4th Ed.) p. 113. "Estates may be unalienable for lives in being and twenty-one years, merely because a life may be an infant or en ventre sa mere." Arden, M. R., in Thellusson v. Woodford (1799) 4 Ves. 227, 337. "The established length of time during which the vesting may be suspended is during a life or lives in being, the period of gestation, and the infancy of such posthumous child." Macdonald, C. B., delivering the opinion of the judges in Thellusson v. Woodford, 11 Ves. 112, 143; Id., (1805) 1 Bos. & P. (N. R.) 357, 393. "That rather implies that he thought the rule was confined to cases of minority." Bayley,

Digitized by Google

B., delivering the opinion of the judges in Cadell v. Palmer, 10 Bing. 140, 145; Id. (1833) 1 Clark & F. 372. "The twenty-one years are introduced to provide for the minority of a child born, and a few months are allowed to let in a posthumous child." Hawley v. Northampton, 8 Mass. 3, 38; Gray, Perp. §§ 171, 176. "Upon the introduction of executory devises, * * * care was taken that the property which was the subject of them should not be tied up beyond a reasonable time. * * * The cases of Lloyd v. Carew, Show. Parl. Cas. 137, in the year 1696, and Marks v. Marks, 10 Mod. 419, in the year 1719, established the point that for certain purposes such time as, with reference to those purposes, might be deemed reasonable beyond a life or lives in being, might be allowed. The purpose in each of those cases was to give a third person an option, after the death of a particular tenant, to purchase the estate; and twelve months in the first case, and three months in the other, were held a reasonable time for that purpose. These cases * * * do not necessarily warrant an inference that a term of twenty-one years, for which no special or reasonable purpose is assigned, would also be allowed. * * * Taylor v. Biddall (1677) 2 Mod. 289, is the first instance we have met with in the books in which so great an excess as twenty-one years after a life or lives in being was allowed. * * * That, however, was a case of infancy, and it was on account of that infancy that the vesting was postponed. This case was followed by, and was the foundation of, the decision in Stephens v. Stephens (1736) Cas. Talb. 232. * * * This, also, was a case of infancy. It was on account of that infancy that the vesting of the estate was postponed. * * * These decisions, therefore, do not distinctly or necessarily establish the position that a term in gross for twenty-one years, without any reference to infancy, after a life or lives in esse, will be good by way of executory devise; but there is nothing in them necessarily to confine it to cases of infancy. * * * The limit is a life or lives in being, and twenty-one years afterwards, without reference to the infancy of any person whatever. This * * * will not tie up the alienation an unreasonable length of time." Cadell v. Palmer, 10 Bing. 140, 142–144, 151; Id. (1833) 1 Clark & F. 372. In the same case it was held that, although a period of 21 years can be allowed without an infant, a period of 9 months cannot be allowed without gestation.

The devise to trustees for the support of the testator's children during their lives, remainder to his grandchildren (born and unborn) when the youngest is 40 years old, is an unreasonable suspension of the grandchildren's future estate. The vesting of their remainder cannot be postponed beyond the time when the youngest is 21. Marston v. Carter, 12 N. H. 159, 162; Dennett v. Dennett, 40 N. H. 498, 503, 43 N. H. 499, 501; Wood v. Griffin, 46 N. H. 230, 234. The number of lives in being that may be designated as a part of the period of postponement, and the power of including the lives of persons to whom no interest is given, and adding a term of 21 years in gross without reference to the infancy of a beneficiary (Gray, Perp. §§ 171–190, 216–219, 223, 224; Lewis, Perp. 167), are open questions in this jurisdiction. A devise to trustees for accumulation during the lives of all the testator's descendants living at his death, and 21 years more, without reference to a case of infancy, and then to his most wealthy heir bearing his name, would require an examination of the reasons of the law, and of the reasons given for the judgments rendered in such cases as Thellusson v. Woodford, 1 Bos. & P. (N. R.) 357, 4 Ves. 227, 11 Ves. 112, and Cadell v. Palmer, before cited. There are many English rules the adoption of which is not necessary here to prevent a disturbance of titles; and Britton v. Turner, 6 N. H. 481, 486, and Hall v. Chaffee, 14 N. H. 215, 226–240, are precedents for a course that may be taken on any subject when foreign authorities are in conflict with elementary principle. The opinion of the majority of the court in Hall v. Chaffee sustains a testator's intention against an English rule of construction in the application of the law of perpetuities. In Duke of Norfolk's Case, 3 Ch. Cas. 1, 36, 49, Lord Nottingham was pressed with this case: "Suppose a contingency which must take effect, if at all, within one hundred years, but may not take effect any sooner. What then? Where will you stop?" "Where?" he answered. "Why, everywhere, where there is not any inconvenience. * * * You may limit, it seems, upon a contingency to happen in a life. What if it be limited, if such a one die without issue within twenty-one years or a hundred years, or while Westminster Hall stands? Where will you stop, if you do not stop here? I will tell you where I will stop: I will stop wherever any visible inconvenience doth appear." Gray, Perp. § 169. Entails, perpetuities, restraints on use (Foster v. Foster, 62 N. H. 55) or alienation, and contracts in restraint of trade ([1894] App. Cas. 535, 553, 554) present questions of visible inconvenience, generally called questions of public policy, in the decision of which it may be necessary to consider what is reasonable and expedient.

The feudal doctrine of forfeiture for and by a conveyance of a larger interest than the grantor has is no part of our common law. Fletcher v. Chamberlin, 61 N. H. 438, 483, 484. A lease for 40 years, made under a power to lease for 21 years, is good for 21. Alexander v. Alexander, 2 Ves. Sr. 644. Under a statute restricting to a term not exceeding 21 years the time for which a tenant for life can be empowered to lease, a testamentary gift to a tenant for life of a

Digitized by Google

power to lease for 63 years is not void. If he makes a lease for more than 21 years, it is void for the excess, and no more. Nelson, C. J., and Bronson and Cowen, JJ., in Root v. Stuyvesant, 18 Wend. 257, 273, 275–277, 290, 291, 302, 306, 307, 313. "If I had come to a different conclusion," says Nelson, C. J., "and been obliged to hold the power to lease void, still I could not concur with the court below in breaking up the other independent portions of the will. * * * The chancellor * * * argues that the general and important intent of the testator was to give a beneficial estate to his children in preference to remoter descendants, and that the loss of the power so far defeats this intent that the will cannot consistently be upheld. But it must not be forgotten that it is at least equally clear that the testator did not intend his children should take the fee; that he secured to their children or descendants. For aught we can know, he had good reasons for thus withholding it. * * * We cannot comprehend the operations of the mind of the testator, and hit with certainty the motive that led to this provision. The nearest approximation to be made is by considering the language he has used; and * * * I am * * * unable to say that the intent to give the power to lease was paramount to that which operated to give the estate for life, or that, if he had known the power to be void, he would have given the fee. On the contrary, the peculiar and special feature of the will appears to be the provision which secures beyond contingency the estate to the descendants of his children. That is the object and end of the whole will. The life estates, the power of appointment, and the remainders over in default are all in furtherance of this design and agreeably to the rules of law. Thus, the life estates are an inseparable part of the scheme of this family settlement, and must be maintained to carry it into effect. If I must take the place of the testator, and decide for him whether he would give up the power to lease, or the residue of the will, * * * I must say he would have yielded the former; that the disposition of the residue does not necessarily hang upon it." "I do not think we are required by any rule of construction," says Cowen, J., in the same case, "to declare that a power which, when executed in a proper way, within legal limits, would be perfectly valid, is void because an abortive attempt may be made under it to create an estate so remote as improperly to suspend alienation. * * * We are to read this will just as if the testator had incorporated in it all the provisions of the Revised Statutes any way applicable, and then declared that, so far as those statutes allow, he desired his will might prevail, and that it should be void in those respects only wherein they declared it should be invalid. * * * In Alexander v. Alexander, 2 Ves. Sr. 644, the master of the rolls said: 'Suppose a power to lease for twenty-one years, and he leases for forty; that shall be good for the twenty-one, because it is a complete execution of the power, and it appears how much he has exceeded it. If the court can see the boundaries, it will be good for the execution of the power, and void as to the excess.' In Thellusson v. Woodford, 4 Ves. 325, Buller, J., followed Lord Talbot when he declared that in the case of wills 'the method of the courts has been not to set aside the intent because it cannot take effect so fully as the testator desired, but to let it work as far as it can.' * * * These sound views have grown into a maxim applicable to almost every legal transaction, 'Valeat quantum valere potest.' To deeds, wills, and the execution of powers may be added judgments, awards, and all contracts, releases, and discharges. * * * 'Utile non debet per inutile vitiari.' * * * Suppose the parents [of the testator's grandchildren] to prove insolvent, dissipated, or extravagant, it would be a disgrace to the law should we break up the titles of these innocent objects of the testator's bounty, and put them to the hazard of final loss by an idle slip of the pen in the creation of a leasing power." "Courts lean in favor of the preservation of all such valid parts of a will as can be separated from those that are invalid, without defeating the general intent of the testator. * * * A single trust, created for two purposes,—one lawful and the other unlawful,—is good for the lawful purpose, although void for the unlawful one." Harrison v. Harrison, 36 N. Y. 543, 547, 548. "It is difficult to discover any principle which forbids the sustaining of the general intent of the testator by cutting off a void trust which is separable from other valid trusts, in a case where the trust which is defeated is independent of the other dispositions of the will, and subordinate to them, and is not an essential part of the general scheme." Manice v. Manice, 43 N. Y. 303, 384. This is "merely a statement in another form of the general proposition that valid and void trusts, when independent of each other, may be separated, and the one rejected and the other sustained." Van Schuyver v. Mulford, 59 N. Y. 426, 432. "When several trusts are created, and they are independent of each other, each trust complete in itself, and the legal can be separated from the illegal, and upheld, without doing injustice, or defeating what the testator might in the emergency be presumed to wish, the illegal trust may be cut off, and the legal permitted to stand, and thus the intention of the testator be effectuated so far as the law will permit." Kennedy v. Hoy, 105 N. Y. 134, 137, 138, 11 N. E. 390; Underwood v. Curtis, 127 N. Y. 523, 541, 542, 28 N. E. 585. "Courts should endeavor, by every reasonable intendment and by a liberal construction, to sustain a testamentary disposition of

Digitized by Google

property, when, in so doing, they can give actual and just effect to the testator's purpose, and validate at least the main, if not the true, part of a testamentary scheme, which contemplates distinct and severable acts." Henderson v. Henderson, 113 N. Y. 1, 16, 20 N. E. 814. "The endeavor is to find a way of upholding the will, not of breaking it down." Greene v. Greene, 125 N. Y. 506, 512, 26 N. E. 739. "It is now considered to be the settled rule of law in New York that the will of a testator is to be carried into effect so far as that intention is consistent with the rules of law; that although some of the objects for which a trust is created, or some future interests limited upon a trust estate, are illegal and void, yet, if any of the purposes of the trust are valid, the legal title vests in the trustees during the continuance of such valid objects of the trust, provided the legal be not so mixed up with the illegal objects of the trust that one cannot be sustained without giving effect to the other." 4 Kent, Comm. 281, note a.

Withholding the remainder from Barker's grandchildren beyond a reasonable time was not the sole or the main purpose for which he devised nearly all his estate to trustees; and his inability to postpone the grandchildren's title unreasonably does not invalidate the trustees' title, nor prevent their doing the lawful fiduciary work which he ordered them to do. The general devise in trust vests the legal estate in them for such legal purposes as require their services. It is a good devise for the valid uses (including the interests, absolute and conditional, of C. and H.) for which the trustees are directed to hold the property during the lives of C. and H. Greene v. Greene, 125 N. Y. 506, 510, 26 N. E. 739. During their lives the trust will not infringe any rule of law. During the intended continuance of the trust the testator meant the remainder should vest in no one but the trustees. The law does not give his children what he gave his grandchildren, nor give his grandchildren what he gave his children. At some time the grandchildren will have their remainder. If his appointment of the time when it is to pass to them from the trustees were a mere nullity, the consequence would be, not that substantially the whole will would be unnecessarily broken, but that the remainder would pass at the termination of the life interests of C. and H. Beyond that time, the validity of the trust depends upon the question whether on this point the will is a mere nullity, or whether the testator's intent that the remainder shall pass at a period more distant than the law allows is carried into effect as nearly as it can be; that is, at the most remote legal time. In Humberston v. Humberston (1716) 1 P. Wms. 332, a testator "devised his estate * * * to the Drapers Company and their successors in trust, to convey the premises to his godson Matthew Humberston for life, and afterwards, upon the death of the said Matthew, to his first son for life, and so to the first son of that first son for life, etc., and, if no issue male of the first son, then to the second son of the said Matthew Humberston for life, and so to his first son, etc., and, in failure of such issue of Matthew, then to another Matthew Humberston for life, and to his first son for life, etc., with remainders over to very many of the Humberstons (I think about fifty) for their lives successively, and their respective sons, when born, for their lives, without giving an estate in tail to any of them, or making any disposition of the fee. * * * By Lord Chancellor [Cowper]: Though an attempt to make a perpetuity for successive lives be vain, yet, so far as is consistent with the rules of law, it ought to be complied with, and therefore let all the sons of these several Humberstons that are already born take estates for their lives; but, where the limitation is to the first son unborn, there the limitation to such unborn son shall be in tail male." By "sons * * * already born," "it must be assumed that the court intended sons born at the time of the testator's death. * * * The distinctive character of the practice of courts of equity, in carrying out executory trusts, is the giving effect to them as far as possible according to the intentions of their author." Lewis, Perp. 450, 451. In Humberston v. Humberston, "the trust was executory; and in those cases the courts adopt the doctrine of cy pres. That mode of construction is inapplicable where * * * the devisees take by direct devise to themselves." Mortimer v. West, 2 Sim. 274, 282. "The case of Humberston v. Humberston * * * has usually been considered as a leading authority for the doctrine" of cy pres. "The trust, however, being executory, the court was authorized to mold the limitations so as to bring them within the established limits, independently of the doctrine in question." 1 Jarm. Wills (4th Ed.) 298, note 1. When the construction is cy pres, nothing is gained by giving it some other name. "In Parfitt v. Hember, L. R. 4 Eq. 443, where it was considered that the testator had intended to create a series of life estates in perpetuity, Lord Romilly, M. R., by cy pres, gave the unborn issue an estate tail, declaring that the doctrine was not confined to executory trusts; and this declaration was approved in Hampton v. Holman, 5 Ch. Div. 183, 190, 191." Gray, Perp. § 652. As cy pres is a construction that gives effect to approximations intended by the testator, it cannot depend upon a devise being direct or indirect.

"The most striking illustration * * * of the anxiety of the courts to prevent the total disappointment of the testator's intention by the operation of the rule against perpetuities is afforded by the doctrine of cy pres or approximation, as it is called. This doctrine

Digitized by Google

applies where lands are limited to an unborn person for life, with remainder to his first and other sons successively in tail, in which case, as such limitations are clearly incapable of taking effect in the manner intended, * * * the doctrine in question gives to the parent the estate tail that was designed for the issue, which estate tail (unless barred by the parent or his issue, being tenant in tail for the time being) will comprise, in its devolution by descent, all the persons intended to have been made tenants in tail by purchase. The intention that the testator's bounty shall flow to the issue is considered as the main and paramount design, to which the mere mode of their taking is subordinate, and the latter is therefore sacrificed." 1 Jarm. Wills, 260, 261. "Where a testator has two objects,—one primary or general, and the other secondary or particular,—which are incompatible, the particular intention must be sacrificed, in order that, as far as possible, effect may be given to the general one." Lewis, Perp. 426. In Robinson v. Robinson (1756) 1 Burrows, 38, 50–52, it was held "that, upon the true construction of the said will, * * * the said Lancelot Hicks must, by necessary implication, to effectuate the manifest general intent of the said testator, be construed to take an estate in tail male, * * * notwithstanding the express estate devised to the said Lancelot Hicks, 'for his life and no longer.'" In Dodson v. Grew (1767) 2 Wils. 322, the will was: "I give, devise, and bequeath unto my nephew George Grew all my lands * * * for and during the term of his natural life, and, from and after his decease, to the use of the issue male of his body lawfully to be begotten, and the heirs male of the body of such issue male; and, for want of such issue male, then I give all and every the aforesaid premises unto my nephew George Dodson, his heirs and assigns, forever." George Dodson was the plaintiff. George Grew entered, and suffered a common recovery, and died without issue male. It was held that he took an estate tail, and consequently the plaintiff was barred by the recovery. "The statute of wills," says Wilmot, C. J., "gives a man power to devise his lands, but he cannot by his will create a perpetuity, nor restrain tenant in tail from suffering a recovery. * * * The intention of the testator clearly was to give George Grew an estate for life only, but his intention also clearly was that all the sons of George Grew should take in succession. Both these intentions cannot take place. * * * The court must put themselves in the place of the testator, and determine as he would have done if he had been told that both of his intentions * * * could not take place, and had been asked which of them he desired should take effect. * * * If we balance the two intentions, the weightiest is that all the sons of George Grew should take in succession; and therefore * * * George Grew must be adjudged to have been tenant in tail, for the testator's great intention most clearly was that the lands should never go over to the * * * plaintiff but upon a failure of issue of George Grew." "The great intention," says Clive, J., "is to give in succession to all the sons of George Grew, which cannot be without construing it an estate tail in him." "Where there appear a particular intent and a general intent, the general must take place." Bathurst, J., in the same case.

The doctrine of cy pres goes on the principle "that where there is a general and a particular intent, and the particular one cannot take effect, the words shall be so construed as to give effect to the general intent." Robinson v. Hardcastle (1788) 2 Durn. & E. (2 Term R.) 241, 254. "It has been the settled doctrine of Westminister Hall for the last thirty or forty years that there may be a general and a particular intent in a will, and that the latter must give way when the former cannot otherwise be carried into effect. * * * Nothing could be more positive than the words of the will in" Robinson v. Robinson "to show a particular intent that the first taker should take an estate for his life, and no longer. But there was a general intent apparent, which could not be effected but by giving him an estate tail, and on that the decision was founded." Doe v. Cooper (1801) 1 East, 229, 234. "A particular intent expressed in a will must give way to a general intent. * * * It is not to be inferred that, because the heirs of the body cannot take in the particular mode prescribed by the testator, he intended that they should not take at all." Doe v. Harvey (1825) 4 Barn. & C. 610, 620. "There is certainly no express gift to" the sons of P. M. "as tenants in tail; but it is contended that, in order to effectuate the testator's general or leading intention, they must be held so to take, according to what has been called the doctrine of approximation or cy pres. * * * The doctrine of cy pres, in reference to questions of perpetuity, arises where a testator gives real estate to an unborn person for life, with remainder to the first and other sons of such person in tail male, or with remainder to the first and other sons of such person in tail general, with remainder to the daughters as tenants in common in tail, with cross remainders amongst them. In such a case, the course of succession designated by the testator is one allowed by law, but the direction that the first taker should take for life only, with remainder to his children as purchasers, is illegal, as tending to a perpetuity. In such cases the law, in order to prevent the testator's intention from being entirely defeated, has treated his expressed intention as divisible into two parts: First, the intention that the first taker and his issue male or issue general, as the case may be, shall all take in succession, according to the legal course of descent; and, secondly, the intention that the first taker shall take an estate for life only, and that his children shall take as purchasers. And,

Digitized by Google

the two intentions being thus ascertained, the courts have treated them as independent of each other, and have said that the inability to carry into effect the second or subordinate intention shall not defeat the primary or general intention; and such a devise nas therefore been held to give an estate in tail male or in tail, as the case may be, to the first taker. By these means, the estate * * * will go in the precise course marked out by the testator, though it will be (contrary to what he intended) liable to be divested from that course by the act of the first taker. * * * The doctrine has been long recognized, and we should be unsettling landmarks if we were to call it in question. The doctrine is nowhere more clearly stated than in a note of the late Mr. Butler, at the end of Fearne's chapter on the rule in Shelley's Case. Fearne, Rem. 204. * * * "The courts have considered that the testator's primary object was that the issue of the devisee should take the land, and that the mode in which the issue should take it was the testator's secondary object, or, as it has been usually expressed, that the former was his general, the latter his particular, intention. Then, in conformity to their uniform practice of effecting the testator's intention as far as possible, they have thought themselves required to adopt that construction of the devise which, by including the devisee, satisfied the testator's general intention that the issue should take, but which, at the same time, by raising in the issue estates different from those which the testator appeared to have intended them, sacrificed to that extent his particular intention.'" Monypenny v. Dering (1847) 16 Mees. & W. 418, 428, 429. "That an estate for life in the plaintiff, according to the particular intent of the testator, contravenes no rule of law, is indisputable. * * * This construction, however, would defeat the testator's general intent, which was to create an interminable succession of estates in the premises. * * * To effectuate, therefore, the general intent of the testator, it is necessary to vest in the plaintiff a fee tail." Allyn v. Mather (1832) 9 Conn. 114, 127. "If the intention cannot be carried into full effect, it is to be carried as nearly into effect as the law will permit. What the real intention of the present testator was with respect to the property in question appears to be clear. He wished his son to enjoy it during his life, and his grandson during his life, and so on forever. But this intention contravenes a legal principle, and cannot be carried into full effect. * * * As, then, the intention of the testator cannot be completely effectuated, it becomes necessary to consider what estate allowed by law will be nearest to that which he intended; and it is clear that an estate tail will better correspond with his views than an estate in fee simple. * * * An estate in tail male is clearly nearer to the intention of the testator than an estate in tail general. The testator designed that the property should go from eldest son to eldest son indefinitely, each eldest son having only a life estate. An estate in tail male, excluding females, would be more in conformity to such design than an estate in tail general, admitting females." Daggett, J., in the same case, pages 129–131.

In Jackson v. Brown (1835) 13 Wend. 437, a testator devised land to his son, S., for life, remainder to the first son of S. for life, remainder to the first and every other son of the eldest son of S. successively in tail male. "It is an established principle," say the court, "in the decision of questions arising under wills, that the intention of the testator shall be effectuated in so far as such intention is consistent with the rules of law. It is a principle of law that perpetuities shall not be permitted to exist,—real estates shall not be so conveyed or devised as to be inalienable beyond a certain period,—because such perpetuities tend to the inconvenience and prejudice of commerce and society. * * * The doctrine of approximation, or, as it is called, the cy pres doctrine, * * * has been adopted in cases where the testator clearly intended to give estates which were contrary to the rules of law; and, in construing such devises, the court's primary object was to give effect to the general intent of the testator, which was that the issue of the devisee should take the land, and that the mode in which the issue should take was his secondary object or his particular intent. In order, therefore, to effect the testator's intent as far as possible (cy pres), the courts adopt that construction of the devise which, by including the issue of the devisee, satisfied the testator's general intent that the issue should take, but which in part defeated his particular intent by giving to his issue estates different from those intended by the testator. * * * By raising the estate tail in S., we should defeat the general intent of the testator, to wit, that of continuing the estate in his descendants as long as the rules of law will permit. If the will gave S. an estate tail, our statute converted it into an estate in fee simple; but, if S. took only an estate for life, then the perpetuity is carried one degree further in the family of the testator. If the law will permit that to be done, then it is the duty of the court to do it, as more nearly effecting the intention of the testator. * * * The testator intended that the lessor [the eldest son of S.] should take as purchaser, and not as heir. This intention is consistent with the rules of law, and should be carried into effect. It was also the testator's intention that the lessor should take an estate for life only. That intention is contrary to the rules of law, as tending to a perpetuity. That intention the court cannot effectuate. But, to effectuate the general intent as far as possible, the lessor must take an estate of inheritance,—a fee simple." "When the particular intent cannot be executed, the gen-

Digitized by Google

eral intent must direct the construction." Hawley v. Inhabitants of Northampton (1811) 8 Mass. 3, 37. "The general intention is to control any particular intention. * * * 'Ut res magis valeat quam pereat.'" Malcolm v. Malcolm (1849) 3 Cush. 472, 477–479. "Where the general intent of the testator is clear, and it is impracticable to give effect to all the language of the instrument expressive of some particular or special intent, the latter must yield to the former. * * * This rule is now clearly established, both in the English and American courts." Redf. Wills, 432, 433. "The doctrine that the general intent must overrule the particular intent has been much, and we conceive justly, objected to of late, as being, as a general proposition, incorrect and vague, and likely to lead in its application to erroneous results. * * * In its origin, it was merely descriptive of the operation of the rule in Shelley's Case; and it has since been laid down in others, where technical words of limitation have been used, and other words showing the intention of the testator that the objects of his bounty should take in a different way from that which the law allows have been rejected; but in the latter cases the more correct mode of stating the rule of construction is that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense. * * * This doctrine of general and particular intent ought to be carried no further than this; and, thus explained, it should be applied to this and all other wills. Another undoubted rule of construction is that every part of that which the testator meant by the words he has used should be carried into effect as far as the law will permit, but no further; and that no part should be rejected, except what the law makes it necessary to reject. * * * This construction makes the least sacrifice of the testator's declared intention. It preserves estates to all his grandchilden. * * * It is true that these grandchildren cannot take estates for life, as the testator intended, for the rule in Shelley's Case prevents it, nor the children of those children estates for life, * * * for the rule of law against perpetuities prevents that; but this is unavoidable, and no construction can carry into effect all the testator wished. * * * Murthwaite v. Jenkinson, 2 Barn. & C. 357, * * * is an example of the proper construction of the word 'issue,' which was considered as a word of limitation, embracing all the descendants, and in which the inconsistent intent that all those descendants should take for life formed no reason why they should not take at all. * * * Thinking therefore that this mode of construing the will gives effect to the greater part of it, and, as far as the rules of law will permit, the whole, whilst that contended for on the part of the plaintiff strikes out altogether the devise to the grandchildren, our opinion is that the former ought to be preferred." Doe v. Gallini (1833) 5 Barn. & Adol. 621, 640–645; 2 Jarm. Wills, 484–489.

As a description of the operation of the rule in Shelley's Case, the doctrine of general intent is immaterial. A devise or bequest to A. for life, and to his heirs, shows an intent, not that A.'s life estate shall be enlarged by the gift to his heirs, but that A. shall have a life estate, and his heirs the remainder. The principle of our common law that finds the intent in competent evidence, and not in rules of construction, upholds the intent, notwithstanding the rule in Shelley's Case. Sanborn v. Sanborn, 62 N. H. 631. If the operation of that rule had not been prohibited by statute, it would not defeat the intention that a remainder should go to the heirs of a tenant for life. So far as the doctrine of general intent is a rule of approximation that makes the least sacrifice of a testator's declared intention concerning realty or personalty (or a mixed fund of realty and personalty), rejecting no more of his will than the law makes it necessary to reject, and preferring "the greater part" and the "weightiest" intent when the greater and the less cannot both be carried into effect, it is as applicable in this and other cases as in those in which it has been applied.

By this curative process, a line of partition is drawn through a gift to a polygamous church. The donor's intent is executed so far as it is legal, and the whole gift is supported and applied to lawful uses. Late Corporation of Church v. U. S., 136 U. S. 1, 50, 55, 56, 10 Sup. Ct. 792. By the same process, a devisee's life estate is made an estate tail, and the time appointed by the testator for the vesting of title is changed and brought within the period prescribed by law. Gray, Perp. §§ 643–670. "A charity being a trust in the support and execution of which the whole public is concerned, and which is therefore allowed by the law to be perpetual, deserves and often requires the exercise of a larger discretion by the court of chancery than a mere private trust; for without a large discretionary power, in carrying out the general intent of the donor, to vary the details of administration, and even the mode of application, many charities would fail." Jackson v. Phillips, 14 Allen, 539, 580. Discretionary power is exercised by weighing evidence on a question of fact. Bundy v. Hyde, 50 N. H. 120; Darling v. Westmoreland, 52 N. H. 408; Boody v. Watson, 64 N. H. 186, 9 Atl. 794; Eckstein v. Downing, 64 N. H. 259, 9 Atl. 626; ——— v. ———, 66 N. H. 153, 31 Atl. —. As a devise to members of the testator's family is more specific than an ordinary public charity, it may carry less latitude of approximation; but authorities before cited show that the margin

Digitized by Google

s not narrow in all cases of private use. Barker did not intend that his gift to his grandchildren should fail by being excepted from the method of construction that would save a bequest to the Mormon Church. The approximation intended by testators is not limited to charitable uses and cases in which the time of vesting is changed by converting life estates into estates tail. Prohibiting a change of the time without such an alteration of a devised estate would be arbitrary legislation. The time is changed by an intended approximation because the testator's disposition of his property is not invalidated beyond the bounds of necessity. The construction is cy pres because it is an ascertainment of his intent. Perry, Trusts, §§ 723–729; Adams Female Academy v. Adams, 65 N. H. 225, 226, 18 Atl. 777, and 23 Atl. 430; Arnold v. Congreve, 1 Russ. & M. 209, 215. If the whole of Barker's property had been New Hampshire land, and his will had been in the form of a devise of the whole in tail to his grandchildren living at his death, he would not have been intestate. His general and primary intent would have been that they should have the property; and, as they could not take an estate tail, they would have a fee simple. Jackson v. Brown, 13 Wend. 437; 66 N. H. 469, 31 Atl. 913. It has been said that "the doctrine of cy pres goes to the utmost verge of the law, * * * to the outside of the rules of construction" (1 East, 451), and that "it is not proper to go one step further." 7 Ves. 390, and authorities cited in Gray, Perp. §§ 645, 651. In changing the character of devised estates for the purpose of changing the time of vesting, the authorities have gone further than there is occasion to go in this case. "Such a construction is to be adopted as will make the devise effectual; and, if it cannot be so to the full extent, then so far as it lawfully can." Dennett v. Dennett, 40 N. H. 498, 500. "The method of the courts is not to set aside the intent because it cannot take effect so fully as the testator desired, but to let it work as far as it can. * * * The very being of executory devises shows a strong inclination, both in the courts of law and equity, to support the testator's intent as far as possible." Talbot, Ld. Ch., in Hopkins v. Hopkins (1734) Forrester (Cas. t. Talb.) 44, 50. "The common law doth divide according to common reason, and, having made that void that is against law, lets the rest stand." Norton v. Simmes, Hob. 12 c, 14; 4 Kent, Comm. 281, note a. "It is * * * difficult at times to determine whether in the case of an executory devise to a class, when some cannot take because too remote, the whole devise is void as against perpetuity, or only that part which offends. The determination of the question depends upon the ability to separate the good from the bad, and at the same time preserve the intention of the testator." Tied. Real Prop. § 544. This test is as applicable to other questions of approximation as to the divisibility of a class of devisees.

A division of a defective will is the execution of the testator's intent, inferred as a fact from competent evidence. When a contrary design does not appear, he intends that separable parts shall be separated if one is illegal or otherwise incapable of execution. He could not desire that the whole should be unnecessarily and unreasonably set aside; that an effort should be made to save as little as possible, or that the dividing line should be drawn at random. A total or disproportionate destruction of the will is not one of the objects he had in view in making it. The nature of the case is evidence of his intent that there shall be no useless mutilation, but that, when enough of his plan is annulled to conform it to the law, it shall be left as nearly whole as consistency and reason will permit. The same evidence shows his meaning to be that if all his arrangements, general and particular, primary and secondary, cannot be carried into effect, "the inability to carry into effect the secondary or subordinate intention shall not defeat the primary or general intention." If any of his orders cannot be executed in the designated time or manner, or to the designated extent, he means that the execution shall be approximate (as nearly as possible according to instructions) in time, manner, and extent. A bequest of $100, to be paid at the end of six years, does not mean that the legatee shall have nothing in case there is less than $100 for him, or in case the executor has no means of payment before the end of twelve years, or in case he has means of payment at the end of five years, and the law requires all legacies to be then paid notwithstanding the testator's appointment of a more remote time. Without other evidence, a mere devise of a farm, accompanied by a suspension of the title in trust for a time, does not indicate a purpose that the devisee is not to have the farm if the specified time is a day, a year, or 20 years longer than the legal period, and if no wrong would be done by an approximation. Within the legal limit, the testator's power of suspending the title is not affected by the disability under which he labors beyond that limit. The devise is effective cy pres, in pursuance of his implied intent to divide according to common reason,—throw out what is against law, and let the rest stand. This legal intent, correctly inferred as a fact, is a part of the will, not less operative or less important than it would be if set forth in express terms in the writing. A refusal to execute it would be an alteration of the will, and a violation of common-law principle and statutory right.

The legality of Barker's small bequests is not disputed. The will is not wholly void, but is admitted to be good in part, and to be divisible. The question is not whether it shall be divided, but where the line of division shall

Digitized by Google

be drawn. In the devise of the remainder to the grandchildren, the last 19 of the 40 years are too remote. In the rest of the time and the rest of the will there is no illegality. The invalidity arising from remoteness would be unnecessarily and unreasonably extended by throwing out 21 years that are not too remote. The intestacy asserted by H. would be a more inordinate expansion of the limited defect. "When a man sits down to dispose of his property by will, it is fair to presume that he does not intend to die intestate, nor to become intestate after death." Weatherhead v. Stoddard, 58 Vt. 623, 629, 5 Atl. 517; Kennard v. Kennard, 63 N. H. 311; Hoitt v. Holtt, Id. 499, 3 Atl. 604. "Where the will admits of two constructions, that is to be preferred which will render it valid. * * * Of two modes of construction, that is to be preferred which will prevent a total intestacy. * * * Where a testator's intention cannot operate to its full extent, it shall take effect as far as possible." 2 Jarm. Wills, 842, 843. These so-called "rules" are a correct statement of Barker's intention. The third applies the first to the partial invalidity, and the second to the question of his alleged partial intestacy. Whether they are regarded as a statement of the fact of intention, or as rules of law adopted by him as a part of his will (Root v. Stuyvesant, 18 Wend. 302–304), the result is the same. They would not have been strengthened by his recital of them. His declaration, inserted in the will, that "if my intention, herein written, cannot operate to its full extent, it shall take effect as far as possible," would have been superfluous. Such a provision, accepted by him as law, or found to be an expression of his implied intent, renders the will valid cy pres. The partial invalidity, neither increased nor diminished, introduces neither total nor partial intestacy. The construction that rejects the approximation intended by the testator, and makes him intestate as to a part of his property, is sustained by authorities in other jurisdictions, but is at variance with the effect given to intent by the law of this state. When the youngest of the grandchildren is 21 years of age, the remainder devised to them will be theirs.

A testator may prefer, in certain contingencies, to be wholly or partially intestate. In this will Barker could have said: "If my intention, herein expressed, cannot operate to its full extent, it shall not take effect as far as possible. No part of my will shall be sustained by an inferred intent that it shall work as far as it can, or by the equivalent rule of construction. If the whole cannot take effect, the whole shall be void." It is not claimed that such a provision can be implied. He could have said: "If the vesting of the remainder in my grandchildren cannot be postponed beyond the time when the youngest is twenty-one, the devise thereof to them is revoked, and as to said remainder there shall be no will." His belief that the protection due from him to them was a will that would save the remainder for them, and his exhaustive effort to do his duty (explained and emphasized by a fact plainly disclosed), cannot be reconciled with an intent that the devise of the remainder shall be revoked, and that his confessed duty shall not be done if the devisees' title canot be suspended beyond the minority of the youngest. The revocation of that devise, leaving the remainder to descend as intestate property, would thwart the purpose of his conditional appropriation of $30,000 (by making H. the absolute owner of a large amount of property), deprive the grandchildren of the protection which the testator considered indispensable, and defeat the main objects of the will. It would be little less erratic than a causeless revocation of the whole instrument. An intended intestacy as to the remainder can be inferred from nothing but mental disorder, of which there is no evidence.

It is said that in some cases "the court must put themselves in the place of the testator, and determine as he would have done if he had been told that both of his intentions in the will, by the rules of law, could not take place, and had been asked which of them he desired should take effect and stand, as both could not" (Dodson v. Grew, 2 Wils. 322, 323; 66 N. H. 467, 31 Atl. 912), and that the court inquire "what the testator would probably have done himself" (Attorney General v. Ironmongers' Co., 1 Craig & P. 208, 224), and what he probably "would have preferred" (2 Beav. 313, 325). It is not said that this is the question in all cases when a testamentary provision cannot be executed. Upon incompetent evidence (circumstantial or direct) that, if Barker had been aware of some matter of law or fact of which he was ignorant, he would have made a different will, legal construction cannot do what he would have done. But this will is competent and sufficient evidence that if he had been informed (when he gave instructions for drafting it) that his intent that his grandchildren should have the remainder could not stand with his intent that they should not have it till the youngest was 40 years old, and had been asked which of these intents should prevail, he would have given an answer that is comprehended in his intent on the subject of approximation. The law determines not what will he would have made if he had known that the last 19 of the 40 years were too remote, but what will he did make in ignorance of this flaw in his appointment of time. His intent that the grandchildren shall not have the remainder till the youngest arrives at the age of 40 years is modified by his intent that they shall have it, and that the will shall take effect as far as possible. The 40 years are reduced to 21 by his general approximating purpose, which is a part of the will. Decree for the trustees.

CLARK and CHASE, JJ., did not sit. The others concurred.

Digitized by Google

PALETHORP v. PALETHORP et al.

(Supreme Court of Pennsylvania. May 13, 1895.)

COURTS—JURISDICTION IN PARTITION.

1. Since Act July 7, 1885 (P. L. p. 257), provides that the courts of common pleas shall have all the jurisdiction of a court of equity in partition, those courts have jurisdiction of a bill by the widow of an heir against the other heirs for a partition of the common ancestor's estate, and over the parties thereto.

2. Where parents devised all their property to their children, the interest of the widow of one of the children is sufficient to sustain a bill for the partition of the estate.

Appeal from court of common pleas, Philadelphia county.

Bill by Harriet Palethorp, widow and administratrix of Edward J. Palethorp, deceased, against Robert Palethorp and others, for partition. From a decree that the cause proceed before the master for final determination, the defendants appeal. Affirmed.

The bill avers that John H. Palethorp and Angelina Palethorp were, at the dates of their respective deaths, seised of certain real estate situate in Philadelphia county, describing the same; the wills of John H. and Angelina Palethorp; the heirs at the time of their respective deaths, including Edward J. Palethorp; the decease of certain of the heirs since, including Edward J. Palethorp, and avers, as to him, that he died intestate, without issue, leaving a widow, the complainant; and the parties entitled to the real estate; the nature of their respective interests; how derived; and that they were all the parties interested therein. Defendants assign as error that the court below erred in refusing to sustain motion to dismiss bill of complaint made by said appellants in these words: "And now, October 28, 1894, Robert Palethorp, by attorney, for all the defendants except Joseph Hey, moved the court to dismiss bill of complainant, for three reasons: (1) Jurisdiction vested in the orphans' court; (2) bill insufficient in form and substance; (3) complainant has no legal or equitable interest in the premises and real estate referred to in said bill."

Robert Palethorp, for appellants. W. A. Manderson, for appellee.

PER CURIAM. While we do not regard the decree appealed from in this case as a final decree, we are very clear that the common pleas has jurisdiction of the case and the parties. That court now possesses all the power of a court of equity in partition cases.[1] We cannot now discuss the merits of the controversy, but we are of opinion that the plaintiff's interest is sufficient to sustain a bill, and that the rights of all the parties can be determined in the subsequent proceedings. Decree affirmed.

[1] Act July 7, 1885 (P. L. p. 257), provides "that the several courts of common pleas of this commonwealth shall each have all the power and jurisdiction of a court of equity in all cases of dower and partition, within their respective counties."

CITY OF PHILADELPHIA, to Use of YOST, v. ODD FELLOWS' HALL ASS'N.

(Supreme Court of Pennsylvania. May 13, 1895.)

PUBLIC IMPROVEMENTS—SEWERS.

An owner constructed, with the city's permission, a private sewer along the street on which his property abutted, and the sewer clerk issued permits to owners on that street to connect with the sewer, and collected sewer rents therefor, and by direction of the board of education a schoolhouse was connected with the sewer, without authority, however, from the city councils. Subsequently, the city constructed a sewer along said street, in front of the owner's premises. *Held*, that the owner was liable for his proportion of the cost thereof, though it did not benefit his property, and was not used by him.

Appeal from court of common pleas, Philadelphia county.

Case stated by the city of Philadelphia, to the use of W. H. Yost, against the Odd Fellows' Hall Association, owner, etc. From a judgment for plaintiff, defendant appeals. Affirmed.

Following is the opinion of the lower court, viz.:

"This was a claim for a sewer made by the city of Philadelphia, along Brown street, in front of defendant's premises, which are situate at the northwest corner of Third and Brown streets. The parties have agreed upon a case stated, which sets out: The construction of the sewer. That the defendant, in the year 1864, obtained permission from the city of Philadelphia to construct, and did construct, a private sewer or drain along Brown street, from Third street to Fourth street. 'That after the construction of the said sewer the sewer clerk of the department of surveys of the city of Philadelphia issued permits to the owners of property on Brown street to connect with the same, and collected sewer rents therefor; it being, however, a custom of the said department, as stated by the said sewer clerk, to grant such permits regardless of whether or not there was any public sewer with which the property owner could connect, it being understood that the said property owner applying for such permit took the chance of finding a sewer or drain, public or private, the city in no wise undertaking to warrant that the sewer with which he was authorized to make connection was public.' That 'the city of Philadelphia erected in the Twelfth school section of the said city a schoolhouse on Third street, above Brown, and in 1875 the school section, by direction of the board of education of the said city, made connection with the said sewer on Brown street constructed by the defendants, whereby said schoolhouse has since used said sewer for drainage purposes. There was no

Digitized by Google

ordinance of city councils passed, directing the school board to make said connection.' The case stated also set out the ninth section of the ordinance of June 20, 1863 (page 190), and the eighth section of the ordinance of May 12, 1866 (page 145). Upon the argument the defendants claimed that as the private sewer was laid by permission of the city of Philadelphia, and under the supervision of the district surveyor, that the city of Philadelphia, when it constructed the sewer along Brown street, in front of the defendant's property, could not claim from the defendant any portion of the costs of such sewer, because the sewer would be of no benefit to the defendant's property, as the private sewer already constructed was ample for the uses of the defendant's property. The question raised by the defendant has been determined adversely to it by this court in the case of City of Philadelphia v. Cadwallader, 20 Wkly. Notes Cas. 14, where, on a scire facias sur municipal claim for a sewer laid along Oxford street, west of Broad, the affidavit of defense set up 'that some years ago the owner of the premises against which this claim is filed, by the authority of the board of surveys, laid a sewer on Oxford street, in front of said premises, leading east, and connecting with a sewer on Broad street, which affords ample drainage for said premises; that the sewer for which the claim is made is not used by, or of any value to, said premises.' Upon a rule for judgment for want of sufficient affidavit of defense, this court, in making the rule absolute, said: 'As this is taxation, the public discretion to improve is paramount, and merely voluntary improvement for the owner's own convenience cannot relieve him from his share of the cost where the city makes a general improvement.' The case of City v. Verner, 20 Phila. 292, was cited by the defendant's counsel as being a decision of the court of common pleas, No. 4, of this county, as adverse to the decision in City of Philadelphia v. Cadwallader, supra. An examination of the case, however, will show that the private sewer referred to was laid subsequently to the said ordinance of May 12, 1866, and the opinion in the case cites without disapproval the said case of City of Philadelphia v. Cadwallader. Whether or not this court would follow City v. Verner, supra, if a case identical to that were before us, we need not determine. It is sufficient now to show that the present case differs from it. We consider that, when the defendant in the present case was allowed to lay a private drain, a mere license was granted. When the time arrived for constructing sewers affecting the locality in which the defendant's property is situated, the city constructed the sewer for which the claim is filed. This sewer was the first owned by the city constructed in front of the defendant's property. The drain the defendant laid was its individual property. For defects in that drain the defendant could be liable. Vanderslice v. Philadelphia, 103 Pa. St. 102. Now, until the present sewer was laid, was there a sewer in front of the defendant's property, which was part of the general sewer system of the city? When it was laid, the direct benefit to the defendant's property accrued; and the city, under its power of taxation, had a right to assess a due proportion of the cost of the sewer against the defendant's property by reason of the said benefit. Stroud v. Philadelphia, 61 Pa. St. 255; Hammett v. Philadelphia, 65 Pa. St. 146; Harrisburg v. Seidelbaum, 151 Pa. St. 172, 24 Atl. 1070. 'Of the necessity of the present sewer, we cannot, of course, speak, nor are we required to do so. The councils are the sole judges of the necessities of sewers, and their judgment is conclusive.' Michener v. Philadelphia, 118 Pa. St. 535, 540, 12 Atl. 174. What is said in the case stated regarding the practice of the 'sewer clerk' issuing 'permits' regardless whether or not any sewers existed, can have no effect in the determination of the present question, because it is not pretended that such clerk has the power to estop the councils of the city of Philadelphia from exercising their power of taxation. So, too, the action of the board of education, in connecting a schoolhouse with the defendant's private drain, might have given the defendant a right of action against the city, but could in no way interfere with the right of the councils to lay public sewers, and to assess their costs against properties specially benefited. Judgment is therefore entered in favor of the plaintiff upon the case stated."

The defendant assigns as error that "(1) the court erred in entering judgment in favor of the plaintiff upon the case stated."

Joseph L. Tull, for appellant. Page, Allison & Penrose, for appellee.

PER CURIAM. The judgment in this case is affirmed on the opinion of the learned court below.

GEIGER v. PRESIDENT, ETC., OF PERKIOMEN & R. TURNPIKE ROAD.

(Supreme Court of Pennsylvania. April 29, 1895.)

TURNPIKES AND TOLL ROADS—BICYCLES.

1. A turnpike company, incorporated before the invention of bicycles, was authorized to maintain a public highway, and to collect tolls from those who traveled on its road with horses, cattle, and certain named carriages, or "other carriages of burthen or pleasure," and "every other carriage of pleasure, under whatever name it may go." *Held*, that it was authorized to collect toll from a bicycler who used its road, though its charter authorized the tolls to be computed only by "wheels and horses."

2. Since Act April 23, 1889, provides that bicyclers shall have the same rights on the public highway, and be subjected to the same restrictions in regard thereto, as are prescribed for persons using horses and carriages, a toll charged bicyclers for using a turnpike road, which does not exceed the toll lawfully charged drivers of two-wheeled carriages, is a proper toll.

Digitized by Google

Appeal from court of common pleas, Berks county; G. A. Endlich, Judge.

Case stated by A. J. Geiger against the president, managers, and company of the Perkiomen and Reading turnpike road to determine the rights of a bicycler upon a turnpike road. From a judgment for plaintiff, defendant appeals. Reversed.

David F. Mauger, Isaac Hiester, and John G. Johnson, for appellant. George S. Graham and Baer & Snyder, for appellee.

DEAN, J. These facts, as abbreviated from the case stated, were agreed upon in the court below: (1) The defendant is a turnpike company, incorporated by the act of 20th March, 1810. Said act and its supplements were made part of the case stated. (2) On March 9, 1894, the company made an order that all persons riding bicycles upon the turnpike should not pass through any of its gates, except upon payment of toll at rate of one cent per mile. (3) The bicycle was not invented and in common use until the year 1875. (4) The plaintiff, on December 11, 1894, while on his bicycle, attempted to pass through a toll gate on the turnpike, but was stopped by the gate-keeper, who demanded from him five cents toll, being the amount demandable at the rate of one cent per mile. Plaintiff paid the five cents under protest, and was then permitted to pass. (5) As a general rule, horses, gentle and well broken, do not take fright at bicycles, but some such horses do. The question of law for the court to answer was whether, on these facts, the company had a right to collect this toll from the plaintiff. The court below, being of opinion that there was no express statutory grant of authority, and no necessary implication of one, to defendant to collect toll from bicyclers, entered judgment for plaintiff; hence this appeal by defendant.

The defendant was organized as a turnpike company under the act of 1810, and under that act had authority to make all such by-laws, rules, and regulations for its management as the Centre Turnpike Company, organized under the act of 25th March, 1805, had, with the right to collect such tolls and profits in proportion to the distance as was granted to the Centre Turnpike Company. On turning to this last-named act, we find, in section 11, the company had the right "to fix such and so many gates or turnpikes upon and across the said road as will be necessary and sufficient" to collect the tolls hereinafter granted to the said company from all persons traveling on the same with horses, cattle, and carriages. Three distinct uses of the highway are here enumerated as subject to tolls,—by horses, cattle, and carriages. Then the method of enforcing payment of tolls is specified: "It shall and may be lawful for them [the managers] to appoint such and so many toll gatherers as they shall think proper, to collect and receive of and from all and every person and persons using the said road, the tolls and rates hereinafter mentioned, and to stop any person driving any * * * sulky, chair, chaise, phaeton, cart, wagon, wain, sleigh, sled or other carriage of burthen or pleasure from passing through the said gates until they shall have respectively paid the same." Then follows a basis of computation or limitation on the rates to be charged, thus: "That is to say, for every space of five miles in length of the road, * * * and so in proportion for any greater or less distance, * * * for every sulky, chair, or chaise with one horse and two wheels, six cents; with two horses, nine cents; * * * for every other carriage of pleasure under whatever name it may go, the like sums according to the number of wheels and horses drawing the same." There is no mention of a bicycle propelled by the muscles of the rider; therefore appellee contends there is no express or plainly implied statutory power in the company to collect tolls from the bicycler.

There is no power in a corporation as against the public except that expressed in its grant, or that which is necessarily implied from it. What is the power granted to this company by the law? The commonwealth conferred on the defendant a right of eminent domain for a public highway, under which it appropriated land, and constructed and kept in repair its turnpike. As soon as constructed and opened, it became public. It was open to all on equal terms,—that is, to all paying toll alike, for a like use. The taking of tolls, it has been held, is only another method of taxing the public for the cost of construction, repair, and reimbursement to the corporation for the capital invested. Com. v. Wilkinson, 16 Pick. 175; Plank-Road Co. v. Thomas, 20 Pa. St. 91. The power here, then, was to a private corporation (1) to take sufficient land for a public highway, and construct and keep the same in repair for the convenient and safe use of the public; (2) to collect from the public who used it by animals and carriages, tolls. The word "tolls," in 1810 and 1805, had in this state a well-defined meaning. As is said in Boyle v. Railroad Co., 54 Pa. St. 310, "It is a tribute or custom paid for passage." Strong, J., in that case, says: "Before 1833, transportation had generally been over common roads, turnpikes, and canals. The common and the legislative mind were then familiar with what is called 'tolls.'" Here the defendant demanded, through the toll gatherer it was expressly authorized to appoint, at the gate it was expressly authorized to erect, from the plaintiff, five cents for passage over the highway, or a toll for its use. It may be conceded that the enumeration in the act of 1805 of the uses for which tolls may be collected restricts the right to collect for such uses only as are either specially or generally designated. But, if a bicycle be a carriage, then the general words "other carriage of burthen or

Digitized by Google

pleasure," and "every other carriage of pleasure, under whatever name it may go," are sufficiently descriptive to subject it to toll. It is not strenuously contended that a bicycle is not a two-wheeled carriage. It is no less a carriage because propelled by a man instead of being drawn by a horse. Whether it be one of burden or pleasure or both is not material, for, if either, defendant was expressly authorized to collect toll from the persons using it on the turnpike. But it is argued the only basis fixed in the act for computation of toll on carriages is by wheels and horses, not wheels or horses; therefore, as this carriage is not drawn by horses, the amount of toll cannot be determined by the law of the corporation, and, as it cannot thus be determined, there is no power to demand any. Assuming the amount of toll to be charged is incapable of computation by the method designated for other vehicles in the act, that does not negative the power expressly given to collect toll from those traveling by carriage. The method of computation by wheels and horses is not the power to collect toll, which is expressly given. That is a mere limitation on the power. The demand must not exceed the sums specified for the animals and vehicles enumerated. In Railroad Co. v. Sly, 65 Pa. St. 205, it is held that toll is the consideration for the use of the highway, and, where there is no express power to charge for transportation by the corporation itself over its own road, the right is a necessary incident of the power granted. Says Sharswood, J., repeating the language of Strong, J., in Boyle v. Railroad Co., supra: "No provision was made respecting rates and charges for their own service as carriers, but the very purpose of their incorporation was that they might carry. How can they carry without compensation? Authorized to engage in a business, it is necessarily incident to their authority that they have the rights which ordinarily belong to such a business." If no method of computation had been given in the twelfth section of the act, the power to collect could have been enforced. If the statute confers authority to receive toll, the law will furnish a remedy to enforce the right. Here, however, not only is the right or power statutory, but also the method of collection. The right to appoint toll gatherers, and erect gates, is expressly given, and the right to the managers to make all such rules and orders as shall be necessary for the well ordering of the affairs of the company. Undoubtedly, the rules and regulations so made must be reasonable, and the amount demanded for the carriage subject to toll must be reasonable; and this is the limitation on the power which the law fixes when the statute is silent as to the amount. The manifest intent of the act of 1810, clearly expressed, was to confer upon defendant authority to collect tolls upon this highway from all persons using the same by carriage of burden or pleasure, and it acted within its authority in collecting toll from this plaintiff.

The only other question raised is whether the amount demanded and received—five cents—was in excess of the amount authorized by law. Prior to the act of 23d of April, 1889, it was at least a matter of disputation whether the use of bicycles on the public highways was not fraught with danger to travelers driving horses. On some of the highways and bridges owned by private corporations they were excluded, because, in the judgment of the managers, safety to the general public demanded their exclusion. Then the legislature, in the exercise of its undoubted control over the highways of the commonwealth, passed the act referred to, which reads thus: "Bicycles, tricycles and all vehicles propelled by hand or foot, and all persons by whom bicycles, tricycles and such other vehicles are used, ridden or propelled upon the public highways of this state, shall be entitled to the same rights and subject to the same restrictions in the use thereof, as are prescribed by law in the case of persons using carriages drawn by horses." This act deprived turnpike companies of all discretion in determining whether this kind of vehicle was dangerous to the traveling public, and, in effect, peremptorily forbade its exclusion. Under it, the bicycler, with his two-wheeled carriage, has the same right to travel on the turnpike as the owner of a sulky, whose carriage is drawn by a horse, but subject to the same restriction as is prescribed by law for the owner of the two-wheeled horse carriage. The only restriction of the right to the use of the road by the driver of the two-wheeled horse carriage is that he shall pay six cents toll for every five miles. The amount charged in this case is somewhat less than that sum; therefore it is within the limit as to the amount fixed by the act of 1889. Without this act, the power to demand and receive tolls under the act of 1810 was clear. The amount, however, being incapable of computation under that act, the managers would have been restricted by the law to a reasonable charge. As this would have been a source of irritation, and possible litigation, the legislature has imposed a maximum charge on defendant, beyond which it cannot go. It has established, out of reach of the discretion of the company, the bicycler's right upon the turnpike, and at the same time has placed a peremptory limitation on the power of the company to exact excessive tolls. The act invests the corporation with no power it did not already possess; confers no benefit it did not already enjoy; and therefore, whether it had accepted the constitution of 1874, as provided in article 16, § 2, is wholly immaterial. The act was solely for the benefit of the bicycler, and the corporation only points to it, as demonstrating that it did not exceed the limit of its power by the act of 1810 in receiving this toll. It may

Digitized by Google

well be doubted whether, without express authority from the legislature, the managers of a public highway could lawfully so discriminate between vehicles using it as to exempt wholly one class of carriages from the tolls which it imposed on all other carriages. Under the act of 1889 there is no power to exclude the bicycler from the turnpike. He has the same right as owners of other carriages to insist that the highway shall be maintained in a reasonably safe condition of repair. The corporation is answerable for injury to himself or vehicle, if this duty be not maintained. Then why should he not bear his fair share of the burden imposed upon the public for the use of it? We see no reason in law or in fact why he should not. Therefore the judgment is reversed, and it is directed that judgment be entered on the case stated for defendant.

COLLINS v. LYNCH.

(Supreme Court of Pennsylvania. April 29, 1895.)

EJECTMENT — ISSUE AS TO ADVERSE POSSESSION—EVIDENCE—INSTRUCTIONS.

1. Where there was evidence that defendant in ejectment, the vendee of a decedent who had claimed by adverse possession, was also in possession with decedent, claiming as cotenant with others under a deed, and as lessee of her cotenants, and had joined them in ejectment against decedent, it was proper to charge that her possession since decedent's death could not be tacked to decedent's possession in order to make a title by adverse possession.

2. Where defendant in ejectment took under a decedent who claimed by adverse possession, the declarations of decedent while in possession as to how she obtained and held possession, made 46 years after her entry, and on the trial of another issue, were not admissible.

3. Where the jury were instructed that a paper title was of no avail against a title by possession, made complete by open, notorious, adverse possession, continuing for 21 years, a charge that the burden of establishing hostile possession and notice thereof to the real owner rests upon the party averring it, and that possession does not become adverse till hostile acts are openly and notoriously committed, such as to preclude a doubt of the character of the holding and knowledge thereof by the owner, was not erroneous as instructing that actual notice of the adverse possession to the real owner must be proved, and that possession does not become adverse till the owner has actual knowledge of its hostility.

4. Defendant in ejectment took under her mother, who claimed by adverse possession. Plaintiff claimed under a deed to himself, his two brothers, and his sister, the defendant, taken during his mother's possession; and there was evidence that the mother authorized the purchase of the legal title. *Held*, that it was proper to define the issue as being between the legal title in plaintiff—who claimed to have purchased, in common with defendant, with the approbation of the mother, who was then in possession—and the mother's possessory title.

5. Plaintiff in ejectment held the legal title, and claimed that defendant, the vendee of one claiming by adverse possession, had recognized his title by accepting a lease from him while she was in possession with her vendor, during the vendor's adverse possession. The lease was executed by "A. and wife," and defendant denied that it was executed in her behalf. *Held*, that evidence of the relations existing between A. and defendant at the time the lease was executed was properly admitted.

6. Where defendant in ejectment took under her mother, who claimed by adverse possession, and it appeared that she was in possession with the mother during a part of the period of adverse possession, it was proper to admit evidence that, during the joint possession, defendant, in common with plaintiff and others, took a deed of the land from the legal owner, and that defendant accepted a lease from her cotenants under the deed, and joined with them in ejectment against the mother, as bearing on the exclusiveness of the mother's possession.

7. On an issue in ejectment whether C. entered land under a contract therefor with the owner's agent, a paper writing over 30 years old, executed by the agent under seal, and witnessed, and delivered to defendant's vendor, who then claimed the land by adverse possession, to the effect that the agent did not consider that C. ever had a contract, was not admissible to show that fact.

Appeal from court of common pleas, Luzerne county; Charles E. Rice, Judge.

Ejectment by John Collins against Sarah Ann Lynch. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was commenced in 1889, and resulted in a judgment for plaintiff, which was reversed on appeal. 27 Atl. 721, 157 Pa. St. 246. The plaintiff claimed an undivided one-fourth part of the land described in his writ, and traced title to the whole tract down to himself, his two brothers, and his sister, the defendant, as tenants in common. Defendant did not attack the validity of this title, but pleaded the statute of limitations, and in support of that defense sought to show that her grandfather, John Shepherd, entered and made the first improvement upon the tract, at some time prior to 1827, and in that year transferred his possession, by a written instrument, to his daughter Sally Ann, she being the wife of William Collins, and defendant's mother; that Sally Ann, with her husband, went into possession under the transfer, and remained thereon, and cultivated the same, claiming the land as her own, up to her death in 1879; and that defendant acquired her mother's interest through a sheriff's sale under an execution. Plaintiff disputed the transfer to his mother, Sally Ann, and her entry thereunder, and claimed that his father, William Collins, entered the land under a contract with Henry W. Drinker, agent of the holders of the legal title, and that Collins disposed of the property as his own by will to his heirs; that thereafter, in 1872, by consent of the widow, Sally Ann Collins, who was then in possession, plaintiff and defendant and their two brothers acquired the legal title from Mary V. Wurts; that in 1877 defendant and J. W. Armstrong, who was then known as her husband, recognized that title by accepting a lease of the land from defendant's cotenants; and that in 1878 defendant joined with her cotenants under the Wurts deed in ejectment against her mother, Sally Ann Collins. The jury were instructed, among other things,

Digitized by Google

that a mere paper title was of no avail against a title by possession, made complete by open, notorious, adverse possession continuously kept up for a period of 21 years.

Defendant assigned as error the following points, among others, viz.:

"It is respectfully submitted that the learned court below erred in the following particulars, to wit:

"(1) In the answer to the defendant's third point. The point was as follows, to wit: '(3) Even if the jury should believe that William Collins, her husband, had a contract from the holders of the paper title, yet if, after his death, a continuous, adverse possession of the land was held by the said Sally Ann Collins, and her successors in title, for a period of twenty-one years from the time of his death before the present action was brought, that would bar any action by the present holders of the said paper title, and vest the title by possession in the defendant, she having become the purchaser of the said title by the sheriff's sale of the title of said Sally Ann Collins, and the conveyance to her by the said sheriff's vendee.' And the answer thereto was: 'This point is answered in the negative. If Sally Ann Collins had not acquired title by adverse possession at the time of her death in 1879, the subsequent possession of Sarah Ann Lynch could not, under the circumstances of this case, be tacked to the previous possession of her mother, in order to make a title by adverse possession as against the plaintiff.'

"(2) In charging the jury as follows, to wit: 'You will inquire whether or not from the time of the death of William Collins until the death of Sally Ann Collins there was a period of twenty-one years, and whether or not Sally Ann Collins was, during that time, in actual, adverse, notorious, open, exclusive possession of the premises. If she was, then she acquired title to the premises, which was subsequently acquired by the defendant by virtue of a sheriff's sale. If she was not, and if, under the instructions that we have already given to you, you find that the possession during the lifetime of William Collins was the possession of William Collins, and in his right, then she had not such title as would pass by that sale, and your verdict should be for the plaintiff.'"

"(4) In rejecting the offer in evidence of the declarations of Sally Ann Collins as to her possession and claim, made while she was in possession of the land and claiming it; she being now dead, and the predecessor in the title now held and defended by the defendant,—as per the following bill of exceptions, to wit: 'Defendant's counsel offer the declarations of Sally Ann Collins, made while in possession of the land, as to her possession of the same; how she held it and how she obtained it; she being now a deceased party, who was formerly in possession, and whose title we claim under; these declarations being made as testimony in a case, Collins v. Benedict, No. 98, January term, 1873, in the court of common pleas of Luzerne county, suit in ejectment; this being offered not as evidence given in that case, but simply as declarations of a deceased party who was formerly in possession, and under whom we claim that right. (Objected to as immaterial and irrelevant.) Plaintiff's Counsel: How do you propose to prove these declarations? Defendant's Counsel: From the records of the court, as returned from the supreme court. The Court: We sustain the objection to the offer. (Exception noted for defendant. Bill sealed.)' The declarations of Sally Ann Collins were as follows, to wit: 'I am 78 years old, going on 79. I live in Pittston township. I live on the lot my father, John Shepherd, got for me. It is the Jesse Fell tract. I have lived on the land for fifty years, about. My father gave me this land. I paid him for it,—six sheep and two cows. I earned them after I was of age, and I left them with my father when I left him. There was 546 acres when I first paid taxes for it. I have paid taxes ever since I went there. When the coal business commenced, then they made those under me pay heavy taxes. I worked and earned this money to pay the taxes; children helped. Never lived anywhere else since I went on this tract. I know Caleb Wells. He used to be my first neighbor. I know Joseph Fell. They have been dead about twenty years. My father gave me this paper before me. When he transferred this writing, I could not write, nor my father; so one of my neighbors fixed this. This is the paper my father gave me. I have not tried to find any person who knows the handwriting of these two men. My father could not write. He would get some person to write for him when he had any writing to do. It was one of these men who wrote this paper. It was this fellow Wells wrote it for my father. I have had this paper in my possession ever since. I always keep my own papers. I have had two or three suits before this. I had one suit against Truxton Benedict, and one for cutting timber. This paper was not produced in that suit. This paper was then in my pocketbook. I don't know when the paper was drawn. I didn't see it drawn. I know nothing but what my father told me. I only knew that he gave it to me. My father gave me this paper. My father died fifteen years ago this spring. He gave it to me long before. It may be three or four years after I took possession of the land. My husband stayed with me. (Paper admitted and bill sealed at request of defendant's counsel. Paper read to the jury: "Pittston, Jan. 10, 1827. I, John Shepherd, for and in consideration of two heifers and six sheep, I do hereby bargain and sell to Sally Ann Collins my possession of the Jesse Fell tract of land, containing 400 acres, more or less. John

Digitized by Google

Shepherd. Witness: Caleb Wells, Joseph Fell.") I and my husband were in possession together. I was married long before I took possession. I and my husband then moved on it. He went off to the canal, and I and the children stayed on the land and worked it. I took care of the property. Once in a while he would be with me. He was most of the time somewhere else. Cross-Examination: I worked in this spring on Jesse Fell tract fifty years ago; say fifty years. I cannot tell the year I moved on. There was a house when we moved on. My husband and my friends helped to furnish it. My father was the mainstay. There was not a neighbor there when I went on. No one had land. We were the first that occupied this land, together with my children. Had three children when I went on the land. My husband worked on the place, too. When my father died, the sons were old enough to take the plow. My husband went to get the Rock Cabin lot. This was before we moved on. About 150 acres where I live. There is a little piece cleared. Cannot say how much was cleared. Mr. Benedict did not clear it. We cleared it some years ago. Then Benedict did not live there for years. He came and then went off. It is cleared up to Hamden's place. They have cleared the timber. I paid taxes, more or less. This land was assessed to me, not to my husband. It was assessed as the Jesse Fell tract. He died there, and I buried him. He died eighteen years ago last fall.'

"(5) In rejecting the offer to prove the declarations of Sally Ann Collins as to how she obtained possession of the land in question, and how she held it, made during the trial of the case of Collins v. Benedict, by a witness who was present and heard her said declarations; the said Sally Ann Collins being the predecessor in the title to the land in question now held by defendant, and being now dead,—as per the following bill of exceptions, to wit: 'Did you hear your mother testify in court in the case of Collins v. Benedict? A. Yes, sir. Q. Did you hear her say at that hearing how she got possession, from whom she got it? Defendant's Counsel: We propose to show by this witness that she was present in court at the time that the case of Collins v. Benedict, No. 98, January term, 1873, court of common pleas of Luzerne county, was tried; that she heard her mother testify at that time, her mother being at that time in possession of the land. We propose to show what her mother testified to, as evidence of the declarations of her mother while in possession, as to how she obtained possession of the land in question, and how she held it. (Objected to because the testimony of the mother in a trial of another issue as to how she held this land in dispute is immaterial and irrelevant.) The Court: Objection sustained. (Exception noted for the defendant. Bill sealed.)'

"(6) In charging the jury as follows, to wit: 'A good title may be acquired in Pennsylvania by adverse possession. There is no dispute about that. The possession, to give title as against the recorded paper title, must be actual, exclusive, notorious, continued, peaceable, hostile. The burden of establishing hostile possession and notice thereof to the owner of the land rests upon the party averring it, and the possession does not become adverse till hostile acts are notoriously and openly committed, such as to preclude a doubt of the character of the holding, and knowledge thereof by the opposite party. These general principles are to be borne in mind by the jury in considering the testimony as to the possession during the lifetime of William Collins, and as to the possession after his death by Sally Ann Collins.'

"(7) In the answer to defendant's first point. The point was as follows, to wit: '(1) The issue in this case is between the paper title held by and obtained from Mary V. Wurts and the possessory title held by Sally Ann Collins.' And the answer thereto was: 'While, in a general way, that is not an incorrect statement of the issue, yet it does not seem to us to be a full statement of the issue as it has been presented by both sides, and we therefore decline to charge as requested in that point. The issue is between the Wurts title in the hands of the plaintiff, claiming to have purchased it in common with the defendant, pursuant to a request, or, at least, with the approbation, of Sally Ann Collins, who was at the time in possession, on the one side, and the possessory title of Sally Ann Collins.'

"(8) In admitting evidence as to the relations of the defendant with one John Armstrong, as per the following bill of exceptions, to wit: 'Cross-Examination by Mr. Lenahan: Q. How old a woman are you? A. I am sixty years old in June. Q. This gentleman here is your brother, is he not? A. Yes, sir. Q. Are you a married woman? A. My husband died in the army. Q. Have you been married since? A. No, sir. Q. Were you married to a man named Armstrong? (Objected to as not cross-examination, and immaterial and irrelevant.) The Court: We think that is competent. We think they have a right to ask that. (Objection overruled. Exception noted for the defendant. Bill sealed.)'

"(9) In permitting the examination of John M. Armstrong as to an immaterial matter, as per the following bill of exceptions, to wit: 'John M. Armstrong recalled for plaintiff in rebuttal. Examined by Mr. Lenahan: Q. Were you a witness in the case of Collins v. Benedict? A. I was. Yes, sir. Q. Was Sarah Lynch sworn in that case? A. I think she was. Q. Did she answer to the name of Sarah A. Armstrong as a witness? (Objected to by defendant's counsel, and the purpose of the question is asked.)

Digitized by Google

Plaintiff's Counsel: The purpose is to show that she answered to that name, for the purpose of contradicting her. (Objected to, that it is immaterial, and not competent evidence to contradict her; that the contradiction is as to matter entirely outside of the issue in this case, and therefore inadmissible.) The Court: We will receive the testimony. (Exception noted for defendant. Bill sealed.)'

"(10) In admitting in evidence the lease from J. A. Collins and others to J. M. Armstrong and wife, as per the following bills of exceptions, to wit: 'Q. After you considered your claim as acquired there, whether or not you went to Sarah Lynch or Sarah Armstrong, and had a talk with her or with John Armstrong about leasing them this property? A. Yes, sir. Q. And if you did, go on and state what was done there. (Objected to. Any arrangement as to leasing this property, made between these tenants in common while Sally Ann Collins was in possession of the land, and claiming the same by virtue of a conveyance from her father, and by virtue of possession kept up for over fifty years previous to this time, is incompetent at this time to in any wise affect the question of her title, irrelevant to the present issue, and is therefore immaterial and inadmissible.) The Court: We are inclined to think this is competent. We admit the testimony. (Exception noted for defendant. Bill sealed.) Plaintiff offers in evidence lease, dated 3d April, 1877, between J. A. Collins and R. T. Bliss and others, of the one part, and Milton Armstrong and wife, of the other part, leasing the land in question for the consideration that the taxes on the above property, both local, state, and county taxes, be paid by the lessees, and for the further consideration that $50 worth of improvements shall be put on the above-described land, the improvements to be the erection of fences, and, if not erected as above, the amount to be paid in lawful money to the parties of the first part. Signed: J. M. Armstrong, seal, and wife, seal. Defendant's Counsel: I object to the admission of this paper in evidence, for the reason—First, it is a matter between other parties than the parties to this issue, therefore it is res inter alios acta; second, because it is not executed by the defendant in this case, or any one authorized to execute it for her, and that her name is not to it; third, that it was executed on Sunday, and therefore void, which objection I am ready to substantiate by definite proof; fourth, that no possession was ever taken under this lease, or any action of any kind taken under it, and no change of possession followed in any way in consequence of its execution. The Court: Objection overruled, evidence admitted. (Exception noted for defendant. Bill sealed.)'

"(11) In charging the jury as follows, to wit: 'So, also, will you take into consideration the testimony as to this lease that has been offered in evidence. If, when it was presented to her, she refused to sign it, to have anything to do with it, or to recognize the claim which was made under it, then it ought not to have any bearing in your consideration of the question. If, when this lease was presented to her, she acquiesced in its execution by John M. Armstrong in the manner that it was executed, it would be a circumstance tending to show the nature of her possession during that period of time,—a circumstance tending to show recognition of the Wurts title which had been bought in 1872. Here is another question of fact, and that is whether or not that lease was executed, as it now appears to be, at the time claimed by the plaintiff, and whether that was done with the knowledge and acquiescence of the defendant. It is because of its bearing upon this question of fact that we have admitted the evidence tending to show her relations with John M. Armstrong, and in that view of the case, that testimony is competent to be considered by the jury.'

"(12) In charging the jury as follows, to wit: 'It is in testimony that the defendant resided upon the premises during the same period of time after the death of her father. But if she was there under her mother, recognizing her mother's claim, then that would not interfere with the exclusiveness of the possession of Sally Ann Collins. But if, during this period between the death of William Collins and the death of Sally Ann Collins, Sarah Ann Lynch was in possession, claiming under the Wurts title, it would have the effect of breaking the continuity and exclusiveness of the possession of her mother. This will require you to consider the testimony with regard to the nature of the possession of Sarah A. Lynch during that period of time. For it appears that in 1872 she and her three brothers took a deed for the Wurts title, which was entered of record. If they took this deed, as alleged by the plaintiff, pursuant to an arrangement with Sally Ann Collins, and Sarah Ann Lynch, one of the grantees in the deed remained in possession under it, the possession of Sally Ann Collins during the subsequent period would not be a hostile and exclusive possession, which is necessary to give title by adverse possession. Of course, as to that question of fact there is a dispute, and you must decide it; it being alleged, on the one side, that this deed was taken with the approbation, if not pursuant to the request, of Sally Ann Collins, and, on the other side, that fact being denied. It appears that in 1878 an action of ejectment was brought by these same parties against the mother, Sally Ann Collins. While the bringing of the action of ejectment would not of itself break the continuity of the possession of Sally Ann Collins, it is neverthe-

Digitized by Google

less a fact to be considered by the jury in determining what was the nature of the claim which Sarah Ann Lynch was setting up while she was in possession, provided you find that the suit was brought by her authority and knowledge. She denies that she authorized the suit in any way, and that her first knowledge of it was when the summons was served. If she authorized the suit to be brought, then it would be a fact bearing upon that question as to whether or not she herself was in the actual possession of the premises, or a portion of it, at least, under this Wurts title, and thus adversely to the possession of her mother. But if she did not authorize the use of her name, then you should disregard that item of evidence in disposing of the question before you.'

"(13) In charging the jury as follows, to wit: 'On the part of the plaintiff the claim is, at some date prior to 1830 (I will not be more specific in commenting upon the testimony as to that. You will remember what the testimony was as clearly as I do), that William Collins went into possession under a contract with Henry W. Drinker. Just what right, if any, Henry W. Drinker had to convey the land, does not appear in the testimony, nor, so far as this particular question is concerned, is it material. We are now considering the question whether they went into possession under this claim of right of William Collins under the Drinker contract, or under the claim of Mrs. Collins under the paper which has been offered in evidence. I do not purpose to go over the testimony bearing upon these questions. It has been very fully and very ably presented to you by the counsel on the one side and the other, and we shall leave it there for your decision. If you find that William and Sally Ann Collins entered under a transfer from her father, John Shepherd, and continued the possession uninterruptedly for twenty-one years, she claiming the land as her own, then she acquired a good title by adverse possession. But if you find that they entered under and pursuant to a claim by William Collins that he had a contract from Henry Drinker, whether such contract was valid or invalid, and that he continued to work the land as his own during his life, then at the time of his death Sally Ann, his wife, had not acquired any title by adverse possession, nor could she tack her subsequent possession to the prior possession of her husband in order to make out a title as against the plaintiff in this case.'

"(14) In rejecting the offer of evidence proposed in the following bill of exceptions, to wit: 'Defendant offers in evidence memorandum under seal from the papers delivered to Mr. Ricketts by Sally Ann Collins, as has already been shown in the case, under seal, by H W. Drinker, showing the exact situation as to the contract, as to whether there was a contract, and what was proposed about it between him and William Collins. (Objected to, as not being in contradiction of anything in this case.) Defendant's Counsel: We offer it as a contradiction of John Collins. The Court: I don't think that would be evidence. (Exception noted for defendant. Bill sealed.)' The paper thus offered is as follows, to wit: 'A paper was drawn up providing for a payment of $50 by Mr. Collings to H. W. Drinker, at which time Collings was to have had a regular contract for the land he desired to have. As Mr. Collings never paid this $50, nor any am't whatever, H. W. Drinker considers that Mr. Collings never held the land by contract from him. In testimony, witness my hand and seal, this 20th September, 1861. Henry W. Drinker. [Seal.] In presence of Caroline T. Drinker.' "

Alexander Ricketts and A. Ricketts, for appellant. John T. Lenahan, James L. Lenahan, and Edward A. Lynch, for appellee.

PER CURIAM. This case depended mainly on questions of fact, which were fairly submitted to the jury, and by them determined in favor of the plaintiff. An examination of the record discloses no substantial error in any of the learned court's rulings, or in its instructions to the jury. The case appears to have been tried in substantial accordance with the views of this court as expressed in opinion on former appeal. We find nothing in the record that would justify us in sustaining any of the assignments of error. Judgment affirmed.

BAILEY et al. v. CITY OF PHILADELPHIA et al.

(Supreme Court of Pennsylvania. April 29, 1895.)

CITIES—PAYMENT OF MORAL OBLIGATIONS—APPROPRIATIONS BY COUNCIL—SIGNING OF WARRANTS—"APPROPRIATE DEPARTMENT."

1. A city, through its councils, may recognize a moral obligation, as where a teacher appointed by a school board serves till the court decides, against the contention of the school board, that confirmation of the appointment by the board of education, which was refused, was necessary; and therefore, councils having made an appropriation therefor, and directed the drawing of a warrant, an injunction will not be granted against the drawing and paying thereof.

2. Under Act June 1, 1885, art. 6, providing that "no money shall be drawn from the city treasury except * * * upon warrants signed by the head of the appropriate department," and article 7, providing that the city controller shall not suffer the appropriation for one item to be drawn on by "any department other than that for which the appropriation was specifically made," the "appropriate department," whose head is to sign the warrant, is the department to which the appropriation is made.

3. Such direction that the head of the "appropriate department" shall sign the warrant is not intended to interfere with the discretion of the councils as to the department to which appropriation should be properly made.

4. An appropriation to a department other than that of education, to pay a mere moral obli-

Digitized by Google

gation of the city to a teacher for services rendered before the courts declared her appointment illegal, is not an interference with the functions of the department of education.

5. The term "department," in the provision of Act June 1, 1885, art. 6, that a warrant shall be signed by the head of the "appropriate department," is not limited to a technical department, but includes all officials charged with details pertaining to the city government, for whose expense the city is obliged to provide; and the clerks of councils are such officials, as to all miscellaneous matters which councils may devolve on them.

Appeal from court of common pleas, Philadelphia county.

Suit by J. Percy Keating and others, as taxpayers, against the city of Philadelphia and certain officers thereof, to enjoin the drawing, countersigning, or paying a warrant in favor of Margaret Sherry. A preliminary injunction was dissolved, and plaintiffs appeal. Affirmed.

J. Percy Keating, Theodore M. Etting, and David W. Sellers, for appellants. Wm. A. Hayes, George L. Crawford, and John G. Johnson, for appellee Margaret T. Sherry. Charles F. Warwick, City Sol., and James Alcorn, Asst. City Sol., for appellee City of Philadelphia.

MITCHELL, J. This case does not raise any question of the relative powers of the board of education and the sectional school boards, nor involve in any way the merits of the original controversy which came to this court in Com. v. Jenks, 154 Pa. St. 368, 26 Atl. 371. What we have now before us is the power of the councils of Philadelphia to make the appropriation to Miss Sherry, and to do it by a transfer of an item from one appropriation to another. On this subject, the main question is the right of councils to recognize a moral obligation as a good consideration for the payment of public money. The facts are not in dispute. Miss Sherry was elected by the sectional school board as supervising principal of the John Moffet Combined Grammar and Secondary School in October, 1891, and began the performance of her duties as such on January 4, 1892. The board of education, on February 10th, refused to confirm her election, and on March 8, 1892, regraded the school so as to dispense with the office of supervising principal. Miss Sherry, and the sectional board which had elected her, claiming that her title was complete by the election, and did not require to be confirmed by the board of education, she brought suit by mandamus to compel the board of education to certify her name on the roll of teachers to the city controller. This suit was decided against her by this court on April 24, 1893. The councils of the city inserted in the appropriation to the board of education for 1894 an item (No. 56) to pay Miss Sherry "the amount of salary in dispute"; but, the board refusing to draw a warrant for this item, it was transferred by ordinance June 18, 1894, to a new item (81½), in the appropriation to the clerks of councils, "to pay Miss Margaret Sherry said salary." This appropriation is, on the face of it, to pay for services rendered. Whether it is accurately called "salary," or not, is unimportant. Nor is it material that the services may not have included all the work of a supervising principal for the full period. That was not Miss Sherry's fault. She held herself in readiness to perform, and, if councils had a right to compensate her at all, the amount was within their discretion, so long as it was exercised in good faith, and without abuse. Miss Sherry not only held herself ready to render the services, but claimed the right to do so. That right depended on a question of authority, under the law, between the sectional school board and the board of education; and the real contest in the matter was between those two bodies, and was fought over Miss Sherry's head. For that she was not responsible. The contest terminated adversely to Miss Sherry's right by the decision of this court in April, 1893; and no compensation was claimed by her, or granted by councils, for any period after that date. While the contest was pending the legal question may fairly be said to have been in doubt. The title of certain teachers to office would seem to be complete by an election by the sectional board, under the law as stated in the opinion of the city solicitor of Philadelphia, March 2, 1888 (Append. Ord. 1888, p. 17), while the qualifications, etc., and the title of others, depended on the action of the board of education. How far supervising principals belonged to one class or the other was open to question. Had the city councils, while Miss Sherry's claim was pending and undecided, passed an ordinance to pay her in settlement of her claim, there could have been no doubt of their authority to do so. The right to compromise and settle an existing and asserted claim does not depend on the ultimate decision for or against its validity. If it did, compromise, instead of being an end of litigation, which the law favors, would be only an additional complication in the progress of it. How far does the law prescribe, as mandatory, any different rule, when the settlement is not made until after the question of right is decided? Undoubtedly, the legal claim of Miss Sherry was at an end when this ordinance was passed. She had no right which could have been enforced by action. But it does not follow that her claim was without merit. The committee of councils reported, on the contrary, after investigation, that it was founded on services rendered under claim and color of right and title, and was meritorious. Does the law prohibit the city from recognizing the moral obligation arising from these circumstances? We do not find anything that compels us to so hold. A moral obligation, in law, is defined as one "which cannot be enforced by action, but which is binding on the party who incurs it, in conscience and according to natural justice;" and again, a "duty which would be enforceable by law,

Digitized by Google

were it not for some positive rule, which, with a view to general benefit, exempts the party, in that particular instance, from legal liability." 15 Am. & Eng. Enc. Law, 716. In this state it is held that such an obligation will sustain an express promise to pay, and, a fortiori, an actual payment. Hemphill v. McClimans, 24 Pa. St. 367; Stebbins v. Crawford Co., 92 Pa. St. 289; Leonard v. Duffin, 94 Pa. St. 218; Brooks v. Bank, 125 Pa. St. 394, 17 Atl. 418; Holden v. Banes, 140 Pa. St. 63, 21 Atl. 239; Kelly v. Eby, 141 Pa. St. 176, 21 Atl. 512. If a mere promise to pay under such circumstances would be enforced by law against an individual, certainly an actual payment, or its equivalent,—an order by the councils on their ministerial officer, who has no duty in reference thereto but obedience,—should be sustained against a municipal corporation. Councils, it is true, are trustees, and the law limits their expenditure of public money to public purposes, but they are also representatives of their constituents, and delegates of the city's legislative powers; and there is nothing in the law, or in sound public policy, to prohibit the city from being honest, and paying its bona fide debts, which are good in conscience and justice, though, for sufficient other reasons, there is a general rule which prevents them from being enforceable by law. The opinion of the learned judge below calls attention to some recent instances of similar municipal action; among them, that in regard to Mr. Oellers, who acted as city treasurer for a time under an election by councils to a vacancy which, it was subsequently decided, should be filled by the appointee of the governor. Com. v. Oellers, 140 Pa. St. 457, 21 Atl. 1085. Councils passed an ordinance making compensation to him for his services. It would have been a very doubtful public policy which would have compelled councils to proclaim in advance that the officer to be elected would get no compensation for his eight months or more of labor and responsibility unless he could maintain his title de jure to the office, the mode of filling which was then known to be in dispute. With such an announcement, it is not likely that the office would be accepted by any man of the character and abilities suited to that responsible position, but, rather, that it would go to some one who wanted it, in the language of the day, for "what there was in it."

The other objections are to the method of payment adopted. The item was originally contained in the appropriation to the board of education, and, when that department refused to draw the warrant, it was transferred to the appropriation to the clerks of councils. Transfer of items is expressly recognized by the act of June 1, 1885, art. 7 (P. L. 45), which provides that the city controller "shall not suffer the appropriation for one item of expense to be drawn upon for any other purpose, or by any department other than that for which the appropriation was specifically made, except on transfers made by the ordinance of councils." Article 6 of the same act provides that "no money shall be drawn from the city treasury except by due process of law, or upon warrants signed by the head of the appropriate department," and it is argued that this item belongs properly to the department of education. But "appropriate department," in this section, means the department to which the appropriation is made, and whose head is to draw the warrants. It is the general direction which is embodied again specifically, as to the controller, in section 7, already quoted, prohibiting that officer from countersigning any warrant drawn by "any department other than that for which the appropriation was specifically made." It is not intended to interfere with the discretion of councils over the department to which appropriations should properly be assigned. How far councils might, under this discretion, appropriate to one department funds, the control of which was within the objects and jurisdiction of another, we need not consider, as no such case is before us. This appropriation is not an interference with the functions of the department of education, for it does not assume to determine any question of title in Miss Sherry as a teacher, or her legal right to salary as such. It is a recognition and payment of an obligation of the city for services rendered, and the department in which they were rendered is not in any way material on this question. If the obligation had been binding in law, and a judgment had been obtained upon it, there would have been no compulsion on the councils to assign the appropriation to pay such judgment to the department of education because the original cause of action arose there. It might appropriately be assigned to the law department, which has the control and supervision of the city's lawsuits. So in the present case the appropriation is one of the miscellaneous class which councils may commit to the care of any department they see fit.

Nor is the objection that the clerks of councils are not a department of the city government any more forcible. There are many expenses of the city which are not directed by a technical department, and appropriations are annually and regularly made, among others, to the district attorney, the clerk of the quarter sessions, the coroner, the sheriff, and other officers who form no part of the city government, strictly so called, and are certainly not departments thereof, under the act of 1885. The words "appropriate department," in that act, therefore, must be held to include all officials charged with duties pertaining to the city government, for whose expenses the city is obliged to provide. The clerks of councils are such officials, as to all miscellaneous matters which councils may devolve upon them, though they are not technically heads of departments.

This case was heard in the court below on a motion to dissolve a preliminary injunction,

Digitized by Google

but, as the whole controversy is involved, the parties have agreed that it shall be treated here as upon final hearing. The order dissolving the injunction is affirmed, and the bill dismissed, with costs.

WARDEN v. CITY OF PHILADELPHIA.

(No. 151.)

(Supreme Court of Pennsylvania. April 29, 1895.)

EMINENT DOMAIN — MEASURE OF DAMAGES — INSTRUCTIONS—OBJECTIONS TO EVIDENCE.

1. In determining the market value of land condemned by a city at the time of its appropriation, the jury may consider whether the tract was ripe for city improvements, and was adapted for division into city lots, and could and would have been sold by the front foot.

2. The court is not bound to comment to the jury upon the testimony of any witness, in the absence of a request to do so.

3. In determining the market value of land condemned by a city, it was proper to admit evidence as to the separate value of buildings situated on the land.

4. On the second day of the trial of a condemnation proceeding, and upon the conclusion of plaintiff's testimony in chief, the defendant city moved to have stricken from the record "testimony as to what might have been the value of this property cut up into lots, opening streets, giving frontages, making it entirely different, on a plan which did not exist." Numerous witnesses had been examined on the subject without objection, and cross-examined by defendant, and a large part of the testimony was in regard thereto. *Held*, that the motion was properly denied both because of its vagueness and the delay in making it.

Appeal from court of common pleas, Philadelphia county.

Proceeding by William G. Warden against the city of Philadelphia on appeal from an award for a tract of land taken by defendant for reservoir purposes. From a judgment for plaintiff, defendant appeals. Affirmed.

The jury found for plaintiff in an amount which included interest on the value of the land at the date of the appropriation, but in discharging the rule for new trial the court required plaintiff to file a remittitur in an amount equal to the interest.

Defendant's specifications of error are as follows, viz.: "(1) The court below erred in overruling defendant's motion as follows: 'That the court order that the testimony produced by the plaintiff as to what might have been the value of this property cut up into lots, opening streets, giving frontages, making it entirely different, on a plan which did not exist there and does not exist, except in the scheme of the witnesses and the claimants, be stricken from the record.' (2) The court below erred in admitting the testimony of James M. Stewart, a witness called by the plaintiff, William G. Warden, as follows: 'Q. Tell the jury what in the early part of 1892 it would have cost to have built that house. (Objected to.) Q. What was the value of the house and buildings upon the lot? (Objected to. Objection overruled. Exception for defendant.) A. I make the value of the buildings on that ground $23,000.' (3) The court below erred in charging the jury as follows: 'If, for example, this land was in a neighborhood which was ripe for city improvements, so that the land at that time could and would have been sold at that time by the foot, you would put a different estimate on it from that which you would naturally put upon it if it was farm land. I say, therefore, you are not to ignore the capacity of the land for city improvements in fixing your value of it.' (4) The court below erred in charging the jury as follows: 'It is proper for you to consider whether this land was ripe for city improvements at that time or not. You ought to give the facts in regard to that such weight as they are entitled to. It was to enable you to form a correct judgment upon that subject that much of this testimony was admitted.' (5) The court below erred in charging the jury as follows: 'If this land was then ripe for city improvements,—if it then could have been sold and would have been sold as city lots,—you have a right to consider that, and should give the plaintiffs the value of that land, whatever it then was. If, on the contrary, you find that this land was not then ripe for city improvements, that the lots were country lots and farm land, and that property was not selling there by the foot or in city lots, but only by the acre, of course you will put a different valuation upon it.' (6) The court below erred in charging the jury as follows: 'You are entitled to consider all the facts which have been put in evidence in ascertaining what was the real market value of the land at the time the city took it, and that, with interest from the 1st of May, 1892, is what you ought to award to these plaintiffs, respectively.' (7) The court below erred in not commenting on the extraordinary estimate of Henry Warden and the other witnesses called by the plaintiff, and permitting their speculative values to be submitted to the jury without any word of caution. (8) The court below erred in entering judgment in favor of the plaintiff."

James Alcorn, Asst. City Sol., and Charles F. Warwick, City Sol., for appellant. George P. Rich, Mayer Sulzberger, and John G. Johnson, for appellee.

PER CURIAM. If this case were before us on a motion for a new trial, much of defendant's elaborate argument would perhaps be relevant and worthy of serious consideration; but that motion appears to have been properly entertained by the court below, and, after due consideration, a new trial was refused, on condition that plaintiff would remit $15,990 of the damages found by the jury. That condition having been complied with, judgment was entered on the verdict thus reduced. On this appeal our inquiry is necessarily restricted to questions of law involved in the assignments of error.

Digitized by Google

In four of the specifications (3 to 6, inclusive) the subjects of complaint are the excerpts from the learned trial judge's charge recited therein, respectively. In the general charge the jury were clearly and distinctly told, inter alia, that the sole question for their consideration was: "What was the fair market value of" plaintiff's property on May 1, 1892, when it was taken by the city? The instructions relating thereto were well calculated to impress upon the jury the propriety of closely adhering to that question in their consideration of the testimony; and whether portions of the charge assigned as error be separately considered, in their detached form, or in connection with the context, and as parts of the entire charge, we fail to discover any substantial error in either of them. With the exception of the instruction as to interest, which was remedied by remitting a sum fully equal thereto, the charge, as a whole, was adequate and substantially correct.

As to the omission of the court to comment on the alleged "extraordinary estimate of Henry Warden and other witnesses called by the plaintiff," etc., complained of in the seventh specification, it is sufficient to say that the learned judge was not requested to comment, favorably or otherwise, on the testimony of any of the witnesses, and, in the absence of such request, he was not bound to do so. The record shows that points for charge were submitted by defendant, and then withdrawn, but what they were or why they were withdrawn does not appear.

There is no merit in the second specification. It is not alleged, nor does it appear, that the witness was incompetent. An examination of his testimony not only shows that he was a competent witness, but that his testimony, including the portion quoted in the specification, was relevant to the issue before the jury.

The only remaining specification that requires notice is the first, alleging error in overruling the following motion, viz.: "That the court order that the testimony produced by the plaintiff as to what might have been the value of this property cut up into lots, opening streets, giving frontages, making it entirely different, on a plan which did not exist there and does not exist, except in the scheme of the witnesses and the claimants, be stricken from the record." In view of the rather vague and indefinite character of this motion, the time when and the circumstances under which it was made, etc., the learned court was clearly right in refusing to entertain it. It was not made until after the trial had progressed for two days, all of plaintiff's testimony in chief (150 printed pages) had been received, and he had rested. If the motion had been granted and the order made, it would have been very difficult, if not impossible, for the parties in interest to know how much of the 150 pages of plaintiff's testimony had been stricken out. During the time that was occupied by plaintiff in the introduction of his testimony, witness after witness was called and examined without objection, and elaborately cross-examined in relation to matters presumably referred to in the motion. Indeed, a very considerable part of the testimony was of that character, and all of it was offered and admitted without objection until the plaintiff closed his testimony in chief, and then the motion was sprung upon him. If defendant's counsel then for the first time began to realize that what he now calls irrelevant and incompetent testimony had been admitted, the very least that he should have done, in his appeal to the discretion of the court, would have been to specify particularly the portions of the testimony at which his motion was aimed. In denying the motion, there is nothing that savors of an abuse of discretion on the part of the learned trial judge.

We find nothing in the record that would justify, much less require, us to sustain either of the specifications of error. Judgment affirmed.

BRADBURY v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. April 29, 1895.)

Appeal from court of common pleas, Philadelphia county.

Proceeding by Mary A. Bradbury against the city of Philadelphia on appeal from a jury of view to determine damages resulting from the taking of land. From a judgment for plaintiff, defendant appeals. Affirmed.

James Alcorn, Asst. City Sol., and Charles F. Warwick, City Sol., for appellant. George P. Rich, Mayer Sulzberger, and John G. Johnson, for appellee.

PER CURIAM. In the court below, this case was tried with No. 151 of this term (William G. Warden against same defendant), in which an opinion has just been filed. 31 Atl. 928. The questions involved are substantially the same in both. For reasons briefly stated in the opinion referred to, we think the judgment in this case also should be affirmed. Judgment affirmed.

In re RAEDER.

(Supreme Court of Pennsylvania. April 29, 1895.)

LIMITATIONS—NEW PROMISE—PART PAYMENT.

The allowance of a dividend upon a note barred by limitations, by a decree of the common pleas directing a distribution of a balance shown to be in the hands of a committee of a lunatic's estate by a triennial statement, does not prevent the statute from being pleaded against the note by the ward after his restoration to reason, or set up against payment of the note in the distribution of the balance shown by the committee's final account.

Appeal from court of common pleas, Luzerne county; Charles E. Rice, Judge.

In the matter of the lunacy of Peter Rae-

Digitized by Google

der. From the decree of distribution, J. A. Raeder, a creditor, appeals. Affirmed.

Following, among others, are the exceptions to the auditor's report:

"Peter Raeder, now decreed to have been restored to reason, excepts to the report of A. C. Campbell, auditor to distribute the funds in the hands of Charles H. Gardner, former committee, as follows: (1) The auditor erred in distributing the sum of $473.32 to the claim of J. A. Raeder. (2) The auditor erred in overruling and disregarding the exceptant's plea of the statute of limitations, as to the claim of J. A. Raeder. (3) The auditor erred in allowing a dividend to the claim of J. A. Raeder, when his note, upon which the claim was founded, was due (not under seal) on the 15th day of July, 1880, and no payment or new promise was shown. (4) The auditor erred in holding that the proof and allowance of this claim before a former auditor, while Peter Raeder was a lunatic and after the statute of limitations had run, to wit, on the 20th of December, 1890, was a final and conclusive adjudication, so as to bar the exceptant after he was restored to reason, and prevent his then, or rather now, pleading the statute of limitations against the claim."

The opinion of the lower court is as follows, viz.:

"Exceptions to the report of the auditor appointed to make distribution of the fund in the hands of the committee, as shown by his final account. At the time of the audit of the partial account of the committee, in 1890, the note in question had been barred by the statute of limitations for more than two years. It was not in the power of the committee to remove the bar of the statute by a new promise; hence his mere failure to object to the allowance of the claim, and his payment of the amount allowed upon it by the auditor, could not have that effect, either upon the gruond of an implied reassumption or of estoppel. But it is argued that the confirmation of the report was a conclusive adjudication of the liability of his ward. In Reber's Appeal, 125 Pa. St. 20, 17 Atl. 189, it was held that the adjudication and allowance of a claim in the distribution of a decedent's estate by an auditor, followed by a decree of the orphans' court confirming the auditor's report, is as effective to toll the bar of the statute of limitations as would be a judgment at law, and in such case the statute is inoperative. On the other hand, it was held in Light's Estate, 136 Pa. St. 211, 20 Atl. 536, 537, that the allowance of a dividend upon a debt by a decree of the court of common pleas, distributing funds of an assigned estate, would not toll the statute. Speaking of Reber's Appeal, Justice Clark said that in a distribution in the orphans' court the adjudication is against the administrator or executor as the legal representative of the decedent, while in the case of a distribution of an assigned estate the adjudication is against a particular fund only. We conclude that there would be very strong analogy between this case and Reber's Appeal, if the distribution had been of a balance in the committee's hands as shown by his final account. But we are unable to conclude that a distribution of a balance in his hands, as shown by a triennial statement of his management of the estate, is conclusive. These statements, like the triennial statements filed by guardians, are merely for the information of the court and the inspection of all parties concerned. Upon the determination of the trust, the committee is required to settle in the prothonotary's office a full and complete account of his management of the property under his care, including all the items embraced in every preceding settlement. It has been held, with regard to guardians' triennial statements, that they are not the subjects of settlement and confirmation (Yeager's Appeal, 34 Pa. St. 174; Foltz's Appeal, 55 Pa. St. 428); and that they are not conclusive upon the ward, though they go through that form (Douglas' Appeal, 82 Pa. St. 109; Wall's Appeal, 104 Pa. St. 14; Bowman v. Herr's Ex'rs, 1 Pen. & W. 282). These rulings are applicable to the statement called a 'partial account,' filed by the commissioner, and the action of the court thereon.

"We are not to be understood as saying that the confirmation of the auditor's report was a nullity. The 20th section of the act of June 13, 1836 (P. L. 596), makes it the duty of the committee to apply so much of the income of the estate as shall be necessary to the payment of debts, the support of the lunatic, and of his family, and for the education of his minor children. The next section provides that, if the income of the estate shall not be sufficient for the purposes aforesaid, it shall be lawful for the committee, under the direction of the court, to apply so much of the principal of the personal estate as shall be necessary for the purpose. Possibly the jurisdiction of the court to make distribution of the fund in the committee's hands, as shown by his partial account, might be sustained under this section, but, even if this be so, it did not extend beyond the particular fund. It may be conceded, for the present purpose, that the confirmation of the auditor's report was so far conclusive as to protect the committee in the payment of the sums awarded the different claimants; but we do not think it can be treated as having the same effect as a judgment in an action at law upon the claim, upon final settlement of the estate.

"In Guenther's Appeal, 4 Wkly. Notes Cas. 41, it appeared that the executors had filed a partial account, showing a fund in their hands. On the distribution thereof Lina Guenther claimed her mother's share, under the will of the testator. The auditor allowed the claim. No exception was filed to the re-

Digitized by Google

port, and it was confirmed. Payments in pursuance thereof were made to her for several years. On the distribution of the funds subsequently acquired by the executors, the conclusiveness of the former decree of distribution was the direct question. She claimed it was conclusive of her right to share in the proceeds. The court below held otherwise, and excluded her claim. On appeal, the supreme court affirmed the decree, and said: 'The prior decree of the orphans' court was conclusive only as to the fund then distributed.' This ruling was followed in Kline's Appeal, 86 Pa. St. 363; and the principle of the decision was recognized in Townsend's Appeal, 106 Pa. St. 268–274, and Grim's Appeal, 109 Pa. St. 391–397, 1 Atl. 212. Following these decisions, and having regard to the purpose for which these triennial statements are filed, we conclude that while the confirmation of the auditor's report may have been so far conclusive as to protect the commissioner in the payment of the sums awarded the different claimants, it was not such an adjudication as would preclude inquiry into the validity of the claim in an action at law against the ward after being restored to reason, or in a distribution of the fund in the committee's hands as shown by his final account. Now, March 16, 1894, the exceptions of Peter Raeder are sustained, and it is ordered and decreed that the balance, after paying the costs of audit and of the claims in full of debt, interest, and costs of M. Norton, Reynolds & Reynolds, and E. H. Butler & Co., be paid to Peter Raeder, the exceptant."

Appellant assigned as error: "Third. That the court erred in sustaining the exceptions of Peter Raeder, and excluding the claim of J. A. Raeder from participation in the distribution."

Geo. K. Powell, for appellant. S. J. Strauss, for appellee C. H. Gardner. Q. A. Gates, for appellee Peter Raeder.

PER CURIAM. There appears to be nothing in this record that would justify us in sustaining either of the specifications of error. The questions therein presented are sufficiently answered by the learned president of the common pleas in his opinion sustaining exceptions to the auditor's report. On that opinion the decree is affirmed, and appeal dismissed, with costs to be paid by appellant.

GILCHRIST, Tax Receiver, v. STRONG et al.

(Supreme Court of Pennsylvania. April 29, 1895.)

CITY BOUNDARIES.

Act May 24, 1887, providing that whenever any township, borough, or city is bounded by the nearest margin of any navigable stream, and the opposite township, borough, or city is also bounded by the nearest margin of the same stream, the middle of the stream shall be the boundary between the two divisions, repeals so much of Act May 4, 1871, incorporating the city of Wilkes Barre, as fixes its boundary at low-water mark, and extends the boundary of that city to the middle of the Susquehanna river, the low-water marks of which had formed the respective boundaries of the two divisions (including the city) lying opposite each other on its banks.

Appeal from court of common pleas, Luzerne county; J. A. Sittser, Special Judge.

Case stated by J. W. Gilchrist, receiver of taxes for the city of Wilkes Barre, against Theodore Strong and others to determine the liability of certain of defendants' property to taxation. From a judgment for plaintiff, defendants appeal. Affirmed.

Following is the opinion of the lower court (Sittser, Special Judge), and defendants' exception thereto:

"The dispute in this case is over the western boundary of the city of Wilkes Barre. It grows out of an attempt on the part of the city to tax the land of the defendants lying between low-water mark and the middle of the Susquehanna river. Whether the true boundary be at low-water mark or at the middle of the river depends upon the construction of two acts of assembly. It appears by the case stated that the city of Wilkes Barre was incorporated by a special act approved May 4, 1871 (P. L. 539), and that it was bounded on the west by low-water mark of the Susquehanna river. The opposite township is also bounded by low-water mark on the opposite side of the same river. Between the boundary lines of the city and township lies the land under the bed of the river, which, prior to the act of May 24, 1887 (P. L. 203), belonged to no municipal division, and, although valuable for its coal, was not subject to taxation. That act, however, provides 'that whenever any township, borough or city is bounded by the nearest margin of any navigable stream of this commonwealth and the opposite township, borough or city, as the case may be, is also bounded by the nearest margin of the same stream, the middle of such stream shall be deemed and taken to be the boundary between such townships, boroughs or cities, as the case may be.' The coal lands of the defendants lie in the bed of the river between the lines of low-water mark. These lands, to the middle of the river, have been assessed with taxes by the authorities of the city of Wilkes Barre as within the limits of the city as enlarged by the act of 1887. The defendants deny that the act of 1887 applies to the city of Wilkes Barre, because the act creating the city of Wilkes Barre and defining its boundaries was a local or special act, while the act of 1887 is a general law, which will not repeal a local or special law in the absence of express words of repeal, and therefore resist the payment of any taxes to the city. Whether the act of 1887 extends the western boundary of the city to the middle of the river is the question in the case.

"A general statute, without negative words, will not repeal a previous statute which is

Digitized by Google

particular, though the provisions of the two be different, unless there is something inconsistent or irreconcilable in them. City of Harrisburg v. Sheck, 104 Pa. St. 53. This is not an arbitrary rule of construction. It has a reason back of it. 'It is against reason to suppose that the legislature, in framing a general system for the state, intended to repeal a special act which the local circumstances of one county made necessary.' Seifried v. Com., 101 Pa. St. 200. It is a question of intention. "The repeal of a special statute enacted for a special purpose must either be expressed, or the manifestation of the legislative intent to repeal must be so clear as to be equivalent to an express direction.' Cole v. Supervisors, 11 Iowa, 552. 'When, however, the inconsistency between a private and a general act is such as to show an intent to repeal the former, the private act must yield.' Gas Consumers' Co. v. Clarke, 13 C. B. (N. S.) 838; Sedg. St. Const. Law, 99, note. That the act of 1871 incorporating the city of Wilkes Barre is a local law cannot be doubted. That the act of 1887 is a general law is equally clear. If the act of 1887 repeals the act of 1871 so as to change the boundary from low-water mark to the middle of the river, the legislative intent to repeal must be so clear as to be equivalent to express direction. The act of 1887 must be given some effect. As said in Engle v. Reichard, 4 Pa. Co. Ct. R. 48, 'If a law can have no operation or effect except as a repeal of a local law, that constitutes necessary implication of the strongest kind, for it is a cardinal rule of construction that a statute shall be so construed as to have effect, and not be a mere nullity or surplusage.' The townships, boroughs, and cities upon which it is contended the act operates were created either by a special act of assembly or by the action of the courts in pursuance of general laws. By either method the result was the creation of a local situation. To hold that the act would only change the boundaries of such municipalities as were created by the courts, and not those created by act of assembly, would seem to be unreasonable. The object of the law was to bring the land lying under the beds of navigable rivers within the municipal divisions of the commonwealth, so as to subject the territory to their control, and the land to taxation. The act deals entirely with local situations, whether that situation was produced by a special act of the legislature or by a special decree of the court. There is no room for the idea that from the general purview of the act there was no intention to disturb special localities. On the contrary, such was the manifest and only intention, and the act would be a mere nullity if such be not its effect. The act had nothing else to operate upon. The boundary of the city of Wilkes Barre at low-water mark on the Susquehanna river is within the very letter of the act. Its situation is accurately described as one, among others, which the law was intended to affect. The act of 1887 deals with land outside of township, borough, or city limits. As to such territory, there is no doubt whatever as to what is meant. There is no local law to relieve it from the general provisions of the act. The fact that by the act it is attached to contiguous municipal divisions does not affect the intent, no matter how the contiguous municipal divisions were created. Being of opinion that the plaintiff is entitled to collect and receive the tax mentioned in the case stated, we direct judgment to be entered in favor of the plaintiff, as in an action of assumpsit, for ninety-three $^{84}/_{100}$ ($93.84) dollars, with interest from September 1, 1892, to April 28, 1893.

"To which defendants except, and bill sealed sealed at their request."

Geo. R. Bedford, H. A. Fuller, and Wheaton, Darling & Woodward, for appellants. William S. McLean, for appellee.

PER CURIAM. The question presented by this case stated was correctly decided by the learned president of the Forty-Fourth district, who specially presided at the hearing. All that can be profitably said on the subject will be found in his clear and satisfactory opinion. On it we affirm the judgment. Judgment affirmed.

In re BOWMAN.

(Supreme Court of Pennsylvania. April 20, 1895.)

LIQUOR LICENSES—HEARING OF APPLICATIONS—REMONSTRANCES.

1. Act June 9, 1891, requires the court to fix a time for hearing applications for liquor licenses, when all persons may be heard. Rule of court 137 requires remonstrances against the granting of licenses to be filed at least five days before the day set for hearing. *Held* that, where a remonstrance was filed only three days before the day set for hearing, it was proper to postpone the hearing one week, and permit the remonstrants to be heard at the hearing then had.

2. The fact that the number of persons in favor of granting a liquor license greatly exceeds the number opposing it is no ground for reversing a decree refusing the license.

Appeal from court of quarter sessions, Luzerne county.

In the matter of the application of Albert Bowman for a hotel license to sell liquors at retail. From a decree denying the application, the applicant appeals. Affirmed.

Following are appellant's assignments of error: "It is respectfully submitted that the court erred in the following particulars, to wit: (1) In overruling the following court rule, to wit: 'Rule No. 137. Remonstrances specifying objections to granting a license, shall be signed by the person or persons objecting and be filed in the clerk's office at least five days before the time appointed, as aforesaid, for hearing. Where a remonstrance is filed, as aforesaid, additional petitions of citizens for and against the granting of the license may be presented on the hearing of the application but not afterwards. Where a remonstrance is filed the clerk shall

Digitized by Google

at once note the fact on the petition.' (2) In making the following order, to wit: 'Now, March 2, 1895, after hearing, the license as prayed for is refused.'"

Michael Cannon, for appellant. John T. Lenahan and E. F. McGovern, for appellee.

PER CURIAM. It is stated in appellant's history of the case that, on the day first appointed for hearing his application, he appeared in court with his witnesses, but in consequence of a remonstrance having been filed only three days before, setting forth that his house "was not necessary for the accommodation of the public," the hearing was postponed for a week. At that time he again appeared with his witnesses, and a hearing was accorded him and the remonstrants. There was nothing irregular or improper in this. It is a mistake to suppose that the postponement of the day fixed for hearing applications to which remonstrances were filed, etc., was such a violation by the court of its own rule No. 137 as would justify us in sustaining the first assignment of error. While the act of June 9, 1891, requires the court to fix a time for hearing applications for licenses, "at which time all persons applying or making objections to applications for license may be heard by evidence, petition, remonstrance, or counsel," it by no means follows that, for the convenience of parties interested, either as applicants or remonstrants, or for the convenience of the court itself, the hearing may not be adjourned to a subsequent day. There is nothing whatever to indicate that the postponement in question was either arbitrary or for an improper purpose. The remonstrants had as much right, under the law, to be heard, as the appellant himself. Both parties were heard, and in due time the court announced its decision. In the absence of anything tending to show the contrary, we must assume that the court's decree is in accordance with the evidence. It matters not that the number of petitioners and others in favor of appellant's application greatly exceeded the number opposed thereto. It is the quality, rather than the quantity, of testimony that often does and should prevail. The assignments of error are not sustained. Decree affirmed and appeal dismissed, with costs to be paid by appellant.

In re ANNEXATION TO BOROUGH OF PLYMOUTH.

Appeal of PLYMOUTH TP.

(Supreme Court of Pennsylvania. April 29, 1895.)

ANNEXATION TO BOROUGH—PROCEEDINGS—QUALIFICATION OF GRAND JUROR—REPEAL OF ACT.

1. One who admitted under oath that he was opposed to the annexation of a township section to a borough, and that he had said to others that he would do all he could against it, was disqualified to sit on the grand jury having the matter of the annexation under consideration.

2. Act April 3, 1851, § 30, requiring the burgess and council of a borough, on petition of owners of lands adjacent to borough limits, to ordain the admission of such lands as part of the borough, is not repealed by Act June 11, 1879, and Act May 17, 1883, authorizing the quarter sessions to declare alterations of borough limits in certain cases.

Appeal from court of quarter sessions, Luzerne county.

In the matter of the annexation of a section of Plymouth township to the borough of Plymouth. From a decree of annexation, the township appeals. Affirmed.

A member of the grand jury before which the matter of annexation was laid, upon being challenged by the petitioners, stated under oath that he lived in the borough, and that he owned, and was the agent for owners of, rented property in the district sought to be annexed, and that he was opposed to the annexation, and had said to others that he would do all he could to defeat it, whereupon the court excluded him as disqualified. Appellants assign the following error, among others, viz.: "(1) The learned court erred in dismissing the exceptions to the finding of the grand jury. Exception: (1) 'The court erred in excluding from the grand jury, on the challenge of the attorney for the petitioners, R. N. Smith, a grand juror, and refusing to permit him to sit and act with the other grand jurors in disposing of said application after he had been sworn.' 'By the Court: 'This exception is dismissed.'"

B. R. Jones and G. L. Halsey, for appellant. D. L. & J. Q. Creveling, for appellee.

PER CURIAM. The grand juror named in the first specification was challenged for cause which the court regarded as sufficient to disqualify him from hearing and participating in the decision of this case. There was no error in this. The conclusion reached by the learned judge was fully warranted by the evidence before him. There was no error in holding that the thirtieth section of the act of 1851,[1] under which this proceeding was had, was not repealed by the acts of 1879 and 1883.[2] They may well stand together. The record discloses no error in dismissing the exceptions, and entering the decree complained of. Decree affirmed and appeal dismissed, with costs to be paid by appellant.

---

[1] Act April 3, 1851, § 30 (P. L. 327), provides, in effect, that the burgess and council of a borough shall, on petition of owners of outside lands adjacent to borough limits, ordain the admission of such lands as part of the borough.

[2] Act June 11, 1879 (P. L. 150), and Act May 17, 1883 (P. L. 36), amending Act 1834 (P. L. 163), authorizes the court of quarter sessions, in certain cases, on petition therefor, to declare alterations of borough limits.

Digitized by Google

CONSHOHOCKEN TUBE CO. v. IRON CAR EQUIPMENT CO. (PHILADELPHIA & R. R. CO. et al., Garnishees).

(Supreme Court of Pennsylvania. April 29 1895.)

REVIEW ON APPEAL—PARTIES INTERESTED.

The question of the extent of the jurisdiction of state courts over receivers appointed by the United States courts cannot be raised by a defendant who suffered judgment to be taken against him for want of affidavit of defense in an action wherein the receivers were garnishees.

Appeal from court of common pleas, Philadelphia county.

Action by Conshohocken Tube Company against Iron Car Equipment Company and others, as garnishees, to recover interest on bonds of defendant company. Plaintiff had judgment, and defendant appeals therefrom by certiorari. Affirmed.

Joseph S. Clark, for appellant. Henry M. Tracy, for appellee.

WILLIAMS, J. This was an action against the Iron Car Equipment Company, begun by foreign attachment, to recover interest due and unpaid upon certain of the bonds of the company held by the company plaintiff. The Philadelphia & Reading Railroad Company and the Western New York & Pennsylvania Railroad Company, both of which were in the hands of receivers appointed by the United States courts, were made garnishees. The writ was issued in January, 1894, returnable to the March term. On the 4th of June the defendant appeared by attorney, and moved for a rule on the plaintiff to show cause of action, and why the attachment should not be dissolved. In compliance with this rule, the plaintiff filed a formal statement, showing a good cause of action on the 9th of June, and obtained judgment therefor on the 23d day of July, for want of an affidavit of defense. This action involved an adjudication that the rule had been complied with, and a good cause of action shown. The rule remained, however, upon the argument list until the following November, when it was discharged, as of course, under the rules of court. From this order the present appeal was taken. It is not an appeal in the ordinary sense of the word, but a certiorari. It brings up the record for review, and, regularly, it can bring nothing not upon the record proper unless there is an allegation that the court below has been guilty of an abuse of discretion. This is not asserted in this case. There is no suggestion of the existence of a defense to the plaintiff's claim, or of any irregularity in the proceedings on which the judgment rests other than that the garnishees are not subject to an attachment issued by the state courts. This is a question that has no significancy so far as the defendant is concerned. It has appeared to the action, and suffered judgment for the amount of the plaintiff's demand. The question of the extent of the jurisdiction of the state courts over receivers appointed by the United States courts may be of importance to them, and since the act of congress of 1888, upon their suggestion, we might feel it our duty, under some circumstances, to remit them to the proper court for a direction whether to pay or not. But their situation is for them to determine. There are demands which they might pay with safety, which it would be their duty to pay, and which, upon business principles, it would be to their interest to settle without delay or expense. In such cases they would naturally prefer to raise no question not necessary for their own protection; and we do not see upon what principle the defendant should be allowed to decide for them or to control their action. But, if his right to do so was clear, he has not attempted to exercise it. His rule was taken before the plaintiff had declared. It called for a disclosure of the demand sued on. No judgment could be asked for until this was made. When it was made, its sufficiency was not questioned, but judgment was suffered. Then came the question as to the business relations between the defendant and the garnishees, and their liability to respond to the plaintiff to the extent to which they were indebted to the defendant. Then, and not till then, came the question whether the judgment rendered by the state court would protect them in the payment of the money in their hands, or whether leave should first be obtained from the United States court having control of their accounts. This question could not have been determined on the rule to show cause of action taken by the defendant. The rule was properly discharged when cause of action was shown, and we see no irregularity in the record that requires us to interfere with the action of the court below. The judgment is affirmed.

KINSLOE et al. v. DAVIS (PENNSYLVANIA R. CO., Garnishee. No. 445).

(Supreme Court of Pennsylvania. April 29, 1895.)

GARNISHMENT—PROPERTY SUBJECT.

A relief fund, payable personally to the beneficiary named by an employé belonging to a railroad relief association, upon such employé's death and the execution by the beneficiary of a release of all claim on account of such death, is not subject to garnishment for a debt of the beneficiary.

Appeal from court of common pleas, Philadelphia county.

Action by R. M. Kinsloe & Son against Thomas B. Davis and the Pennsylvania Railroad Company, garnishee. From a judgment for plaintiffs in the attachment execution, the garnishee appeals. Reversed.

Digitized by Google

John Scott, Jr., for appellant. Peter Boyd, for appellees.

WILLIAMS, J. The judgment in this case was entered "on answers" made by the garnishee. The complaint now made is that the answers were misunderstood, or their legal effect mistaken, by the court below. The plaintiff alleged that the railroad company was indebted to Thomas B. Davis, the defendant, and sought to reach the alleged debt by an attachment execution in which the railroad company was made garnishee. Interrogatories were served, and the answers on which the judgment was entered were made in response to them. These answers deny any indebtedness to the defendant and any business transactions with him, but proceed to state that his father was for many years in the employ of the railroad company, and became in March, 1886, a member of the Pennsylvania Railroad Relief Fund. This fund, made up from fees and dues of members and donations made by the railroad company, is administered by the company in accordance with certain fixed rules and regulations. One of these appears to be that the members may name the beneficiary to whom, on his death, the sum named in the certificate shall be paid. Another requires the company to pay only to the person or persons named as beneficiaries, and upon the execution of a release to the company from all claims that might or could be made by such beneficiary for or on account of the death of said member. The answers further set forth that William Davis, the father of the defendant, named his five children as his beneficiaries, so that the defendant would be entitled to receive from the company, upon the execution of the release required, one-fifth of $250, less one-fifth of the funeral expenses; but that, under the "regulations and practice of the said relief department," this sum would be payable to the defendant only, and not to him until the execution and delivery of the release. Such associations, organized for the relief of members in case of injury, and of their families in case of death, are not against public policy (Johnson v. Railroad Co., 163 Pa. St. 127, 29 Atl. 854), and the regulations adopted in order to secure the contemplated relief to the persons entitled to it should be upheld, unless they are contrary to law. The regulations set up in the answers were not contrary to law, and, although no copy of them has been appended, the correctness of the answers in this respect has not been excepted to or denied. Accepting them as true, as the motion for judgment "on answers" does, the question raised is, do these answers show a fund in the hands of the garnishee liable to seizure under the attachment? We think they do not. They show the existence of a fund belonging to the Pennsylvania Railroad Relief Association in the hands of the garnishee. They show that this fund is administered for the relief association by the garnishee, and under the regulations which the relief association has adopted. They show that under these regulations the sum due to a beneficiary is payable only to him or her in person, and upon the execution of a release to the railroad company for all liability growing out of the accident or death by reason of which the money is payable. An attaching creditor is not within the mischief against which the relief association was intended to afford protection. He does not fall within the description of the person or persons entitled to take. He can neither execute nor compel his debtor to execute the release to the railroad company. The answers do not support the judgment, and for this reason it is reversed. The record is remitted and a procedendo awarded.

KINSLOE v. DAVIS (PENNSYLVANIA R. CO., Garnishee. No. 446.)

(Supreme Court of Pennsylvania. April 29, 1895.)

Appeal from court of common pleas, Philadelphia county.

Action by H. C. Kinsloe against William S. Davis and the Pennsylvania Railroad Company, garnishee. From a judgment for plaintiff in the attachment execution, the garnishee appeals. Reversed.

John Scott, Jr., for appellant. Peter Boyd, for appellee.

WILLIAMS, J. This case is disposed of by Kinsloe v. Davis (just decided) 31 Atl. 934. For the reasons given in the opinion filed in that case, the judgment entered "on answers" made by the garnishee in this case is reversed. The record is remitted and a procedendo awarded.

PLATT et al. v. JOHNSON et al.

(Supreme Court of Pennsylvania. May 6, 1895.)

LANDLORD'S LIEN.

Under Act June 16, 1836, § 83, providing that goods on leased premises, taken under execution, and liable to the landlord's distress, shall be liable for rent then due, not to exceed one year's rent, a provision in a lease for 33 months, at a gross rental, payable in monthly installments in advance, that if the lessees were sold out by sheriff's sale the rent for balance of term should at once become due, and primarily payable out of the proceeds of the sale, entitles the landlord, upon the happening of that event, to the payment out of such proceeds of rent for balance of term, not to exceed one year's rent.

Appeal from court of common pleas, Clearfield county; Cyrus Gordon, Judge.

Judgment for Platt, Barber & Co. against J. C. Johnson and others, by confession, upon promissory notes. From a decree distributing the proceeds of a sheriff's sale, the judgment creditors appeal. Affirmed.

Following is the opinion of the lower court, viz.:

"The auditor in this case was appointed to make distribution of money in the hands of the sheriff arising from the sale of the per-

Digitized by Google

sonal property—principally store goods—of Johnson & Petersen, by virtue of certain writs of fieri facias in his hands against them. The claimants of the fund were: First. John A. Petersen, on labor claim, which was disallowed by the auditor because of insufficiency of notice to the sheriff. Second. Harrisburg Boot & Shoe Company, an attachment, which was disallowed because attachment was subsequently dissolved by the court. Third. Seyler Bros., on claim of $1,937.50 for rent alleged to be due and owing them on the premises in which said goods were, under an agreement of lease with said Johnson & Petersen dated 31st May, 1893, for the term of thirty-three months from 1st July, 1893, at the sum of two thousand sixty-two dollars and fifty cents, payable in monthly payments of sixty-two dollars and fifty cents each, in advance. Said lease was in writing, and among other stipulations therein were the following, to wit: One reading: 'And the said party of the second part further covenants and agrees that if they shall at any time during the continuance of this lease attempt to remove, or manifest an intention to remove, their goods and effects out of or off from said premises, without having paid and satisfied the party of the first part in full for all rent which shall become due during the term of this lease, that then, in such case, such removal or attempt to remove shall be considered fraudulent, and the whole rent for the whole term of this lease shall be taken to be due and payable; and the said party of the first part may proceed, by landlord's warrant or other process, to distrain and collect the whole in the same manner as if, by the conditions of this lease, the whole rent were payable in advance.' And the other: 'It is agreed and understood that if second parties [J. & P.] become embarrassed, or make an assignment for benefit of creditors, or are sold out by sheriff's sale, that then the rent for balance of term shall at once become due and payable as if, by the terms of this lease, it were all payable in advance, and shall be first paid out of proceeds of such assignment or sale, any law, usage, or custom to the contrary notwithstanding.' Under this latter clause, claim was made for the rent for the entire term, less the sum of $125 paid, leaving the balance, $1,937.50. Of this claim the auditor allowed the sum of $250, being for the rent for four months remaining unpaid at the time of the sheriff's sale, and disallowed the balance on the ground that the clause in the lease under which it was claimed was void, as against public policy. Sustaining this position, he says: 'The claim for rent under the clause in the contract between Seyler Bros. and Petersen & Johnson is not allowed, save for the four months mentioned. The claim for the residue of rent under the clause quoted is rejected for the reason that the auditor believes that so much of the contract as relates to this contention is void as against public policy; that, if such provision in a contract of renting could be once maintained, it would and could be made the means of perpetrating fraud, and the recognition of such stipulations would throw the door open wide for the covering up of property from the reach of creditors. Many other reasons might be given why such unlimited contracts ought not receive recognition. We do not say that a reasonable provision for protecting the landlord against loss by reason of his property remaining unoccupied may not be provided for by contract, but we do say that the provision in this contract is too sweeping in its character, and ought not to be sustained.' Fourth. The other claimants were the execution creditors, and the balance of the fund left, after deducting costs, auditor's fee, and the $250 aforesaid, to Seyler Bros., was distributed to Platt, Barber & Co., upon their execution, which was the first writ in hands of the sheriff. Exceptions were filed to the auditor's report by Seyler Bros. because the auditor did not allow their rent claim for at least one year, instead of four months, which exceptions were overruled by the auditor. The report was confirmed nisi 21st May, 1894, and on 22d May, 1894, said exceptions were renewed. The only claimants now contesting for the fund are Platt, Barber & Co. and Seyler Bros., and the question raised by the exceptions involves the proper construction to be placed upon the clauses quoted from the lease. We are of opinion that the construction placed thereon by the learned auditor is wrong, and that the exceptions should be sustained, and the distribution account restated so as to appropriate to the claim of Seyler Bros. one year's rent, less, however, the amount which the testimony shows Johnson & Patersen were required to pay per month for stable, which Seyler Bros. agreed, but failed, to furnish, to wit, the sum of three dollars per month, or thirty-six dollars for the year appropriated to. We arrived at the conclusion to thus construe this lease reluctantly, for the reasons that it seemed to be a one-sided contract, and a hard one for the tenants and their creditors, and because of the experience and legal ability of the learned auditor who passed upon the questions, and the weight to which his views are entitled. We have, however, given the questions involved careful consideration, and cannot view the case in any other light. We are led to this conclusion by finding the facts and law pertaining to the questions at issue to be as follows, viz.:

"First. It is apparent from the stipulations of the lease that it was the intention of the parties that the landlord should hold the goods of the tenant upon the premises as security for the payment of rent for the entire term, even in advance of maturity, and that the landlord had no other security therefor. And to that end the contract prohibited the

Digitized by Google

removal of the goods, either by the tenant, or by his creditors, through legal process.

"Second. That, while the rental was payable in monthly installments in advance, the parties agreed, as clearly as the English language enabled them to do, that if any effort was made or intention manifested, regardless of its purpose, to remove the goods from the demised premises, or if the ability of the tenant to pay the rent should become impaired by reason of financial embarrassment, assignment, or sheriff's sale, the rent for the entire term should become due and payable at once, and that it should be first paid out of the proceeds of any assignment or sale of the goods of the tenant, with same effect as if the lease had expressly provided it should be payable in advance, and there is no evidence in the cause indicating that any fraud was resorted to or intended by the parties in the making of this lease.

"Third. When persons enter into a contract with stipulations providing for the regulation and conduct of certain business between them, such contract becomes the law between them; and when not tainted with fraud, or void as against public policy, or in conflict with the laws of the land, it will be legal and binding upon all persons.

"Fourth. The provisions of the lease in question are not against public policy, or contrary to law. What principles of law are contravened by it? How does it furnish the means of perpetrating fraud, or throw open the door for covering up of property? These allegations could as well be made of a lease which provided expressly that the rent for the entire term should be payable in advance. Contracting parties can as legally provide that rent shall become payable in advance upon the happening of a certain contingency, hazarding its collection, as to provide at the outset, and absolutely, that it shall be payable in advance. It is no more against public policy to allow a preference to a landlord on distribution, under the act of assembly, for one year's rent thus becoming due in advance, than it would be if expressly made payable in advance, or was past due. The creditor may be in ignorance as to the status of the tenant in the matter of payment of rent, no matter whether already due, or possible thus to become due, and can as well inform himself in the one case as the other, and may not be able to do so in either. It is undoubtedly true that surprises and hardships often result from such stipulations in leases, where credit is extended in ignorance of them, but it does not follow that they are on that account illegal or void. Such misfortunes result rather from the failure of the creditor to inform himself as to the facts, in order to judge of the tenant's financial responsibility. A merchant, in selling goods to a tenant, is presumed to know the law, and that it gives a preference against executions, to the landlord, for one year's rent due and owing; and prudence would seem to dictate that he should inquire as to the facts before parting with his property. If he sought information of the landlord, he would have the right to rely upon it; and if the landlord should mislead him he would be estopped from taking advantage of it, and if he refuse to give him the desired information he could protect himself by withholding the credit.

"Fifth. The evidence shows that the rent for the entire term became due and payable according to both clauses of the case quoted, —under one, because the tenants became financially embarrassed; and under the other, because through their acts in becoming embarrassed, and confessing judgments to creditors on which the sheriff's sale was made, they intended that the goods should be removed from the demised premises, and they were so removed after the sale, and thereby all means of the landlord to collect his rent taken away. The very contingencies which the two clauses of the lease provided should cause the rent for the entire term to become due, happened.

"Sixth. As sustaining our conclusions, we cite the following authorities viz.: The act of June 16, 1836, § 83, under which the claim for rent is made, provides 'that goods and chattels being in or upon any messuage, lands or tenements, which are or shall be demised for life or years, or otherwise, taken by virtue of an execution, and liable to the distress of the landlord, shall be liable to the payment of any sums of money due for rent at the time of taking such goods in execution. Provided, that such rent shall not exceed one year's rent.' 'A landlord is entitled to claim rent payable in advance out of the proceeds of a sheriff's sale of the tenant's goods upon the demised premises.' Collins' Appeal, 35 Pa. St. 83; Beyer v. Fenstermacher, 2 Whart. 95; Purdy's Appeal, 23 Pa. St. 97. The landlord is not confined, in his claim for rent, to the current year, so that no more than one year's rent be received; and the criterion is, not so much that the rent is due, and the goods liable to distress, but that they are liable for the payment of the rent. Wickey v. Eyster, 58 Pa. St. 501; Ege v. Ege, 5 Watts, 140; Richie v. McCauley, 4 Pa. St. 471; Weltner's Appeal, 63 Pa. St. 302. In the case of Goodwin v. Sharkey, 80 Pa. St. 140, the clause in the lease was almost a literal duplicate or copy of the first clause quoted of the lease in this case. The supreme court, by a per curiam opinion, say: 'Upon the plaintiff's own evidence in the trial in the court below, the defendants had a right to distrain. The whole rent for the term might have been made payable in advance, and there exists no reason why it might not be made payable at any time during the running of the lease, upon the happening of any contingency. The right of distress would immediately arise. By the terms of the

Digitized by Google

lease, the whole rent became due whenever the lessee should attempt to remove, or manifest an intention to remove, his goods and effects out of or off from the demised premises without having paid and satisfied the lessors in full for all rent which should become payable during the term. There is nothing here requiring the intention or attempt to be fraudulent.'

"Therefore, now, 20th October, 1894, in accordance with these views, the exceptions to the auditor's report are sustained, and the distribution account therein restated as follows, viz.:

Balance of fund for distribution to creditors.....		$850 74
Distributed.		
To Seyler Bros., one year's claim for rent.....	$750 00	
Less tenants' claim, acct. of stable	36 00	
	$714 00	
To Platt, Barber & Co. judgment (No. 574, Dec. T., 1893)	136 74	
		$850 74

"And exceptions noted for Platt, Barber & Co."

Appellant's assignments of error are as follows, to wit:

"(1) The court erred in its restatement of the account and order of distribution, which is as follows:

Balance of fund for distribution to creditors.....		$850 74
To Seyler Bros., one year's claim for rent.....	$750 00	
Less tenants' claim, acct. stable	34 00	
		$714 00
Platt, Barber & Co. judgment (No. 574, Dec. T., 1893)		136 00
		$850 74

"(2) The court erred in the conclusion of law as follows: Fifth. 'The evidence shows that the rent for the entire term became due and payable according to both clauses of the lease quoted,—under one, because the tenants became financially embarrassed; and under the other, because, through their acts in becoming embarrassed, and confessing judgments to creditors, on which the sheriff's sale was made, they intended that the goods should be removed from the demised premises, and they were so removed after the sale, and thereby all means of the landlord to collect his rent taken away. The very contingencies which the two clauses of the lease provided should cause the rent for the entire term to become due, happened.'

"(3) The court erred in not distributing the proceeds of the sheriff sale to the judgment and execution of Platt, Barber & Co. (No. 574, Dec. T., 1893), less the rent due and earned, amounting to the sum of $250."

Howard B. Hartswick and David L. Krebs, for appellants. W. C. Pentz, for appellees.

STERRETT, C. J. The fund for distribution in this case was the net proceeds of Johnson & Petersen's personal property—principally store goods—seized on the premises leased by them from J. S. Seyler & Bro., appellees, and sold on executions in favor of Platt, Barber & Co., the appellants. The only complaint is as to the $714, awarded to said lessors as balance of one year's rent due them by their lessees, the defendants in the executions. It is contended by appellants that the extent of the landlord's claim on the fund was $250. This sum was awarded to them by the learned auditor, but on exception thereto the learned judge was of opinion that, upon a proper construction of provisions in the lease making the entire rent due and payable in advance, they were entitled to one year's rent, less tenants' claim of $36 on account of stable, etc., and he accordingly awarded them the said sum of $714. The lease of the storeroom, etc., occupied by Johnson & Petersen is for the term of 33 months from July 1, 1893, at the monthly rental of $62.50, payable in advance; but it contains the following clauses, by which, in certain contingencies, the rent for the entire term would become due and payable: (1) The lessees agree "that if they shall, at any time during the continuance of this lease, attempt to remove, or manifest an intention to remove, their goods and effects out of or off from the said premises, without having paid and satisfied the party of the first part in full for all rent which shall become due during the term of this lease, then and in such case such removal or attempt to remove shall be considered fraudulent, and the whole rent of this lease shall be taken to be due and payable; and the said party of the first part shall proceed, by landlord's warrant or other process, to distrain and collect the whole in the same manner as if, by the conditions of this lease, the whole rent were due and payable in advance." (2) "It is agreed and understood that if second parties become embarrassed, or make an assignment for the benefit of creditors, or are sold out by sheriff's sale, then the rent for balance of term shall at once become due and payable, as if by the terms of the lease it were all payable in advance, and shall be first paid out of proceeds of such assignment or sale, any law, usage, or custom to the contrary notwithstanding." It was claimed by the lessors that upon the happening of the lessees' embarrassment, and seizure and sale of their personal property,—contingencies specified in the last-quoted clause,—the entire rent became due and payable out of the proceeds of the sale, so far as the fund would reach. There is nothing illegal, or contrary to public policy,

Digitized by Google

in either of the above-quoted provisions. As was said in Goodwin v. Sharkey, 80 Pa. St. 149, 153: "The whole rent for the term might have been made payable in advance, and there exists no reason why it might not be made payable at any time during the running of the lease, upon the happening of any contingency. The right of distress would immediately arise" upon the happening of the specified contingency, and that right might be exercised by the lessor, to the extent of collecting more than one year's past due rent, provided the rights of execution creditors have not previously attached. If they have, the act of June 16, 1836, limiting the lessor's right to payment out of such fund to an amount not exceeding one year's rent, becomes operative in favor of the execution creditors. That a landlord is entitled to claim rent payable in advance out of the proceeds of a sheriff's sale of the tenant's goods upon the demised premises, provided his claim does not exceed one years's rent, is well settled. Beyer v. Fenstermacher, 2 Whart. 95; Purdy's Appeal, 23 Pa. St. 97; Collins' Appeal, 35 Pa. St. 83. And in his claim he is not restricted to the current month or year. Richie v. McCauley, 4 Pa. St. 471; Wickey v. Eyster, 58 Pa. St. 501; Weltner's Appeal, 63 Pa. St. 302. Nor does it make any difference that, as in this case, no more than a month's rent was originally made payable in advance, if, by force of express covenants in the lease, the whole rent becomes due and payable in advance upon the happening of certain contingencies, one or more of which have actually occurred before the rights of execution creditors attached. Goodwin v. Sharkey, supra; Owens v. Shovlin, 116 Pa. St. 371, 9 Atl. 484. In this case the lessees undoubtedly became financially embarrassed before the lien of plaintiffs' executions attached, and thus at least one of the contingencies on which the entire rent became due and payable in advance actually happened. Without pursuing the subject further, we are clearly of opinion that there was no error in awarding to the landlords one year's rent, less the $36 set off, etc. There is nothing else in the case that requires further comment. The action of the court below is amply vindicated in the opinion sent up with the record. Decree affirmed and appeal dismissed, with costs to be paid by appellants.

McNEILE v. CRIDLAND et al.

(Supreme Court of Pennsylvania. May 6, 1895.)

DIRECTING VERDICT—FRAUD OF AGENT — LIABILITY OF PRINCIPAL.

1. In an action on a purchase-money mortgage, where there was evidence that plaintiff's agent, who negotiated the sale, represented to defendants, with intent to deceive, that the house was well built on solid ground, on which representations defendants relied in purchasing, whereas the house was erected on filled ground, which settled, and caused the house to crack, though in making the representations the agent acted contrary to instructions, it was error to direct a verdict for plaintiff.

2. A principal is bound by the fraudulent representations of his agent, within the scope of the authority that he is held out to possess.

Appeal from court of common pleas, Philadelphia county.

Scire facias by Hugh McNeile against Martha H. Cridland and another upon a mortgage. From a judgment for plaintiff, defendants appeal. Reversed.

Joseph W. Shannon, for appellants. H. Gordon McCouch, for appellee.

STERRETT, C. J. In directing a verdict in favor of plaintiff for balance due on the purchase-money mortgage in suit, the learned trial judge evidently proceeded on the assumption that the testimony introduced by defendants was wholly insufficient to sustain any defense whatever to plaintiff's claim or any part thereof. This assumption we think was unwarranted. The testimony referred to presents questions of fact which should have been submitted to the jury. It tends to prove, among other things, that in purchasing the mortgaged premises the defendants relied on representations made by plaintiff's agent, Locker, through whom the sale was negotiated, to the effect that the house was built on solid, and not on made, ground, a well-built house, etc.; that, instead of being well built and on solid ground, it soon became apparent that the house was erected on filled in or made ground, which gradually settled to such an extent as to cause the sinking, cracking, and bulging out of the front wall, and other resultant damages described by defendants' witnesses, and that an expenditure of seven or eight hundred dollars would be required to repair the damages thus occasioned, and put the building in proper condition. It is unnecessary to refer in detail to the testimony tending to prove the allegations of fact relied on by defendants. It is sufficient to say that, if believed by the jury, they would have been warranted in finding that the alleged misrepresentations were in fact made by plaintiff's agent, Locker; that they were not only untrue, but, in the circumstances, they were calculated to deceive, and did deceive, the defendants to their injury. This being so, the case should have been submitted to the jury, with proper instructions as to the law applicable to such a state of facts as defendants' testimony tended to prove. It was the exclusive province of the jury to consider and pass upon the testimony, and, if they found defendants' allegations were substantially true, then to ascertain the damages sustained by them, and, if they were less than plaintiff's claim, to deduct the same therefrom, etc. It is well settled that the principal is bound by the acts of his agent, within the scope of the authority that he is held out to the world to possess, even notwithstanding the latter acted contrary to instructions. One who authorizes

Digitized by Google

another to act for him, in a certain class of contracts, undertakes for the absence of fraud in the agent acting within the scope of his authority. Among other cases, recognizing this and kindred principles, are the following: Brook v. Railroad Co., 108 Pa. St. 529, 1 Atl. 206; Smalley v. Morris, 157 Pa. St. 349, 27 Atl. 734; Keough v. Leslie, 92 Pa. St. 424; Caley v. Railroad Co., 80 Pa. St. 363; Hessner v. Helm, 8 Serg. & R. 178; Stubbs v. King, 14 Serg. & R. 206; Gas Co. v. Cook, 123 Pa. St. 170, 16 Atl. 762. In the latter it was said: "There is a long series of cases, some of them very recent, * * * that, when an agent exceeds his authority, his principal cannot avail himself of the benefit of his act, and at the same time repudiate his authority. This principle rests upon the solid foundation of natural justice and common honesty." It follows from what has been said that the learned trial judge erred in directing a verdict for the plaintiff. Judgment reversed, and a venire facias de novo awarded.

HALL v. CLEARFIELD & M. RY. CO. et al.

(Supreme Court of Pennsylvania. May 6, 1895.)

VENDOR AND PURCHASER — SUFFICIENCY OF DEED TENDERED — EQUITABLE EJECTMENT.

1. An agreement for the purchase of a right of way provided that upon payment of the price the owner should give a deed to the railroad company, and also that the company should construct and maintain a crossing over the right of way. *Held*, that the owner had a right to incorporate into his deed to the company a covenant that the grantee should maintain a crossing for the grantor, his heirs and assigns.

2. Where the company entered under said agreement, and maintained the crossing to the owner's satisfaction, but refused to accept a deed containing the covenant as to the crossing, the owner could bring equitable ejectment for the land, though the company tendered the balance of price, and a formally executed stipulation that the agreement as to the crossing should not be abridged, or merged in the deed, because not mentioned therein.

Apreal from court of common pleas, Clearfield county.

Equitable ejectment by George H. Hall against the Clearfield & Mahoning Railway Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

The defendant named above, by a written agreement dated June 18, 1892, purchased a right of way through plaintiff's property for $500; $1 being paid down, and the remainder being payable upon the execution and delivery of a deed of conveyance, "whenever requested, in fee simple, clear of all incumbrances." The agreement contained a provision that the "railroad company shall construct and maintain a good and sufficient crossing over the right of way on said premises." The defendant company constructed its road, and tendered a deed to plaintiff, to be executed in the usual form. No reference was made in it to the crossing. Plaintiff refused to execute the deed unless it contained a covenant that the railroad company was to maintain a crossing for plaintiff, his heirs and assigns. The company refused to make such covenant, claiming that it was not bound to do so by the terms of the contract of purchase, but constructed a crossing, and maintained it, to the entire satisfaction of plaintiff. The plaintiff brought this action of ejectment on the 23d of January, 1894. On the 27th of January, 1894, the defendant company caused the agreement of purchase to be recorded, and on the 28th of July, 1894, made a legal tender to plaintiff of the purchase money, with interest and the costs of this suit then accrued, and at the same time tendered to plaintiff their acknowledgment, in writing, duly executed, stipulating that the fact that the provision about the crossing not being mentioned in the deed "shall not abridge nor abrogate the covenant as to the crossing contained in the agreement between the said Hall and said company, dated June 18, 1892, recorded in Clearfield county in Deed Book M, page 333." Plaintiff refused to accept this.

Defendants' assignments of error are follows:

"(1) The court erred in refusing to affirm defendant's first point. The point and answer thereto are as follows: 'It appearing from the facts admitted in this case that the defendant company, prior to the bringing of this suit, did construct a crossing for the use of the plaintiff over its tracks and right of way purchased from the plaintiff, and has maintained the same to the satisfaction of the plaintiff and on the 28th of July, 1894, did make a legal tender to the plaintiff of five hundred seventy-one and 50-100 dollars ($571.50), purchase money, with interest and costs of suit accrued at that date, and has kept up said tender, the money being considered in court, the defendant has complied with the agreement made with the plaintiff, and dated the 18th of June, 1892, which is recorded in the office of the recorder of deeds for Clearfield county, in Miscellaneous Book M, p. 333, the plaintiff is not entitled to recover in this action, and your verdict must be in favor of the defendant.' Answer: 'This point is denied.'

"(2) The court erred in refusing to affirm defendant's second point. The point and answer thereto are as follows: 'It appearing from the undisputed evidence in the cause that the Clearfield & Mahoning Railway Company, defendant, went into possession of the premises described in the writ in pursuance of the contract dated June 18, 1892, and began the construction of its road within the time specified therein, and that it has complied with the said contract according to the terms and tenor thereof, and on the 28th of July, 1894, did make a legal tender of the purchase money, with interest due on that date, and with costs of suit then accrued, and did at that time, by writing duly executed by the said Clearfield & Mahoning Railway Company, and then offered to the plaintiff, admit that the provision in said agreement, which was then recorded, relating to the crossing, should not be abridged

Digitized by Google

or abrogated because the provision as to the crossing was not mentioned in the deed from plaintiff to defendant, the plaintiff cannot, by means of this action of ejectment, require or compel the said Clearfield & Mahoning Railway Company to accept a deed with another covenant relating to the construction and maintenance of said crossing, and that before any breach of the said contract, dated June 18, 1892, on the part of the Clearfield & Mahoning Railway Company has been committed, and your verdict must be in favor of the defendant.' Answer: 'This point is denied.'

"(3) The court erred in refusing to affirm defendant's third point. The point and answer thereto are as follows: 'The provision of the contract dated June 18, 1892, relating to the crossing, being in these words: "It is further agreed that the said railroad company shall construct and maintain a good and sufficient crossing over the right of way on said premises,"—created a mere personal right in the plaintiff to use said crossing. The same is a right of way, in gross, across defendant's right of way and tracks for the use of the plaintiff, and it cannot be by the plaintiff assigned to another, or transmitted by descent; and the plaintiff cannot, by means of an action of ejectment, compel and require the defendant company to insert a provision in the deed for the land sold to the defendant company, which would run with the land and become appurtenant to it, and your verdict must be for the defendant.' Answer: 'This point is denied.'

"(4) The court erred in refusing to affirm defendant's fourth point. The point and answer thereto are as follows: 'The Clearfield & Mahoning Railway Company, defendant, having, by writing duly executed, acknowledged that the provision relating to the crossing in the contract already recorded should not be merged or abrogated by reason of the same not being mentioned in the deed of conveyance for said land purchased from the plaintiff as aforesaid, and the said defendant having fully complied with all its undertakings and stipulations by it to be done, kept, and performed in said agreement, the plaintiff cannot, by means of this action of ejectment, compel the defendant company to accept a deed with another covenant relating to said crossing, and your verdict must be for the defendant.' Answer: 'This point is denied. As we have instructed you in our general charge, we do not think that the defendant the railroad company complied with the article of agreement, and were carrying out the article of agreement, which referred to the construction and maintenance of this crossing, by simply giving to Mr. Hall a paper stating that the agreement in this respect should not be merged in the deed, because, as we view the matter, if the defendant company in the future should sell their rights to some other railroad company, the railroad company buying the rights of the present defendant could go to the record, and, not seeing any reference in this deed from Mr. Hall to the defendant railroad company in regard to the keeping and maintaining of this crossing, they would be, or might be, absolved from the duty of maintaining this crossing. Therefore, as we have said in our general charge, we think there should be some reference to the duty of the railroad company to construct and maintain this crossing in the deed itself.'

"(5) The court erred in refusing to affirm defendant's fifth point. The point and answer thereto are as follows: 'That there is no covenant in the agreement between the plaintiff and the Clearfield & Mahoning Railway Company, dated June 18, 1892, requiring the defendant to accept a deed containing any provision relating to the construction or operation of any crossing; and, there being no evidence that the defendant ever agreed to accept a deed containing such provision, the verdict must be for the defendant.' Answer: 'This point is denied.'

"(6) The court erred in refusing to affirm the defendant's sixth point. The point and answer thereto are as follows: 'That under the provisions of said contract dated June 18, 1892, the plaintiff cannot compel or require the C. & M. Ry. Co., by means of an action of ejectment, to accept a deed with a covenant requiring the defendant to maintain a crossing for the heirs and assigns of the plaintiff, such as is contained in plaintiff's deed, tendered and offered in evidence." Answer: 'This point is likewise denied.'

"(7) The court erred in the following portion of the general charge to the jury: 'The deed which the railroad company asked Mr. Hall to have executed contained no reference to this constructing and maintaining of a good and sufficient crossing over the right of way on said premises; but the railroad company, in order to satisfy Mr. Hall on this point, at the same time agreed to give to him a memorandum or receipt which would show hereafter that this provision about the construction and maintenance of the road in the agreement had not merged in the deed, or lapsed. The paper which they proposed to give him to show that the agreement about the road had not lapsed was this: "Received of George H. Hall deed from himself and wife to the Clearfield & Mahoning Railway Company, dated ——, for land in Lawrence township, Clearfield county, Pennsylvania. The delivery and acceptance of this deed shall not abridge nor abrogate the covenant as to the crossing contained in the agreement between the said Hall and said company, dated June 18th, 1892, recorded in Clearfield county in Deed Book M, page 333." Now, the railroad company claimed that that was all they were obliged to give Mr. Hall, to show that there was any agreement about the construction and maintenance of this road or crossing; but we instruct you, as a matter of law, that they were obliged to do more than that. They were obliged to make a proper reference in the deed which they prepared for

Digitized by Google

execution by Mr. Hall. They were obliged, in such deed, to make a proper reference to the construction and maintenance of said crossing. And we instruct you, as a matter of law, that they did not fulfill their duty on this point when they simply contented themselves with giving Mr. Hall this receipt, or offering to give him this receipt.'

"(8) The court erred in the following portion of the general charge: 'If this paper (the agreement) had been what is known as a legal conveyance, the words "heirs and assigns" should have been inserted, but being an executory paper,—not a conveyance, but only an agreement to convey,—we do not think the words "heirs and assigns" were necessary; and we instruct you, as a matter of law, that the railroad company should have accepted the deed which we have referred to, prepared by Mr. Hall, and offered this day in evidence, and which is marked "Plaintiff's Exhibit B, H, B, G, 2-25-95." '

"(9) The court erred in the following portion of the general charge: 'We instruct you further that the plaintiff has a right to have this question raised and determined in the present equitable ejectment. Here was a dispute between these two parties as to what kind of conveyance should be executed by Mr. Hall. How could such a dispute be settled? In England it would have been settled by bill in equity, but, prior to recent years, in Pennsylvania we had no court of equity, and therefore we were obliged to work out these equitable questions by verdicts of juries in ejectments, and hence arose in Pennsylvania the custom of equitable ejectments. As we view the matter, the plaintiff had a right to have this matter decided in this equitable ejectment, and, as we view the matter, the plaintiff also had a right to execute the deed in the form in which he tendered it to the defendant; and, as we view the matter, the defendant was wrong in insisting upon the plaintiff's executing a deed which had no reference to the obligation on the part of the defendant to construct and maintain this crossing; and, as the defendant was wrong in this matter, it results that the verdict should be against the defendant.'

"(10) The court erred in giving binding instructions to the jury to find for the plaintiff in the form of verdict directed by the court."

C. H. McCauley and Frank Fielding, for appellants. Oscar Mitchell, for appellee.

PER CURIAM. The subjects of complaint in the first six specifications are the learned court's answers to the defendant's points for charge recited therein, respectively. We are satisfied from an examination of the record that there is no substantial error in any of said answers. Neither of said points, as presented, could have been affirmed, and hence they were rightly refused. Nor do we think there is any error in either of the excerpts from the learned judge's charge recited in the seventh to the ninth specifications, inclusive, or in directing a verdict for plaintiff, as complained of in the tenth specification. There is nothing in either of the assignments of error that requires special notice. The learned judge is substantially correct in his construction of the agreement of June 18, 1892, on which this action is founded, and also in regard to the kind of conveyance therein provided for. The agreement is executory, and evidently contemplates the execution and delivery of a deed, in due form, expressed in such apt words as will secure to each party, respectively, the rights and privileges mentioned in the agreement, or intended to be granted or reserved. The construction contended for by the defendants is unreasonable, and wholly untenable. Their covenant to "construct and maintain a good and sufficient crossing over the right of way on said premises" is not independent of and unconnected with the right of way acquired by the defendant, but a covenant running therewith, and thus securing to plaintiff the "good and sufficient crossing" intended to be appurtenant to his land on either side of said right of way. Inasmuch as the time fixed in the verdict and judgment of the court within which the $499 consideration money should be paid has expired, the same is hereby extended for 60 days from the date of filing this opinion. With this single modification, we think the judgment on the conditional verdict should be affirmed. The judgment, as above modified, is accordingly affirmed.

McKNIGHT v. BELL.

(Supreme Court of Pennsylvania. May 6, 1895.)

TRIAL—DIRECTING VERDICT.

Where the controlling question is the truth or falsity of an allegation upon which there is a conflict of testimony, it is proper to submit the question to the jury.

Appeal from court of common pleas, Blair county.

Action of ejectment by Robert McKnight against Edward Bell. Judgment for defendant. Plaintiff appeals. Affirmed.

J. D. Blair and Daniel J. Neff, for appellant. A. A. Stevens, for appellee.

PER CURIAM. This action of ejectment was brought to recover possession of the undivided half of the northerly half of 80 acres of land, part of a larger tract, of which, inter alia, the plaintiff's father, Robert McKnight, Sr., died seised in 1860. A prima facie case for plaintiff was made out by showing that in 1875, in the division of his father's lands, the 80-acre tract was allotted and conveyed, by the other heirs, to himself and his brother, William McKnight. In substance, defendant's contention was that, at or about the time of said division, the plaintiff, Robert McKnight, and his brother William, made a parol partition, between themselves, of said 80 acres, adopting as their

Digitized by Google

division line a lane which, crossing the tract about midway, divided the same into two very nearly equal parts, of about 40 acres each; that, in pursuance of said partition, and possession taken and held thereunder, plaintiff became sole owner of the southerly part of said tract, and his brother William sole owner of the northerly part,—the land now in controversy; that the last-mentioned piece, thus acquired in severalty by William McKnight, was afterwards sold by the sheriff, as his property, and conveyed to A. L. McCartney, under whom defendant claims. In support of this contention, considerable testimony, direct as well as circumstantial, was introduced by the defendant; and, on the other hand, the plaintiff introduced rebutting evidence, tending to show that no parol partition of the 80-acre lot had ever been made between him and his brother William. The alleged parol partition, on which defendant relied, thus became the controlling question of fact in the case. It is not our purpose to either review or summarize the testimony bearing on the subject, but an examination of the record has satisfied us that the cause could not have been withdrawn from the jury. The question was fairly submitted to them by the learned trial judge in a clear and able charge, which, considered as a whole, is free from any substantial error. We find nothing in the record that would justify us in reversing the judgment. Judgment affirmed.

SHELLENBERGER et al. v. PATTERSON et al.

(Supreme Court of Pennsylvania. May 6, 1895.)

CORPORATIONS — SUBSCRIPTION TO STOCK — ALLOTMENT BY DIRECTORS.

1. The president of a corporation directed a subscription to certain untaken capital stock to be noted for him, in order to procure a loan which, without that subscription, exceeded the amount of stock subscribed. At the time of the stockholders' meeting to vote on the proposed loan, and the directors' meeting to authorize an issue of bonds for the same, both stockholders and directors knew of the president's further subscription, but no request for any of the shares taken by him was made by any stockholder, and the loan was accepted by the company. *Held* that, though the subscription was made without the prescribed formalities, and nothing was paid thereon, the stockholders and directors cannot deny its validity.

2. The action of a de facto board of directors in allotting stock to themselves to the prejudice of other stockholders is void, though they paid for the stock so taken.

3. Plaintiffs prayed only that defendants be restrained from disposing of certain corporate stock, but it appeared from the order appointing the referee to hear the matter, and from the manner in which the case was presented, that it was the intention of all parties to determine the title of one of the defendants to said stock. *Held* that, though no cross bill was filed praying therefor, the court properly adjudicated the question of title in accordance with the facts found.

Appeal from court of common pleas, Blair county.

Bill by W. L. Shellenberger and others against F. G. Patterson and others and the Altoona, Clearfield & Northern Railroad Company to restrain the leasing of said railroad. From a decree for defendants, plaintiffs appeal. Affirmed.

The opinion of the lower court is as follows, to wit:

"After carefully considering the evidence in this case, we are unable to discover any substantial error in the master's finding of the material facts. In this, as in all other cases where the master was also the examiner before whom the testimony was taken, we feel that he is better qualified to judge of the credibility of the witnesses than the court, who has had no opportunity of hearing them deliver their testimony, or of observing their manner on the witness stand. We are, however, satisfied, from an examination of the testimony filed, that there was sufficient evidence to warrant the conclusion to which the master came.

"The principal question involved is the validity of F. G. Patterson's claim to the ownership of six hundred shares of the capital stock of the Altoona, Clearfield & Northern Railroad Company. It appears that in the month of September, 1891, F. G. Patterson, who was then the president of the company, directed S. J. Westley, the treasurer, to note his subscription for six hundred shares of the capital stock of said company. Mr. Patterson was then acting as the agent of the company to secure a loan for it of sixty thousand dollars. This loan could not be secured without this subscription, as otherwise the indebtedness of the company would have been in excess of the amount of stock subscribed, which would have been in violation of the act of assembly of May 8, 1876. By making this subscription the loan was obtained, and the mortgage of the company to secure it given to the Pennsylvania Trust Company, of Reading, Pa., dated October 1, 1891, which recited a resolution of the company passed September 22, 1891, authorizing the increase of the indebtedness in said sum, and the borrowing of an amount not to exceed the amount of the capital stock subscribed. The master finds as a fact that at the time of the special meeting of the stockholders at which it was voted to increase the indebtedness of the company, and at or before the meeting of the board of directors held October 1, 1891, at which authority was given the president and secretary of the company to execute and deliver a series of bonds, and execute the mortgage for sixty thousand dollars, both the stockholders and directors had knowledge of said subscription of F. G. Patterson. It is true, nothing was at this time paid on his subscription, but subsequently, on the 6th day of January, 1893, he tendered the treasurer ten per cent. thereof, which was refused by the treasurer, who alleged that the subscription was illegal. Subsequently, in February, 1893, Mr. Patterson tendered the entire amount of the

Digitized by Google

subscription to the treasurer, which was also refused. This stock was part of the untaken authorized capital stock of the company, and not an increase of said stock. The entire authorized capital stock was fifteen hundred shares, and less than nine hundred shares had at this time been issued. The complainants contend that this subscription is void because not in writing and not made in the manner prescribed by law. It may be conceded, as a general rule, that a subscription for stock must, in order to bind the parties, be made in the prescribed form, and must be in writing. It does not follow, however, that an oral subscription may not, under certain circumstances, be binding. Where, as in the case at hand, a subscription was made by an agent of the company for the purpose of obtaining from a third party a loan, and such subscription was recognized by the stockholders and directors of the company, who accepted the loan with a knowledge of such subscription, and presumably with a knowledge that without such subscription the loan would have been invalid, and contrary to law, can it be said that either party under such circumstances would be permitted to deny the validity of such subscription, notwithstanding all the requisites prescribed had not been complied with? Having received the benefit of this subscription, and taken advantage of it, the stockholders and directors of the company are estopped from denying or questioning it. Their acts, if not such as to be an express ratification of the subscription, are at least such as to have that effect, and prevent them from now questioning its validity in this or any other proceeding. But it would seem that this subscription was as regular as some other subscriptions for stock of this company. There was not at that time any regular subscription book kept in the office of the company or elsewhere. Persons were solicited to subscribe by stockholders, and sometimes upon agreeing verbally to take a certain number of shares the same were issued. Some of the stockholders had books in which to note subscriptions, but they were in no sense such subscription books as would be required to comply with all legal formalities. We do not think it is necessary, in order to sustain the validity of Mr. Patterson's claim, to rely on the fact that a lawfully constituted board of directors, by resolution of November 17, 1893, expressly ratified the subscription, for we have a sufficient ratification of it by the company without this. This resolution, however, shows that a legally constituted board of directors of the company recognized the claim of Mr. Patterson, and that there is no disposition on the part of either Mr. Patterson or the company to avoid it.

"What standing in this case, then, have the complainants, who are seeking to nullify it? They, in common with the other stockholders, received the benefit and advantage of this subscription. At the time it was made and in effect ratified by the corporation and its stockholders, none of the complainants are shown to have offered or been willing to subscribe for this stock. No request was made by them for an allotment of it among the stockholders, and it appears it had been acquiesced in by them from October, 1891, until the 19th of October, 1893, a period of upwards of two years. Under such circumstances, it is too late for them now to contend that this stock was unlawfully disposed of, because no allotment of it was made among the stockholders. If the stockholders were at any time entitled to an allotment, they have waived such right by their act, and their acquiescence in and recognition of Mr. Patterson's subscription. But it seems to us that the question of whether the stock should have been allotted among the stockholders, and they given an opportunity to subscribe for it in proportion to the shares of stock held by them, does not in any way affect the legality of the subscription of Mr. Patterson, and really does not arise in this case. There is nothing in any of the authorities cited by counsel which rules that, if no allotment is made giving all the corporators an opportunity to subscribe for untaken stock, the subscription of any shareholder or other person would be illegal. They hold no more than that untaken stock is held by the corporation in trust for the corporators, and must be disposed of for the benefit of all; that it cannot be disposed of unequally to the corporators, and, if so disposed of, each corporator injured may have his action against the corporation. There is no case that decides that any stockholder, after the stock has been disposed of, even if done by the corporation in violation of the rights of such stockholders, has any remedy in equity to compel the issue of such stock to him, or to have the subscription of the one who subscribed to this stock declared invalid. If injured, he has his remedy at law to recover damages for such injury. But, as was said in Curry v. Scott, 54 Pa. St. 276, it is a sufficient answer in this case to say that there is no averment in the bill that, at the time Patterson subscribed for this stock, the complainants, or any of them, offered to take or were willing to take the stock at par, or that it would have sold for more. Without such averment no injury can be shown to have been sustained by the complainants. For the reasons given, we think the master did not err in finding that F. G. Patterson was legally entitled to this six hundred shares of stock.

"It follows, therefore, that the action of the de facto board of directors in attempting to cancel the certificates of stock issued to Patterson, and in authorizing an allotment of this stock, and issuing certificates for two hundred and eighty-seven shares of it, was illegal. The subscription of Mr. Patterson left

Digitized by Google

but eleven shares of the authorized capital stock untaken. But we have no doubt of the illegality of the action of the board of directors for other reasons. This board, which has been termed the 'Langdon Board,' was not a legal board of directors, and, as a de facto board of directors, it needs no argument to show that they could pass no resolution which could affect the Patterson stock, for, as we hold, his claim thereto was valid. De facto officers of a corporation clearly have no right to do any act whereby any stockholder of the corporation would be prejudiced. It is equally clear to our mind that they could not legally issue certificates for this two hundred and eighty-seven shares of stock. 'Acts of officers de facto are not valid when such acts are for their own benefit, because they cannot take advantage of their own want of title, which they must be cognizant of. It is only where it is for the benefit of strangers or the public, who are presumed to be ignorant of such defects of title, that their acts are good.' Commissioners v. McKissan, 2 Rawle, 140. They cannot invoke the aid of their own acts as officers de facto to promote their own individual interests, hence the allotment of stock by the complainants to themselves was illegal, invalid, and void, even if they had paid for it; but the master finds as a fact that there was no value given for the stock allotted; that they paid for it merely by an exchange of checks. In our judgment they are neither legally nor equitably entitled to this stock, and we have no hesitancy in holding that the certificates for these two hundred and eighty-seven shares of stock are illegal and invalid. The question of the right of F. G. Patterson to sell his stock to the Pennsylvania Railroad Company, or to S. M. Prevost, general manager of said company, has been fully discussed by the master.

"It is alleged by the complainants that some of the leased lines of the Pennsylvania Railroad Company are parallel and competing with the line of the Altoona, Clearfield & Northern Railroad Company. The master has found that they were not parallel or competing, and we think he was fully warranted by the evidence in so finding. We might add that it is more than doubtful, however, whether this issue is properly raised by the pleadings in this case. There is no allegation in the bill that any of the leased lines of the Pennsylvania Railroad Company are parallel or competing with the said Altoona, Clearfield & Northern Railroad. Neither is it alleged nor shown how the complainants can be injured by the transfer of the stock. This bill being filed by private parties, we can only consider their individual rights, and have nothing to do with the rights of the public. If the rights of the public are invaded, it can be remedied only by a bill filed by the attorney general in the name of the commonwealth.

"For the reasons given, and others that might be given, we think the bill of the complainants in this case must be dismissed. The only remaining question is as to the form of the decree suggested by the master. It may be contended that as no relief is prayed for by the bill other than the granting of an injunction, and as no cross bill has been filed by the defendants, no affirmative relief can be given the defendants other than that prayed for in the bill. This would seem to be the general rule, and is so laid down in Story, Eq. Pl. (10th Ed.) note bottom of page 352. But in this case, in view of the fact that it appears from the order of court made at the time the master was appointed, and from the testimony, and the manner in which the case was presented by counsel on both sides, that it was the intention of the parties to determine in this proceeding the title of F. G. Patterson to the six hundred shares of stock, and also the legality of the certificates for the two hundred and eighty-seven shares of stock allotted or distributed by the de facto board of directors, and as the bill and answer squarely raised these issues, we can see no harm in making such a decree as will settle these questions between the parties. Under the circumstances in this case, we feel that it is proper that we should decree that to be done which we find clearly ought to be done to prevent further litigation and to effectually accomplish what was evidently intended by the parties in this case to be accomplished by this proceeding. And now, to wit, July 3, 1894, this case came on to be heard upon the report of the master and exceptions thereto, and after hearing the argument of counsel for the respective parties, and thereupon, upon due consideration thereof, the exceptions are dismissed, and the report confirmed, and it is ordered, adjudged, and decreed: (1) That complainants' bill be dismissed, with costs. (2) That the treasurer of the Altoona, Clearfield & Northern Railroad Company be and is hereby directed to countersign the certificates for six hundred shares of stock issued by F. G. Patterson to himself on February 23, 1893, upon his paying into the treasury of the company the sum of thirty thousand dollars ($30,000), being the par value of said six hundred shares of stock; or, in lieu of countersigning such certificate, another to be issued countersigned, and delivered to F. G. Patterson for six hundred shares, upon payment by him of the said sum of thirty thousand dollars to the treasurer of said company,—whereupon the title in F. G. Patterson shall in all respects and for all purposes become vested. (3) That the certificates for the two hundred and eighty-seven shares of stock allotted or distributed by the de facto board of directors be canceled, and the holders thereof be restrained from assigning, transferring, or otherwise disposing of such shares to any other person or persons whomsoever."

Digitized by Google

Following, among others, are plaintiffs' assignments of error: "(15) The court erred in overruling the appellants' exception to the master's first conclusion of law. The exception thereto is as follows: 'The master erred in the first paragraph in his conclusions of law, as follows: "That the action of the stockholders and board of directors of the A., C. & N. R. R. Co. voting an increase of indebtedness of the company, and directing an issue of the bond and execution of the mortgage for $60,000, with a knowledge of the previous subscription of F. G. Patterson for the 600 shares of stock, was a ratification of his act, and placed in him the title for such stock, which could not subsequently be questioned, and this whether, at the time of subscribing, the 10 per cent., or any other amount, was paid by him, or not; for the reason that there never was any subscription, and there could not be any ratification of that of which there never was any existence, especially when the directors and stockholders had no knowledge of the alleged direction to note a subscription, and no subscription ever being noted, nor any money paid on account of same, at the time when the alleged ratification took place as stated by the master." ' The ruling of the court, so far as it had relation to this ruling of the master and the exception, is as follows: 'Where, as in the case in hand, a subscription was made by an agent of the company for the purpose of obtaining from a third party a loan, and such subscription was recognized by the stockholders and directors of the company, who accepted the loan with a knowledge that without such subscription the loan would have been invalid and contrary to law, can it be said that either party under such circumstances would be permitted to deny the validity of such subscription, notwithstanding all the requisites prescribed had not been complied with? Having received the benefit of this subscription, and taken advantage of it, the stockholders and directors of the company are estopped from denying or questioning it. Their acts, if such acts be not an express ratification of the subscription, are at least such as to have that effect, and prevent them from now questioning its validity in this or any other proceeding.' (16) The court erred in overruling the appellants' exception to the master's second conclusion of law. The exception is as follows: 'The master erred in his second conclusion: "That it became the duty of Westley, the treasurer of the company, to accept from Patterson ten per cent., or three thousand dollars, tendered him on the 6th of January, 1893, and to accept a check tendered him on the 23d of February, 1893, and countersign at that time the certificate of stock for the 600 shares, for the reason that the treasurer had no authority to do any such act without the express authority of the board of directors, which he did not have. Neither had he the right or power thus to take away the vested rights of the stockholders to have and to take their pro rata share in said stock without notice or opportunity to subscribe for and take the same." ' The ruling of the court having relation thereto is as follows: 'No request was made by them for an allotment of it among the stockholders, and it appears it had been acquiesced in by them from October, 1891, until the 19th of October, 1893, a period of upwards of two years. Under such circumstances, it is too late for them now to contend that this stock was unlawfully disposed of because no allotment of it was made among the stockholders. If the stockholders were at any time entitled to an allotment, they have waived such right by their acts and their acquiescence in and recognition of Mr. Patterson's subscription.' (17) The court erred in overruling the appellants' exception to the master's fourth conclusion of law. The exception is as follows: 'The master erred in his fourth conclusion: "That the action of the defendant board of directors in recognizing, confirming, and ratifying the subscription of F. G. Patterson to the 600 shares of stock placed in said Patterson a title to said stock which could not be questioned or disturbed upon his paying to the treasurer the par value of said 600 shares of stock, even supposing the action of the stockholders of the company in voting an increase of the company's indebtedness, and issuing of the bonds and execution of the mortgage, was not a ratification of the prior subscription of Mr. Patterson. Because this was after the 287 shares of stock had been issued and paid for, and after the service of the injunction enjoining and restraining the board from taking such action in the matter of the 600 shares of stock." ' The ruling of the court is as follows: 'We do not think it is necessary, in order to sustain the validity of Mr. Patterson's claim, to rely on the fact that a lawfully constituted board of directors by resolution of November 17, 1893, expressly ratified the subscription, for we have a sufficient ratification without this. This resolution, however, shows a legally constituted board of directors of the company recognized the claim of Mr. Patterson, and that there is no disposition on the part of either Mr. Patterson or the company to avoid it.' (18) The court erred in overruling the appellants' exception to the master's fifth conclusion of law. The exception is as follows: 'The master erred in his fifth conclusion, in concluding "that the Cresson & Coalport Railroad and Pennsylvania Railroad is not a competing line with the Altoona, Clearfield & Northern Railroad between Altoona and Fallen Timber; nor are the Tyrone & Clearfield Railway and the Pennsylvania Railroad competing lines with the Altoona & Philipsburg, connecting with the A., C. & N. R. R." The master in both instances has based his conclusions upon partial statements of the plaintiffs' proofs and claims, and severed them erroneously so as to mislead the court.' The ruling of the court is as follows: 'It is alleged by the com-

Digitized by Google

plainants that some of the leased lines of the Pennsylvania Railroad Company are parallel and competing lines with the line of the Altoona, Clearfield & Northern Railroad Company. The master has found that they are not parallel or competing, and we think he has been fully warranted by the evidence in so finding.' (19) The court erred in overruling the appellants' exception to the master's sixth conclusion of law. The exception is as follows: 'The master erred in his sixth conclusion, viz.: "That the agreement or understanding or arrangement between F. G. Patterson and the Pennsylvania Railroad Company, through S. M. Prevost, for the transfer or assignment of the 600 shares of stock, or any other shares of stock, to the Pennsylvania Railroad Company, is not prohibited by the provisions of the constitution, nor any other existing law,"—because the master's conclusion is wholly based upon an erroneous finding of fact, not warranted by any testimony in the cause.' The ruling of the court is as follows: 'Neither is it alleged nor shown how the complainants can be injured by the transfer of the stock. This bill being filed by private parties, we can only consider their individual rights, and have nothing to do with the rights of the public. If the rights of the public are invaded, it can be remedied only by a bill filed by the attorney general in the name of the commonwealth.' (20) The court erred in entering its decree, namely: '(1) That complainants' bill be dismissed, with costs.' The court erred in that portion of the opinion which is as follows: 'The complainants contend that this subscription is void because not in writing, and not made in the manner prescribed by law. It may be conceded, as a general rule, that a subscription for stock must, in order to bind the parties, be made in the prescribed form, and must be in writing. It does not follow, however, that an oral subscription may not under certain circumstances be binding. Where, as in case in hand, a subscription was made by an agent of the company for the purpose of obtaining from a third party a loan, and such subscription was recognized by the stockholders and directors of the company, who accepted the loan with a knowledge of such subscription, and presumably with a knowledge that without such subscription the loan would have been invalid and contrary to law, can it be said that either party, under such circumstances, would be permitted to deny the validity of such subscription, notwithstanding all the requisites prescribed had not been complied with? Having received the benefit of the subscription, and taken advantage of it, the stockholders and directors of the company are estopped from denying or questioning it. Their notes, if not such as to be an express ratification of the subscription, are at least such as to have that effect, and prevent them from now questioning its validity in this or any other proceeding.' (21) The court erred in that portion of the opinion which is as follows: 'We do not think it is necessary, in order to sustain the validity of Mr. Patterson's claim, to rely on the fact that a lawfully constituted board of directors, by resolution of November 17, 1893, expressly ratified the subscription, for we have a sufficient ratification of it by the company without this. This resolution, however, shows that a legally constituted board of directors of the company recognized the claim of Mr. Patterson, and that there is no disposition on part of either Mr. Patterson or the company to avoid it. What standing in this case, then, have the complainants, who are seeking to nullify it? They, in common with the other stockholders, received the benefit and advantage of the subscription at the time it was made, and in effect ratified by the corporation and its stockholders. None of the complainants are shown to have offered or been willing to subscribe for this stock. No request was made by them for an allotment of it among the stockholders, and it appears to have been acquiesced in by them from October, 1891, until the 19th of October, 1893, a period of upwards of two years.' (22) The court erred in that portion of the opinion which is as follows: 'It follows, therefore, that the action of the de facto board of directors in attempting to cancel the certificate of stock issued to Patterson, and in authorizing an allotment of this stock, and issuing certificates for two hundred and eighty-seven shares of it, was illegal.' (23) The court erred in that portion of the opinion which is as follows: 'The question of the right of Mr. Patterson to sell this stock to the Pennsylvania Railroad Company, or S. M. Prevost, general manager of said company, has been fully discussed by the master. It is alleged by the complainants that some of the leased lines of the Pennsylvania Railroad Company are parallel and competing with the line of the Altoona, Clearfield & Northern Railroad Company. The master has found that they were not parallel or competing, and we think he was fully warranted by the evidence in so finding.' (24) The court erred in entering its decree, namely: 'That the treasurer of the Altoona, Clearfield & Northern Railroad Company be and is hereby directed to countersign the certificate for six hundred shares of stock issued to F. G. Patterson to himself on February 23, 1893, upon his paying into the treasury of the company the sum of thirty thousand dollars ($30,000), being the par value of said six hundred shares of stock; or, in lieu of countersigning such certificate, another to be issued, countersigned, and delivered to F. G. Patterson for six hundred shares, upon payment by him of the said sum of thirty thousand dollars to the treasurer of said company,—whereupon the title in F. G. Patterson shall in all respects and for all purposes become vested.' (25) The court erred in entering its decree, namely: 'That the certificate for the two hundred and eighty-seven shares of stock allotted or distributed by the de facto board of directors

Digitized by Google

be canceled, and the holder thereof be restrained from assigning, transferring, or otherwise disposing of such shares to any other person or persons whomsoever.'"

H. M. Baldrige and David L. Krebs, for appellants. F. G. Patterson, Thos. H. Greevy, and Daniel J. Neff, for appellees.

PER CURIAM. A careful consideration of this record has led us to the conclusion that there is no substantial error in the findings of the material facts, or in the conclusions drawn therefrom. There does not appear to be anything in either of the questions involved that requires other or further consideration than is given thereto in the opinion of the learned president of the Twenty-Ninth judicial district, who specially presided at the hearing. The only modification of the decree that suggests itself to us as proper is the addition to the second paragraph thereof of the following words, viz.: "Provided, that the said sum of $30,000 shall be paid within 60 days from the date of our decree." As thus modified, the decree of the court below is affirmed on said opinion, and the appeal is dismissed, with costs to be paid by the appellants.

In re SANDCROFT.

(Supreme Court of Pennsylvania. May 6, 1895.)

LIQUOR LICENSE.

The fact that there was no remonstrance against the granting of a liquor license, and no evidence given against the applicant, does not justify an assumption that the court acted arbitrarily in refusing the license, or that the reason assigned for the refusal—that there was no necessity for the house to be licensed—did not in fact exist.

Appeal from court of quarter sessions, Centre county.

In the matter of the application of Jacob Sandcroft for a retail liquor license. From an order denying the application, the applicant appeals. Affirmed.

In this case the appellant came into court with a proper petition, fully signed and executed, with a bond having proper sureties thereon, and his petition was accompanied with a certificate, signed by 23 citizens of his township, certifying to his good moral character, and asking that a license be issued to him. There was no remonstrance whatever in the court below, and no evidence whatever against him.

George W. Zeigler and Wilbur F. Reeder, for appellant.

PER CURIAM. It is conceded that appellant's application for a retail liquor license was heard, considered, and refused by the court for the reason "that there is no necessity for the house to be licensed." The fact of the refusal and the reason therefor, above quoted, are both recited in the assignment of error. In the absence of anything on the record to justify us in so doing, we have no right to assume that the court acted arbitrarily, or that the reason assigned for its action in refusing appellant a license had no existence in fact. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

In re OPENING OF PRINGLE ST. IN KINGSTON BOROUGH.

(Supreme Court of Pennsylvania. April 29, 1895.)

OPENING OF STREETS—LIABILITIES OF BOROUGH.

The confirmation of a viewer's report, reciting that the damages would be in a certain amount if a certain portion of a proposed street were opened, and that the abutting lot owners would not be benefited, and that the borough would not be benefited by the opening, and that it would therefore be unjust to assess the borough property owners to pay the damages, does not constitute a decree for the payment by the borough of the amount mentioned as damages, on which execution process could issue.

Appeal from court of quarter sessions, Luzerne county.

In the matter of the opening of Pringle street in Kingston borough. From a decree awarding a mandamus execution against the borough for damages, the borough appeals. Reversed.

Appellant's assignments of error are as follows, to wit: "The court erred (1) in refusing to strike off the confirmation of the report of viewers; (2) in finding that the petitioners were the parties entitled to avail themselves of this record; (3) in finding that the viewers intended to award damages to the land of Thos. Pringle heirs alone; (4) in finding that the report of viewers was equivalent to a judgment in favor of the Pringle heirs, and against the borough; (5) in finding that the draft attached to it supplied the defects of the report; (6) in awarding mandamus execution upon the judgment (if a valid judgment) more than twenty-one years after its entry without evidence that it remained unpaid; (7) in allowing interest on the award; (8) in allowing interest without any offset against the Pringle heirs, who have remained for over twenty-one years in possession of the premises, and have during all that time received the rents and profits thereof; (9) the record shows no judgment in favor of the petitioners."

Thos. H. Atherton, for appellant. Wheaton, Darling & Woodward, for appellees.

STERRETT, C. J. The vice of this decree awarding a mandamus against the borough appellant is that there was no judgment, or decree in the nature of a judgment, or any definitely ascertained indebtedness of the borough to the appellees, or either of them.

Digitized by Google

on which any execution process could by any possibility issue. It was a mistake to assume that the confirmation of the report of the viewers in January, 1873, was in effect a decree for the payment of money by the borough to the appellees, or to any other person, because the viewers neither assessed, nor intended to assess, any sum or sums of money as damages against the borough in favor of anybody. That clearly and conclusively appears by their report. After setting forth therein that, "in opening said Pringle street, beginning at Main street, and running up to the Pringle House, we find that no person would sustain damages exceeding the advantages, the said street being opened nearly all the way between these two points," the viewers proceed to say: "In our opinion the damages would be $750 by the opening of the street from the southeasterly side of said Pringle House to the creek; and in our opinion the individuals owning lots and land along the line of said street would not be benefited by the opening or extending of the said street from the southeasterly side of said Pringle House to the creek; and it is also our opinion that the borough would not be benefited by the opening of said street between the last two points named. Therefore, we hereby report that it would be burdensome, wrong, and unjust to assess the lot owners or the borough with advantages sufficient to pay the damages that would be caused by the opening of said street from the southeasterly side of the Pringle House to the creek." In other words, while they express their opinion that the damages caused by the opening of the northwesterly portion of the street would be $750, they not only omit to specify how much thereof should be paid to the respective owners of property abutting thereon, but they decline to assess the same against the borough, or against other property owners, in the form of special benefits, and distinctly give their reasons therefor. While the report is clearly not a proper execution of the order issued to the viewers, and perhaps ought to have been set aside, or recommitted to them, the court and all parties concerned appear to have acquiesced in the action and suggestions of the viewers, and thenceforth, for over 20 years, treated the proceeding as an opening and settlement of damages merely of the southeasterly portion of the street, from Main street to the Pringle House, and a temporary abandonment of proceedings as to the northwesterly portion of the street. But, however that may be, it is very clear that there is nothing in the report of the viewers, or in the confirmation thereof by the court, to sustain the mandamus. It follows from what has been said that the learned court erred in awarding the mandamus, and all the assignments of error, except the first, should be sustained. Decree reversed and petition dismissed, with costs to be paid by the appellees.

CONSHOHOCKEN TUBE CO. v. IRON CAR EQUIPMENT CO. (HARRIS et al., Garnishees).

(Supreme Court of Pennsylvania. April 29, 1895.)

GARNISHMENT—ANSWER OF GARNISHEES—TRIAL BY JURY.

Where there is material question as to whom funds in the hands of garnishees belong, and it is so set out in the answers of such garnishees, a rule for judgment should be discharged, and the title to the said funds determined by an issue tried before a jury.

Appeal from court of common pleas, Philadelphia county.

Action by the Conshohocken Tube Company against the Iron Car Equipment Company, defendant, and Joseph S. Harris and others, receivers, garnishees. Appeal by the garnishees from a judgment against them. Reversed.

John G. Lamb, for appellants. Henry M. Tracy, for appellee.

WILLIAMS, J. The appellants are garnishees in a foreign attachment, against whom a judgment has been entered "for amount admitted." The question to be now decided is whether the answers support the judgment. Looking at the answers and the several amendments as they stood when the judgment was entered, their formidable proportions may be reduced to three brief statements: First, the receivers of the Philadelphia & Reading Railroad had purchased railroad supplies that were unpaid for to the amount of $4,935.65, by orders sent to the defendant, and filled apparently by it; second, that they are informed by the counsel of a company known as the "Railroad Equipment Company" that these orders were in fact filled by that company, and not by the defendant, and that the money due for said materials belongs to, and is claimed by, the Railroad Equipment Company, and does not belong to the defendant; third, that the receivers were appointed as such by the circuit court of the United States for the Eastern district of Pennsylvania, and that they are advised by counsel that the amount due by them for materials "cannot be the subject of attachment in this proceeding." The answers admitted an indebtedness for materials, and set up two reasons why judgment should not go against the garnishees in this attachment proceeding. The first of these, which set out the claim of the Railroad Equipment Company to have filled the orders made by the receivers, and to be entitled to the money due therefor, was a sufficient reason for refusing the judgment. It was not incumbent on the garnishees to show that the claimant had a good title to the money. They were stakeholders merely, and were not bound to determine at their peril to whom the money in their hands should be paid. Bank v. Gross, 50 Pa. St. 224. The answers of a garnishee are not

Digitized by Google

to be construed with the same strictness as an affidavit of defense, and judgment will not be entered on answers, unless the answers do by fair interpretation admit an indebtedness due to the defendant for some specific amount, or, at least, for a sum sufficient to cover the plaintiff's demand. Bank v. Meyer, 59 Pa. 361. A garnishee is entitled to the protection of the court, and a judgment should not be rendered against him where there is doubt as to the defendant's title to the fund attached. Biddle v. Bank, 41 Leg. Int. 15. In such cases, the rule for judgment should be discharged, and the title to the fund determined by an issue tried before a jury. The second reason was not sufficient, as it was stated by the garnishees. They alleged no reason for thinking that the judgment of the state court would not afford them a sufficient voucher, upon the circumstances of this case. They did not so much as express a fear upon that subject. They simply set up the advice of counsel that the debt due by them "cannot be subject to attachment in this proceeding." We think it can be, but whether judgment should be rendered in any given case must depend upon circumstances. The accounts of the receivers must be settled in the court which appointed them, and if the transaction out of which the indebtedness grew was such as that court could not approve, or the payment of the money attached would be a withdrawal of it from the proper purposes of the trust created by the appointment, then, in any such case, upon the suggestion of the receivers, the state court would suspend the proceedings until the consent of the proper court could be asked and obtained. Since the act of congress of 1888, we think an attachment may issue against a receiver as garnishee, but, if it becomes necessary for his protection to withhold judgment until the opinion of the proper United States court can be taken upon the propriety of the payment to the attaching creditor, this should be done. In this case we put our reversal of the judgment wholly upon the other ground. The judgment appealed from is now reversed, and the record remitted, with instructions to the court below to discharge the rule for judgment against the garnishees, and proceed to determine the right of the claimant, the Railroad Equipment Company, to the fund attached by an issue to be tried before a jury.

PORT v. HUNTINGDON & B. T. R. CO.

(Supreme Court of Pennsylvania. May 6, 1895.)

RAILROAD COMPANIES — CONSTRUCTION OF TRACK —BUILDING CAUSEWAYS—DAMAGES.

1. The causeway contemplated by Act 1849, § 12, to be built by a railroad company to enable a person through whose land its railroad passes to cross its tracks, is a way for travel on, over, or under the tracks, according to the lay of the land where it is built, and is intended solely to connect the parts of one tract severed by the railroad, and owned by such person, so that access may be had from one part to the other, and not elsewhere.

2. Matters considered by a jury of view in assessing damages for the taking of land by a railroad company, pursuant to Act 1849, § 11, cannot be reconsidered in assessing the damages recoverable for failure of a railroad company to connect by a causeway the parts of one tract of land severed by its road, as required by section 12 of said act.

3. The measure of damages recoverable for failure to build the causeway required by Act 1849, § 12, to be built by a railroad company to enable a person through whose land its road passes to cross the tracks, is the inconvenience suffered by the landowner in the enjoyment of his premises.

Appeal from court of common pleas, Huntingdon county; O. O. Furst, Judge.

Proceeding by George A. Port against the Huntingdon & Broad Top Railroad Company to recover damages for defendant's failure to build a causeway over its road on plaintiff's land. There was a verdict for plaintiff for $425, and from the judgment rendered thereon defendant appeals. Affirmed.

The opinion of the lower court (Furst, P. J.) is as follows:

"The verdict in this case is so reasonable that it seems to us to be a very fair adjustment of the case, and it ought not to be disturbed, except for manifest error. Upon the trial of this case, we reserved two questions of law,—the first, in answer to plaintiff's second point; and the second, in answer to the same point and to defendant's ninth and thirteenth points. We also reserved the question whether, under the evidence, the plaintiff was entitled to recover. Plaintiff's second point and defendant's thirteenth point relate solely to the question whether the twelfth section of the Railroad Act of 1849 contemplates a causeway under the railroad. We affirmed plaintiff's point, reserving the question, as stated, for further consideration. We are of opinion that the character of the causeway must be determined by the location of the railroad, where the necessity requires the causeway to be constructed. If the railroad is built at grade, a causeway can be built at grade. If the railroad is elevated, as by a heavy fill, it is clear that the cheapest and best causeway would be under the railroad. If the railroad is depressed, then an overhead crossing would be proper. So that the conditions of the ground must be considered, as to whether the causeway shall be overhead, under, or at grade. The ninth point we affirm. The causeway is intended to connect the severed parts of the tract, so that access may be had from the one part to the other on plaintiff's own land, and not elsewhere. The question whether it was practicable to build one so as to connect the triangle with the main lot was left to the jury. The jury found that it was. The last question is predicated upon the testimony of the plaintiff alone,—whether, under his testimoney, a recovery can be had, etc. This is the question upon which our mind is not clear.

Digitized by Google

If what plaintiff testified on the stand has to be considered as fact, and not opinion, we would be compelled to hold that he, by his own testimony, defeats his case. But, upon a careful reading of his testimony, we are inclined to the view that the greater part of his evidence on this branch of the case is matter of opinion only, influenced by the fact that plaintiff's preference was to have a causeway over the lands of defendant, rather than over his own. The character of the petition for viewers rather leaves such impression on the mind. We, however, differed from counsel upon this view of the law; and we held on the trial, and still hold, that the causeway is intended to be rather an internal improvement or arrangement, so as to afford the means of getting from the one part of the land to the other, and it does not comprehend a means of getting off the premises, to market, etc. While the plaintiff did express his opinion strongly on the subject of the location of the causeway, defendant called a witness (John L. Isenberg) who testified that it was practicable to construct the causeway on the premises; that at the abutment a passageway could be made under the roadbed. When we remember that this portion of plaintiff's lot is spanned by an iron bridge from six feet high and upwards, and that there are open spaces between the bents, it is not difficult to find that an underway can be made so as to cross the road.

"We are satisfied that we directed the jury properly upon the subject of damages, and the difference is the damages under the eleventh and twelfth sections of the act.[1] The fixed rule for the assessment of damages incident to the taking of land for the location and construction of a railroad, under the right of eminent domain, vested in the corporation, is well defined in the eleventh section of the act of 1849 (General Railroad Law), and in many decisions of the supreme court. The rule as announced in Navigation Co. v. Thoburn, 7 Serg. & R. 411, has been followed down to the latest case. That rule is: The value of the property, as a whole, immediately before the injury, or the construction of the railroad; its value immediately after the construction, as affected by it. The difference, if any, is the true measure of damages. Any burden cast upon the land, by the construction of the railroad, which detracts from its value, is to be considered by the jury in estimating the damages. The way in which the railroad cuts the tract or lot, as diagonally, by a curve, or otherwise; the inconvenient shape in which the remaining part is left; the depth of excavations, or height of embankments; the obstruction or entire interruption of access to public or private ways; the division of the tract or lot into different parts, so that persons or cattle cannot pass from one to the other, or, if at all, only with greater or less difficulty and danger, etc.,—are all proper subjects, matters, and things to be considered by the jury of view in assessing the damages; and these are to be considered once for all, under the eleventh section of the act, and, having been so considered, they are not the subject of consideration again in the present proceeding. Pierce, R. R. pp. 210, 211; Navigation Co. v. Farr, 4 Watts & S. 362; Searle v. Railroad Co., 33 Pa. St. 57; Patten v. Railroad Co., Id. 426; Watson v. Railroad Co., 37 Pa. St. 469; Railroad Co. v. Hiester, 40 Pa. St. 53; Brown v. Corey, 43 Pa. St. 495; Railroad Co. v. Hottenstein, 47 Pa. St. 28; Harvey v. Railroad Co., Id. 428; Hornstein v. Railroad Co., 51 Pa. St. 87; Railroad Co. v. Hill, 56 Pa. St. 460; Railroad Co. v. Stauffer, 60 Pa. St. 374; Railroad Co. v. Ranck, 78 Pa. St. 454; Railroad Co. v. Bunnell, 81 Pa. St. 414; Hoffer v. Canal Co., 87 Pa. St. 221; Railway Co. v. Bentley, 88 Pa. St. 178. In Railroad Co. v. Hiester, supra, the third assignment of error was to the court's answer to defendant's second point. The answer allowed the jury to consider the damage incident to the taking of the land, arising from inconvenience in crossing the road and interference with crossings already established. The supreme court held this was correct; saying, in this particular, damages should not be included for making the crossings themselves, for they are to be made by the company, but for damages by reason of their not having been constructed. As it was the duty of the company to construct them in the first instance, without any demand, damage for not so doing, commensurate with the injury, is an incident of the taking, and may be allowed. It is plain that all such damages are to be assessed as incident to the original taking, and hence are presumed to be included in the assessment made in 1855. Nevertheless, the company, under the twelfth section of the act, is required to make one causeway for each property through which the railroad passes, if necessary, and if demanded, and for failure to do so the company would still be liable in the manner pointed out in the general law in the twelfth section. Such causeway, as we understand the law, means a crossing so as to afford access to the lands separated by the railroad. It has no reference to the road crossings, as they are provided for independent of this requirement. If the evidence shows no necessity for the causeway

[1] Act 1849, § 12, provides: "* * * And for the accommodation of all persons owning or possessing land through which the said railroad may pass, it shall be the duty of said company to make or cause to be made, a good and sufficient causeway or causeways, whenever the same may be necessary to enable the occupant or occupants of said land to cross or pass over the same with wagons, carts and implements of husbandry, as occasion may require; and the said causeway or causeways, when so made, shall be maintained and kept in good repair by the said company; and if the said company shall neglect or refuse on request to make such causeway or causeways, or when made to keep the same in good order, the said company shall be liable to pay any person aggrieved thereby all damages sustained by such person in consequence of such neglect or refusal, such damages to be assessed and ascertained in the same manner as provided in the last section for the assessment of damages. * * *"

Digitized by Google

for such purpose, and if it further shows, by the testimony of the landowner himself, that such causeway cannot be built over or under the railroad, then the company cannot be considered in default for not so doing, as the law never requires the doing of a vain or impossible thing; and if it further appears by the plaintiff's own testimony, uncontradicted by any testimony, that the causeway sought in the proceeding is not to get to such part of his land, but that he virtually seeks a road to get from his land over lands belonging to others, and thence over the line of the railroad into the streets of the town, since, in default of such road or causeway, as termed by plaintiff, damages are to be assessed against the company, then it is apparent to our mind that plaintiff is seeking a second assessment of damages, which in this case were assessed in 1855, and duly paid. Such damages are, in our opinion, incident to the original taking, and cannot be again assessed. Neither do such damages belong to this plaintiff, whose title to the lot did not originate until twenty years or more after the construction of the railroad. The question of the necessity of the causeway, etc., was carefully submitted to the jury, and their attention was called to the true rule of damages, so that there should be no double assessment. That the measure of damages was the inconvenience plaintiff suffered in the enjoyment of his premises, arising out of a failure to construct a causeway, the amount of the verdict indicates to our mind that the jury so considered the case, and allowed for such damages only. If, however, we are wrong in our views of plaintiff's testimony, the case is in proper shape for the supreme court to so declare, and thereupon to enter a different judgment upon the reserved questions. In order to end litigation, and to have the case speedily reviewed by the supreme court, we have arrived at the above conclusion without proper time to fully state our views, as we otherwise would have done, if we had more time to devote to the case. We therefore refuse a new trial, and we direct judgment to be entered upon the verdict in favor of the plaintiff, and we seal defendant a bill to this ruling."

Appellant's specifications of error are as follows, viz.:

"(1) The court erred in assuming jurisdiction, appointing viewers, and directing and trying an issue, in view of the former assessment of damages to the owners of the land in 1855, at the time of the construction of the railroad, as set out in defendant's fifth point and answer thereto, in the following words: 'Fifth. Damages having been once assessed to James Hight, the owner of the Port lot, under the act of assembly which is claimed to support this proceeding, at the time of the construction of the road, and the Huntingdon & Broad Top Railroad Company having paid the damages then assessed, and continued to use their right of way through this lot to the present time, without change of location, this is conclusively presumed to be in full of all damages that could be sustained by the landowner. The damages assessed under the railroad law are not only for the land taken, but for inconvenience and expense in using it and obtaining access to it. Answer. This is true as to the land taken for the roadway, and all things provided for in the eleventh section of the act; but it has nothing to do with the question or right to have a causeway, or damages upon failure to erect the same. This latter right is provided for in the twelfth section, and in this section only. The court should have held that the former assessment and payment of damages in this case was a bar to this proceeding. (2) The court erred in substantially affirming, and not denying, plaintiff's first point, as follows: 'First. Under the evidence, the necessity for a causeway for the use of the plaintiff was determined as of June 11, 1891, by act of the defendant company. Answer. This is a question of fact for the jury, under all the evidence. If the necessity for a causeway arose, you must determine when it arose. There can be very little question, perhaps, that, if a causeway became necessary, it became necessary coincident with the filling up of the trestlework of the road, and that was in 1891.' (3) The court erred in refusing to affirm defendant's second point, as follows: 'Second. The right to have damages assessed in a proceeding of this kind is purely statutory. It does not exist, except given by express statute; and the act of 1869, and its supplements, do not make any provision whatever for compelling a railroad company to make a causeway over or across its track. Answer. The right is statutory; that is, regulated by the act of the legislature. Under the act of 1849, which embraces the twelfth section, which I have read, it is made the duty of railroad companies, in cases therein provided, to erect causeways, and, upon failure to do so, to respond in damages. The act of 1889 does not repeal this provision.' (4) The court erred in qualifying, and not affirming, defendant's seventh point, as follows: 'Seventh. Both the eleventh and twelfth sections of the act of 1849 have reference to damages to real estate, and not to a loss of profits in business; and the true measure of damages is the injury done to the real estate, and the difference occasioned in its value by reason of the act complained of, —in taking land, or refusing to make a causeway, as the case may be. Answer. This is the measure as to the damages under the eleventh section of the act, for the taking of the land, but under the twelfth section the measure is somewhat different. Under the twelfth section, which we have already read to you, defining what the damages are, whatever damages are sustained by the owner, in the enjoyment and occupation of his premises, in consequence of the

Digitized by Google

refusal or neglect of the company to build a causeway, is the measure. The assessment, however, under this section, where there is a failure to perform the duty, is to be according to the manner set forth in the eleventh section; and wherever the injury is certain and definite, or permanent, there can be but one assessment. Whatever damages Mr. Port sustains by the failure of the railroad company to erect a causeway must be assessed by this jury in this proceeding.' (5) The court erred in entering judgment for the plaintiff on the question reserved under defendant's ninth point: 'Ninth. The railroad company had no power, and was under no obligation, to go through the lands of Horace Dunn, or any other person, to make Mr. Port a road; and if it was impracticable to make him a causeway on his own land, or he declined to have such a causeway made on his own land, then he cannot recover in this proceeding. Answer. This point is predicated upon the testimony of Mr. Port himself. We have reserved the question involved in this point for further consideration, and as a reserved point; and, in connection with this reservation, we have also reserved the question whether there is any evidence upon which the plaintiff is entitled to recover. That we reserve for future consideration.' (6) The court erred in denying defendant's tenth point, and holding that an appearance by defendant before the viewers, eleven months after the proceeding was commenced, was a waiver of the prior demand required by the act of assembly, and especially in view of the denial of such demand for a causeway filed in this case: 'Tenth. A request or notice from George A. Port to the railroad company to make such a causeway as the law requires was necessary, as a condition precedent to his commencing this proceeding for viewers, and the assessment of damages. The form of this notice or request is not prescribed by law, but it should be sufficiently explicit to inform the company or its officers that he claimed the benefit of the law upon which his proceeding is now rested. If he failed in this, the whole proceeding fails, and he cannot recover. Answer. When Mr. Port began this proceeding, it was necessary, before he had the right to have viewers appointed, to make a request for a causeway; and if he did not make the request, upon that fact being shown to the court, the court would have set aside the proceedings and required him to call upon the company first. But having presented his petition, and the court having appointed viewers, and the defendant appearing before these viewers, and never alleging a failure to make this request, we say it is now too late to raise the question of former request, and the jury will consider this case just as though that request had been made.' (7) The court erred in not affirming defendant's thirteenth point, and in entering judgment for plaintiff on question reserved thereunder: 'Thirteenth. A railroad company is not obliged to provide the owner or occupant of land through which its road passes with a way under its road, to enable him to pass from one part of his land to another. Answer. We reserve for further consideration, in connection with our answer to the ninth point, the question whether the railroad company would be bound to make a causeway under the line of their roadbed.' (8) The court erred in evading, and not affirming, defendant's fourteenth point: 'Fourteenth. A railroad company is not obliged to provide means for crossing its tracks by the owner or occupant of land through which it passes, for any other purpose than to enable such owner or occupant to pass from one part of his plantation or lot traversed by the railroad to the other part of the same plantation or lot. Answer. The duty, in cases provided for in the act, is to construct a causeway or causeways so as to enable the occupant of the land to cross over the same with wagons, carts, and implements of husbandry, as occasion may require. They are not bound by this provision to furnish landowners roads, etc., off their premises. No damages can be assessed in this action for the location of the railroad, or for injuries occasioned by the location.' (9) The court erred in its answer to defendant's sixteenth point, which point and answer are as follows: 'Sixteenth. A causeway, under the twelfth section of the act of 1849, is a construction or contrivance to be made by a railroad company to enable the owner or occupant of the plantation or lot through which its road is constructed to pass over the tracks with wagons, carts, and implements of husbandry, at or above grade, from one portion of said lot or plantation to the other portion of the same. Answer. This is clearly so, but whether the duty referred to may not, in a given case, require the causeway to be built under grade, when is cannot be built at or above grade, we have reserved for future consideration.' (10) The court erred in its answer to defendant's eighteenth point, as follows: 'Eighteenth. The defendant was not obliged, at the request of the plaintiff, to make a causeway over its road, for his accommodation, where it passes through the land of another. Answer. The right to a causeway, under the twelfth section of the act, is confined to the lands of the owner or occupant; and we have already so stated, repeatedly, in answer to other points, and in our general charge.' (11) The court erred in denying defendant's nineteenth point, as follows: 'Nineteenth. If a causeway was not necessary for the use of the owner of the locus in quo at the time of the construction of the road, and one many years afterwards became necessary only by reason of the change

Digitized by Google

in the use of the premises by a subsequent owner, the defendant was not obliged to construct it. Answer. We do not think the necessity for a causeway is confined absolutely to the period of the construction of the road. It may arise subsequently, and if it so arise the duty to construct it is regulated by the act of assembly, and the twelfth section must be our guide as to the duty devolving upon the railroad company.' (12) The court erred in denying defendant's twentieth point, as follows: 'Twentieth. A request for a causeway by the owner of land traversed by a railroad must be made at the time of the construction of the road, or within a reasonable time thereafter; and if such request be not made until thirty-seven years after the construction of the road, and after it was devoted to a purpose different from what is was used for at the time of construction, and by a subsequent owner, it is not reasonable, and the defendant was not obliged to construct one. Answer. We cannot affirm this point, as stated. The request ought to be made whenever the necessity arises. If not made until 37 years after the necessity arose, it would be regarded either as evidence of abandonment of the right to a causeway, or as evidence that no necessity existed.' (13) The court erred in entering judgment for the plaintiff on the questions reserved in answers to defendant's ninth, thirteenth, and sixteenth points, instead of entering judgment for the defendant non obstante veredicto. (14) The court erred in charging the jury as follows: 'If you come to the conclusion that there was a necessity to build this causeway, the next important question for you to determine is, was it practicable to build one,—could one be built on the premises of Mr. Port? * * * You must consider: First, whether there was a necessity for this causeway, and, if so, when did that necessity arise? Secondly, was it practicable to build it? If you find both the necessity and that it was practicable to build it, then the plaintiff would be entitled to damages.' (15) The court erred in charging the jury as follows: 'The first question, as we have already said, for you to determine, is, have this company refused to build a causeway? You will have no trouble in coming to the conclusion that the company have failed to build a causeway, and that failure, under the evidence, we feel perfectly safe in saying to you, can be regarded by the jury as a refusal to build a causeway.'"

Brown & Brown and John M. Bailey, for appellant. George B. Orlady, for appellee.

PER CURIAM. An examination of this record with special reference to the specifications discloses no substantial error. The questions involved, so far as they are material, have been sufficiently considered, and correctly decided, by the learned president of the common pleas. It is unnecessary to add anything to what has been said by him in his opinion on the questions of law reserved, etc., and on that opinion the judgment is affirmed. Judgment affirmed.

BURR v. KASE et al.

(Supreme Court of Pennsylvania. May 13, 1895.)

LOST INSTRUMENT—PAROL EVIDENCE — PURCHASE UNDER CONTRACT OF DEFEASANCE —EVIDENCE AS TO CONTRACT—LACHES.

1. Where a party made no search for a lost instrument, executed 12 years before the trial, within 3 years of the trial, parol evidence of its contents was not admissible.

2. In ejectment by a judgment debtor for land sold under execution, plaintiff alleged a contract with the defendant sheriff's vendee, whereby the latter, being the plaintiff in the execution, was to purchase the property, and reconvey to plaintiff upon being repaid his expenditures. The contract was lost, and plaintiff testified that he could state only the substance of it, and what it was gotten up for; that it recited the fact of his indebtedness to the vendee, and was to the effect that, when the debt was paid, the vendee should reconvey to plaintiff. He was not sure that the agreement stated the amount of the indebtedness, and could not tell the amount of it, or give means for determining the same, and he did not think the agreement contained anything as to taxes or repairs on the property. *Held*, that the evidence as to the contents of the lost instrument was insufficient to justify relief.

3. On an issue as to the making of a lost contract between the defendant, a sheriff's vendee, and plaintiff, the defendant in the execution, whereby the former was to buy the land and reconvey to plaintiff upon being repaid his expenditures, plaintiff testified that the contract was made, and defendant denied that allegation. The one who plaintiff claimed drew the contract testified to a faint recollection of drawing "some paper" for the parties, but could not give its contents. Two witnesses testified that, after defendant bought the land, he said that all he wanted was to get his share out of the property. Another testified that defendant said that, after he got his money out, he should return the property to plaintiff, and that plaintiff had a paper to protect himself, but on cross-examination failed to testify as to such paper. Plaintiff was not present at any of such conversations. *Held*, that the evidence did not show the existence of the agreement.

4. Plaintiff's land was sold under execution to defendant, and he alleged a lost written contract whereby defendant agreed to reconvey to plaintiff upon being repaid his expenditures, which contract defendant denied. The year after defendant took possession the premises were burned, and defendant received the insurance, without objection by plaintiff, though he then had the contract. Six years later, defendant sold the property to one who took possession and made improvements in good faith, with plaintiff's knowledge. Five years later, plaintiff brought ejectment for the property, without demanding the same, or giving notice of his title, or offering to pay for the improvements. *Held*, that plaintiff was guilty of gross laches, fatal to his action.

Appeal from court of common pleas, Lackawanna county.

Ejectment by Charles A. Burr, committee of A. E. Burr, against John Kase and H.

Digitized by Google

Stone. From a judgment for defendants, plaintiff appeals. Affirmed.

Plaintiff's assignments of error are as follows, viz.:

"First. The court erred in charging as follows: 'It is necessary for you to find, before you can render a verdict for the plaintiff in this case, that H. Stone, the other defendant, had knowledge of this agreement between Dr. Burr and John Kase. If Stone was a bona fide, innocent purchaser for value of this property, without any notice, at or before the time of the purchase, of this secret arrangement between Dr. Burr and Mr. Kase, then he is not chargeable with that arrangement, and your verdict will have to be for the defendant.' Second. The court erred in refusing to affirm the plaintiff's fifth point, as follows: 'That even if H. Stone did not have notice of the agreement between Dr. Burr and John Kase, which converted the sheriff's deed into a mortgage, if the jury find that such an agreement was made before he purchased of Kase, it appearing that only a portion of the purchase money was paid, he would be entitled to protection to the extent of the money he had actually invested in the property before notice of Dr. Burr's claim, either by way of purchase money or improvements, with interest thereon; and it is for the jury to find this amount from all the evidence in the case.' Answer: 'This point is refused.' Third. The court erred in refusing to affirm the plaintiff's seventh point, as follows: 'A bona fide purchaser is entitled to protection only to the extent of the money paid before notice. Therefore, H. Stone is entitled to protection in this case, even if the jury find he was an innocent purchaser for value, provided they find for the plaintiff as to the trust arrangement only to the extent of the money he expended prior to November 27, 1891; and this amount the jury is to fix, upon all the evidence in the case.' Answer: 'This point is refused.' Fourth. The court erred in affirming the defendants' third point as follows: 'If the jury should find from all the evidence that there was a written agreement made prior to said sheriff's sale between John Kase and A. E. Burr, by which John Kase agreed upon certain conditions to reconvey said property to A. E. Burr, and that said conditions had been fulfilled at the time suit was brought, and should further find from all the evidence that the said defendant H. Stone had no notice at the time or prior to his purchase of the land in question of John Kase, there can be no verdict against the defendants.' Answer: 'I affirm this point.' Fifth. The court erred in affirming and qualifying the defendants' fourth point, as follows: 'If the jury find from all the evidence in the cause that H. Stone was an innocent purchaser without notice of any equities in the plaintiff, A. E. Burr, the plaintiff cannot recover, and the verdict must be for the defendants.' Answer: 'If you find that H. Stone was an innocent purchaser for value and without notice, the verdict must be for the defendants. With this qualification I affirm this point.'"

Everett Warren, W. S. Hulslander, and A. A. Vosburg, for appellant. W. W. Watson and W. S. Diehl, for appellees.

GREEN, J. The counsel of the parties made an agreement, which is printed in the appendix, to the effect that the appellant need not print any more of the testimony than such as related "to the transaction between John Kase and H. Stone, together with the charge of the court, and so much of the record evidence and exhibits as the appellant may see proper to print in his paper book." It is stated in the agreement by way of recital that "the only question raised by the assignments of error is to what extent H. Stone is entitled to protection as an innocent purchaser without notice of any equities in the plaintiff, A. E. Burr, absolutely or only to the extent of the money actually paid before notice." If the case depended only upon the solution of that question, an agreement such as the foregoing might not be subject to objection. But in this case there is another question, of far greater importance than this, the decision of which cannot be determined or even promoted by the solution of this. If the plaintiff's claim of title was of such a character that it cannot be sustained under all the evidence, even against Kase, the sheriff's vendee of the title, it is only a waste of time to inquire to what extent an innocent purchaser from Kase can be protected against the plaintiff's claim. It is unfortunate that the testimony relating to the inception of Burr's claim of title was not printed in the paper books, as it has nearly doubled our labor to discover it in a most voluminous record of 332 pages of typewritten matter. After a wearisome expenditure of most precious time, which we cannot afford to spare, we have reached the conclusion that the plaintiff's claim cannot be sustained in any point of view. It is grossly lacking in every element which is essential to its existence, and we could not possibly give it sanction without disregarding, and practically overruling, a long line of decisions, the wisdom and justness of which have been demonstrated by a constantly recurring experience of more than half a century.

In 1879, and prior thereto, the plaintiff was the owner of the surface of a small tract of land, containing about 25 acres, near Carbondale, in Lackawanna county. It was incumbered with two mortgages, amounting together to $3,500, and a judgment in favor of John Kase, one of the defendants. The plaintiff alleges that prior to the sheriff's sale of the property, which occurred in May, 1879, he made a written agreement with Kase, whereby it was agreed that the property should be sold at sheriff's sale under Kase's judgment for $500, and that at the sale Kase should buy the property, and thereafter hold

Digitized by Google

it until he was repaid all his expenditure on account of the property, and, when he was fully repaid, he should reconvey the property to the plaintiff. The plaintiff's abstract of title contains no reference to this agreement, but in an amendment to the abstract the agreement is alleged substantially as above stated, and at the end of the amendment the plaintiff's claim is stated as follows: "That the sheriff's deed and the written agreement between A. E. Burr and John Kase formed part and parcel of the same transaction, and, as the agreement was not recorded, the whole constituted an unrecorded mortgage, and was security for the said debt of $3,500." The claim of the plaintiff, therefore, is that Kase held the title as a mortgagee only. Very often in this class of cases the attempt is made to hold the sheriff's vendee liable as trustee upon a trust arising ex maleficio. But our decisions have been perfectly uniform since Kellum v. Smith, 33 Pa. St. 158, decided in 1859, and indeed long before that, that a resulting trust cannot be created in that way; that "the fraud which will convert the purchaser at a sheriff's sale into a trustee ex maleficio of the debtor must have been fraud at the time of the sale. Subsequent covin will not answer, any more than subsequent payment of the purchase money will convert an absolute purchase into a naked trust. When the purchaser at a sheriff's sale promises to hold for the debtor, and afterwards refuses to comply with his engagement, the fraud, if any, is not at the sale, not in the promise, but in its subsequent breach. That is too late." From this decision we have never departed.

Looking now at the claim that Kase held title only as a mortgagee under an unrecorded defeasance, it will be at once perceived that the first and indispensable requirement is that there was a written agreement, duly made and executed by the parties, containing the terms of the alleged contract upon which the property was sold. The sale by the sheriff was made on May 3, 1879, and on the 8th day of May following the sheriff's deed to Kase was acknowledged in open court, and entered in the prothonotary's office in Sheriff's Deed Book. It is an undisputed fact that Kase went into possession of the premises immediately after the sale, and continued therein until 1886, when he sold the property to Stone for $2,250, and Stone took possession at once, and has occupied the premises ever since. This action of ejectment was brought June 1, 1891, 12 years after the sheriff's sale to Kase. On the trial the learned court below submitted to the jury two questions of fact, to wit, whether there ever was such an agreement between Burr and Kase as was claimed by Burr, and whether Stone was an innocent purchaser for value without notice. The jury found a verdict for the defendant, and presumably they did not sustain the contention of the plaintiff upon either fact; but, as it is possible they may have found for the defendant Stone because he was an innocent purchaser for value without notice, it cannot be positively assumed that they found that the agreement alleged to have been made between Burr and Kase was never made.

This makes it necessary for us to review the testimony in order to learn whether we, sitting as chancellors, could determine whether the whole evidence was sufficient to change the absolute deed from the sheriff into a mortgage. The plaintiff stakes his case upon the allegation that there was an agreement in writing which established the defeasance. On the trial he did not produce any writing, but said he had lost it, and could not find it after diligent search. He therefore undertook to prove its contents by parol. He produced no witnesses but himself to testify to the contents, and this is his testimony on that subject: "Q. Now, doctor, without trying to give us the exact language I wish you would tell us the substance of this paper. A. It set forth the agreement entered into between myself and Mr. Kase in regard to this property, setting forth the facts. Q. What facts did it set forth? A. The fact that I owed him so much on this property, and that all he wanted—all he ever claimed to want—was simply his money out of it, and, when that was paid that the property should be reconveyed to me. Q. What, if anything, was said in the paper about a sheriff's sale? A. It stated the property was to go to him for the present. I forget just how it was worded. Q. I mean the substance of it. A. I cannot repeat it verbatim. I can only repeat the substance of the paper, what it was got up for. Q. Just tell the substance of it again. A. That when he received his money, what was due him, that was all he wanted. Q. Did the paper state what was due him? A. I think it did, or about the amount. Q. Do you know what amount was stated in the paper as being due him? A. I think it was the amount of the mortgage. Q. Which was how much? A. $3,500." This was his testimony in chief. On cross-examination he was asked: "Q. Now, will you again state, as near as you can, what that alleged paper contained? A. Well, as I stated before, it contained an agreement between myself and Mr. Kase in regard to this property; agreed to let him have it on this note, which he had paid to save costs to myself; that I was going to have the benefit of it. Q. Was this all in the paper? A. I don't know as it was. That was our agreement. Q. I am asking you what was in that paper. A. It was an agreement to this effect: It was an agreement that Kase gave me to satisfy me that he didn't want to take any advantage of me; that when he received what he had against that property, that it should be deeded back to me. Q. Was that in the paper? A. Yes. Q. That was in the paper? A. That was in the paper. It may not have

Digitized by Google

been just in those words, but in substance that is what it was drawn for. All that he wanted, he didn't want to take any advantage of me. Q. Was that in the paper, that he didn't want to take any advantage? A. I don't know as it was, but, when the paper was signed, the paper was drawn up on that basis, so that I would have something to show. Q. Doctor, will you tell me what was in the paper? A. Well, I was telling. Q. I don't want you to tell outside of it. A. Well, I will tell you as near as I can. It was an agreement, and Mr. Kase— I couldn't tell you verbatim. I can only tell you the purport of the paper; that whenever he got what was due him, that I should have the property, that he would transfer the property back to me, and that the reason why it was sold the way it was, was on that paper, or I wouldn't have let it be sold. Q. I want to know what was in the paper. A. Well, I have told you. Q. What was there about anything else? A. Well, I don't know. It was the usual paper drawn up by Alderman Thompson, I suppose, in these cases, as an agreement between me and Mr. Kase that I should have the property at any time he got his money out of it, or I paid him the money. Q. It didn't mention about anything else,—any other fact? A. Well, there may have been. I can't give you just the words of the paper. Q. Can you tell now, doctor, any other fact that you say was in that paper? A. Well, it mentioned something about the amount. Q. Was he to have back his expense? A. There wasn't anything said about that. I don't think there was. Q. Anything said about taxes? A. I don't remember anything being said about taxes. Q. Anything about repairs? A. I don't remember anything about repairs." The foregoing is practically the whole of the plaintiff's testimony as to the contents of the alleged agreement. When it is considered that the effort of the plaintiff is to take away the title to land held by virtue of a sheriff's deed conveying an absolute title, by means of a lost written instrument, the only proof of whose contents is the testimony above indicated, it will at once be seen how utterly deficient it is in all legal requirements as to that kind of testimony. A criticism that pertains to the whole of it is that it does not purport to be a statement of the actual contents of a written instrument at all. It does not designate a subject-matter by any kind of description. It does not contain the slightest attempt to repeat any of the actual words of the instrument, or even to give the meaning of words actually used. It states no terms of any kind. It contains no statement or even description of the amount of money which Kase was entitled to obtain before any obligation to reconvey arose, nor does it furnish any means of determining what that amount should be. It expressly ignores all knowledge as to whether certain important matters of expenditure were included, such as the expenses incurred by Kase, the taxes on the property, and repairs made. The whole of the testimony leaves the subject of Kase's right of recoupment in a state of hopeless uncertainty. The witness has but one idea as to the paper, and that is that in some way or at some time the property was to be conveyed back to him. In other words, the plaintiff's testimony, instead of being a statement of the literal contents of the paper or its substance, is nothing but the declaration of his opinion as to its legal effect. He was to have back the property when Kase got what was due him. When, however, he was subsequently asked what indebtedness there was due from himself to Kase, he was entirely unable to tell. He denied that he owed anything on the $500 judgment. He admitted that he owed sums which he could not state, and he made no attempt to define either the aggregate amount which he owed, or the sums or kinds of indebtedness which Kase was entitled to have reimbursed out of the land. It would not be possible for any chancellor to decree the specific performance of such an agreement, or to frame a decree which would do justice between the parties. The evidence is entirely too meager.

As an illustration of the strictness required in proving the contents of lost instruments, the following cases are instructive:

In Dennis v. Barber, 6 Serg. & R. 420, an important letter was lost. A witness was offered who had made an extract or copy from it, but not of the whole, and he offered to testify that the copy or extract was all of the letter that related to the business in question, and that the remainder of it had no connection with that business. The offer was rejected, and this court (Gibson, J.) said, sustaining the court below: "Mr. Levy did not pretend that either the extract offered, or his own recollection, embraced even the substance of the whole letter. But it is urged that his offer to prove that the rest of it related in no respect to any matter in the cause was equivalent to proof of the contents not comprised in the extract. A decisive answer is that for all this we have only the opinion of a witness who undertakes to say what the letter did not contain, without pretending to give an account of what it actually did contain; and, although we would in the present case rely on Mr. Levy's judgment with implicit confidence, yet, as every rule of evidence must be general, we would, if such evidence were competent, often be compelled to give credit to witnesses who could not claim anything like an equal degree of respect. There can seldom be a sound construction of written evidence, without adverting to all the parts and considering the operation of the whole; but the operation of the several parts on the exposition of the whole is seldom, if ever, perceptible to any but a professional eye; and the danger would therefore be that

Digitized by Google

the court, while they thought they were deciding on a view of the whole, would be giving a garbled construction of but a part. * * * Every day's experience must bring home to the conviction of all men the insecurity of relying on men's recollection; and I care not, therefore, how strictly the construction of written evidence may be protected from the insidious influence of parol proof. In this we have already relaxed too far." These words of wisdom are especially applicable to this case. The plaintiff claims that he is entitled to a reconveyance of land from the defendant, which he says is worth from twelve to fifteen thousand dollars. The defendant has a sheriff's deed for an absolute fee-simple title to the land. The action is not brought until after 12 years from the date of the deed, and during every moment of that time the vendee of the sheriff and his assignee have been in adverse possession of the land. The plaintiff says he has lost the paper under which he claims a reconveyance, and, although he admits he made no search for it during three years before the case was tried, he was allowed to give parol evidence of its contents. He does not pretend to recollect the contents or any portion thereof. He gives what is really nothing but his own opinion of the meaning of the writing. He does not for a moment state upon what terms and conditions, or at what time, or in what circumstances, he was entitled to have a reconveyance under the agreement; and he admits entire ignorance as to whether certain important items of disbursement, which necessarily accompanied the holding of the land, were to be repaid to the grantee before he could be required to transfer the title. He cannot state the amount of his indebtedness to the grantee, though he concedes that the whole of his indebtedness was to be first received by the grantee. He denies that he owed anything to the grantee on account of the judgment of $500 which the grantee held against him, and he admits that he owed the grantee other sums of money, the amounts of which he is unable to state. On what possible basis could a reconveyance be ordered by a court without having—First, full knowledge of the precise terms of the agreement of defeasance; and, second, without knowing the exact amount of the indebtedness which the plaintiff owed to Kase for which the latter was entitled to be reimbursed. It is simply and utterly impossible to make any such decree in such a state of the proof.

In M'Credy v. Navigation Co., 3 Whart. 424, we held that evidence of the contents of an instrument alleged to have been lost cannot be given without previous proof of its due execution, which includes proof of its delivery; and where a witness called to prove the former existence of an instrument testified that it had been put into the hands of A. as an escrow, and A. on his examination testified that he could not recollect on what occasion or with certainty to whom it was given up, and that he should not have given it up without the consent of both parties, it was held that evidence of the contents of the instrument was properly rejected.

In Kerns v. Swope, 2 Watts, 75, Gibson, C. J., said: "The rule of law which requires the best evidence to be produced is nowhere more rigidly enforced than in proving the contents of a lost deed. There are but two ways of doing this in the circumstances of the present case. Before a copy can go to the jury, it must be proved to be such by one who compared it with the original; and it is even then inadmissible if there be a counterpart."

In Coxe v. England, 65 Pa. St. 212, Agnew, J., said, speaking of a witness who was offered to prove the contents of a lost letter: "She cannot say that she remembered any sentences of the letter word for word as they were written or read aloud. Her account evidently shows a hasty glance only at the letter, while the true source of her recollection was the utterance of her husband. * * * In addition to this, she does not profess to give the whole contents, and does not even state that this portion of the letter was all that related to the subject of the timber. On this point her testimony falls far short of the evidence of the contents offered in Dennis v. Barber, 6 Serg. & R. 420, a case which rules this in respect to the proof of contents."

We hold that the proof of contents in this case was altogether short of the requirements of the law, and that it cannot be considered as sufficient to establish any right of recovery in the plaintiff as upon an agreement in writing. The plaintiff admitted on the trial that he had made no search for the paper within three years before the trial, and, in our opinion, the offered proof of contents should not have been received for that reason.

But there is a still more important objection to the validity of the claim, and that is the want of sufficient proof that there ever was such an agreement. The plaintiff testified that the agreement was written by an alderman named J. G. Thompson, living in Carbondale, and that he attested it as a witness, and took the acknowledgment of the parties to it. The alderman was called as a witness by the plaintiff, but he entirely failed to establish either the preparation or the execution of such a paper. After stating that he knew both Dr. Burr and John Kase, he was asked: "Q. Did you do any business for them about 1879? A. Yes. Q. Do you remember drawing any paper between them relating to the cottage property in 1879, in the spring? A. Well, I cannot recollect anything very particular about it. I have some recollection of drawing some paper, a faint recollection of drawing some paper for Mr. Kase and Mr. Burr. Q. Can you give us the contents of that paper at this time? A. I cannot." The remainder of his testimony was no improvement upon the foregoing. No other testimony was offered by the plaintiff as to the execution of any written agreement between Burr and Kase. When

Digitized by Google

Kase was called as a witness on his own behalf, he denied in the most positive and emphatic manner that he ever made any written agreement, or any other agreement, with Burr for the purchase of the property and the reconveyance of it, as alleged by Burr. After saying that Alderman Thompson never drew any paper between him and Burr relating to this property, he was asked: "Q. State whether or not you ever signed any paper. A. No; I never did. Q. Whether you ever signed any paper agreeing in any way to reconvey this property upon any conditions whatever to Dr. Burr. A. No; I never did. Q. State whether, at any time before, at the time, or since the sheriff's sale, you ever made any agreement in any way to reconvey this property to Dr. Burr upon any condition. A. Not any. Q. State whether Dr. Burr ever demanded of you to make any conveyance of this property to him. A. No; he never did." His subsequent testimony made no change in the foregoing. So far, then, as the making of an agreement in writing is concerned, the case stands upon the testimony of Burr, on the one side, and Kase, on the other. There was some attempt made on the part of the plaintiff, as is usual in this class of litigations, to show admissions in conversations by Kase of having made some kind of agreement with Burr to reconvey. Mrs. Catharine Lee was one of these witnesses, and she said: "I heard Mr. Kase and my husband talking about the cottage property at that time. Mr. Kase, as I understood it, wanted to get his share out of the property. It is so long ago that I can hardly remember the conversation fully. That is all he wanted, to get his share out of it, or something like that." As this would be entirely consistent with the idea that Kase wanted to get his money back by a sale of the property as his own, and as nothing was said about any reconveyance of the property to Burr, the testimony was absolutely useless in support of the plaintiff's claim.

M. B. Simrell, a witness for the plaintiff, testified to a conversation with Kase which occurred in 1879, 15 years before the time when he testified. After saying that he was at Kase's store, and was talking with Kase about the property, he was asked: "Q. Tell us what the conversation was. A. I asked him if it was going to take all Mr. Burr had to satisfy this judgment, and he says: 'Oh, no; he will be left all right.' And I says: 'How is this?' 'Well,' he says, 'I have got some money involved there, and, when I get my money out, I am satisfied, and shall return the property to him.' Q. What else? A. And I says: 'How is this? Has he got any bonds for that?' And he says: 'He has got a paper to protect him.' Q. Is that all the conversation? A. I think that is the sum and substance of it that day." On cross-examination he gave this version of the same conversation: "Q. What was said next? A. I said: 'How is it? You have got him advertised, and you are going to sell him out by the sheriff.' And he said: 'That is all right.' I said: 'Ain't that going to ruin him? Ain't that going to take all he has got?' He said: 'He has enough there to pay me, and, after I get that, that is all I want.' Q. Was there anything else said? Do you remember anything more that was said about this? A. Nothing particular." The discrepancy between the testimony of this witness in chief and on cross-examination is enough to condemn it for any purpose in a case of this kind, where the whole fate of the case depends upon clear, precise, and indubitable testimony to the very matter in controversy, without considering its lack of detail as to most essential matters, or the fact that the defendant positively denied the whole conversation. On his examination in chief he simply said that Kase said: "When I get my money out, I am satisfied, and shall return the property to him." This, of course, means no more than a simple declaration to a stranger of an intention that, when he got his money out, he should return the property to Burr. He does not say that he had made any contract to reconvey, but simply that he would reconvey. In other words, he had the intention to reconvey, which, of course, he might change at any moment. Dr. Burr was not present, and therefore it was not in any degree the expression of a contract to reconvey. Then the witness, in reply to the next question, said: "He has got a paper to protect him." What kind of a paper? The witness does not say. Was it a bond of indemnity, or an agreement to hold the property in trust, and ultimately, if either Burr should pay the debt he owed Kase, or Kase should recoup himself out of the proceeds of the property, that would protect him? And what money was Kase to get out of the property? Was it all the debts Burr owed him, or only the liens on the property, and was it to include expenditures for taxes, repairs, expenses, and costs? The witness says nothing as to any of these particulars. But in his cross-examination the witness says nothing about any agreement to reconvey, or any paper that would "protect him." And the question is, which version is correct? It is a sufficient reply to the whole of this that it is too indefinite, too uncertain, and too contradictory for any court to rely upon as the basis of a decree. The only other witness to conversations is Philo Lee, and this is his testimony: "I and Mr. Kase got talking, and I asked Mr. Kase how he and Mr. Burr was getting along. He said he thought they would get along all right; that all he wanted, he says, was to get what belonged to him; if he gets that, he would be perfectly satisfied." There is nothing here of any agreement to reconvey, or any intent to do so, and, as to getting what belonged to him, it is altogether consistent with getting his money by means of a sale on his own account. This

Digitized by Google

is all the testimony in the case on the part of the plaintiff upon this subject, and it is so lamentably short of the kind of testimony required for such a case that it will only be necessary to state the rule which has been established for quite half a century in this commonwealth to make out a right of recovery in this class of cases.

The cases in which it is held that in order to convert a deed absolute on its face into a mortgage, or to create a parol secret trust as against such a deed, the evidence must be clear, precise, and indubitable, are so numerous, and the profession is so familiar with them, that only a brief reference to a few of them will be necessary. In the case of Fisher v. Witham, 132 Pa. St. 488, 19 Atl. 276, we said: "While a deed absolute on its face, executed prior to the act of 1881, may be converted into a mortgage by parol proof, it is well settled that the evidence must be clear, explicit, and unequivocal. It must show an agreement in the nature of a defeasance, contemporaneous with the execution and delivery of the deed. Subsequent admissions alone are not sufficient. The evidence in this stale case falls far below the required standard, and we therefore think the court below was clearly right in sustaining exceptions to the master's report and dismissing the bill." In Rankin v. Simpson, 19 Pa. St. 471, Mr. Justice Woodward, commenting upon this class of cases, said: "If a party call on courts to execute parol contracts for land in spite of the statute of frauds and perjuries, let him prove a contract. Because he can find persons who remember the owner's loose or casual declarations indicative of a sale, shall he have a decree in disregard of the statute, and in opposition to his own declared convictions? The chancellor has never lived who would tolerate such a demand. Patents and deeds and wills would be a solemn mockery if they might be trifled with and set aside in this manner." In Nicolls v. McDonald, 101 Pa. St. 514, we said: "When a party sets up title against a deed absolute in its terms, and seeks to convert it into a mortgage, the proof of the alleged agreement necessary to change its character must be clear, explicit, and unequivocal. It should not rest on the subsequent admissions and declarations of the alleged mortgagee only. * * * When the attempt is made, he claims as a mortgagor seeking to redeem. Although the action may be ejectment in form, yet in substance it is a bill in equity to compel a reconveyance of the land from the mortgagee in possession. * * * If the parol evidence be insufficient to move a chancellor to decree a reconveyance, it is insufficient to justify a recovery in ejectment. * * * If he be of opinion that the evidence does not make out a case which would induce a chancellor to decree a conveyance, it is his duty to give the jury binding instructions to that effect." To show by parol that a deed absolute on its face is a mortgage, the proof must be clear, explicit, and unequivocal. Plumer v. Guthrie, 76 Pa. St. 441. To convert a deed absolute on its face into a mortgage by parol evidence, it must be clear, precise, and indubitable, sufficient to satisfy the mind of a chancellor; otherwise it is error to submit it to the jury. Pancake v. Cauffman, 114 Pa. St. 113, 7 Atl. 67; Rowan v. Finney, 96 Pa. St. 192; Saunders v. Gould, 134 Pa. St. 445, 19 Atl. 694.

It is unnecessary to multiply the citations. Applying the principle to the present case, it is seen at once that the plaintiff's claim is destitute of merit. His oath is met by the contrary oath of the defendant Kase. If we look for corroborating circumstances, they are absent; but they are present against his claim with great force. For instance, in the very next year after Kase received his sheriff's deed, some of the buildings on the premises took fire, and were burned to the ground. Kase received almost $4,000 of insurance money, and, according to the plaintiff's theory, Kase was thereby fully paid all the money that was due him. Yet the plaintiff took no steps to enforce his equity. If he held a written agreement such as he alleges, then was the time to present his demand, and, if refused, to take immediate steps to enforce it. Then everything was fresh in the memory of parties and witnesses, the written agreement was in the plaintiff's possession, according to his statement, and his remedy was simple and easy. It is absolutely inexplicable why he did not do this, and no explanation worth speaking of is attempted. He stood by and did nothing. Finally, Kase, being in possession constantly for seven years, sold the property to Stone, who was undoubtedly an innocent purchaser for value without notice. Stone took possession at once, and spent some $1,500 in improvements, according to the testimony. Meanwhile Burr gave him no notice of his claim of title, but allowed the improvements to be made without any objection or demand or offer of indemnity. It is simply impossible to reconcile such conduct with the integrity of the plaintiff's claim. At last, after delaying all efforts to assert his title for 12 years, he brings the present action, without making any demand upon Stone, or giving any notice of his title, or making any offer to pay him the money he had expended. This is gross laches, which is fatal to any claim in an equitable proceeding. In our opinion, no chancellor would decree a conveyance in such circumstances as these, and therefore we hold that Burr cannot recover either against Kase or Stone. The assignments of error are all dismissed. Judgment affirmed.

Digitized by Google

STATE v. APPLEGARTH et al.

(Court of Appeals of Maryland. May 16, 1895.)

OYSTER PACKING—LICENSE TAX—CONSTITUTIONALITY OF LAW—INTERSTATE COMMERCE.

1. Code, art. 72, §§ 66, 67, as re-enacted by Laws 1894, c. 380, requiring packers and canners of oysters for sale or transportation to pay a license either of $300, or in proportion to the number of bushels packed, imposes a tax upon occupation, and does not violate the provision of the bill of rights requiring equality and uniformity in taxation.

2. Laws 1894, c. 380, re-enacting and amending Code, art. 72, tit. "Oysters," the object of which is to regulate, protect, and preserve the oysters of the state, does not, by requiring, in sections 66 and 67, a license to be paid by persons engaging in the oyster business, embrace a subject different from its title and the body of the act.

3. Code, art. 72, as re-enacted by Laws 1894, c. 380, §§ 66, 67, imposing a license upon packers and canners of oysters for "sale or transportation," does not seek to regulate interstate commerce, in violation of the federal constitution.

Appeal from criminal court of Baltimore city.

Charles G. Applegarth and Henry B. Pearson were indicted for engaging in the business of packing and canning oysters without a license, and from an order sustaining a demurrer to the indictment the state appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, BRISCOE, PAGE, and BOYD, JJ.

Atty. Gen. Poe and Charles G. Kerr, for the State. E. H. Gans and R. H. Haman, for appellees.

BOYD, J. The appellees were indicted for engaging in the business of packing and canning, for sale and transportation, oysters taken in the waters of this state without obtaining from the state a license therefor. A demurrer to the indictment was interposed, which was sustained, pro forma, by the court below. The prosecution is based on sections 66, 67, art. 72, Code Pub. Gen. Laws, as amended by chapter 380 of the Laws of 1894. It is contended on behalf of the appellees that these sections are (1) in conflict with the constitution of this state, because the license provided for is an arbitrary and unequal tax, contrary to the fifteenth article of the bill of rights, and not a lawful exercise of the police power of the state; and (2) that they are a regulation of interstate commerce, in violation of the constitution of the United States. We will consider the case in that order.

There has been on our statute books for many years legislation having in view the protection and preservation of the oysters of this state. Since 1860 a separate article has been devoted to this subject in the several Codes of Public General Laws of Maryland. For some years past the legislatures have generally been called upon to devote more or less time to this important subject, and, at the session of 1894, article 72, tit. "Oysters," of the Code, was repealed, and re-enacted with amendments. Section 66 of that article, as thus amended, requires every person, firm, or corporation engaged in the business of packing and canning oysters for sale or transportation to take out, on or before the 1st day of September in each year, a license to engage in such business by application to the clerk of the circuit court of the county in which the place of business of such applicant is situated, or to the clerk of the court of common pleas, if in Baltimore city. The applicant is required to state the number of bushels of oysters which he proposes to pack during the succeeding eight months, and to pay at the time of issuing the license the sum of $25 for such license, and in addition thereto the sum of $1 per 1,000 for every 1,000 bushels over 10,000 so estimated in his application as the total number to be packed during the season. He is also required to make a return, under oath, within 30 days after the 25th day of April in each year (that being the end of the season in which oysters can be caught), to the clerk from whom he obtained the license, of the number of bushels packed or canned by him during the season, and to pay the clerk the further license money of $1 per 1,000 for each 1,000 bushels packed or canned by him over and above the estimate in his application. This report must be forwarded to the comptroller of the state, who is authorized to return any overpayment, in case he is satisfied that the total number of bushels packed by said person was less than the number stated in his application. This section further provides that all moneys thus received from said licenses shall be paid over and accounted for by the clerks to the comptroller to be placed by him to the credit of the oyster fund, as provided by section 29 of said article. The latter section provides for the payment of moneys received from dredging licenses and other sources therein named into the treasury, to be "placed to the credit of a fund which shall be called 'The Oyster Fund,' and the same shall be kept separate and distinct from other funds in the treasury, and shall only be drawn upon for the purpose of maintaining sufficient and proper police regulations for the protection of fish and oysters in Maryland waters, and in the payment of the officers and men and keeping in repair and supplying the necessary means of sailing the boats and vessels of the state fishery force." Section 67 fixes penalties for the violation of section 66, and authorizes any person to pay the sum of $300 per annum for a license, without being required to report the number of bushels handled by him, or otherwise disclose the operation of his business.

The above are the material parts of the sections of this law directly involved in this case. An examination of the other provisions of this article will show that the legislature has required those engaged in catching and taking oysters, for sale, out of the waters of

Digitized by Google

Maryland, with rakes, tongs, scoops, dredges, and other instruments, to take out licenses, and also those engaged in selling oysters on commission. It will also be seen that great care has been taken to require persons connected with the oyster business to deal fairly with the state, and large outlays of money are provided for, to be paid out of the oyster fund, for the purpose of regulating, preserving, and protecting this important and valuable industry of our state. In considering this question, it is well to bear in mind that the oyster beds are the property of the state (McCready v. Virginia, 94 U. S. 391; Bradshaw v. Lankford, 73 Md. 431, 21 Atl. 66), and that the legislature, representing the sovereign power of the state, can pass laws determining how oysters can be taken, can prohibit them from being taken at all, or make such other reasonable regulations concerning them as it may deem best and proper for the interests of the state at large. If the restrictions imposed upon those engaged in the business of taking oysters be withdrawn, the oyster beds might be destroyed, or at least seriously injured. It has therefore been deemed proper by the legislature to provide a "state fishery force," at large expense, to enforce the laws passed for their preservation and protection. If the income from licenses granted under laws existing prior to 1894 proved insufficient to meet the demands on the state, the legislature had the undoubted right to provide for the deficiency, provided, of course, it kept within constitutional bounds. If there be a class of persons engaged in business in this state who are largely dependent upon the oysters in the waters of this state for the conduct of their business, but who had heretofore not been required to have and pay for licenses for the privilege of engaging in such occupation, we can see no just or equitable ground to restrain the legislature from requiring them to do so, unless prohibited by the organic law of this state or of the United States. Such legislation on this particular subject might well be justified on the ground that the state, as owner of the oysters, is entitled to a reasonable and fair compensation for them; and it may not be deemed just or wise to impose all the burden on those who oftentimes undergo great hardship and suffering in catching them, and therefore those engaged in packing and canning them are called upon to contribute their share of the compensation. If the state is not to profit by sales of its property, it should at least be protected from any loss in caring for it, and all those engaged in the oyster business might justly be required to contribute their portion of the cost and expense of preserving them. When we remember that oysters in the waters of the state belong to it, and see, from an examination of the article of the Code in which the sections now before us are embraced, the great expense incurred by the state in fostering and encouraging this industry, and preserving the oysters, and that all the revenue derived from the licenses objected to in this case are required to be placed in the separate fund applicable to those purposes, we might perhaps content ourselves by declaring this law to be valid on the ground that these license fees are imposed for the regulation of the oyster business, with which oyster packers are connected. But we are now dealing with a statute passed by the legislature for the benefit of the state, and we are not called upon to draw nice distinctions between the power to license for regulation, and the power to license with a view to revenue, as is sometimes required in construing charters of municipal corporations for the purpose of determining whether or not such corporation had the power to exact certain license fees. The cases of Vansant v. Stage Co., 59 Md. 335, and State v. Rowe, 72 Md. 553, 20 Atl. 179, cited by the appellees, are of the latter kind.

The privilege of carrying on the business of packing and canning oysters is made, by this law, to depend upon the taking out of a license, and we do not think the provisions of the state constitution, looking to equality and uniformity in taxation, are thereby violated. It is said in Tiedeman's Limitations of Police Power (page 282) that 'the most common objection raised to the enforcement of a license tax is that it offends the constitutional provision which requires uniformity of taxation, since the determination of the sum that shall be required of each trade or occupation must necessarily, in some degree, be arbitrary, and the amount demanded more or less irregular. But the courts have generally held that the constitutional requirement as to uniformity of taxation had no reference to taxation of occupation." The right to require the payment of license fees for the privilege of carrying on business of different kinds has been recognized for many years in this state, and the license fees required to be paid have been fixed, in the discretion of the legislature, according to circumstances and the character of the business. Take, for example, the licenses to brokers. Exchange and insurance brokers are each required to pay $100 per annum; stock and merchandise brokers $75, and real estate and bill brokers $50, per annum. Those engaged in the sale of ordinary goods, chattels, wares, or merchandise are required to pay according to the amount of stock at the principal season of sale, thus varying from $12 to $150 per annum. Those selling spirituous or fermented liquors in quantities not less than a pint are required to pay from $18 to $150 per annum, while ordinary keepers pay from $25 to $450, according to the rental or annual value of the premises. Other instances might be cited, but these serve to illustrate what has been the practice in this state, and it would scarcely be contended that licenses cannot be required of persons engaging in such occupations as those above mentioned. Upon what principle, then, is the license fee required of oyster packers illegal? It is ar-

Digitized by Google

gued that the method adopted is novel. If that be admitted, it does not invalidate the law, but it does not materially differ from the traders' licenses, so far as the method of fixing the rate is concerned. In the latter the license fee is graduated according to the amount of stock on hand at the principal season of sale, while in this it is according to the number of oysters packed; the effort in each case being to require payment according to the amount of the business done in the occupation taxed.

We do not agree with the learned counsel for the appellees that this law imposes a tax on the property, and not on the occupation. In the case of State v. Cumberland & P. R. Co., 40 Md. 22, relied on by him, the act of assembly in question prohibited coal-mining companies from transporting any coal mined in this state until a state tax of two cents per ton on said coal was paid. It was intended to be in lieu of all other state taxes to be paid by those companies, and expressly provided that the comptroller should give the companies paying the tax discharges from state taxes on their capital stock. It being manifestly and confessedly a direct tax on the property in the opinion of four out of seven judges who sat in the case, they held the law to be in violation of the fifteenth article of the bill of rights of this state. The other three judges dissented, on the ground that it was not unconstitutional, notwithstanding the language of the statute. This case differs widely from that, as this law simply provides for a license tax on the business or occupation of those engaged in packing or canning oysters, and not for a tax on property. In State v. Philadelphia, W. & B. R. Co., 45 Md. 361, this court held that a tax of one-half of 1 per centum upon the gross receipts of railroad companies was not a direct tax upon the property of the companies, within the meaning of the fifteenth article of the bill of rights. It was such a tax as might be imposed or laid "with a particular view for the good government and benefit of the community," and not such as was prohibited under the prior clause of this article. Although that case differs from this, we refer to it as reflecting upon the character of tax the clause in the fifteenth article of the bill of rights relied on refers to, as construed by this court. See, also, Rohr v. Gray, decided at last October term, but not yet officially reported, 30 Atl. 632. It is true that the burden imposed on oyster packers as a class may differ from that on other occupations, but that is for the sound discretion of the legislature. An attorney at law may not pay taxes on one dollar's worth of property, and he is not now required to pay any license tax to the state for the privilege of practicing his profession, while his neighbor, if a merchant, not only pays taxes on his stock of goods, but is required to pay a license tax before he can sell one dollar's worth of goods, yet it cannot be successfully contended that the law of this state requiring merchants to pay a license tax is unconstitutional. The courts must leave to the sound discretion of the legislature, which, of course, should be honestly exercised, the question as to what occupations shall be licensed, what rates shall be charged, etc., so long as the laws do not manifestly conflict with some provision of the constitution of the United States or of the state. The method adopted in this case is probably as just as could be established. It is regulated by the amount of business done, and the privilege is given of paying the sum of $300 as a fixed amount, instead of being governed by the number of bushels packed. If the legislature had arbitrarily fixed $300 as the license tax to be paid by all oyster packers, the right to do so could not be questioned. Why, then, could it not adopt as a minimum license fee $25, and as a maximum $300, with a sliding scale between those sums, according to the amount of business done? This is practically what was done.

Again, it was contended on the part of the appellees that if the license fee is to be regarded as a mere tax on the business of the packer, then this law embraces a subject distinct from its title and from the body of the act. The act of 1894, as has already been said, repealed and re-enacted article 72 of the Code, and included all the public general laws on the subject of oysters, to the date of its passage. It adopted various regulations for the government of those connected with the oyster business, and in doing so provided for licenses to packers. It was therefore not only unobjectionable, but very appropriate, to include the provisions of sections 66 and 67 in this article. They are a part of the system adopted by the legislature to regulate, protect, and preserve the oysters of the state, and hence were embraced in this article. This is not without precedent in this state. In article 23, tit. "Corporations," we find subdivisions of "Insurance Companies" and "Insurance Department," and under the latter provision is made for licensing agents of foreign insurance companies, who are required to pay $200 per annum, and also a tax of 1½ per centum on the premiums collected, received, or secured in this state, or from residents thereof, in addition to some other fees named. The state has a large revenue from that source. Nor do we see any objection to the provision of the law requiring the license fees collected of the oyster packers to be paid into the oyster fund. Whether the money goes into the general treasury, and any deficiency in the oyster fund is made up by the state out of the general fund, or whether it be paid directly into the oyster fund, can make no possible difference to the packers. They are really benefited by the method adopted by this law, as the money paid by them is required to be used for purposes connected with the oyster business, in which they are directly interested. If the state has the right to impose the license tax, as we hold it has,

Digitized by Google

it can certainly determine what shall be done with the money as long as no unlawful use is made of it. Having considered the various objections urged by the learned counsel for the appellees to this law, we are of opinion that, treating it as a tax on the occupation of these persons, the law is not obnoxious to any of the provisions of our state constitution, and therefore must be sustained, unless it be in conflict with the federal constitution, which we will briefly refer to.

But little stress was laid on this ground of defense either in the oral argument or the brief filed by the appellees. We do not see how there can be any serious question about the validity of this law, so far as affected by the constitution of the United States. The law does not in any way discriminate in favor of the citizens of this state against the citizens of other states. On the contrary, it only applies to those whose places of business are in this state. Nor do we think it can be said that it in any way regulates or undertakes to regulate interstate commerce. It was suggested in argument that, as the law applied to those engaged in packing or canning oysters for sale or transportation, the latter clause made the law objectionable. That term was evidently used to exempt those who packed or canned oysters for their own purposes, but not for sale or transportation. Of course, oyster packers in this state may sell or transport all their oysters within the state, or they may sell or transport some of them beyond the state. But that does not prohibit the state from taxing them for the prosecution of their business within the state. It was said as early as the case of Nathan v. Louisiana, 8 How. 80, that "no one can claim an exemption from a general tax on his business within the state on the ground that the products sold may be used in commerce. No state can tax an export or an import as such, except under the limitations of the constitution. But before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the state, it is a subject of taxation by the state. A cotton broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation." Although it is sometimes difficult to draw the line between what is and what is not a regulation of commerce among the states, we have been referred to no case, and know of none, decided by the federal courts, that will bring this case within any of those classes that have been held to be in conflict with the constitution of the United States. Being of the opinion, then, that there is no well-founded constitutional objection to the law under consideration, viewing it from the standpoint of either the federal or state constitution, and recognizing the right of the legislature under those circumstances to pass it, we must reverse the judgment below, and award a new trial. Judgment reversed, and new trial awarded.

BALTIMORE TRACTION CO. v. APPEL

(Court of Appeals of Maryland. March 26, 1895.)

ACTION AGAINST STREET RAILWAY—ACCIDENT AT STREET CROSSING—EVIDENCE OF NEGLIGENCE.

1. The burden of establishing contributory negligence is on defendant.

2. Though plaintiff was wanting in ordinary care in attempting to cross defendant's tracks he may recover if defendant's employé, in the exercise of ordinary care, might have avoided the accident after he saw plaintiff, or by the use of ordinary care might have seen that plaintiff was in danger of being struck.

3. Where the evidence is conflicting, the question of negligence is for the jury.

4. Act 1894, c. 185, requiring the court to direct special findings of fact where they are requested by either party, does not require the court to submit special questions, when the request therefor is not made until after the close of the arguments, when the jury is about to retire.

Appeal from superior court of Baltimore city.

Action by John Conrad Appel against the Baltimore Traction Company for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

At the conclusion of the trial the plaintiff offered the following prayers, among others: "(1) The plaintiff prays the court to instruct the jury that if they believe from the evidence that the plaintiff received the injuries mentioned in evidence to his person and property, from a collision with the car of the defendant in charge of the motorman and conductor in the employ of the defendant, and that such collision was caused by the negligence of defendant's motorman in the management of the car of which he was the motorman, and that the plaintiff was at the time of the accident driving on West street, being one of the streets of Baltimore city, and using due care in so doing, then the plaintiff is entitled to recover. (2) The plaintiff prays the court to instruct the jury that the burden is on the defendant to prove any such contributory negligence on the part of the plaintiff as will preclude the plaintiff from recovery, but, in determining whether the plaintiff was guilty of contributory negligence or not, the jury should consider the whole evidence in the case, including the plaintiff's as well as the defendant's. (3) If the jury find from the evidence that the motorman in charge of the car which struck plaintiff's wagon saw, or by the exercise of ordinary care might have seen, that the plaintiff did not hear or comprehend the signals given by the motorman of the approach of the car, then it was his duty to have stopped the car. (4) Even if the jury find that there was want of ordinary care on the part of the plaintiff, yet he is entitled to recover, provided that the motorman could have avoided the accident by the use of ordinary care after he saw, or by the use of ordinary care might have seen, that the plaintiff was on the track, and was in danger of being struck by the car."

Digitized by Google

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

F. C. Slingluff and Ed. Duffy, for appellant. C. D. McFarland, P. J. Campbell, and Emil Budnitz, for appellee.

BRISCOE, J. The appellee brought suit against the appellant, a street-railway company, operating its lines in the city of Baltimore, for injuries sustained by reason of the negligence of one of its employés while propelling an electric car on the public streets of that city. The case was tried before a jury, and, the judgment being for the plaintiff, the company has appealed. The questions arise solely upon exceptions to the rulings of the court upon the prayers, and a construction of the act of 1894, c. 185, relating to "Special Findings of Facts by Court or Jury." Upon the close of the plaintiff's testimony, the court was asked to withdraw the case from the jury: First, because of the contributing negligence of the plaintiff; and, secondly, because there was no legally sufficient evidence to entitle the plaintiff to recover; and the failure of the court to so instruct the jury forms the basis of the first bill of exception. In refusing to grant these prayers, or either of them, the court committed no error, because there was evidence, if the jury believed it, to entitle the plaintiff to recover. The court having refused at this point of the case to take the case from the jury, the appellant offered its evidence, and the second exception embraces the rulings of the court, at the close of the testimony, upon the prayers of both plaintiff and defendant. There were 17 prayers in all. The first, second, fourth, and fifth prayers of the plaintiff were granted, and the third rejected. All of the defendant's prayers were rejected except its twelfth, and the court granted in lieu of the rejected prayers an instruction of its own, which we will hereafter consider. The first, second, and fourth prayers of the plaintiff were properly granted, and have been approved in recent street-railway cases decided by this court. Traction Co. v. Wallace, 77 Md. 435, 26 Atl. 518; Railway Co. v. Coleman, 80 Md. —, 30 Atl. 918; Arnreich's Case (Md.) 28 Atl. 809; Cooke v. Traction Co. (Jan. Term, 1895) 31 Atl. 327, to be reported. The fifth prayer related to the measure of damages in the event of a verdict for the plaintiff, and was not seriously controverted by the defendant. By the first, second, and third prayers of the defendant, which had been previously rejected, the question as to what constitutes contributory negligence was sought again to be made one of law for the court, rather than one of fact for the jury, to determine, upon the facts of the case. This court has repeatedly decided that the question of negligence or the want of ordinary care, where there was a contrariety of evidence in cases like the one here presented, is one of fact for the jury. This is the approved doctrine both in England and this country, and we deem it unnecessary to refer again to the adjudicated cases bearing upon it. As already stated, these prayers, under the facts of this case, were properly rejected. The prayer granted by the court, in lieu of the other rejected prayers of the defendant fully and fairly covered the law of the case. It told the jury that if the plaintiff was guilty of the want of reasonable and ordinary care in attempting to cross the tracks of the defendant under the circumstances of this case, then he is not entitled to recover, unless the motorman could have avoided the accident by the use of ordinary care, after he saw, or by the use of ordinary care might have seen, that the plaintiff was on the track, and was in danger of being struck by the car.

The third bill of exception involves an important question of practice, under the act of 1894, c. 185, allowing in this state special findings of fact, in all cases where issues of fact are submitted to court or jury. This act provides that "in all cases where issues of fact are submitted to a jury, the court may at its own discretion, or shall at the request of either party, require the jury, in addition to rendering a general verdict for the plaintiff or defendant, to find specially upon any particular questions of facts material to the issues on trial, which questions shall be in writing; and in all cases at law where issues of facts are tried before a court without a jury, the said court, at the written request of either party, find specially upon any question of facts which it may deem necessary to be determined in order to arrive at its verdict. All such special findings of facts, whether by the jury or by the court, shall be in writing, and must be filed with the clerk as part of the record of the case, and in civil cases where a special finding of facts shall be inconsistent with the general verdict rendered at the same trial, the former shall control the latter and the court must give judgment accordingly; but nothing herein contained shall limit the court's power to grant a new trial or to arrest judgment on motion." In the case before us the court refused to submit the special questions, because they were too late, not having been requested until after the arguments had been concluded, and the jury were about to retire. It will be observed that while the statute imperatively requires the court, at the request of either party, to instruct the jury, in addition to rendering a general verdict, to find specially upon particular questions of fact, material to the issue, yet it nowhere prescribes the time when the request shall be made, or when they shall be presented to the court. It is clear, then, that the law leaves it to the sound discretion of the trial court. The supreme court of Indiana so held in the case of Kopelke v. Kopelke, 112 Ind. 435, 13 N.

Digitized by Google

E. 695, and reaffirmed in Hartlep v. Cole, 120 Ind. 253, 22 N. E. 130, in construing a similar statute. And to the same effect is Thomp. Trials, p. 2021. The better practice, we think, independent of any rule of court, would be to make the request at the time of the submission of the prayers, certainly not later. Manifestly it is too late, after the close of the argument and the jury about to retire. The action of the court, in rejecting the request in this case, was not error. Finding no reversible error in any of the rulings of the court upon either the prayers or special findings of fact, and as the case was properly submitted, we shall affirm the judgment. Judgment affirmed, with costs.

WILSON v. DONNELLY et al.

(Supreme Court of Rhode Island. May 16, 1895.)

ATTACHMENT — ACTION ON FORTHCOMING BOND—EXCEPTIONS ON APPEAL.

1. In an attachment where the defendant gives a bond to the officer, such officer is the proper person to bring suit on the bond.
2. Where the time has been extended to allow exceptions to be presented to the court, and they are not presented until three days thereafter, they are properly disallowed.
3. In an action by an officer against a surety on a forthcoming bond in attachment, the failure of the officer to file it with the clerk of the court as required by Pub. St. c. 207, § 18, is not a defense, the plaintiff in the attachment suit being the real party in interest.

Exceptions from Providence county court.

Action by Allen K. Wilson against Edward F. Donnelly and another on an attachment bond.

Defendants gave a bond to plaintiff, as the officer making the attachment, under Pub. St. R. I. c. 207, § 16, which provides that when goods are attached the defendant may give bond, with sureties, to the officer, and Pub. St. R. I. c. 207, § 18, which provides that when accepted by him he shall surrender the property to the person whose interest has been attached, and file the bond with the clerk of the court. Decree for plaintiff. Defendants except. Overruled.

Thomas W. Robinson, for plaintiff. T. J. McParlin, for defendants.

PER CURIAM. We do not think that the defendants make a case for a new trial. Though the plaintiff may have no personal interest in the bond in suit, but only as trustee for the plaintiff in the attachment suit in which it was given, the bond runs to him, and suit on it must be brought in his name. The exceptions were presented to the court for allowance three days later than the extended time allowed by the court. The court could not do otherwise than disallow them for that reason. The petition does not set forth, nor is there any affidavit accompanying it which sets forth, the facts on which the accident, mistake, or unforeseen cause relied on as the ground of new trial arose. The defense set up by the defendant John F. Donnelly against his liability on the bond in suit, as appears by the statement of exceptions on file among the papers, was that the plaintiff, on accepting the bond, did not file it with the clerk of the court, as provided by Pub. St. R. I. c. 207, § 18, and that the defendant surety, in consequence of such neglect, was led to surrender the security which he had received for becoming surety. We do not think that such neglect of the officer would constitute any defense to the present suit in which he is merely a nominal party, the real party in interest being the plaintiff in the attachment, to dissolve which the bond was given. If the surety has been injured by the officer's neglect to file the bond as alleged, his remedy would seem to be a suit against the officer.

PIERSON et al. v. SPRINGFIELD FIRE & MARINE INS. CO.

(Superior Court of Delaware. Nov., 1885.)

ACTION ON INSURANCE POLICY—PLEADING—DEMURRER.

1. A demurrer reaches back to the first substantive defect in the pleadings.
2. In an action on an insurance policy conditioned on notice and proofs of loss being given by insured, and payable 60 days "after" the notice and proofs of loss are received by insurer, a complaint which fails to show that notice and proofs of loss were served 60 days before commencement of the action is demurrable.
3. Such defect is not cured by pleading over, though the complaint alleges that plaintiff has complied with all the conditions of the policy.

Assumpsit by William H. Pierson and another, trading as Pierson Bros., for the use of William H. Pierson, against the Springfield Fire & Marine Insurance Company, a corporation existing under the laws of Massachusetts, on a policy. Heard on demurrer to certain of the pleas. Judgment for defendant.

Benjamin Nields, for plaintiffs. Edward G. Bradford and Lewis C. Vandegrift, for defendant.

COMEGYS, C. J. The counsel for the defendant having offered for consideration and insisted upon the rule that, in the case of a general demurrer to a subsequent pleading, the court will go back and examine the whole record, and give judgment against that party who has committed the first fault in the substantial pleading, we are to examine the declaration, and determine upon its sufficiency, in substance the same as if it had been demurred to for insufficiency. "A demurrer, in whatever stage of the pleadings it is taken, reaches back in its effect through the whole record, and in general attaches ultimately upon the first substantial defect in the pleadings on whichever side it may have occurred; defects in substance

Digitized by Google

not being aided by the adverse party's mere pleading over, as formal defects are." Hence, though the parties join in demurrer upon any one particular point, in any stage of the pleadings, judgment must, nevertheless, be given upon the whole record, and regularly against that party in whose pleading the first substantial defect has occurred. Thus, if the declaration is ill in substance, the plea in bar frivolous, and demurrer joined on the plea, judgment must be for the defendant; for, though the issue in law is joined immediately, and in terms on the plea only, and though that is worthless, yet a bad plea is sufficient for a bad declaration. Gould, Pl. pp. 474, 475, c. 9, §§ 36, 37, and the cases there cited. We are therefore to examine the declaration in this case as the first pleading, and decide whether it is sufficient in substance to support the action brought, which is assumpsit.

There are two counts in the narr., one declaring upon the policy of insurance sued upon, according to its supposed legal effect. The other, or second, sets out the policy in haec verba. Are these counts respectively, or is either of them, sufficient in law for the above purpose? That is the question. To solve this question satisfactorily, it is necessary to determine what the true intent and meaning and undertaking of the policy are, as shown by it. This will fix its legal effect and proper construction. Without undertaking to use the very language or pursue the order of the provisions of the policy, it may be taken to be a promise on the part of the defendant, in consideration of the money paid by the plaintiff, to insure to the amount of $3,500 a stock of goods consisting of certain building material of wood, known as "mill work," contained in the building mentioned in the counts, for a term commencing on the 14th day of January, 1880, at 12 o'clock noon, and ending with the same day, 1881, against all such immediate loss or damage sustained by the plaintiff and his legal representatives as might occur by fire to the property specified, not exceeding the sum insured, nor the interest of the assured in the property, except as therein provided, other than loss by theft at or after the fire; loss occasioned by invasion, insurrection, riot, civil commotion, military or usurped power; by lightning, or explosions of any kind, unless fire ensued, and then for the loss or damage by fire only; by loss or damage caused by removal of the property from a building where there is no loss by fire, unless such removal was necessary to preserve the property, in which case the damage was to be borne by both parties in proportion as the whole sum insured bore to the whole value of the property insured; nor for loss or damage caused by neglect to use all practicable means to save and preserve the property from damage at and after the fire,—to be paid to the plaintiff 60 days after due notice and satisfactory proofs of the loss or damage, made by the plaintiff, are received at the office of the company in Springfield, upon condition that in case of loss the plaintiff should give immediate notice thereof, and render to the company a particular account under oath of the loss, stating the time, origin, and circumstances of the fire, the occupancy of the building containing the property insured, other insurance upon the same, if any, and copies of all policies, the whole value and ownership of the property, and the amount of the loss or damage, and also should produce the certificate under seal of a magistrate, notary public, or commissioner of deeds nearest the place of the fire, and not concerned in the loss, or related to the plaintiff, that he has examined the circumstances attending the loss, knows the character and circumstances of the plaintiff, and verily believes that he has, without fraud, sustained loss on the property insured to the amount claimed. There are other conditions or provisions in the policy which affect the plaintiff's right of recovery, but, as they do not interfere with his right to sue in the first instance, they need not now be referred to.

What are above stated as conditions affecting the liability of the defendant under the policy are, with all other stipulations therein, expressly made such by the terms of the policy as set forth in the second count. The right of action, therefore, depended upon the performance of such conditions by the defendant, or of his being able to render a valid excuse for nonperformance. They are, therefore, conditions precedent to the commencement of an action by the plaintiff. The cause of action is not complete without showing performance, or matter in excuse. By the averment next the last in the first count, there is a sufficient allegation that the plaintiff complied with, strictly, all those conditions; thus prima facie entitling himself to an action. Such action, however, could not be brought immediately thereupon, but, by the terms of the policy, was postponed until the expiration of 60 days after due notice of the fire and satisfactory proofs of the loss or damage were received at the office of the company at Springfield. The defendant, therefore, had 60 days after notice of the fire and satisfactory proofs of the loss or damage given and made by the plaintiff, were received at Springfield in which to pay for such loss or damage. There is nowhere in the narr. an averment that such notice and proofs were given and furnished by the plaintiff to the defendant at Springfield, or received by it there from him. As the right to sue could not arise until 60 days after such event or transaction, it follows that the plaintiff does not show by the declaration he had a right of action against the defendant. The defect is one of substance, and not of mere form, and therefore is fatal as against the present suit. The fact omit-

Digitized by Google

ted to be averred is material to recovery in the suit, and, being so, it was necessary that it should be set forth in the narr., like all other material facts, and proved also. The distinction between form and substance in pleadings is stated as follows in section 17 of chapter 9 of Gould's Pleading, before referred to: "The difference between matter of form and matter of substance, in general, under the statute of Elizabeth, as laid down by Lord Hobak, is that that without which the right doth sufficiently appear to the court is form, but that any defect by reason whereof the right appears not, is a defect in substance." In the next section, giving his own definition, the author says: "If the matter pleaded be in itself insufficient, without reference to the manner of pleading it, the defect is substantial; but, if the only fault is in the form of alleging it, the defect is but formal." He then proceeds to give examples of both classes. In this case the matter pleaded (that is, what appears by the declaration) is insufficient, in that it is not averred that due notice of the fire and satisfactory proofs of the loss or damage sustained by the plaintiff were received at the office at Springfield 60 days before the suit was brought. The judgment in this case must therefore be for the defendant.

HOUSTON, J. There are two counts in the narr. on the policy of insurance, which is in writing, but not under seal by the company, if it has any, and consequently the action is properly in assumpsit, and which is apparent to us upon the record. The first of these counts sets forth the policy according to its substance, the second in the words in which it was written and printed in the usual form of its policies of insurance; to the first of which no less than 14 special pleas have been filed, and about the same number, and substantially the same, special pleas have been filed to the second count. The first plea to each, however, consists of the general issue of non assumpsit in the action, while the second plea to each of them is, in brief, as follows: Secondly, that the plaintiff did not give immediate notice of the said loss by fire to the said defendant in manner and form as he had alleged in said count; thirdly, that he did not give immediate notice to the said defendant of the said loss by fire and render to said defendant a particular account thereof in manner and form as he had alleged in said counts, except to the second count it adds that he did not render such particular account under oath, etc.; the fourth plea is to the first count only, and denies merely that the said George W. Pierson, his brother, and formerly his partner in the business, transferred to the plaintiff and his assigns all his right and interest in the policy of insurance, and all benefit and advantage to be derived therefrom in manner and form as alleged by him in said first count; and, fifthly (and which plea is also to the first count only), that the plaintiff did not become entitled to the benefit and advantage to be derived from the policy of insurance in the first count mentioned in manner and form as alleged by him in that count. All these pleas to both of the counts have been traversed by the plaintiff in his replication, and issue is joined on each of them respectively. But to the sixth plea to the first and to the fourth plea to the second count, which are substantially the same, and allege that in the said policy of insurance it was provided that any attempt at fraud on the part of the assured should cause a forfeiture of all claim under the policy, and that the plaintiff, being the assured under it, after the said fire had occurred, and before the commencement of this action, did make an attempt at fraud upon the defendant touching and concerning the said loss by fire, to wit: On the 7th day of September, 1882, at New Castle county, he was required by the defendant to produce for examination by the said defendant certain books of account of the said plaintiff relating to the business of said plaintiff, in order that the said defendant might ascertain the amount and cash value at the time of said fire of the goods, merchandise, and effects of the said plaintiff burned up, consumed, and destroyed thereby, and, being so required, the plaintiff did then and there willfully and fraudulently neglect and omit to produce said books of account for examination as aforesaid, with the intent on the part of the plaintiff to cause the defendant to believe that the amount and cash value at the time of said fire of the said goods so burned up and destroyed as aforesaid were greater than in truth and fact they were, and to deceive, injure, and defraud the defendant in the premises. Although the plaintiff, when so required, was able to produce said books of account for examination as aforesaid, the plaintiff has demurred, and has, in substance and in effect, assigned the following causes therefor, viz.: That the said pleas do not allege that the said books of accounts mentioned in them in any manner related to the said property destroyed by said fire, nor to the business of said plaintiff connected therewith; nor do they allege that the said books contained any statement or items showing the amount and cash value at the time of the said fire of the goods, merchandise, and effects of the said plaintiff so burned, consumed, and destroyed thereby; nor do they allege what the amount and cash value at the time of said fire of the goods, merchandise, and effects of the said plaintiff burned up, consumed, and destroyed thereby actually were; nor do they allege that the said plaintiff was required to submit to an examination under oath by any person appointed by the defendant, and produce his books of account and other vouchers; nor do they allege that the defendant required the plaintiff to pro-

Digitized by Google

duce books of account relating to the said plaintiff's claim.

But the policy expressly stipulates "that in case of loss the assured shall give immediate notice thereof, and shall render to the company a particular account of said loss, under oath, stating the time, origin, and circumstances of the fire; the occupancy of the building insured, or containing the property insured; other insurance, if any, and copies of all policies; the whole value and ownership of the property, and the amount of loss or damage; and shall produce the certificate, under seal of a magistrate, notary public, or commissioner of deeds nearest the place of the fire, and not concerned in the loss or related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has without fraud sustained loss on the property insured to the amount claimed by the said assured. In no case shall the claim be for a greater sum than the actual damage to, or cash value of, the property at the time of the fire, nor shall the insured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby assured bears to the whole sum insured on said property, whether such other insurance be by specific or by general or floating policies; and, without reference to the solvency or the liability of other insurers, assignors, unless the assignee owns the property, must make the proof hereby required. If required, the assured shall produce books of account and other proper vouchers, original or duplicate invoices, and all property hereby insured, whether damaged or not damaged, and be examined under oath by any person appointed by the company touching all questions by him deemed pertinent to the loss, and subscribe such examination when reduced to writing; and a refusal to answer such questions and subscribe such examination when reduced to writing shall cause a forfeiture of all claims under this policy." And although the last clause but one of it stipulates that, if required, the assured shall produce books of accounts (on which alone, and in the very words of it), the breach of it by the plaintiff is alleged by the defendant in the two pleas demurred to by the plaintiff for the reasons before stated, it is apparent, I think, from the immediate context, as well as from every other clause contained in the whole extract, that the meaning and intendment of it was that books of account, relating to the property insured and the business connected therewith, were the only books of accounts the production of which could be required under it; for it would be unreasonable for us to interpret it, as we find it either in the policy or in the pleas, to mean any book or books of account which had no relation whatever to the property insured or the business connected with it. As such a thing would have been utterly useless at any time and under any circumstances, it could never have been intended or contemplated by either of the parties to the agreement, and it was therefore unnecessary for the defendant to allege in either of these pleas that the said books of account required to be produced, as stated in them, in any manner related to the said property destroyed by said fire, or to the business of said plaintiff connected therewith, as such was clearly the import and meaning of the terms employed in the policy in regard to that matter wherever it is referred to in it; and the breach of that particular stipulation by the plaintiff is alleged in the very words of it, as I have before said, in the pleas; and, if there could be no question or uncertainty as to the meaning of that stipulation on the face of the policy itself, it was as clearly sufficient to allege the breach of it simply in the words of it, as was done in this case. And as this is the only stipulation in the policy of which any breach by the plaintiff is alleged in either of these pleas, I also consider all the other causes assigned by the plaintiff in support of his demurrers to them equally insufficient; that it was not necessary for the defendant to allege in them that the said books of account required to be produced as averred in them contained any statement or items showing the amount and cash value, at the time of the said fire, of the goods, merchandise, and effects of the said plaintiff, so burnt, consumed, and destroyed thereby, for, with the interpretation which I have given to the stipulation and to the simple and direct breach in the words of it, as alleged in the pleas, no such and no further allegation was necessary to constitute it a good plea of defense on that ground, because the agreement in that respect on that part of the plaintiff was positive and express, and without any qualification, that he would produce his books of accounts relating to the property insured in his business connected with it, if required, and which rendered the actual production of them necessary as a condition precedent to the commencement of the action by the plaintiff. Nor were any of the other allegations set forth in the remaining causes of demurrer assigned by the plaintiff necessary, for the reasons already stated, as they all proceed on the same erroneous assumption that the pleas in question imported that the defendant had required the production of books of account by the plaintiff, which did not relate or pertain to the property insured, or his business connected therewith; and, as the meaning and construction of the terms referred to in the policy, and literally repeated in the pleas, are to be ascertained and determined by the court, I accordingly think that the demurrer of the plaintiff to the sixth plea of the defendant to the first count in the declaration and to the fourth

Digitized by Google

plea to the second count in it are insufficient, and should therefore be overruled by the court.

The seventh plea to the first and the fifth plea to the second count are also substantially the same, and are, in brief, as follows: That, after the said fire had occurred, and before the commencement of the action, the plaintiff made an attempt at fraud upon the defendant, touching and concerning the said loss by fire in the said counts mentioned, in that the plaintiff did, in and by his statement under oath, in said counts mentioned, of the amount of loss or damage by said fire, knowingly, willfully, and fraudulently state that the amount of the said loss on the said goods and effects burned up, consumed, and destroyed by the said fire according to the cash value thereof at the time of said loss was the sum of $12,899.21, with the intent on his part to cause the defendant to believe that the cash value at the time of said loss of said goods and effects so burned up, consumed, and destroyed was greater than in truth and fact it was, and to deceive, injure, and defraud the defendant in the premises, although the cash value thereof at the time of said loss was, and was by the plaintiff at the time of making his said statement under oath well known to be, a much smaller sum of money than the sum of money aforesaid, to wit, the sum of $5,000. To these two pleas the plaintiff has also demurred, and assigned the following causes therefor, in substance: That, although it is alleged by the defendant in said pleas that the said misrepresentation of the said loss or damage by said fire was made by the plaintiff with the intent to cause the defendant to pay to him a much larger sum than the actual amount of the loss sustained by him in the destruction of said goods by said fire, they do not allege that said statement was made with the intent to cause the said defendant to pay to the said plaintiff a larger sum than is claimed on said policy, to wit, the sum of $3,500; nor do they allege how or in what manner the said defendant was or could be harmed or injured by the alleged statement.

The stipulations in the policy on which the defense of these two pleas is predicated are: First, that which requires the assured, in case of loss, to give immediate notice thereof, and to render to the company a particular account of said loss, under oath, stating, among other things specified, "the whole value and ownership of the property, and the amount of loss or damage"; secondly, to "produce the certificate, under seal of a magistrate, notary public, or commissioner of deeds nearest the place of the fire, and not concerned in the loss or related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount claimed by the said assured. In no case shall the claim be for a greater sum than the actual damage to, or cash value of, the property at the time of the fire, nor shall the insured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby assured bears to the whole sum insured on said property," etc.; and, thirdly, "any fraud, or attempt at fraud, or any false swearing on the part of the assured shall cause a forfeiture of all claim under this policy." These stipulations constitute parts of the express agreement entered into with the company by every person who obtains a policy of insurance of this kind from it on his property, and when the breach of any of them by the plaintiff is pleaded as a legal defense to an action by him against the company on such a policy of insurance, if the fact of the breaches alleged is admitted, or is not traversed or denied before the court upon the record, it would seem to be, by the consent and agreement of the assured, embodied in the contract between the parties, a legal defense to the action. But these two pleas aver that the alleged false statement by the plaintiff under oath that the amount of the loss or damage by said fire was $12,899.21, when it was in fact a much smaller amount, to wit, the sum of $5,000, was knowingly and willfully so made by him, with the intent to cause the defendant to believe that the said loss was much greater than in truth and fact it was, and to deceive, injure, and defraud the defendant in the premises; and the further meaning of which is that it was an attempt at fraud, and a false swearing, on the part of the plaintiff, which caused a forfeiture of all his claim under the policy. And this allegation of the intent on the part of the plaintiff thus to defraud the defendant in the premises, in itself considered, as much an allegation of a fact in the pleas as that of any other fact alleged in them, as that he made the alleged statement itself, or made it under oath, and that it is an allegation of a fact in the pleas, is only the more obvious when we consider that it was this intent alone, if it existed, that constituted the alleged act an attempt at fraud on part of the plaintiff in the premises. If the plaintiff had traversed these pleas, the allegation that the statement was willfully and falsely made by him, with the intent to defraud the defendant, would have been the allegation of a material fact in the case, to be submitted to and found by the jury, in order to sustain these pleas. But the plaintiff has demurred to them, and by the causes assigned for it evidently expects the court to infer that there could not have been such an intent on the part of the plaintiff, and that the defendant could not have been harmed or injured by the alleged statement, inasmuch as it appears from the pleas themselves that the alleged loss actually sustained—$5,000—was a larger sum than is secured by, or can be claimed on, the policy.

Digitized by Google

to wit, the sum of $3,500; without denying, however, except indirectly and inferentially, as I have before stated, the allegation in the pleas that the said statement was so made by the plaintiff with the intent to defraud the defendant. It is neither a demurrer nor plea, properly considered, I think, inasmuch as it neither admits nor directly denies the pleas; and it is too uncertain and equivocal to be sustained as a sufficient answer by way of demurrer to the pleas in question, and should, therefore, be overruled by the court.

And I also consider the demurrers to the eighth plea to the first and to the sixth plea to the second count, which are substantially the same, are insufficient. The main allegation in each of them simply is that the plaintiff did willfully and falsely swear in said statement that the amount of the said loss on said goods was the sum of $12,899.21, although the cash value of said goods so burned, consumed, and destroyed was, at the time of said loss, and was well known to the plaintiff at the time of making said statement under oath to be, a much smaller sum of money than the sum aforesaid, to wit, the sum of $5,000; and essentially differing only from the two preceding pleas in the omission to allege that it was done with the intent to defraud the defendant, or with any other intent or qualification whatever. And yet, with this fact thus alleged in each of these pleas, the plaintiff has demurred to them, and assigned for causes of it that the pleas do not allege that said statement was made with the intent to cause the defendant to pay to the plaintiff a larger sum than is claimed on said policy, to wit, the sum of $3,500; nor do they allege how, or in what manner, the said defendant was or could be harmed or injured by the alleged statement. But it was obviously and utterly unnecessary that the pleas should contain either of these allegations, or any other allegation than we find in them to constitute each of them as they stand, if the fact alleged in them be admitted, or if, on a traverse of them hereafter under the recent statute, it should be proved on a trial of the case before a jury a good and complete defense to the action; for, in my opinion, if it was a fact, as alleged in the pleas, that the plaintiff willfully, knowingly, and falsely swore that the amount of the loss on the said goods so burned and destroyed by the said fire was $12,899.21, when in truth and in fact it was much less, to wit, $5,000, it was a direct breach of the stipulation in the policy that, in case of a loss, he should give immediate notice thereof, and should give to the company a particular account of said loss, under oath, stating, among things specifically mentioned in connection with it, "the whole value and ownership of the property, and the amount of loss or damage"; and also a direct breach of the further stipulation in the policy that "any fraud, or attempt at fraud, or any false swearing on the part of the assured, shall cause a forfeiture of all claim under this policy." And of all the obligations expressly assumed by the plaintiff on entering into this contract of insurance by accepting this policy there was none more solemn nor stringent than this, perhaps; but this agreement on the part of the plaintiff not to swear falsely to that or any other specific statement of fact required to be made under oath upon the penalty or forfeiture of all claim under the policy, is a distinct and substantive stipulation in itself, independent of all other specific stipulations contained in the policy; and although it may be impossible to conceive that any such false statement could have been willfully and knowingly made by him under oath with an entirely innocent, honest, or harmless intention towards the defendant, it requires no other allegation of intent on the part of the plaintiff in these two pleas to constitute it a clear violation and breach of that particular stipulation than that he intentionally swore falsely to the amount of the loss, as is substantially alleged in them. But is not this allegation of a material and substantial fact in the pleas, and a good defense to the action, if the allegation be true, admitted by the demurrer, which, instead of denying it, assigns for cause that they do not allege that the said statement was made with the intent to cause the said defendant to pay to the said plaintiff a larger sum than is claimed on said policy, to wit, the sum of $3,500; nor do they allege how, or in what manner, the said defendant was, or could be harmed or injured by the alleged statement,—that is to say, because it appeared from the pleas themselves that the loss was at least as much as $5,000; and all of which, by necessary implication, if not expressly, admits that the said statement so made by the plaintiff under oath was false in that particular, and was well known to him to be false when he so made and swore to it? The demurrer is not for matter of form, but matter of substance, although special causes are assigned for it, and neither of them is sufficient to support it. Such is my opinion, and I therefore think that the demurrers to the eighth plea to the first and to the sixth plea to the second count should also be overruled by the court.

The ninth, tenth, and eleventh pleas to the first count, and the seventh, eighth, and ninth pleas to the second count, which are substantially the same, are traversed in the replication, and issue is joined on each of them. The twelfth plea to the first and the tenth plea to the second count, which are substantially the same, allege that before the commencement of the action the plaintiff made certain false entries in his books of account, relating to the business of the said plaintiff, with the intent to deceive the said defendant as to the amount and value of the said goods burned up, consumed, and destroyed by the said fire, and to injure and defraud the defendant in the premises; to each of which pleas the plaintiff has

Digitized by Google

demurred and assigned the following causes therefor: Because they do not allege what entries were made by the plaintiff in said books of account, with the date or dates thereof, nor wherein said alleged entries were false; nor do they allege that said books of account in any manner related to the said property destroyed by the said fire, or to the business of said plaintiff connected therewith. I consider that in pleas of fraud of this kind the allegations contained in them were sufficient to constitute a good plea in a case of this character without either of the additional allegations suggested in the first cause of demurrer assigned, and also without either of the additional allegations suggested in the second cause of demurrer assigned, for the reason before stated by me when considering a similar objection in the demurrers to. I therefore think that the demurrers to the twelfth plea to the first and to the tenth plea to the second count should also be overruled.

But I think the demurrer of the defendant to the replication of the plaintiff to the thirteenth plea of the defendant should be sustained on the grounds assigned for it in the causes of demurrer, and because the replication in effect denies that the defendant has put a proper construction in and by his said plea on the word "immediately" in the phraseology of the said policy of insurance, wherein it provides as one of the conditions thereof "that the assured, in case of loss by fire, should immediately thereafter render to said defendant a particular account thereof," etc., as alleged in said plea, and the plaintiff thereby seeks to raise as a question of fact on the said replication a question of legal construction purely, to be determined by the court on the meaning of the word "immediately" when it occurs in such connection in a policy of insurance, and in a case like this; and that judgment should therefore be rendered for the defendant on this demurrer. And I think that the demurrer of the defendant to the replication of the plaintiff to the fourteenth plea to the first count in the declaration is not sustainable, for, as I have before said, I have no doubt that the provision of the policy on which that plea is based has reference only to such books of account of the plaintiff as had relation to the goods and property covered by the policy of insurance, and to the business of the plaintiff connected therewith. The language of it, as well as the reason of the thing, clearly imports this, I think. It is in these words: "If required, the assured shall produce books of account and other proper vouchers, original or duplicate invoices, and all property hereby insured, whether damaged or not damaged," etc. The connection in which the words "books of account" occur in this sentence clearly indicates and implies such books of account only as related, like the "other proper vouchers," original or duplicate invoices, "to the property thereby insured, or to the business of the plaintiff connected therewith." And such must have been the meaning of the words in question according to the understanding and intention of both of the parties to the policy of insurance, because it would be utterly unreasonable to suppose that it could have been within the intendment of the parties that books of accounts having no relation to the property thereby insured, or no relation to the business of the plaintiff connected with it, would ever be required to be produced under this or any other provision of the policy. But, under the generality of these words, when taken without the context, and the slight ambiguity which is only so made to appear in the meaning of them, the only breach of that condition in the policy alleged in the plea is limited to them exclusively, for it singularly omits to allege any breach of the context, or to allege that the plaintiff was at the same time required to produce other proper vouchers, "original or duplicate invoices, and all property thereby insured, whether damaged or not damaged," or that the plaintiff then and there refused and omitted to produce them. And as the plea thus seeks to take advantage of this slight ambiguity arising from the generality of the words "books of account," when read or considered without the context, as a defense to the action, I think the plaintiff was warranted by the character and design of the plea in replying to it specially, instead of traversing it, and taking issue upon it. But, for the reasons already stated, I think the plea itself is as defective and demurrable as the replication to it, and even more so. As, however, there is no demurrer to the plea, and I am now only considering seriatim the several demurrers in the order in which they are presented in the record of the case, and the plea and replication are alike defective, I will here merely say that I am of the opinion that the demurrer to the replication now under consideration should be overruled.

The demurrer of the defendant to the replication of the plaintiff to the fifteenth plea to the first count of the declaration, is good, in my opinion, and should be sustained, because the replication in effect substantially traverses and denies the whole plea, and which it should have done in form as well as effect, instead of replying to it specially, and in a double manner, as we find it. I therefore think that judgment should be rendered for the defendant on this demurrer. And for the reasons before stated I think the demurrer of the plaintiff to the fourth plea of the defendant to the second count of the declaration, is not sustainable, and should therefore be overruled. And for the reasons before stated I also think the demurrer of the plaintiff to the fifth plea of the defendant to the second count of the declaration should be overruled, and also that the demurrer of the plaintiff to the sixth plea to the second count of the declaration should be overruled. And for reasons before stated my opinion also is that the demurrer of the plaintiff to the tenth plea to the second count of the declaration should be overruled. And for the reasons before stated I consider

Digitized by Google

the demurrer of the defendant to the replication of the plaintiff to the eleventh plea to the second count of the declaration should also be overruled. But I consider the demurrer of the defendant to the replication of the plaintiff to the twelfth plea to the second count of the declaration sufficient, and that judgment should be thereupon entered for the defendant. And also that the demurrer of the defendant to the replication of the plaintiff to the thirteenth plea to the second count is sufficient, and should be sustained by the court. But, relying on the well-settled rule of pleading that a demurrer, in whatever stage of the pleadings it is taken, reaches back in its effect through the whole record, and in general attaches ultimately upon the first substantial defect in the pleadings, on whichever side it may have occurred—defects in substance not being aided by the adverse party's pleading over, as defects in form rarely are. Hence, though the parties join in demurrer upon any one particular point in any stage of the pleadings, judgment must nevertheless be given upon the whole record, and regularly against that party in whose pleadings the first substantial fault has occurred. Gould, Pl. c. 9, §§ 36, 37. The counsel for the defendant further contend that certain substantial defects specified by them occur in the declaration of the plaintiff, either of which is sufficient under that rule to entitle the defendant to judgment against the plaintiff on any one of the demurrers joined in issue by the parties in the case, and that both special counts in the narr. are faulty in substance, for the reasons assigned, viz.:

1. The first count states that the insurance money was to be paid 60 days after the notice and satisfactory proofs of the same, made by the assured, were received at the office of said defendant in Springfield. But there is no allegation either that such proofs were received at Springfield 60 days before the bringing of the suit, or ever were received there. Was such an allegation necessary in that count, after alleging, as it does, that the plaintiff gave immediate notice of the said loss by fire, and rendered to said defendant a particular account of said loss under oath, with the certificate under the seal of the notary public nearest the place of the fire, in full and complete compliance in every particular as required by the condition of the said policy of insurance? I cannot think that it was, and the fact that it is further alleged by the plaintiff on the record that he did not refuse or omit to produce, on the requisition of the defendant for its examination, his books of accounts relating to the property insured, and his business connected therewith, but adds to the conclusion of my mind that such an allegation was not necessary in that count. For so much being alleged to have been done by the plaintiff in accordance with the conditions and requirements of the policy, to supply the specified proofs of the loss by the fire, and not being satisfactory to the defendant, we must, I think, consider that it now properly becomes a question to be determined in the trial of this action whether the proofs so submitted and received at Springfield were sufficient, within the true meaning and intendment of the agreement between the parties, unless we are prepared to hold that the proper constructions of this somewhat remarkable clause in the policy confers upon the defendant, by the intendment of both of the parties, the sole and exclusive right and the absolute power of determining the question when the proof of the loss should be satisfactory to the company.

2. The second count, it is objected, is fatally defective upon the same ground, and in regard to which my opinion, of course, is the same as on the first objection.

3. The first count, it is next objected, nowhere states the defendant's promise after the loss to pay any moneys. But was that necessary, inasmuch as it alleged in the count the said company, a corporation existing under the laws of the state of Massachusetts, was summoned to answer the plaintiff of a plea of trespass on the case, upon promises? And thereupon the plaintiff, by Benjamin Nields, his attorney, complains: For that, whereas, heretofore, to wit, on the 14th day of January, A. D. 1880, at the county aforesaid, a certain policy of insurance was then and there made and entered into and signed by the president and secretary of the said corporation defendant, and countersigned by James Wooley, agent at Wilmington, in the state aforesaid, and the same was then and there delivered by the said defendant unto William H. Pierson and George W. Pierson, trading as Pierson Bros., under and by which said policy it was agreed as follows: That the said defendant, in and by said policy of insurance, in consideration of the receipt of $35 to them paid by said Pierson Bros., did insure the said Pierson Bros. against loss or damage by fire to the amount of $3,500 for the term of one year on their stock of goods therein mentioned, and with the further description, terms, limitations, stipulations, and conditions in said policy contained, and in said count substantially alleged, in the form and manner usual in such cases. In this the count expressly alleges the action to be in assumpsit on the case, upon promises and a policy of insurance in writing, but without seal, made and delivered by the defendant corporation to the assured for the consideration mentioned, and then and there paid to it for the first year, and twice afterwards, on the renewal of it, on each of the two succeeding years. The import of the allegation in the count therefore is that the said defendant, in and by the said policy of insurance, in consideration of the receipt of the said $35 to them paid by said Pierson Bros., agreed to insure them against loss or damage by fire to the amount of $3,500, for the term of one year on their said stock of goods and property therein de-

Digitized by Google

scribed and more set forth. And we have the authority of Mr. Chitty, and the case cited by him, that this word "agreed," in a declaration in assumpsit, is equivalent to the word "promised," for he says a declaration in assumpsit should in all cases show that a promise has been made, either by expressly averring that the defendant "promised," or by other equivalent words; and afterwards adds that the word "agreed" is held to be an equivalent word. 1 Chit. Pl. 308. And this was the promise made in this case, on which the action was founded, and was the only promise to be alleged or proved in it to support it, so far as any promise could be needed for that purpose in an action of assumpsit on a written agreement or contract, as this was. This promise, however, was not only in writing, but was a conditional promise, wholly dependent upon a future accident or contingency which might never happen, in which event the defendant had to pay nothing, notwithstanding the consideration received, and which, as an actionable promise, could have no force or effect whatever in law until the future accident or contingency should occur, but, the instant it occurred, became unconditional, absolute, and complete in its legal force and effect by the terms of the contract itself; and therefore no promise after that could be required or need be alleged in the declaration to give legal validity to it, or to maintain an action of assumpsit upon it. And what I have just said will also apply to all the objections of the defendant following the third down to and including the fourth.

5. The fifth objection of the defendant is that the policy set out in the second count is not stated to have been countersigned by the duly-authorized agent of the defendant at Wilmington, but I think that allegation sufficiently appears in the count.

6. The sixth and last objection is to the second count also, and which is that it is fatally defective, in that no proper breach is laid or alleged in it, because the contract to be performed by the defendant was in the alternative, viz. either to repair, restore, or replace the property, or to pay the loss or damage; and that the loss was not compulsorily payable until the lapse of 60 days after satisfactory proof thereof. But the policy contemplates that alternative performance may be entered upon within this time, viz. upon or after notice within 30 days after the receipt of proofs of loss. Where a contract is in the alternative, the breach must be laid accordingly. 1 Chit. Pl. 334. This is a case of alternative promises. Leake, Cont. 675, 679. This objection to the second count I consider is well taken, and should be sustained. In a late edition of Chitty's Treatise on Pleadings, by I. C. Perkins, LL. D., I find the form of a declaration or count on a policy of insurance similar to this prescribed, the conclusion of which is as follows: "And although all conditions have been performed and fulfilled, and all events and things existed and happened, and all periods of time have elapsed, to entitle the plaintiff to a performance by the defendant of their said contract, and to enable the plaintiff to maintain and nothing existed or has occurred to prevent the plaintiff from maintaining, this action, yet the plaintiff hath not, out of the stock and funds of the said company, or in any other manner, been paid or made good the said damage and loss so sustained by him as aforesaid (if the policy gives an election to the defendants to reinstate, that clause must be set out in the declaration, and the following breach added here), nor has the defendant reinstated the premises so injured and destroyed as aforesaid. And the plaintiff claims," etc. 2 Chit. Pl. 171. The omission of the alternative breach in the second count was a substantial defect, and must, therefore, be held fatal to it on the demurrers joined in the case.

FULTON v. TOWN OF DOVER.

(Court of Errors and Appeals of Delaware. Feb. 1, 1888.)

DEDICATION OF HIGHWAY—EVIDENCE — PRESCRIPTION.

1. Though the recording of a plat of land with a roadway, and the selling of lots in accordance therewith, creates by implication a contract with the purchasers that the roadway will remain for their benefit, it does not constitute a dedication of such roadway to the public as a highway or street. Rowan's Ex'rs v. Town of Portland, 8 B. Mon. 232, distinguished. Per Comegys, C. J., dissenting.

2. Under Rev. Code, c. 60, providing that "all public roads * * * heretofore laid out as such or made by lawful authority, or which have been used as such and maintained at the public charge for twenty years, are declared to be common highways," a roadway not dedicated by express grant is not a public highway, in the absence of use and maintenance by the public for 20 years, or of acts on the part of the owner amounting to an estoppel. Per Comegys, C. J., dissenting.

Dissenting opinion. For majority opinion, see 12 Atl. 394.

COMEGYS, C. J. The principal question in this case seems to be whether the plaintiff below dedicated to the use of the public a portion of his land, called "Fulton's Addition to Dover," which would be enclosed between parallel lines 60 feet apart, beginning at the northern edge of Cecil street, and running in continuation by right line with Queen street, of said town, to Clara street, or even Mary street, shown on the map attached to the brief by him delivered in this court. He was the legal owner in fee of all the land inclosed by the outlines of the "Addition"; and, like every other tenant in fee, could dedicate any part or the whole of his land to public use. The respondents contend that the survey by the complainant of the "Addition," and making a plot of it, and recording that plot in the recorder's office, with the descriptive notes upon it referring

Digitized by Google

to defined or contemplated streets, and the sale of some of the lots contained within the plan, of themselves constitute a dedication of the streets mentioned or referred to, as and for public streets or highways of the aforesaid town, for the benefit of said town or its inhabitants. The contention of the respondent is the contrary or involves a contrary consideration. If there was dedication by the complainant of the part marked on his map aforesaid, attached to his brief, as "Proposed Extension of Queen," then he had no case at all in the court below, and has none here; because, in the view that there was dedication, no formal steps whatever were necessary to be taken by the town council of Dover to open Queen street as projected and shown by the dotted lines on such map. The chancellor has, in the reasons for his decree, taken the ground that the proceedings adopted by the town council for condemnation of the bed of this projected Queen street from Cecil to Clara streets, were invalid, as not being in conformity with the statute giving them power of condemnation of ground for streets, and I agree with him entirely. In the view I take of this case, it is not necessary I should go into that question, nor into others raised by the complainant below. But, while I agree entirely with the decision of the chancellor upon the subject of nonconformity by the respondents with the requirements of the town law about taking land for streets, I am unable to reach the conclusion he has done,—that this projected Queen street, so far north as Mary, was dedicated, by the acts of the complainant before stated, to the town of Dover, as and for one of its public streets.

I think it may be safely laid down as law that in cases of dedication to the public generally of a highway, for example, or to a municipal body of a street, there must, to make the dedication complete, be some act of acceptance on the part of the intended donee of the grant. In the case of public highways, where no positive formal act of dedication is shown, but public user is relied on, it must not only appear that such user has been uninterrupted and continuous for at least 20 years, but that the public authorities have treated the way as a public one, by expending money in repairing it, or by some other unequivocal act indicative of treating it as a public road. While the fact that certain individuals, finding it to their convenience to do so, have used the way for such a period, would be evidence of a grant by the owner of the fee of an easement of way, and therefore subject him to an action for hindering them in their use of it, yet no public right grows out of like user; that is, dedication of the way to public use until there has been, in the mode pointed out, acceptance of the donation, with the obligation of its consequent duties. If one divide his farm in two, laying down a road between the parcels and recording his plot of such partitions, and selling lots, fronting upon such road, to different purchasers, would the public at large thereby acquire any right of travel upon such road? I think not. If, without objections on the part of the owner of the farm, the public treated the road as one of the highways of the county, and adopted it into their books of roads as kept by the levy court, and committed the repair of it to an overseer, continuing this for a period of 20 years, a public easement or right of way would be created, which the owner could not afterwards challenge. But the public would derive no advantage from the fact that a plot of the road was recorded; as that, of itself, would show nothing but that the seller of the lots and his purchasers intended to place upon record the precise location of their lots and the way or road to them. The making of the plot, selling by it, with the road laid down upon it, would operate a contract between the seller and those claiming under him, and the respective buyers, and those claiming under them, that the road should, as between such parties, always be and remain a way or road for the benefit of the latter; but none would exist in behalf of the public at large, who would be in no sense a party to the implication of contract between the seller and his purchasers. With them there would, upon the purchase, arise an obligation or contract for the perpetuity of the road or way for every use and convenience their ownership and residence of and upon their lots might require, including the use thereof by all persons having occasion to go to see them on business or otherwise; but with the general public there would be none, nor would such use by the lot owners, or rather right of use by them and the others referred to, be ground for supposing any. The freehold of such a road or way would still remain in the seller of the lots, subject though it would be to a perpetual easement of open unobstructed way, in behalf of the lot owners and their successors in title. It would surely be a great hardship upon an owner of land if he could not sell a part of his ground, and make proper means of access to it by roads, if in the country, or streets, if in a town, without being held in the one case as having dedicated them to the public, or in the other to a corporate town. The lot buyers have no interest that the way shall be a public highway, but only that it shall be open to them for all their uses. When the public meant to make it their highway, the law furnishes them with the means of doing so. In a case like the present, there is no intendment of dedication in favor of the whole people of a town, by simply making a plot, with projected streets upon it, and sale of a few lots, none on the streets in question. It is rather that the streets are for perpetual use by the buyers and their successors in the title. Those persons are

Digitized by Google

parties to the implied contract for streets; the general public, nor that of the town, are such in any sense. One may have a purpose of dedication of ground for a highway or street, and may show it by making and recording or otherwise publishing maps; and yet, until some private individual has purchased property upon the proposed highway or street, no private interest in either has been created, nor do the public acquire any rights until some steps have been taken showing a purpose to accept the dedication. Until either purchase has been made by an individual in the one case, or acceptance of dedication by the public in the other, the ground owner may withdraw his scheme entirely (it being but in the nature of an offer), which could not be if the making and publishing and recording of a map had any efficiency whatever per se. Now, while it is not contended that withdrawal can be made, after private purchase on the faith of the evinced purpose of making a street, yet, because of that hindrance, no public right accrues. Otherwise all the legal idea of dedication to public use, as expressed in the books, must be abandoned. And the reasoning of this opinion is entirely justified and in harmony with the true idea of dedication to public use, which is a contract implied between the dedicator and the public, the obligation of which upon the latter is that it will accept the highway as such and maintain it in repair. It is quite obvious that in this case the authorities of the town had, in the beginning, no idea of dedication at all; for they sent out a committee to view the premises, and decide upon the expense of opening Queen street, and kept their report under consideration for about 10 months. It fixed $900 as the amount of such expense. This did not meet the approval of the town council, who cut the amount down to the nominal sum of 6 cents; but this, it is evident from the answer, was because it was believed the property of the complainant below would be actually enhanced in value to an amount greater than any damage he would sustain by opening the street. All this shows that the idea of dedication is an afterthought. Be that as it may, and it is not material either way, my opinion is that there was no dedication by the complainant of the proposed extension of Queen street to the public.

The first section of chapter 60 of the Revised Code defines "public highways" as follows: "All public roads, causeways and bridges, heretofore laid out as such, or made by lawful authority, or which have been used as such and maintained at the public charge for twenty years, are declared to be common highways." In the case of Johnson v. Stayton, 5 Har. (Del.) 448, tried in Sussex at the October term, 1854, Judge Harrington, in delivering the charge to the jury, said, among other things: "The legislature has qualified the common law in this state respecting roads claimed to be such by dedication. So many neighborhood roads exist by the indulgence of landowners that the common law was considered harsh in reference to forfeiting private land by indulgence, and the legislature has required that such a road shall have not only been used but maintained and kept up by the public for twenty years, to make it a public road against the owner of the land." Page 470. This settles, by a decision, what is the evidence of dedication from public user; and it follows that unless there be such user as the statute prescribes, and the charge recognizes as the law, there can be no inferential dedication. Dedication must be by actual grant, or such declaration or conduct on the part of the landowner as would be treated as an estoppel in pais. Here there is neither grant nor estoppel. The case of Rowan's Ex'rs v. Town of Portland, 8 B. Mon. 232, upon which that part of the decree of the chancellor against the complainant below is chiefly based, is a different one in its facts from that before him; it being a case where an owner had founded and laid out a whole town, had made and recorded a map of it, with his declaration upon it that all sales were to be regulated by the map. In such case there would seem to be no room for doubt that all streets shown on such map should be treated as highways of such town for public use; the very consideration, it might with perfect justice be assumed, which prompted buyers to invest their money being that they were to be part of the body politic of a town shown on the map. What the Kentucky court would have said, in the case before it, if there had been on the statute book of that state such a feature with respect to dedication as has been pointed out as being upon the pages of our Code, I can only conjecture. The rights of buyers of lots upon a plot, and those of the public, with reference to streets or highways, are by no means the same, for they do not rest upon the same support. I am of opinion, upon the above view of the case, that the decree of the chancellor dissolving the injunction granted by him as to that part of Queen street as projected between Cecil and Mary streets should be reversed; and that the injunction, as it respects the whole of said street, should be made perpetual; and that the respondent below pay the costs in three months.

JONES v. CAREY.

(Superior Court of Delaware. April 1, 1891.)

DANGEROUS ANIMALS—CONTRIBUTORY NEGLIGENCE.

One who harbors a dog in the habit of attacking passing teams, and who knows of the habit, and permits it to run loose, is liable for injuries received in a runaway caused by the dog's attack; and it is no defense that plaintiff knew of the dog's habit, and was not cautious in driving by defendant's house.

Digitized by Google

Action by George F. Jones against Philip P. Carey to recover damages for personal injuries. Verdict for plaintiff.

Alfred P. Robinson, for plaintiff. Robert C. White, for defendant.

COMEGYS, C. J. (charging the jury). By the undisputed testimony in the case, the plaintiff, who is a physician, was, about 10 o'clock in the morning of the 24th of June last year, driving in a vehicle along the highway at or near the defendant's house, in Gumborough hundred, in this county, when, at about 175 yards from the house (which had been passed by him on his way), the dog in question suddenly appeared, chasing him, and barking, and trying to bite the horse's legs, and jumping up at his nose. This so frightened the animal that he ran off, drew the carriage upon a low fence along the road, and threw the plaintiff out, occasioning the injuries he received, and which he has described to you. The plaintiff says that, at the time the dog attacked his horse, he (the plaintiff) had the reins in one hand, and a package of eggs in the other. This is the testimony of the plaintiff in his examination in chief and his cross-examination with respect to the casualty and the circumstances attending it. He then further testified to the character of the dog as one given to the practices which had occasioned the injury complained of, which testimony was supported by that of other witnesses speaking before you to the same point. The plaintiff also swore that he had been attacked by the same dog at other times and in a similar manner, and that he had complained to the defendant about it, and insisted that he should get rid of him, but that the defendant gave him no satisfaction or assurance upon that point. It appears from the language of the defendant before you that he had great affection for his dog, and was loth to part with him, which was very natural. This testimony, imputing knowledge of the habits of the dog as a creature that chased and attacked wayfarers with their teams upon the highway, was supported by that of Mr. West, who had a dog given to like practice, and who before this accident, in conversing about the habits of their respective dogs, said to the defendant, "We shall have to kill our dogs," or words to that effect; when the defendant replied that he should not shoot his dog, and that, if anybody wanted him shot, he would have to shoot him himself, or used language of like import. It therefore appears, if you believe the testimony of the plaintiff and his witnesses, that the defendant's dog had the bad and dangerous habit of attacking wayfarers with their teams passing along the public road or highway, at or about the defendant's premises, barking and endeavoring to bite the horses or other creatures; and also by the testimony of the plaintiff and Mr. James A. Short that the defendant was aware of such dangerous disposition and practice on the dog's part. If you believe this testimony, then you have the case of a person keeping a vicious and dangerous dog, with knowledge of the habit imputed to him by witnesses examined in your hearing. This is sufficient to support the plaintiff's case, and entitle him to your verdict, unless there be something shown by the testimony on the part of the defendant or the circumstances disclosed which you think sufficient, in view of the law in cases similar in principle, to justify you in withholding it from him, and giving your verdict to his opponent.

It seems to me best that I should now give to you the law applicable to cases similar in their character to that you are trying, as such law is held by this court. This case is presented for prosecution as one of negligent conduct on the part of the defendant in keeping a dangerous dog, and causing thereby a grievous injury to the plaintiff. It is defended on the ground that any injury received by the plaintiff on the occasion referred to was the result, in fact, of his own negligence and want of due care at the time, and that, if he had then exercised the degree of care which his knowledge of the habits of the defendant's dog required of him as a man of reasonable and ordinary prudence, the mischief of which he complains would not have been done; and he points to the admission by the plaintiff in his testimony that he held, at the time of the dog's attack, the reins in one hand, and the package of eggs in the other, insisting that if he had been mindful of the danger which he had reason from experience to anticipate, and had provided against it by holding the reins by both hands, his horse would not have got away from him, and consequently the accident would not have happened. In other words, he contends that, this prudent care required of the plaintiff not having been observed by him, the case is in fact one where contributory negligence existed on the plaintiff's part, and thus he is precluded from recovery. As the defense rests mainly upon this plea, it is the duty of the court to instruct you what the term "contributory negligence," as understood in law, is. It will be for you, then, with such explanation of its meaning, to say whether the plaintiff was guilty of it in this case or not.

And, first, it is well that you should know what the law considers negligence to be. It is want of proper care, under the circumstances existing at the time and calling for its exercise. That makes it necessary to say that want of proper care is the absence of such caution as a man of common prudence—that is, the average man—takes when it concerns him to be vigilant, sufficiently to protect himself from apparent or suspected danger. Applying these definitions to the case before you as disclosed by the proof, then, if you believe the plaintiff, at the time mentioned, was not observing the care of

Digitized by Google

himself which a reasonably prudent person would, if situated as he was, have taken, he was regligent of his duty; and, under common circumstances, he would be debarred from recovering. On the contrary, if you believe from the testimony that upon the occasion in proof he was observing all the ordinary care, under the circumstances shown, that a person of ordinary prudence and circumspection, traveling upon a public road or highway, ought to have taken, then he was not guilty of any want of such care. It is, however, to be understood, generally, that the degree of care to be taken must always be regarded as being proportioned to the risk incurred; that is to say, if the risk be great, the caution should correspondingly increase with it. This is good sense, as well as law. It is also to be taken into account in this case that it is testified to by the plaintiff that he had passed by the house where the dog was kept, a distance of about 150 yards by the road, and 75 in a straight line from the building, which we may take as the point of danger. Having thus driven by that point, was the fact that he held the reins by one hand only an act of negligence? In other words, would a person of ordinary prudence have done more? If not, then he was guilty of no negligence at all, especially if you believe his statement that he had no warning of the approach of the dog until he ran up behind and attacked the horse. In the latter view, the plaintiff was not negligent, and of course neither did nor omitted to do anything which promoted or occasioned the casualty. He contributed nothing on his part to bring it about. Contributory negligence is taking such part in an act of injury to person or property, either by action or omission to act when required by common prudence to act, as is a cause of resultant mischief. But it must be what the law calls the proximate cause of it; that is, that it produced it. If it did not, then, if the plaintiff's negligent act was the remote or nonproducing, and not the efficient, cause, operating at the time or then existing, it was only a remote cause of the trouble, and does not bar him of his claim to a verdict. Under ordinary circumstances, we should put it to you to say whether the plaintiff in this case was negligent of his duty in driving along the public road, and that such negligence was or was not the promoting cause, or one of the promoting causes, of the difficulty, and that, if you should find that it was, you should deny him your verdict; but here are circumstances which call for different instruction, which we now proceed to give, as applicable to certain cases of claims for damages from alleged negligence.

While it is perfectly true, as has often been announced from this bench, that if it be shown in the progress of a trial, by credible testimony, that the plaintiff, in a suit for damages against a defendant for negligence alleged on such defendant's part, cannot recover if the plaintiff's own negligence where such was in proof, was a direct, promoting, and not remote, cause of the trouble, yet there are cases—and this, if you are satisfied with the plaintiff's proof, seems to be one of them—where, notwithstanding want of ordinary diligence on a plaintiff's part, if such exist, he may still recover; and the rule of contributory negligence does not apply if the negligent misconduct of a defendant is of such a character as to be deemed willful. In case of willful misbehavior on a defendant's part,—willful neglect of an obvious duty,—such recklessness of consequences, if dangerous consequences were reasonably to be apprehended from such neglect, must be taken to have been present in the mind of a defendant, and are to be treated as willful negligence on a defendant's part, depriving him of the plea that he is not to be fixed with a verdict against him, because the plaintiff was not using all the care of himself he ought to have done. That plea will not excuse him His willful neglect of duty is in the nature of intentional misconduct, and, where such exists, it is no excuse that the other side was in fault also. This law will be found in the books that treat of contributory negligence, and no special reference need be made to them. I refer particularly to the valuable work of Beach.

The defendant has offered proof on his part which, if true, would have a tendency to say that some other dog must have been the actor on the occasion; but you will weigh it, in connection with the positive proof on the plaintiff's part, that it was the dog of the defendant, and no other, that ran at his horse; and his habit of doing so has, as I have heretofore pointed out, been shown to be of the mischievous character displayed on the occasion of the 24th of June last. And then the plea is made that the defendant gave away his dog, and that he did not belong to him when the plaintiff was injured. But you will not forget that he gave him, if he did so at all, to the person living only a mile and a half from his old home. Was such a gift to get rid of the dog, or was it otherwise? Owners of dogs, or those who harbor or permit them to stay about their premises, are answerable for all their misconduct resulting from bad habits, where such dogs are known by their owners or harborers as having them; and, though this is the first case calling for treatment of that topic, yet the law about keeping vicious or mischievous dogs has always been known to our people, and none can plead ignorance to it. There is no greater or more dangerous nuisance than the keeping or harboring about one's house or upon his premises of a dog with the bad habit of running out upon the highway, and attacking people who, upon their lawful occasions, are traveling along the public roads and highways of the county or state. And as people have a per-

Digitized by Google

fect right to use such thoroughfares at pleasure, and as no one has the right to interfere with that privilege, no such interference is to be expected or provided against; and therefore, while positive negligence in pursuing such travel is not to be encouraged, at the same time only ordinary care—that is, such as other people take—is to be required of any wayfarer in going his journey.

The result of all this is that if you believe the testimony offered to you by the plaintiff to be true as to the cause of the accident, and that the defendant knew of the bad habit of his dog in running out at wayfarers and their teams passing along the highway at or about his premises, he is without any defense before you; his knowledge of the habit of his dog, and refusal to get rid of him in some efficient way, and still keeping him, or allowing him to be upon his premises to the time of the accident, being in effect willful negligence, which, when it exists, is not excused or palliated by any negligence merely on the part of a plaintiff. In other words, contributory negligence is no defense where the negligence of the defendant is willful, as it is to be considered here if you believe the plaintiff's proof and that of his witnesses. In fact, such proof, as to the accident and its circumstances, is not gainsayed by any proof on the defendant's part; his real and chief defense being neglect on the part of the defendant, which, we have pointed out to you, does not avail where the negligence on the defendant's part is willful.

Verdict for the plaintiff.

CLARK v. STATE.

(Supreme Court of New Jersey. Feb. 21, 1895.)

CRIMINAL LAW—CHANGE OF PLEA.

A motion in a criminal case to withdraw a plea of guilty, and to substitute therefor one of not guilty, is addressed to the discretion of the court, and, consequently, the court's action is not the subject of error.

(Syllabus by the Court.)

Error to court of quarter sessions, Hudson county; Hudspeth, Kenny, and Hoffman, Judges.

Joseph Clark, being convicted of a misdemeanor, brings error. Dismissed.

Argued November term, 1894, before BEASLEY, C. J., and DEPUE and VAN SYCKEL, JJ.

John T. Dunn, for plaintiff in error. Chas. H. Winfield, for the State.

PER CURIAM. The plaintiff in error, being indicted and arraigned for the commission of a misdemeanor, pleaded guilty in open court. Some days afterwards he applied to the court to be permitted to withdraw such plea, and to traverse the charge. This motion was refused, and it is now insisted that in so doing the court committed an error in law. We find no basis for this appellate procedure. When an application is made in a criminal case to recall a plea of guilty and to plead de novo, it is a matter addressed to the discretion of the court. This has always been the doctrine prevailing from the earliest times in this state. Any other rule would be replete with mischief. By its force a defendant could plead guilty, and then, after the witnesses on the part of the state had been discharged, could come into court, and claim as a right to take back his confession and guilt, and put the state to its proof. Fortunately such is not the practice. When the defendant in this case asked to plead anew, the application was addressed to the discretion of the court. The action of the court, under such circumstances, is not appealable; consequently this writ must be dismissed.

KOENIG et al. v. SMITH.

(Supreme Court of New Jersey. Feb. 21, 1895.)

REPLEVIN BY CHATTEL MORTGAGE.

A mortgagee is entitled to the possession of the mortgaged chattels, and if the sheriff has taken them under an execution against the mortgagor, and refuses, on demand, to deliver them to the mortgagee, replevin will lie.

(Syllabus by the Court.)

Replevin by Isha V. Smith against John G. Koenig and others. Verdict for plaintiff. Rule to show cause why a new trial should not be granted. Discharged.

Argued November term, 1894, before BEASLEY, C. J., and DEPUE and VAN SYCKEL, JJ.

John H. Backes, for plaintiff. Barton & Dawes, for defendants.

BEASLEY, C. J. This is an action in replevin. The plaintiff is the mortgagee in a chattel mortgage given by one Sarah A. Johnson, who was the tenant of the defendant Koenig, and in whose possession it remained. There was a condition in the mortgage that, if the mortgagor should "permit or suffer any attachment or other process against property to be issued against her," etc., the mortgagee was empowered to take possession, etc. Rent falling in arrear, the defendant, as landlord, issued his distress warrant, and seized the mortgaged chattels; and thereupon the plaintiff, by virtue of his mortgage, demanded the delivery of the same to him, and, upon refusal, replevied the same. There can be no doubt that, if the mortgagee was entitled to the possession of these chattels, the refusal of the defendant to deliver them on demand was an unlawful detention of them. A mortgagee being in possession, or having the right of possession, has a right of occupancy that cannot be legally disturbed or interfered with under any legal process against the mortgagor. This is the doctrine established by the court

Digitized by Google

of errors in the case of Fox v. Cronan, 47 N. J. Law, 503, 2 Atl. 444, and 4 Atl. 314. It is entirely clear that under the force of that decision the landlord could not exclude the mortgagee, even temporarily, from the possession of the chattels mortgaged. It was therefore properly held in the trial court that the plaintiff in replevin was entitled to judgment. The other objections have been examined, but we find nothing in them of substantial importance. Let the rule be discharged.

DODD v. CONSOLIDATED TRACTION CO.

(Supreme Court of New Jersey. Feb. 21, 1895.)

TROLLEY RAILWAY—TOPPING OVERHANGING TREES.

A traction company authorized by the city to erect its trolleys has the right to top the branches of trees overhanging the street when such act is reasonably necessary for the passage of its wires.

(Syllabus by the Court.)

Action by Amanda H. Dodd against the Consolidated Traction Company. On demurrer to plea. Overruled.

This action was brought to recover damages for the alleged destruction by the defendant of certain shade trees of the plaintiff while constructing its trolley road. The plea demurred to sets out its chartered rights and various statutes, under which it claims the right to build its road, and then avers: "And, in the stringing of the said wires, [did] necessarily and unavoidably a little trim and cut off some of the branches of the said trees of the said plaintiff which then overhung the street called 'Ocean Avenue,' doing no unnecessary damage to the said trees, as it lawfully might do," etc. The question, therefore, simply is whether the defendant was vested with sovereign powers and immunities, and exempted from liability to damages for injuries done to individuals and their property in the exercise of those powers.

Argued November term, 1894, before BEASLEY, C. J., and DEPUE and VAN SYCKEL, JJ.

W. C. Spencer, for plaintiff. James B. Vredenburgh, for defendant.

BEASLEY, C. J. (after stating the facts). The defendant is entitled to judgment on this demurrer. The boughs of the trees that were trimmed overhung the street, and were subject to removal by the municipal authorities whenever the public exigency or convenience required it. The city had conferred on the defendant the right to extend its wires, in the usual mode, along the streets; and such authority involved, by implication, the competency to do whatever was reasonably necessary to effect the end in view. Whatever the city could have done to carry into effect the project in question the defendant could do. On this demurrer the defendant is entitled to judgment.

DEPUE and VAN SYCKEL, JJ., concurring.

STATE (GREEN, Prosecutrix) v. CITY OF PERTH AMBOY.

(Supreme Court of New Jersey. Nov. 8, 1894.)

EXTENSION OF CITY STREET—APPOINTMENT OF COMMISSIONERS.

Section 1 of chapter 287, p. 444, Laws 1892, approved April 9, 1892, authorizes the common council of third-class cities to appoint three judicious and disinterested citizens of the city as commissioners to assess damages for land taken for improvements therein stated. The record brought up fails to show the appointment of persons so qualified, and all proceedings as to such appointment, and thereafter had, should be set aside.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of Mary E. Green, against the city of Perth Amboy, to review appointment of commissioners. Appointment set aside.

Argued before DIXON, REED, and ABBETT, JJ.

J. R. & N. English, for prosecutrix. John W. Beekman, for defendant.

ABBETT, J. The prosecutrix owns a house and lot in Perth Amboy, fronting on Lewis street. In 1892 there was a street on the westerly side of her house, called "Rector Street." The improvement cuts off a strip about 10 feet wide by 164 feet long, and also a portion of the house occupied by prosecutrix as a summer residence. An ordinance was passed July 20, 1892 "to open Rector street from Gordon street to Lewis street." The first section provided "that Rector street be and the same is hereby extended and opened from Gordon street southerly through lands of the grantee of James M. Chapman, deceased, and others, as the same was intended to have been laid out in 1856." The second section provides: "That the centre line of said street shall be laid out parallel with High, and at the distance of 343 feet from the easterly line thereof. Said street to be 50 feet in width throughout its entire length." Commissioners of assessment were appointed December 12, 1892, and they awarded prosecutrix $525.31 damages for land taken, and assessed the property left after the improvement for $52.44, which award and assessment were afterwards ratified and confirmed by the common council. August 14, 1893, a writ of certiorari was allowed, removing said ordinances and all proceedings thereunder.

Among the reasons presented for setting aside the proceedings and assessment are the following: The commissioners who assessed the damages of prosecutrix were not appointed in accordance with the provisions of the statute. The statute says: "It shall

Digitized by Google

be lawful for the common council to appoint three judicious and disinterested citizens of the city to make the estimate." Laws 1892, c. 287, § 1. The report of the commissioners was not made sufficiently in detail to enable the common council to determine the principle upon which the estimate and assessment were made; nor do they state such principles in their report. The prosecutrix should not have been assessed for benefits to her lands from the so-called "improvement," as it does not appear that she derived any benefit therefrom, and the evidence shows that she did not derive any therefrom.

The said act does not give power to take and condemn buildings and tenements, and does not give power to take part of one, as is done in this case. The proceedings of the council fail to show affirmatively that the three commissioners to make the estimate were judicious and disinterested citizens of Perth Amboy, and are therefore defective. The evidence also clearly shows that the prosecutrix has not been allowed sufficient money to compensate her for cutting away part of her house, and taking 15 feet of her land. There was unnecessary and improper delay in attacking the proceedings culminating in the passage of the ordinance, and, the city having proceeded in good faith to spend money and make the improvement, all proceedings, including and prior to the ordinance, will be allowed to stand, but the appointment of commissioners and all proceedings thereafter are set aside.

STATE (UNITED NEW JERSEY RAILROAD & CANAL CO. et al., Prosecutors) v. NATIONAL DOCKS & N. J. JUNCTION CONNECTING RAILROAD CO. et al.

(Supreme Court of New Jersey. Feb. 21, 1895.)

MUNICIPAL CORPORATIONS—CONTRACTS WITH RAILROAD COMPANIES—VACATION OF STREET.

1. Under the act of March 9, 1893 (P. L. p. 157) the board of street and water commissioners of Jersey City is the proper municipal authority to enter into contracts with railroad companies whose roads enter or lie within the city, and said board may make such contracts by resolution, without the concurrence of any other board, and notwithstanding the veto of the mayor.

2. The mere vacation of a public street by a municipal board does not involve the infringement of any private right.

(Syllabus by the Court.)

Certiorari, by the state, on the prosecution of the United New Jersey Railroad & Canal Company and the Pennsylvania Railroad Company, against the National Docks & New Jersey Junction Connecting Railroad Company and the mayor and aldermen of Jersey City, to review a resolution of the common council of Jersey City. Resolution affirmed.

Argued November term, 1894, before BEASLEY, C. J., and DEPUE, VAN SYCKEL, and LIPPINCOTT, JJ.

J. B. Vredenburgh, for prosecutors. Charles D. Corbin, for defendant National Docks Co. Spencer Weart and W. D. Edwards, for defendant Jersey City.

DIXON, J. On August 28, 1893, the board of street and water commissioners of Jersey City, over the veto of the acting mayor, passed several resolutions vacating a portion of Railroad avenue, and changing the grade of Wayne street, in order to enable the National Docks & New Jersey Junction Connecting Railroad Company to construct and operate its road across Railroad avenue with greater safety to life and property. The resolutions were adopted as part of a contract entered into by the city and the railway company, in supposed pursuance of an act of the legislature, approved March 9, 1893 (P. L. 1893, p. 157), authorizing such contracts to be made. The prosecutors dispute the legality of these resolutions on several grounds, of which we deem it necessary to notice specially only three.

First, it is said the board of street and water commissioners is not "the proper municipal authority," under the statute mentioned. By the city charter (P. L. 1871, p. 1094) the power of vacating streets and changing grades in Jersey City was intrusted to the board of public works, and by the Acts of 1889, p. 187, and 1891, p. 249, the powers of that board were transferred to the board of street and water commissioners. Because of the possession of this power, that board became the proper municipal authority to enter into contracts involving the exercise of the power.

Secondly, it is alleged that the concurrence of the board of aldermen, or of the board of finance, and the approval of the mayor, with attestation by the city's seal, were necessary to validate the contract intended. The counsel for the prosecutors has not referred us to any statute making these things necessary, and we have found none. The act of 1893 calls for only "a contract," and the board may contract by resolution, unless some additional solemnity be expressly required. City of Jersey City v. Lehigh Valley Terminal R. Co., 55 N. J. Law, 203, 26 Atl. 148.

Another objection is that, by vacating Railroad avenue, the resolutions take away the rights of the prosecutors as abutting owners, and enable the National Docks Company to occupy the property of the prosecutors, without making compensation. This, however, rests upon a mistaken view of the effect of the resolutions. The vacation of the street does not in the least impair private rights. It is only a surrender or extinction of the public easement. Dodge v. Railroad Co., 43 N. J. Eq. 351, 11 Atl. 751, on appeal 45 N. J. Eq. 306, 19 Atl. 622; Read v. City of Camden, 54 N. J. Law, 347, 374, 24 Atl. 549. We find no reason for denying the legality of the resolutions, and they are affirmed, with costs.

Digitized by Google

BAUMAN v. WHITELEY.

(Supreme Court of New Jersey. Feb. 21, 1895.)

NONSUIT.

A plaintiff has a right to a nonsuit, on his own motion, at any time before the jury have retired to consider of their verdict.

(Syllabus by the Court.)

Action by David Bauman against Francis Whiteley. The court refused to allow plaintiff to submit to a nonsuit, and he brings a rule to show cause why a new trial should not be granted. Rule made absolute.

Argued November term, 1894, before BEASLEY, C. J., and DEPUE and VAN SYCKEL, JJ.

R. B. Seymour, for plaintiff. Samuel Kalesch, for defendant.

BEASLEY, C. J. The case before the court is thus tersely stated in the brief of the counsel of the plaintiff, viz.: "On the trial of said cause below, the plaintiff rested his case. The attorney of the defendant offered no evidence on his behalf, and moved the court to direct a verdict for the defendant. Thereupon the attorney for the plaintiff announced his intention to submit to a voluntary nonsuit, and desired that the plaintiff be called. This motion was opposed by the attorney for the defendant, who maintained that, the case being closed, the plaintiff could not at that time submit to a nonsuit against the objection of the defendant, and insisted that the court must refuse the application for a nonsuit. The court refused to allow the plaintiff to submit to a nonsuit, and directed a verdict for the defendant." This judicial action cannot be sustained. At the stage of the cause in question, the plaintiff had the right to submit to a nonsuit. The indisputable common-law practice accorded to the plaintiff this privilege at any time before the rendition of the verdict, and such was the invariable course of the law in the courts of this state until the enactment of our statute. Prior to that event the universal practice in all our superior courts was for the clerk of the court, after the jury had returned into court and were ready to render their verdict, and after the name of each juror had been called, to call the name of the plaintiff. If there was a response from the plaintiff, the verdict was taken, but, if the plaintiff remained silent, he was nonsulted, and the jury was discharged. This procedure prevailed until the year 1862, when the statutory regulation, which is now contained in the 185th section of the practice act, was passed, which plainly recognizes the ancient practice, and at the same time modifies it. The provision is expressed in these words, viz.: "It shall not be necessary to call the plaintiff when the jury returns to the bar to deliver their verdict, and the plaintiff shall have no right to submit to a nonsuit after the jury have gone from the bar to consider of their verdict." The law gives the plaintiff the right to withdraw his case from the cognizance of the court at any time before the jury have retired to consideration of their verdict, and the court cannot any more deprive him of this privilege than it can of his right to institute the suit. Let the rule be made absolute.

FOUNTAIN v. LINN.

(Supreme Court of New Jersey. Feb. 21, 1895.)

COMPETENCY OF WITNESS—TRANSACTIONS WITH DECEDENT.

The plaintiff was not a competent witness, under the act of 1880, to contradict evidence produced on the part of the defendant of a conversation between the plaintiff and the testatrix.

(Syllabus by the Court.)

Action by Jesse T. Fountain against Clarence Linn, executor of Sarah O. Gaskill. Verdict for plaintiff. Rule to show cause why a new trial should not be granted. Rule made absolute.

Argued November term, 1894, before the CHIEF JUSTICE, and DEPUE and VAN SYCKEL, JJ.

Theo. E. Dennis, for plaintiff. John Linn, for defendant.

VAN SYCKEL, J. A witness testified on behalf of the defendant on the trial below to a conversation between the plaintiff and the decedent in her lifetime, in which the plaintiff admitted that she owed him no wages. In this suit, brought to recover wages alleged to be due from decedent to plaintiff from December, 1887, to December, 1891, the plaintiff, against the objection of the defendant, was admitted as a witness to deny that in this conversation he made the admission testified to. Our statute passed in 1880 provides: "That in all civil actions in any court of law or equity of this state, any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity; provided nevertheless, that this supplement shall not extend so as to permit testimony to be given as to any transaction with or statement by any testator or intestate represented in said action." Supp. Revision, p. 287. The transaction between the plaintiff and the testatrix which was the subject of the suit was a contract for the services of the plaintiff rendered to the testatrix in her lifetime, the wages for which he claimed were unpaid. The denial which the plaintiff was permitted to make of the evidence that he had admitted to testatrix that he had been paid in full was, within the language of the act of 1880, testimony as to the transaction with the testatrix. It related expressly to that transaction, and should have been excluded, according to the letter as well as the spirit of the act. In Smith v. Burnet, 35 N. J. Eq. 321, Mr. Justice Reed says: "The object of the restrictive clause in all the statutes is mutuality. Their purpose is, in the language of Dr. Wharton,

Digitized by Google

to provide that when one of the parties to a litigated obligation is silenced by death, the other shall be silenced by law. * * * It is apparent that the object of the legislature is to be primarily regarded, and that the object is to close the mouth of a party whose interest is antagonistic to the estate of a deceased person in regard to those transactions and conversations in which the deceased bore a part, and concerning which he, if living, would be the most important, perhaps the only, witness beside the opposing party." This clear exposition of the purpose of the statute in our court of last resort must settle this controversy. The rule to show cause should be made absolute.

In re HANDY'S ESTATE.

Appeal of LARNED et al.

(Supreme Court of Pennsylvania. April 29, 1895.)

ASSIGNMENT FOR CREDITORS—SALE OF PROPERTY FREE FROM LIENS—ASCERTAINMENT OF INCUMBRANCES—PROPERTY CHARGED BY WILL.

1. H., by will, authorized his trustees, on certain conditions, "to advance by way of loan" certain money to his son. He, however, being alive when the son reached the stipulated age, gave him the money, but took his notes therefor, and by codicil directed that they bear interest, the interest to be deducted from the income payable to him during the life of his mother, and at her death the principal to be deducted from the share going to the son on final distribution. *Held*, that the money thus given the son was not an advancement, but a loan, which being charged by the will on the whole share left the son, including the real estate, his share being an undivided interest in the real and personal estate blended, till partition should be made by the trustees, was an incumbrance on the property, within Act Feb. 17, 1876 (P. L. 4), providing for sales of incumbered property by assignees for the benefit of creditors.

2. A son borrowed from his father shares of stock, and, with the father's consent, pledged it as collateral for his own notes. The father's executors redeemed the stock, and held the notes as a debt against the son. He then, by deed, assigned to them all his interest in his father's estate, to secure his indebtedness to such estate, including the money by them paid to redeem the stock. *Held*, that this was a pledge by a debtor to his creditor, and therefore not void, under Act April 17, 1843, requiring an assignment to one person in trust for another to be recorded within 30 days.

3. Under Act Feb. 17, 1876, providing for sale by an assignee for creditors free from liens, where the property is so incumbered as to make it difficult to determine whether it can be sold for enough to pay all the incumbrances, such sale may be ordered, though the appraised value of the property shows a small margin over the incumbrances, the appraisement being on present values, and the debtor's interest being in remainder, and the life tenant still living.

4. Though Act Feb. 17, 1876, provides for an order for sale by an assignee for creditors of real estate only, freed from liens, where the incumbrances on it are so great as to make it difficult to determine whether it can be sold for enough to pay all of them, yet the same court, having jurisdiction to supervise the sale by the assignee of the personalty, may order him to sell all the property together, freed from liens, it consisting of an undivided interest in a remainder, which may be all real estate or all personalty, or real estate and personalty combined, as trustees may in their discretion determine.

5. In such a case it is no valid objection to the sale of real estate and personalty that thereby the senior lien holder may be deprived of his privilege under Act April 20, 1846 (P. L. 411), of using his lien, as equivalent to money, in bidding at the sale, it being a right of convenience only, which should not override clear equities of the case in other respects.

6. Though Act Feb. 17, 1876, makes no express provision for an ascertainment, in advance of the sale by the assignee, of the amount or priority of liens, but merely provides that the proceeds shall be appropriated to liens extinguished by virtue of the sale, according to their priority, still such ascertainment, being in furtherance of the purpose of the act, to enable the assignees to make advantageous sales, should be made.

Appeal from court of common pleas, Philadelphia county.

In the matter of the assigned estate of Edward S. Handy, Jr. From an order staying execution on a judgment of William H. Larned and another against assignor, and directing sale by the assignee, said judgment creditors appeal. Modified.

William Drayton and Joseph L. Tull, for appellants. R. L. Ashhurst and John G. Johnson, for appellee.

MITCHELL, J. The appellants are lien creditors, having a judgment in the court of common pleas No. 3 of Philadelphia, by virtue of which they issued execution and levied on the interest of their debtor in certain real estate. This execution was stayed by an order from common pleas No. 4 of Philadelphia; and a sale of the undivided interest of the debtor in the estate of his father, Edward S. Handy, Sr., both real and personal, as one whole, was ordered to be made by the debtor's assignee for the benefit of creditors.

1. The jurisdiction of the court of common pleas No. 4, to thus interfere with the process of another co-ordinate court, must be found in Act Feb. 17, 1876 (P. L. 4),[1] and

[1]Act Feb. 17, 1876, provides: "That in all assignments for the benefit of creditors it shall and may be lawful for the several courts of common pleas of this commonwealth, upon application of the assignees of insolvent debtors, setting forth that the personal estate is insufficient for the payment of the debts, and the real estate incumbered with liens to such an extent as to render it difficult to determine whether the same can be sold for enough to pay all the liens as aforesaid, to grant an order, where the said court shall deem it for the manifest interest of all parties, authorizing and empowering the said assignees to make public sale of such real estate, or so much thereof as shall be deemed necessary, at such place and upon such terms as the said court shall direct [then follow directions as to notice, etc.], which sale or sales, after being confirmed by said court, shall discharge all liens against the real estate so sold, excepting that where the lien of a mortgage upon real estate is or shall be prior to all other liens upon the same property, except other mortgages, ground rents and the purchase money due the commonwealth, the lien of such mortgages shall not be destroyed or in any way affected by any sale made by virtue or authority of any sale made under the provisions of this act; and the proceeds arising therefrom shall be appropriated to liens extinguished by virtue of such sale, according to their priority."

Digitized by Google

it is contended by the appellants that the facts of this case did not bring it within that act, because—First, there was but one incumbrance against the land; and, secondly, because the figures show that there was no substantial doubt on the sufficiency of the estate to pay the liens on it.

First, the liens claimed were the appellants' judgment, and certain claims by the trustees of the estate of E. S. Handy, Sr., arising under his will, and others arising out of the acts of the debtor, his son. Handy, Sr., by his will, authorized his trustees, under certain conditions, to make a loan to his son, but subsequently, during his lifetime, gave his son the sum specified, and other moneys, and it is claimed by appellants that these were advancements not chargeable on the real estate. This contention, however, cannot be maintained. The moneys given by Handy, Sr., to his son were not advancements, but loans, though payable in a specified and restricted way. The testator's words are, "to advance by way of loan," and, when the son arrived at the stipulated age during his father's lifetime, the father gave him the money, but took his notes for the amount, and, by codicils to his will, directed that these notes should bear interest at 5 per cent., which should be deducted from the income payable to the son from the estate during the widow's life, and at her death the principal should be "deducted" from the share going to the son on final division and distribution. And, lastly, the share of the son in the entire estate was an undivided interest in the real and personal estate blended, until partition should be made by the trustees. We think the loans made by the father were clearly charged by his will on the whole share left to the son, including the real estate. The other claims of the trustees arising out of the acts of the debtor, Handy, Jr., present a much more doubtful question. The son borrowed from his father 50 shares of stock of the Philadelphia Trust Company, and, with the father's consent, pledged it as collateral security for a loan on his own notes. In April, 1893, the father's executors redeemed the stock, and held the notes as a debt against the son; and on the same day the latter by deed poll assigned all his right, title, and interest in his father's estate to the trustees as security for the amount of all he then owed his father's estate, including the $17,285 paid by the trustees to redeem the stock above mentioned. As this was a pledge by the debtor to his creditor, the learned master rightly held that it was not void for failure to record it within 30 days.[2] So far as the interest pledged is personalty, it was a valid and effective assignment. But the other question whether, so far as relates to the interest in real estate (if the latter can be considered as severable at all from the blended interest), it was not postponed to appellant's judgment by the failure to record it until nearly a year later, was not determined by the master, as, in his view of the case, that question would not arise until distribution. For this reason, although it has been urged here by appellant, we do not decide it now, but leave it with the other matters that will require the attention of the master and the court below. These matters will include the question, back of much that has been argued here, whether E. S. Handy, Jr., had any interest at all in the real estate as such, which could be the subject of lien. As will be noticed more fully hereafter, no specific gift is made to him of any part of the estate, real or personal, but only a share in the sum total of the value of both; and it is open to argument that his interest in realty as such will begin only in the event of any realty being set apart to him in the division which the trustees shall make hereafter. That his interest in the estate as a whole is vested and liable for the payment of his debts, as the master held, does not settle the question of its present liability as land to the lien of a judgment.

The second ground of objection, that the case is not within the act of 1876, because of the absence of any difficulty in determining whether the property can be sold for enough to pay all the incumbrances, may be disposed of briefly. It is true that the appraised value of the personalty and the assessed value of the realty show a small margin in the amount of the debtor's interest over the incumbrances, but these figures are based on present values, while the debtor's interest is in remainder after his mother's life estate. This feature of the case introduces an element of uncertainty, and therefore of difficulty, which the court had a right to consider. Thompson's Appeal, 126 Pa. St. 467, 19 Atl. 43; Pauley's Estate, 149 Pa. St. 196, 24 Atl. 114. On the first branch of the case, therefore, we are of opinion that it was within the act of 1876, and the jurisdiction of the court properly attached.

2. But it is further objected that, even if the court had jurisdiction, it was over the interest of Handy, Jr., in the realty only, and would not sustain the order to sell the blended interests in both realty and personalty in one block. It is true that the act of 1876 applies only to real estate. But it is a remedial statute, and should be construed in advancement of the remedy. There could be no better illustration of the usefulness of such an act than the present case. The supplementary petition of the assignee shows that the estate of Edward S. Handy, Sr., includes 35 houses in the city of Philadelphia, and four tracts of land, amounting to nearly 175 acres, in the rural wards of the city, assessed for taxation at $108,100, besides

[2] Act April 17, 1843, in connection with existing laws, requires an assignment to one person in trust for another to be recorded within 30 days.

Digitized by Google

something over double that amount in personalty. The interest of the debtor which is proposed to be sold is in this estate as a whole, of blended realty and personalty, and is not only undivided, but in remainder, after the life estate of his mother, and partly contingent on other remainders to his brother and sisters. Moreover, of what the debtor's share shall finally consist, as to realty or personalty, is and must remain entirely uncertain and contingent until after the death of the life tenant, when the trustees are to make partition and distribution, in their unfettered discretion, so that they make "four equal shares"; and until that time there is a power of conversion in the trustees as to a considerable portion of the realty by a sale which would under the will be paramount to any interest of Handy, Jr., or a purchaser of his title in any part of the realty. Nothing could be more utterly vain and speculative than an attempt to fix the value of the debtor's interest in the real estate under such circumstances. He may not have any real estate at all, for, as the personalty is more than two-thirds of the whole, the trustees may allot his entire share in personalty, or, on the other hand, they may put it all in realty, with or without owelty. The one thing in all this maze which is capable of even an approximate estimation is the general value of his interest in his father's estate as a whole, real and personal combined. This is what the court below have ordered to be sold. In so doing they have reached the most just, economical, and convenient result, as is conclusively shown by the master in his very able report. For doing this, so far as the share may be regarded as realty, the act of 1876 is ample warrant; and, while that act does not refer to or provide for sales of personalty, yet the supervision of the assignee as to such matters is part of the general jurisdiction of the court, and there is nothing in the statute to prevent the blending of the exercise of the two jurisdictions in one order, where, as here, it is in plain furtherance of the remedy intended.

The only serious objection to this conclusion is that the senior lien creditor may thereby be deprived of his privilege of using his lien as equivalent to money in bidding at the sale. This argument is not without weight, and has been very strenuously urged by appellants. But we do not think it can override the clear equities of the case in other respects. The right itself depends on the act of 20th April, 1846 (P. L. 411), and is obviously not a right of substance, but of convenience only, to avoid the necessity of formal payment by the purchaser to the sheriff or into court of money which the sheriff or court must return to him in settlement of his lien when distribution is made. It arises only in cases of clear prima facie title on the records to receive the money back. Where this prima facies is disputed, the statute provides for the ascertainment of the facts, but, where it does not appear clearly on the records, the right does not arise at all. In the present case the balance, not only of convenience, but of the substantial equities, is against the creditor's right; and not by any act of the law or which the law can prevent, but by the testator's act in giving his son an undivided remainder in the blended real and personal estate, so that the latter's interest in the realty alone, if any he has, is impossible of present ascertainment.

3. It is further objected to the proceedings that the court postponed the consideration of the liens until after the sale. This objection we are obliged to sustain. The learned master was of opinion that the scope of the act of 1876 did not extend to the determination in advance of the amount or priority of liens, but left these as questions of distribution merely. This view, while in accordance with the general practice of our legal system, represents one of its weak points, growing out of inherent difficulties in shaping equitable rights with merely common-law instruments. A lien creditor who, endeavoring to protect his claim, has to bid in ignorance or doubt how much, if any, of the proceeds of the sale will come back to him upon his lien, necessarily has to leave a margin for the uncertainty. His bid is to that extent speculative, and therefore smaller than if based on exact knowledge. It is in the interest of justice to all parties that public sales should be upon ascertained rights, not only as to title, but as to the destination of the proceeds. The act of 1876 was a remedial statute, passed in aid of this interest. The authority it gives the court having jurisdiction of the assignee to stay the hands of the sheriff, and of execution creditors proceeding in pursuance of their unquestionable legal rights, is an equitable power, to direct the administration of a trust estate for the general benefit of all parties interested, according to their respective rights. In so doing the court is required to marshal the liens in order to see which are to be discharged, and it is a legitimate and convenient, if not strictly a necessary, part of this process to ascertain their amounts and priority. Such ascertainment in advance is in furtherance of the purpose of the act, to enable assignees "to make advantageous sales of said real estate," and the act, without any strain, will bear this construction. We are therefore of opinion that the sale should be preceded by an ascertainment of the liens, if any, which will remain, and of those which will be discharged, together with their several amounts and their respective rank or priority. The order appealed from is directed to be modified as herein indicated. Costs of this appeal to be paid by the appellees, but to be reimbursed out of the fund produced by the sale.

Digitized by Google

In re HANDY'S ESTATE.

Appeal of PHILADELPHIA TRUST, SAFE-DEPOSIT & INSURANCE CO. et al.

(Supreme Court of Pennsylvania. April 29, 1895.)

CONSTRUCTION OF WILL—CODICIL—CONTINUATION OF ORIGINAL TRUSTS.

To a will providing that the shares of testator's sons should be held in trust during their mother's life, and until each should reach 25; that then one-half the share of each should be so held until he should reach 28; and that then one-fourth should be held under a spendthrift trust, for the son's life,—a codicil was added directing that the trustees should, on the death of his wife, divide the "estate, both real and personal, into four equal shares, and one equal share shall be held by my said trustees for each one of my said children upon the trusts and for the same purposes as are set forth in my will, and for no other trust or purpose whatsoever." *Held*, that the codicil only continued the old trusts, and did not put the whole shares of the sons under spendthrift trusts.

Appeal from court of common pleas, Philadelphia county.

A petition of the assignee for the benefit of the creditors of Edward S. Handy, Jr., praying for an order to sell his interest in the estate of his father, Edward S. Handy, free of all debts, was referred to a master, who filed his report, to which exceptions were filed. From a decree of the court entered on the hearing of the exceptions, the Philadelphia Trust, Safe-Deposit & Insurance Company and others, executors and trustees under the will of Edward S. Handy, appeal. Affirmed.

Rowland Evans and R. L. Ashhurst, for appellants. John G. Johnson, for appellee.

MITCHELL, J. By the second codicil to his will Edward S. Handy, Sr., directed that upon the death of his wife his trustees should divide his "estate, both real and personal, into four equal shares, and one equal share shall be held by my said trustees for each one of my said children, upon the trusts and for the same purposes as are set forth in my will, and for no other trust or purpose whatsoever." It is claimed by the appellants that this last clause of the sentence establishes a spendthrift trust for the whole share of E. S. Handy, Jr., and puts it all beyond the reach of his creditors. It is necessary, therefore, to look carefully into the trusts and purposes set forth in the will. So far as concerns the children, the provisions of the will are that the residue, being the bulk of the estate, is left in trust to the present appellants: (1) To allow testator's wife to occupy his city and country residences with the children, and after her death to allow the children to reside in his country house, if they desire to do so, without paying rent; (2) to pay one-half the net rentals and income to his wife, and to divide the other half in equal shares among his four children; (3) upon the death of his wife, to pay one-fourth of the net income of his estate to each of his daughters during her life, to her separate use; (4) upon the death of either daughter, to pay three-fourths of the principal of her share to her issue, if any, or, in default of issue, then to testator's surviving children, and the other fourth as his said daughter may direct, etc.; (5) when each of his sons attains the age of 21, to advance him, in their discretion, with his wife's consent, $20,000; (6) after the death of his wife, to pay each of the sons one-half of his share, as he shall attain the age of 25, and half of the rest, or one-fourth of his whole share, when he attains the age of 28, and the remaining fourth to hold on a spendthrift trust for the life of the son. It is thus seen that the will creates six separate trusts or duties on the part of the trustees, all of which require the whole estate, except the sums authorized to be loaned to the sons, to be kept together during the widow's life, and four of which necessarily extend the duration of the trust, as to the larger part of the estate, during the lives of the four children. This is evidently the result contemplated by the testator, and the only provisions made for a separation of the joint estate, and a partition or division of any of the corpus, are after the death of the widow, upon the death of a daughter, or the attaining of the ages of 25 and 28 by the sons. The will was made in 1874, the codicil in 1883, and in the interval both of the sons had come of age, but it does not appear if the younger had reached 28 or even 25. Turning, now, to the codicil, its first and main purpose is manifest at once,—to provide for a division of his estate at an earlier period than he had contemplated in his will. He revokes the power to sell his real estate in the city of Philadelphia, and directs the trustees, upon the death of his wife, to divide his estate into four equal shares, and to hold one share for each child, "upon the trusts and for the same purposes as are set forth in my will, and for no other trust or purpose whatsoever." These last words are very significant. They express the intention to make no new trusts, but to continue the old ones. Something was necessary to be said on this subject, or it would have been fairly open to inference that the peremptory direction to divide, without restriction, had done away entirely with the trusts in the will after the widow's death. Let us look at what is left of these untouched by the codicil. All of them remain unchanged during the life of the widow. At her death the separate use trusts for the daughters, and the direction as to the devolution of their shares upon their respective deaths, remain, with the single alteration that the period of division or separation of the common estate is advanced from the death of the mother and daughter both to the death of the mother only. As to the sons, except the provision for the loan at 21, the trust by

Digitized by Google

the will was to continue for the whole share during the mother's life, and until each should reach 25, then for one-half until he should reach 28, and then for one-quarter for his life, to protect against creditors, anticipation, etc. No separation of his share from the common estate was to be made, except as to the above-named fractions at the periods specified. By the codicil, the division of the estate in common into four shares in severalty is to be made upon the mother's death, but no change is made in the times of distribution. Each son, under the codicil, is to get, as he did under the will, one-half at 25, one-quarter at 28, and one-quarter to be held for his life. The trusts of the will continue under the codicil for the protection of this part of the testator's purpose. It will thus be seen that there was a necessity for the testator in his codicil to refer to the subject to prevent the implied revocation of the trusts in the will; that what he expressed was an intention to preserve those trusts, but not to create new ones; that there were amply sufficient of the trusts expressly created by the will, left unaffected by the codicil, to satisfy his direction that the shares of each child should be held upon such trusts; and that to construe the codicil as effecting an entire change in his provision for his sons, by putting their whole shares under spendthrift trusts, is not only uncalled for, but would be subversive of his intent not to create any new trusts, expressed in his direction that the shares were to be held for the same trusts and purposes as in his will, "and for no other trust or purpose whatsoever." The learned master and court were therefore right in their construction of the will upon this question. The matters in the third and fourth assignments of error have been disposed of in Larned's Appeal (opinion filed herewith) 31 Atl. 983, to which reference is made, without further discussion here. Appeal dismissed; costs of this court to be paid by appellants.

HUSTON v. HARRISON et al.

(Supreme Court of Pennsylvania. May 13, 1895.)

OWNERSHIP OF BONDS — POSSESSION AS EVIDENCE —EQUITY PLEADING—BURDEN OF PROOF.

1. The fact that one claiming to own certain bonds authorized another in writing to collect interest on the same, in the absence and without the knowledge of the real owner, is not sufficient to prove ownership in the claimant.

2. The possession of interest coupons is no evidence of ownership of the bonds from which the coupons were cut.

3. The bill alleged that certain property belonged to A., and charged defendant, as executrix of A., with having misappropriated it. The answer expressly denied the charge, and averred ownership of the property in defendant. *Held*, that the burden of proof was on complainant to overcome the responsive answer with two witnesses, or with one witness and corroborative circumstances.

4. Where one holds property as agent for another, the fact that he is in possession thereof is no evidence that he owns it.

Appeal from court of common pleas, Philadelphia county.

Bill by Violet A. I. Huston against Philippa Harrison and others. From a decree for defendants, complainant appeals. Affirmed.

The report of the master (John C. Grady) is as follows:

"This case was referred to the undersigned, as examiner and master, on the 4th day of March, A. D. 1893 (per certificate annexed hereto), immediate notice of which was given to all persons in interest, designating the 13th day of the said month as the time for the first meeting, which, in accordance therewith, was held at 1 o'clock p. m., at the office of the master, when and where it was agreed between counsel to be ready to proceed with the case on the 27th day of that same month. The master was attended by John Walker Shortledge, Esq., counsel for the plaintiff; by John M. Gest, Esq., and John G. Johnson, Esq., counsel for Philippa Harrison, one of the defendants; and by Henry B. Robb, Esq., and Richard P. White, Esq., counsel for Clara A. Stoops, another of the defendants. Mrs. Philippa Harrison, however, alone of the defendants, filed an answer. For some time meetings were held twice a week, adjourning from place to place, to suit the convenience of the suitors and their witnesses. Thus, about one year was consumed in the taking of testimony, which embraces about 500 typewritten pages; and, after it closed, the months of April and May, 1894, were devoted to the argument of counsel. No meeting was postponed on the master's account, and the postponements granted at the request of counsel on both sides were for necessary reasons. It seldom happens that a case is prosecuted with less delay on the part of counsel or parties to a cause.

"The master will first consider the pleadings in the case and the issues raised by them.

"The bill in this case was filed on January 16, 1893, by Violet A. I. Huston against Philippa Harrison, the Pennsylvania Company for Insurances on Lives and Granting Annuities, Philippa Harrison, executrix of the estate of Teresa L. C. Anderson, Clara H. Stoops, and the Fidelity Insurance, Trust & Safe-Deposit Company. The bill sets forth: (1) That the complainant's mother, Teresa L. C. Anderson, died on December 2, 1883, leaving an estate of $83,000, invested in the following securities: $5,500 city of Philadelphia, 6% loan, registered; $4,000 city of Pittsburgh bonds, 7% water loan, registered; $2,000 Lehigh Valley R. R. bonds, 7% loan, registered; $1,000 Phila. & Reading R. R. bonds, 7% loan, registered; $34,000 city of Cincinnati bonds, $7^3/_{10}$% loan, coupon; $13,000 city of Pittsburgh bonds, 5% loan, coupons; $6,000 Northern Central R. R. bonds, 5% loan, coupon; $5,000 Penna. Canal Co. bonds, 6%

Digitized by Google

loan, coupon; $5,000 Western Pacific R. R. bonds, 6% loan, coupon; $4,000 Texas & Pacific R. R. bonds, 6% loan, coupon; $1,000 Delaware & Raritan and Camden & Amboy R. R. bonds, 6% con. loan, coupon; $1,000 Connecting R. R. bonds, 6% loan, coupon; and $1,500 in cash, etc.,—all of which passed into the hands of her executrix, Philippa Harrison, to whom letters were granted on December 13, 1883. (2) That said Philippa Harrison, in 1885, filed her account as executrix, in the orphans' court, which was adjudicated on October 16, 1885, and confirmed absolutely as first and final account, sec. reg. That the executrix, in her said account, accounted only for the following securities: $500 city of Philadelphia 6% loan, registered; $4,000 city of Pittsburgh bonds, 7% water loan, registered; $1,000 Lehigh Valley R. R. bonds, 7% loan, registered; $1,000 Northern Central R. R. bonds, 5% loan, coupon; $5,000 Penna. Canal Co. bonds, 6% loan, coupon; $1,000 Delaware & Raritan and Camden & Amboy R. R. bonds, 6% con. loan, coupon,—together with cash about $1,500, with which the executrix was surcharged. That the estate thus accounted for was distributed under the decree of the court to the Pennsylvania Company for Insurances on Lives and Granting Annuities, trustee under the will. That the remainder of the estate, or about $69,000, invested as above set forth, was deceitfully and fraudulently appropriated and converted by Philippa Harrison to her own use. (3) That the will of said Teresa L. C. Anderson, dated June 9, 1882, bequeathed an annuity of $300 to her husband, Oliver H. Anderson, for his life, and the remainder of her estate to the Pennsylvania Company for Insurances on Lives and Granting Annuities, in trust for the testatrix's two daughters, Clara H. Anderson and Violet A. I. Anderson, for their lives, with remainder to their children, etc. (4) That Clara H. Anderson (now Clara H. Stoops) became of age in 1888; and Violet A. I. Anderson (now Huston), the complainant, became of age in 1891, but at the time of the adjudication were minors, residing with Philippa Harrison, the executrix, and under her charge and control, and were not represented at the audit. That Oliver H. Anderson died in 1888. (5) That Clara H. Stoops alleged that in 1888 the said Philippa Harrison gave her (said Clara) the $34,000 city of Cincinnati bonds, on condition that Philippa Harrison should be paid the income therefrom during her lifetime. That said bonds were delivered to said Clara H. Stoops, and placed by her in a box in the Fidelity Insurance, Trust & Safe-Deposit Company. That said income had been paid to Mrs. Harrison until 1892, when said Philippa Harrison attempted to disavow the arrangement, and filed a bill in equity (in court of common pleas No. 1, as of September term, 1892, No. 638) against the said Clara H. Stoops and the Fidelity Insurance, Trust & Safe-Deposit Company to regain possession thereof. That said bonds belong to the estate of said Teresa L. C. Anderson, and as such should be in possession of the Pennsylvania Company for Insurances on Lives and Granting Annuities, as trustee under her will. (6) That in November, 1890, Philippa Harrison made a revocable deed of trust to the Pennsylvania Company for Insurances on Lives and Granting Annuities of securities belonging to the estate of said Teresa L. C. Anderson, amounting to $47,000, by the terms of which trust the income was to be paid to said Philippa Harrison for life, with remainder to certain appointed relatives of said Philippa Harrison, residing in England or elsewhere. (7) That certain other of the securities enumerated and alleged to belong to the Anderson estate are in the deposit box of said Philippa Harrison in the Pennsylvania Company for Insurances on Lives and Granting Annuities, or the Fidelity Insurance, Trust & Safe-Deposit Company. That the income of the estate fraudulently misappropriated by said Philippa Harrison for nine years amounted to $38,277, part of which had been invested in certain real estate, viz. 826 and 828 Corinthian avenue, 2515 Brown street, and 1704 Spring Garden street. (8) That until December 30, 1892, the complainant had no knowledge of the magnitude of her mother's estate, nor of the fraudulent conversions thereof by the executrix, nor that the $34,000 city of Cincinnati bonds were a portion thereof; nor had complainant any reliable knowledge or information concerning said estate, and had no evidence that the account of the executrix was false. The bill further set out that more than five years had elapsed since the confirmation of the said final account of the defendant as executrix, and that a bill of review was barred, and concluded with a prayer for an account and discovery of the assets of the estate; that the Pennsylvania Company for Insurances on Lives and Granting Annuities be decreed to hold all securities in its possession as trustee under the will of Teresa L. C. Anderson, and should cancel the deed of trust of 1890; for an injunction and further relief.

"To this bill Mrs. Harrison filed her answer individually and as executrix of Teresa L. C. Anderson. After reserving all right of exception to the jurisdiction of the court, (1) the defendant admitted the death of Mrs. Anderson on December 2, 1883, and that, as executrix of Mrs. Anderson, she received and duly accounted for the following assets: $500 city of Philadelphia 6% loan; $4,000 city of Pittsburgh water loan, 7%; $1,000 Lehigh Valley Railroad 7% loan; $1,000 Northern Central Railroad 5% loan; $5,000 Penna. Canal 6% loan; $1,000 Delaware & Raritan and Camden & Amboy 6% loan; $1,000 city of Pittsburgh loan, paid off after the death of testatrix; and $456.05, deposited in her name in the Philadelphia Savings Fund. That her account as executrix was filed in the orphans' court on March 30, 1885, and duly adjudicated. No exceptions were filed, and the balance paid over to the Pennsylvania Company for Insurances on

Digitized by Google

Lives and Granting Annuities, as trustee under the will. Denied that Teresa L. C. Anderson was the owner of the securities therein mentioned, or any of them, save and except the above mentioned, for which she had properly accounted. (2) Defendant denied the allegations of the bill; that the sum of $69,000 invested in the securities mentioned, or any of them, or any income therefrom, were assets of Teresa L. C. Anderson; and that they had been fraudulently appropriated or converted by her to her own use, in violation of law. (3) The will of Teresa L. C. Anderson was admitted. (4) That the Pennsylvania Company for Insurances on Lives and Granting Annuities, being trustee for the complainant under the will of Teresa L. C. Anderson, were represented at the audit of the defendant's account. (5) Denied that the $34,000 city of Cincinnati bonds were the property of Teresa L. C. Anderson, and averred that they were and are the property of the defendant, although now the subject of litigation in a bill of equity filed by Mrs. Harrison against Mrs. Stoops (C. P. No. 1, Sept. term, 1892, No. 638). (6) Admitted the revocable deed of trust in November, 1890; averred that all the securities were her own individual property; that none of them were ever the property of Mrs. Anderson, nor did any of them belong to her estate; that in September, 1892, defendant withdrew about $10,000 of the securities, and made a new revocable deed of trust of the remainder to the Pennsylvania Company for Insurances on Lives and Granting Annuities. (7) That all securities that were delivered by her to the Pennsylvania Company for Insurances on Lives and Granting Annuities were her own private property; and denied that defendant had fraudulently misappropriated the income of the estate of Teresa L. C. Anderson; denied that she had fraudulently misappropriated any of the assets of said estate; denied that the real estate mentioned was purchased by any of the income of the said estate; averred that said real estate was purchased by defendant with her own property; that her husband had died intestate as to No. 1704 Spring Garden street, and defendant had purchased the interest of the heirs at law with her own money. (8) Defendant averred that she had fraudulently converted no part of the estate of said Teresa L. C. Anderson.

"The issue thus raised by the pleadings is simply: Did the bonds enumerated in the bill belong to Teresa L. C. Anderson at the time of her death, and were they as such misappropriated by her executrix, Philippa Harrison, or were these bonds in fact the property of Mrs. Harrison, as claimed by her? The master notes in passing, but reserves for further consideration, that the answer reserves to the defendant the right to object to the jurisdiction of the court of common pleas, and that the averments of the answer are directly responsive to the bill, and would therefore require to be overcome either by two witnesses or one witness and corroborating circumstances. The defendant, however, met the case upon the merits, and the master has endeavored to ascertain the real facts of the controversy. In this attempt every witness was heard, and great latitude given to counsel in their examination. The investigation covers 500 pages typewritten testimony, but, when scarcely 20 pages had been taken, the counsel for the plaintiff felt obliged to withdraw from the consideration of the master $7,000 of the securities which the bill alleged had been embezzled by Mrs. Harrison, as it was found they were in the possession of the trustee for the complainant and her sister, who were actually participating, and had been for some time, in the income thereof.

"2. The master, having fully considered the voluminous testimony, now admits his findings of fact: The defendant Philippa Harrison was first married in England to a sea captain, named George Dani, who died November 28, 1856. Dani left several properties in Brunell street, Liverpool, and some shares of stock in the Royal Insurance Company. Prior to his death, Teresa L. C. Francis (afterwards Teresa L. C. Anderson, mentioned in the bill), who was a niece of the defendant Philippa Dani, lived with her in England. Dani having died, his widow married, in England, John Harrison, in April, 1858; and shortly afterwards they, with Miss Francis, removed to Philadelphia. For a while the Harrisons conducted a saloon or tavern on Twentieth street, below Callowhill street, until about 1860, when they opened a cloak store at No. 20 South Eighth street. Afterwards, in 1863, the business being prosperous, the Harrisons established another store at No. 60 North Eighth street, under the name of Francis & Co., in which Miss Francis was stationed with other girls as a saleswoman. The manufacturing, however, was done at the lower store; and it was clearly established by the testimony that Miss Francis was not interested in the business, except as an employé, her name being used merely as a device to keep the customers from suspecting that the two establishments were in reality but one. About three years afterwards, in 1866, Miss Francis married Oliver H. Anderson, a house painter by trade, who for a while followed his business as a journeyman, but shortly fell into dissolute habits, which caused him to leave the home of the Harrisons, with whom he and his wife had continued to reside. Mr. and Mrs. Anderson had two children,—Clara, born November 25, 1866, married Harry R. Stoops, April 30, 1890; and Violet, the complainant, born in 1870, and married W. M. Huston, in March, 1886. Mrs. Anderson continued to live with Mrs. Harrison until her death, in December, 1883; and her children continued to live with Mrs. Har-

Digitized by Google

rison, who assumed their education and care, until their respective marriages. Anderson himself died in 1888, but it appears had not supported his family for many years. About 1870 the health of John Harrison, the head of the entire establishment, began to fail. In 1871 the Harrisons disposed of the upper store, 60 North Eighth street, to Mrs. Bush; and in 1872 they disposed of the lower store, 20 South Eighth street, to Mr. Marter, and retired from business with a handsome competency. In the following year the entire family went to England, and lived abroad until 1876, when they returned to Philadelphia, and resided here until John Harrison's death, April 28, 1882. His will was dated in England as far back as 1862, apparently at the time of his visit to obtain funds with which to establish the store at 60 North Eighth street. In it he made his wife, Philippa Harrison, executrix and tenant for life of his personal estate, and at her death bequeathed it to Mrs. Anderson for her life, then to her children. His personal estate was inventoried at $134,014, and did not include any of the bonds or securities now in dispute. On the day following the probate of the will, Mrs. Harrison appointed the Pennsylvania Company for Insurances on Lives and Granting Annuities her agent for the collection of the income. Mrs. Anderson was about 12 years younger than her aunt, Mrs. Harrison, who is now about 67 years of age. In 1882 their respective ages were therefore about 43 and 55 years. Mrs. Anderson was not only younger, but better educated and more accustomed to writing, than Mrs. Harrison, and for some time had been in the habit of attending to the business matters of the whole family. John Harrison, for a number of years, had rented a box in the safe-deposit vaults of the Pennsylvania Company for Insurances on Lives and Granting Annuities, in which were kept not only his own securities, but also those of his wife and those belonging to Mrs. Anderson; and also the $7,000 of city loan and other registered securities in the name of himself and Mrs. Anderson, as trustees for the latter's children. Towards the close of his life, the active management of affairs was surrendered to Mrs. Anderson, who, together with Mrs. Harrison, had the right of access to the said deposit box. Of this right Mrs. Anderson did not avail herself until March 25, 1880, when she began collecting the coupons. Except in this way, Mrs. Anderson never had possession of the bonds. Shortly after Mr. Harrison's death, his widow, accompanied by Mrs. Anderson and the two children, sailed for Europe, having first arranged with the Pennsylvania Company for Insurances on Lives and Granting Annuities to collect and remit the income of nearly all the securities in the box. On a certain day it appears that Mrs. Anderson arranged the details with Mr. Jarvis Mason, trust officer of the Pennsylvania Company for Insurances on Lives and Granting Annuities, and gave him instructions for remittance in a written paper prepared by Mr. Mason, dated June 6, 1882. Mrs. Harrison expected to be absent four years, so four years' or four and one-half years' coupons were cut from most of the securities belonging to Mrs. Harrison, and a power of attorney was given by Mrs. Anderson for the collection of the interest upon certain securities registered in her name, including those held in trust for her children. Mrs. Harrison also executed powers of attorney for the collection of interest upon the securities of John Harrison's estate, to which she was entitled for life. During her stay abroad, Mrs. Harrison was in negotiation with the heirs at law of her husband, whose will disposed only of his personal estate. Considerable correspondence on the subject passed between Mrs. Harrison and her counsel, E. Cooper Shapley, Esq., in which Mrs. Anderson, as usual, acted as her amanuensis and assistant. Mrs. Harrison, Mrs. Anderson, and the children remained abroad, however, but a little over a year, returning in September, 1883. Shortly afterwards, Mrs. Anderson died, on December 2, 1883, leaving a will dated June 9, 1882, drawn by Mr. Shapley, in which she devised a property in Asbury Park to Mrs. Harrison for life, bequeathed an annuity of $300 per annum to her husband, and the residue to the Pennsylvania Company for Insurances on Lives and Granting Annuities, as trustee for her children. She also directed that Mrs. Harrison should take care of her daughters during their unmarried minority. Mrs. Harrison was appointed executrix of the will, and letters were issued to her. The first visit she made to the safe-deposit box after Mrs. Anderson's death was on December 10, 1883, when she took with her the two grandnieces, who were then seventeen and thirteen years of age. Their care, education, and maintenance devolved upon Mrs. Harrison, who, having no children of her own, looked upon them as fully supplying the place. They were liberally educated, clothed, and well provided for until, and in a measure, in the case of Clara, for some time after, their marriage. In 1885 Mrs. Harrison filed her account upon the petition of Oliver H. Anderson, the husband of Mrs. Teresa L. C. Anderson, who had been separated for some years, but was entitled to a small annuity of $300 under the will. The account was prepared by E. Cooper Shapley, Esq., and in it the accountant charged herself with $12,500, the amount of the inventory, but claimed no credits, adding in place of the usual credits the following memorandum: 'Inasmuch as any deductions for payments or charges would affect the amount eventually due the daughters of the decedent, the accountant has entered nothing on the debit side of the account.' The husband of the decedent, who was represented by counsel, endeavored to surcharge the accountant, and the audit adjourned for the purpose of allowing the accountant to file a supplemental ac-

Digitized by Google

count, which took the form of an agreement between the parties to a surcharge of one registered bond of the city of Pittsburgh, $1,000, and a deposit in the Philadelphia Savings Fund of $456.05. Mr. Anderson was paid the arrears of his annuity, and the balance was paid over to the trustee. In reference to this surcharge, the master, after an examination of the record of the orphans' court and the testimony taken at the audit, is not surprised that the accountant, either from a well-grounded belief that the items of surcharge actually belonged to her, or from a bona fide lack of knowledge that they did not, failed to include them in her account. The record shows that the account was adjudicated by the orphans' court, and in due time confirmed absolutely. The city loans held in the names of John Harrison and Teresa Anderson for Clara were duly transferred to the Pennsylvania Company for Insurances on Lives and Granting Annuities, as substituted trustee, shortly after Clara came of age; and the loan held in trust for Violet was also transferred to the Pennsylvania Company for Insurances on Lives and Granting Annuities, as trustee, shortly after her marriage. The latter event, which took place in March, 1886, removed Violet from Mrs. Harrison's household. The marriage was a clandestine one, without Mrs. Harrison's knowledge or consent, and was the first interruption of the domestic harmony. Clara, in 1890, married Harry R. Stoops. Since her mother's death, Clara had been accustomed to attend to Mrs. Harrison's business for her; and Mr. Stoops, even before his marriage, advised with Mrs. Harrison as to investments, made purchases of securities, and was given powers of attorney for the collection of interest. This relation between Mrs. Harrison and Mr. and Mrs. Stoops continued until June, 1892, when a dispute arose between them as to the $34,000 city of Cincinnati bonds. Upon November 2, 1892, Mrs. Harrison filed a bill in equity against Mrs. Stoops and the Fidelity Insurance, Trust & Safe-Deposit Company in the court of common pleas No. 1, as of September term, 1892 (No. 638), where she alleged that, reposing special confidence and trust in her grandniece Clara H. Stoops, the complainant nominated and appointed her deputy or agent, which gave her full and free access to and control over the contents of her safe-deposit box in the Fidelity Insurance, Trust & Safe-Deposit Company; that in said box, among certain other papers and securities, were the $34,000 city of Cincinnati $7^3/_{10}$% coupon bonds belonging to the complainant; and that afterwards, without the knowledge or permission of the complainant, the said Clara H. Stoops rented another box in her own name, in which she placed these $34,000 bonds, refusing the said Philippa Harrison a key to the same. The answer of Clara H. Stoops admits that she rented a box of the Fidelity Insurance, Trust & Safe-Deposit Company, and that she deposited the said bonds therein, but denied that they belonged to the complainant, and claimed that she (the defendant) was the owner, and had been the owner since June 15, 1888, by gift from the complainant. She also admits that she retained the keys of the box, and refused access thereto to the complainant. This bill is yet pending. Shortly afterwards, on January 15, 1893, the present bill was filed by Violet A. I. Huston.

"3. The master now proceeds to the determination of the disputed ownership of the bonds mentioned in the bill. The contention of the plaintiff is based chiefly upon the memorandum or letter of instructions drafted by Mr. Mason, and signed by Mrs. Anderson, dated June 6, 1882 (Exhibit 1, page 8, of testimony). By this letter the Pennsylvania Company for Insurances on Lives and Granting Annuities is directed to collect, under powers of attorney to it given, the interest from certain loans registered in the name of Mrs. Anderson, and also to collect 'the interest coupons which I have cut from the following bonds, and deposited with them to hold for my account.' As before stated, this arrangement was made just prior to the departure for Europe of Mrs. Harrison and Mrs. Anderson and the children, in order to provide for remittances during a contemplated absence of four years. After a careful consideration of the testimony, the master is clearly of opinion that, in making this arrangement with Mr. Mason, Mrs. Anderson was not acting for herself alone, but for Mrs. Harrison and the whole family, in preparation for a sojourn abroad. The memorandum, standing by itself, is not sufficient to prove ownership in her, even if it were distinctly intended as a claim of title, as it would be merely a declaration by Mrs. Anderson in her own interest, in the absence of Mrs. Harrison. But the master believes, and so finds, that this was unintentional on Mrs. Anderson's part, for it seems plain enough that her whole mission and object was to have the income collected from their joint securities in one agreement, and that she never intended to claim ownership or provide a pretext for litigation against her aunt, because, to the credit of both of them, there is no evidence of any quarrel or misunderstanding. The paper was drawn by Mr. Mason from a mere memorandum furnished him of the securities, and Mr. Mason's own impression was that Mrs. Anderson was acting for Mrs. Harrison. It was most conclusively shown that Mrs. Anderson acted as agent and amanuensis for Mrs. Harrison in all her other business matters. Not to multiply instances, it is impossible to read the correspondence between Mr. Shapley and Mrs. Anderson, and the letters which the latter wrote to Mr. Mason, without seeing that she was accustomed, in speaking of Mrs. Harrison's business and property, to use the first person, without the slightest apparent intention of causing any confusion of proprietor-

Digitized by Google

ship. Mrs. Anderson used to write the letters, and sometimes Mrs. Harrison would sign them; sometimes Mrs. Anderson would sign them for her. Thus, for example, Mrs. Anderson wrote to Mr. Shapley July 25, 1882: 'Aunt wishes me to say, will you be kind enough to get the house appraised [for collateral inheritance tax] as soon as you can, as she wishes it all settled up as early as possible, and please do it as reasonable as you can, as I shall have to stand the expenses.' And in Mrs. Anderson's letter she says, in speaking of the buying out of the shares of the collateral heirs of John Harrison in the Spring Garden street house: 'I am going to give them ten thousand dollars for a clear title.' Exhibit 26, signed by both Mrs. Harrison and Mrs. Anderson, the latter writes again in reference to the proposed conveyance: 'I hold the reins in my hands, and I can do as I like,' etc. 'I thought my marriage settlement was lost or destroyed,' etc. 'My husband sold out my bonds, and with that money he bought the house,' etc. And Exhibit 27: 'I will not sell the house, and do not want to pay them a dollar.' All through her correspondence Mrs. Anderson identified herself completely with her aunt Mrs. Harrison, and used the 'I' and the 'my' with a perfectly innocent intention. No doubt is left in the master's mind that Mrs. Anderson was acting and writing as the 'business man' of the family.

"The complainant was not able to show that Mrs. Anderson was in fact possessed of the securities in dispute, or indeed of any property other than that accounted for by her executrix. Some city directories were produced to show that Mrs. Anderson was a partner of Harrison's at the upper store, 60 North Eighth street, which store was conducted under the name of Francis & Co. This, however, as a mere ex parte compilation of names, is not competent evidence of the fact of partnership; and, moreover, the entries in the directory are not invariable, most of them omitting the name of Teresa Francis altogether. But the evidence produced by the defendant leaves no doubt in the mind of the master that the business name of Francis & Co. was only a trade artifice, and that Mrs. Anderson was merely a saleslady or employé, differing only from the other employés in that she was a member of the Harrison household. It did not appear what salary she received, if any; but the other girls in similar positions did not receive more than $10 a week. The question of this alleged partnership the master regards as important in the determination of the case. The burden of proof was, of course, upon the complainant, who averred that Mrs. Anderson was possessed of this large estate, to prove the fact, and the question of its derivation naturally arose. Her husband was intemperate, and contributed but little, if any, of his earnings as a house painter to his wife; and that she derived nothing from her family clearly appears from the evidence of her sister, Mrs. Beach. Where, then, did Mrs. Anderson derive this fortune? In answer to this pertinent inquiry, the complainant attempted, as stated, to show, upon the authority of a few entries in the old city directories, that Mrs. Anderson was a partner in the business. The defendant, on the other hand, produced a large number of witnesses, who clearly proved that Mrs. Anderson was not a partner, but simply an employé, and, so far from being wealthy in her own right, was all her lifetime dependent on the bounty of Mrs. Harrison, her aunt.

"The master will refer briefly to the testimony on this head. Thus, G. W. Marter, one of the complainant's own witnesses, said that Mrs. Anderson told him that she was simply a saleslady. Mr. Marter's father was the purchaser of one of the Harrisons' stores in 1872, and was especially interested, as he said, in ascertaining the fact. J. C. Hutchins, another of complainant's witnesses, who knew the Harrison family since 1862, and whose store on Eighth street was next door, testified that Mrs. Anderson was a saleslady. Mrs. Gardeicke, who was an employé at the store, and knew Mrs. Anderson like a sister, said she was only a saleslady. Michael A. Durrell, Mrs. Mary W. Asay, Mrs. Isabella Neely, who were all coemployés with Mrs. Anderson, and knew her well, testified positively to the same effect; and Mrs. Eveleth, who acted with her mother, Mrs. Bush, in purchasing the lease of No. 60 North Eighth street, testified that Mrs. Anderson did not conduct herself as a partner. In addition, Mr. Edwin R. Hawkins, Theodore Wernwag, Henry M. Steel, Aaron De Wald, D. W. Chambers, David M. Chambers, and Edward Brown, who were old business friends and associates of Harrison's, testified that Mrs. Anderson was not known as a partner or reputed as such. The learned counsel for the complainant moved to strike out this testimony, but the master regarded it as cumulative and corroborative of the fact, and therefore refused the motion. And, finally, Mrs. Susan C. Beach, a sister of Mrs. Anderson, testified emphatically that Mrs. Anderson was not a partner in the business. She was not only qualified to know by reason of her relationship, but she was also employed as a saleslady herself in the store. It is true that the upper store was run in the name of Francis & Co., Francis being the maiden name of Mrs. Anderson. But it would be rash to infer from that circumstance that Mrs. Anderson was a partner, even if it were not so clearly explained by the witnesses Mrs. Gardeicke, Mrs. Asay, Mrs. Neely, and Mr. Durrell, who were employés of the establishment, and who testified that this was but 'a trick of the trade,' frequently practiced where two or more retail establishments were under the same management,

Digitized by Google

and Mrs. Anderson frequently spoke of the arrangement as having been made with that end in view. The cumulative effect of this mass of disinterested testimony is irresistible, and the master therefore finds as a fact that Mrs. Anderson was not a partner in the business, and that no source appeared from which she could possibly have derived the property in dispute. The defendant's evidence, moreover, went much further than this. She not only showed that it was impossible that Mrs. Anderson could have accumulated the large fortune claimed in the bill, and that during her lifetime she never claimed an estate of such magnitude, but it was shown that Mrs. Anderson herself stated, shortly before her death, the amount of her savings, corresponding to the sum actually accounted for by her executrix. Mrs. Gardeicke was one of Mrs. Anderson's most intimate friends, beginning at the time of her employment as a saleslady at the upper store with Mrs. Anderson; was so intimate with her as to be bridesmaid at her marriage; visited her socially during her business career, and at times afterwards, considering herself almost as one of the family, particularly at a very important time in Mrs. Anderson's latter days, when she was considering a proposition to live with her husband. From this testimony it is not doubtful that, if Mrs. Anderson had really possessed this alleged estate, she would have accepted her husband's proposition; but as the income from $15,000 would not, in her mind, after maintaining a home including her husband, leave sufficient to defray the expenses of her daughters' education, she decided to remain with the Harrisons. How important, then, is Mrs. Gardeicke's testimony: 'Q. You were, of course, employed on a salary yourself? A. Oh, yes; and I always understood that Mrs. Anderson was. She always told me that she had a salary, but she never told me just how much she had. Q. Do you remember any conversation with Mrs. Anderson as to the amount of money which she had saved? A. Oh, yes; I distinctly remember one day she came down to my house. She was quite sad that day, and we had a conversation with regard to her staying with Mrs. Harrison. I believe Mr. Anderson wanted her to come and live with him. Q. Did they live together at the time? A. Oh, no; and I advised her to go with Mr. Anderson, and we had a long conversation about it, but she did not think she could afford to go with Mr. Anderson because her aunt would disinherit her.' And, again: 'Q. Did you then have any conversation with Mr. Anderson at that time relative to her property? A. Well, at that time I advised her to go with Mr. Anderson, and I asked her how much money she had when she said she could not afford to go. I said: "Have you not enough to live on?" And she said, "No." "Well," I said, "Terelisa, how much have you got?" She told me she had only $15,000, and I said: "Well, that is enough to get bread and butter, and I would go, and I think Mrs. Harrison will forgive you. It will be all right after a while." Q. What did she reply to that? A. She said, "No;" her children had to be educated, and she could not educate them as she wanted them educated.' That conversation occurred in 1882. And, again, in Mrs. Gardeicke's testimony, Mrs. Anderson is quoted as saying: 'She told me repeatedly she had no one to thank but her aunt Mrs. Harrison.'

"The probabilities of the case are on other grounds strongly with the defendant. Thus, it seems incredible that Mrs. Anderson's husband, the father of complainant, should not know the existence of his wife's fortune; and, if he possessed that knowledge, how strange it is that its existence should not have been disclosed at the time, in order that he might be entitled to a third of the fortune, instead of $300 a year. He was represented by counsel, and was endeavoring to get all he could. Mr. Anderson and his wife had lived together at the Harrisons' home when business was prosperous and money-making. It is not easy to believe that he did not understand their affairs. He must have had knowledge of the condition of his wife's finances, but neither he nor any one else seems to have considered her wealthy. Again, the conduct of Mrs. Harrison is not easily reconcilable with the complainant's theory of the case. According to this, Mrs. Harrison, as soon as her niece Mrs. Anderson died, took possession of a large estate, appropriated it and the income thereof to her own use, concealed her fraud from her innocent victims, and for years has been leading a life of fraud, treachery, and hypocrisy. On the contrary, the first visit made by Mrs. Harrison to the safe-deposit box after Mrs. Anderson's death was about one week thereafter, on December 10th, and she was accompanied by both her grandnieces; and on the 18th of the month she appointed Clara her deputy on the books. Ever afterwards Clara took her mother's place as assistant or agent, and, even before her marriage to Mr. Stoops, the latter was accustomed to collect her interest and make her investments. She consulted Mr. Stoops about her deed of trust before she made it, and he himself testified he handled all of the estate. It is hardly possible that Mrs. Harrison, if engaged in the perpetration of a fraud, should have selected as her agents and confidants the persons most of all concerned to prevent it. Again, when Mrs. Harrison filed her account, she claimed no credits or commissions, because she did not wish to diminish the daughters' inheritance. If her object was avaricious, she might easily have claimed the usual allowances. This account, as well as Mrs. Anderson's will, was prepared by E. Cooper Shapley, Esq., a careful and highly reputable member of the

Digitized by Google

bar, who had no idea he was innocently assisting in the perpetration of a gross fraud. So, too, it was established by the testimony that Mrs. Anderson and her daughters were supported by Mrs. Harrison and treated with great indulgence. It is hardly likely that a woman possessed of such a large estate would be supported in this way or consent to live upon the bounty of another.

"It not only appears from what has been said that Mrs. Anderson was not possessed of any independent fortune, and had no more than what was derived from the savings of her wages and gifts from Mrs. Harrison, but it further appears to the satisfaction of the master that Mrs. Harrison had means of her own independent of her husband. It was testified to by numerous witnesses that Mrs. Harrison derived a not inconsiderable estate from her first husband, Dani, which was used either as capital in the business, or lent to her husband. According to Mrs. Gardeicke's testimony, it was a generally known fact, and Mrs. Anderson had always said so. Mr. Durrell, another employé, testified that Mrs. Anderson told him Mrs. Harrison had lent her husband the money; Mrs. Asay to the same effect. Mrs. Anderson herself, in her letter to Mr. Shapley, states that the house was bought with Mrs. Harrison's money. H. H. Brown testified that Mrs. Anderson told him she brought Mrs. Harrison's money to America, because it could be used to better advantage; Mrs. Beach, to the same effect. The latter, who was a sister of Mrs. Anderson, said: 'My Aunt Philippa had property in England left her by her first husband. About the time that the premium on gold was three for one of greenbacks, my sister Teresa [Mrs. Anderson] went to England, and disposed of some of her property, and brought the money back to Philadelphia. The amount I do not know, or the amount of the property sold. The money she brought back was put into the business conducted by John Harrison. Whether the money was given or lent I do not know.' The amount of Mrs. Harrison's separate estate did not appear with exactness from the testimony. A good deal was said about a marriage settlement made between Mr. and Mrs. Harrison at the time of their marriage, and some of the witnesses testified to a portion, at least, of its contents, as tending to show what property belonged to Mrs. Harrison. This marriage settlement was claimed to have been lost, but the counsel for the complainant moved to strike out all the testimony relating to it, on the ground that its loss or destruction did not sufficiently appear from the evidence to enable secondary evidence to be given. In the opinion of the master, it matters but little whether it is stricken out or not. Although secondary and perhaps defective, yet it is probably the best the defendant could secure, as she was herself incompetent and not permitted to testify as to matters occurring before Mrs. Anderson's death. However, it is sufficiently demonstrated otherwise, and the master finds as a fact that Mrs. Harrison's separate estate provided the capital, and, so far as the evidence goes, all the capital, which established both stores on Eighth street, out of which the money now in controversy was derived, while John Harrison contributed his skill and business knowledge, which, with the co-operation of his wife, led to the success of the business. The master accordingly, after a careful consideration of the evidence and the probabilities of the case, and the exhaustive arguments of counsel on both sides, is of opinion, and so finds, that the defendant Philippa Harrison has shown herself, in opposition to the claim of the plaintiff, to be the actual owner of the disputed property.

"There was a further claim made by the plaintiff against Mrs. Harrison, which was, strictly speaking, hardly pertinent to the issue, nor in fact raised by the bill. The master, however, will discuss it rather than appear to have passed it without notice. It appeared, after Mrs. Anderson's death, Mrs. Harrison, as her executrix, collected the interest upon the securities included in her account until, in accordance with the decree of the orphans' court, she transferred the securities to the trustee under the will. This interest and the interest upon the city loans, etc., registered in trust for Clara and Violet, were not included in Mrs. Harrison's account. The defendant has the technical defense that the adjudication of her account was conclusive, and she could not in this proceeding be surcharged with this interest. But she had also the very substantial defense on the merits that, as it was shown before the master, she had, after their mother's death, expended far more upon the maintenance, support, and education of the children than she had received from Mrs. Anderson's small estate. Had she filed a strict account, the estate would have been much decreased, and she omitted to do so. The account was filed by Mr. Shapley, as her attorney, and under his advice. This claim of surcharge is not made in the bill, but the master has given it careful consideration, and reports it to be without merit.

"4. What has been said substantially disposes of the case upon its merits. There were several other questions argued at length before the master, as to which he begs leave to submit his conclusions of law:

"First. The burden of proof is upon the complainant to show that Mrs. Anderson, at the time of her death, was the owner of the securities in question. The usual rule is that he who asserts ownership must prove it, and the rule is the same in equity as at law. Pusey v. Wright, 31 Pa. St. 387. The complainant's testimony, in the opinion of the master, has failed to overcome this burden. The agreement is insufficient, because it was not intended to operate as an assertion of

Digitized by Google

ownership, because it was not even written or dictated by Mrs. Anderson, but by a third party, because it was never shown to or seen by Mrs. Harrison, and is therefore incompetent to affect her, and because it is explained by a mass of evidence to have been made by Mrs. Anderson in behalf of Mrs. Harrison, and to save trouble to her. Nor is the burden of proof overcome by Mrs. Anderson's possession of the coupons. At most, that would only be proof of the ownership of the coupons, and it would not follow that she was therefore the owner of the bonds from which they were cut. But, in fact, her possession of the coupons was Mrs. Harrison's possession; as the whole evidence leads to the conclusion that in this matter she was merely an agent so far as Mrs. Harrison's securities are concerned. In considering the question of the burden of proof, the master has laid no stress upon other considerations which, were it necessary, might be held important. In his opinion, it should require a very high standard of evidence to prove that, after the lapse of 10 years, an executrix, incompetent herself to testify, has been guilty of gross fraud, embezzlement, and perjury. But the master does not think that the complainant has produced sufficient evidence to prove title in Mrs. Anderson, even if the issue were directly between Mrs. Anderson and Mrs. Harrison herself, under circumstances which precluded both from testifying, and if the fact involved were very recent, instead of having occurred many years previously.

"Second. In respect to the effect of the answer as responsive to the bill: The bill alleges that certain property belonged to Teresa L. C. Anderson, and charges that the defendant, as executrix of Mrs. Anderson, fraudulently misappropriated it. The answer, in the most direct and explicit fashion, denies the charge, and avers that the ownership of the securities is in the defendant Mrs. Harrison. The burden of proof was on the complainant to meet the responsive answer, and overcome it with two witnesses or one witness and corroborative circumstances. This, in the master's opinion, the complainant has failed to do. Even if the Mason agreement of June 6, 1882, be considered as a corroborative circumstance or consistent with Mrs. Anderson's ownership of the bonds, yet there is not the testimony of a single witness to show that Mrs. Anderson was the owner of them. On the contrary, the evidence of the witnesses is the other way. It is not necessary for the master to enter into any exhaustive review of the cases upon this familiar rule of equity. The master, however, refers to Eberly v. Groff, 21 Pa. St. 251, where the answer denied, as in this case, the fraud charged in the bill; and also to Eaton's Appeal, 66 Pa. St. 483, and the cases which follow it: appeal of Rowley, 115 Pa. St. 150, 9 Atl. 329; Priestley's Appeal, 127 Pa. St. 420, 17 Atl. 1084; Bell v. Bank, 131 Pa. St. 318, 18 Atl. 1079; and, particularly, Cresson's Appeal, 91 Pa. St. 168. The master thinks that the rule applies in this case, and reports that the bill should, if only for this reason, be dismissed.

"Third. It was urged by the learned counsel for the complainant that Mrs. Anderson was shown to have been in possession of the bonds in dispute, and that this fact of possession settled the question of title or ownership. Under certain circumstances, possession is undoubtedly prima facie evidence of title, but the evidence in this case removes it from the class of cases to which the learned counsel refers. It is evident from a consideration of the circumstances attending the possession of these securities by Mrs. Anderson that she was merely acting as the agent for Mrs. Harrison, and that she was prevented by the fiduciary relation which undoubtedly existed from acquiring, by means of such possession or right to handle the securities, any adverse title. It shows that Mrs. Anderson had not the possession of these bonds except as representing Mrs. Harrison.

"Fourth. The defendant raised the question of the jurisdiction of this court, claiming that Mrs. Harrison, as executrix, was accountable only in the orphans' court. Her counsel referred to several cases in support of this proposition; but, as the case was heard and argued upon its merits, the master prefers to decide it in the same manner. The defendant also argued the similar proposition that the account of Mrs. Harrison, being a final account, and having been adjudicated and confirmed as such, was conclusive. In support of this were cited Welting v. Nissley, 6 Pa. St. 143, and Estate of Helfenstein, 135 Pa. St. 300, 20 Atl. 151. These cases appear to the master to sustain the defendant's position. The account purported to be a final account, and the adjudication thereof is a final decree. There were no exceptions and no appeal. It is now too late for a bill of review in the orphans' court, under the act of October 13, 1840 (Brightly's Purd. Dig. 447), and the decree is conclusive. The account is regular on its face, is upon a subject-matter over which the court had jurisdiction, and if this executrix, who has settled her account, had the same adjudicated and confirmed, and paid over the balance ascertained to be due, is to be compelled, after the lapse of years, to state a new account as a defendant in a bill in equity, no executor or administrator can consider himself finally relieved from responsibility. The master, however, having fully considered the case upon its merits, does not think it necessary to pass upon this question, as the parties desired a decision upon the merits.

"The parties to the case agreed that the stenographer's charges should be taxed as part of the costs, and it was subsequently agreed that the amount should be $250, of which each party has advanced one-half. The master, upon the conclusion of the testimony and argument, requested the counsel for the parties to agree upon the amount

Digitized by Google

of his fee as examiner and master in the cause. They reported to him that they were unable to agree upon the amount, and the master is therefore obliged to fix a sum which should be proper under all the circumstances. The examiner and master began to hold his meetings on March 27, 1893, and held over thirty meetings. The testimony was taken stenographically, and the typewritten notes number some 500 pages. Five meetings were held for argument, which was concluded May 22, 1894. In view of the large amount of testimony, the importance of the questions involved in the case, and the labor and attention bestowed by the master upon it, he considers that a fee of fifteen hundred dollars is a proper one under all the circumstances, and he fixes that amount.

"Upon the question of the liability for costs the master sees no reason for departing from the usual rule that they shall be imposed upon the unsuccessful party to the litigation. The defendant, in the opinion of the master, has not acted with any fraudulent intent, and has been subjected to the expense and annoyance of defending a claim devoid of merit. The master thinks that the costs of the suit should be paid by the party responsible for it.

"The master respectfully recommends the court to enter the following decree: Decree: 'And now, this —— day of ——, 1894, the report of John C. Grady, Esq., examiner and master, coming on to be heard, the same is approved, and the bill filed in this case by Violet A. I. Huston against Philippa Harrison, the Pennsylvania Company for Insurances on Lives and Granting Annuities, Philippa Harrison, executrix of the estate of Teresa L. C. Anderson, Clara A. Stoops, and the Fidelity Insurance, Trust and Safe-Deposit Company, is hereby dismissed, and it is ordered that the complainant, Violet A. I. Huston, pay the costs.'

"All of which is respectfully submitted.

"July 21, 1894."

Following, among others, are the complainant's assignments of error, viz.:

"(1) The court below erred in dismissing the thirty-first exception to the master's report, to wit: 'The master erred in finding that "the complainant was not able to show that Mrs. Anderson was in fact possessed of the securities in dispute, or indeed of any property other than that accounted for by her executrix."' * * * (3) The court below erred in dismissing the thirty-third exception to the master's report, to wit: 'The master erred in his findings in relation to Exhibit No. 1, dated June 6, 1882, which was the appointment of the Pennsylvania Company, etc., by Mrs. Anderson as her agent to collect the income from her securities, as follows: "After careful consideration of the testimony, the master is clearly of opinion that, in making this arrangement with Mr. Mason, Mrs. Anderson was not acting for herself alone, but for Mrs. Harrison and the whole family, in preparation for a sojourn abroad. The paper was drawn by Mr. Mason from a mere memorandum furnished him of the securities, and Mr. Mason's own impression was that Mrs. Anderson was acting for Mrs. Harrison."' (4) The court below erred in dismissing the thirty-fourth exception to the master's report, to wit: 'The master erred in not finding as facts that Mrs. Anderson had the use, control, and possession of all the bonds in dispute, and that the purchase of a portion of them by her was established by the proofs; and that there was no evidence of title to any of them in Mrs. Harrison.' * * * (9) The court below erred in dismissing the thirty-ninth exception to the master's report, to wit: 'The master erred in holding, as a conclusion of law, that the complainant's proofs did not overcome the effect of the answer of respondent.'"

John Walker Shortledge (Thomas R. Elcock, of counsel), for appellant. John Marshall Gest (John G. Johnson, of counsel), for appellees.

PER CURIAM. An examination of the master's report in this case, and a careful reading of the testimony in connection therewith, convinces us beyond question that the findings of fact contained in the report are fully sustained by the evidence. The plaintiff's case is entirely devoid of merit, and we affirm the decree of the learned court below, upon the conclusions and findings of the master, and upon the reasoning contained in the report; the costs of this appeal and all other costs to be paid by the appellant.

McCONAGHY v. PEMBERTON et al.

(Supreme Court of Pennsylvania. May 13, 1895.)

COVENANT TO BUILD ON LAND—BREACH—MEASURE OF DAMAGES—DEPENDENT COVENANTS—EXPERT EVIDENCE.

1. Defendants conveyed certain lots of an addition owned by them to plaintiff, in exchange for other property, and in consideration of his covenant to build on the lots. *Held* that, in determining the damages resulting from plaintiff's failure to build, it was proper to reject evidence that the property taken by defendants in exchange was not worth the amount at which all the parties valued it when the trade was made.

2. In determining the damages resulting from a grantee's breach of covenant to build on the land, though the testimony of experts was admissible generally as to improvement to a neighborhood by the building of houses, it was properly excluded as to what damages the grantor sustained in the particular case under consideration.

3. The failure of a grantor to perform a covenant to put in pavements on the streets adjoining the lots conveyed excused the grantee from compliance with his covenant to build on the lots within a specified time.

4. Where defendants conveyed lots in an addition owned by them to plaintiff, and plaintiff failed to perform his covenant to build houses on the lots, the amount required to carry on defendant's building operations on the remainder of their lots cannot be recovered as damages for plaintiff's breach, on the theory that when the covenant was made the parties had in contemplation the benefits to accrue to the remainder of defendant's lots by the building of houses on those sold to plaintiff, and, that on account of plaintiff's breach, defendants were unable to sell the houses erected.

Digitized by Google

by them on their lots while relying upon plaintiff's covenant.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by John McConaghy against Clifford Pemberton, Jr., and others. From a judgment for plaintiff, defendants appeal. Affirmed.

The referee's report is as follows, viz.:

"The referee appointed by the parties by agreement of reference of April 10, 1892, duly filed, and copy of which is attached to this report, respectfully reports that the first meeting in this case was held before him on May 13, 1892, at which he was attended by Francis A. Lewis, Esq., and Lucius S. Landreth, Esq., for the plaintiff, and by Elias P. Smithers, Esq., for the defendants; that from the time of the first meeting until May 9, 1893, when the argument of the case was finally disposed of, numerous meetings have been held, and a large amount of testimony has been taken.

"The controversy in this case arose out of a sale or exchange of real estate between the plaintiff and the defendants' firm. The agreement in reference to this was reduced to writing, and this memorandum of agreement in writing was dated the 4th day of August, 1890. Amongst other things, it set forth that the street pavement was to be put in by the parties of the first part on front and rear and side streets, and also an agreement on behalf of John McConaghy that houses were to be built on Clifford street by the party of the second part within one year. Some of the street improvements, such as water pipes and sewers, were put in by Pemberton & Co.; but the paving bills, which was the most expensive part of the street improvements, were not paid by Pemberton & Co. A lien was filed against the property which had been acquired by Mr. McConaghy, and he was obliged to pay the bills. For the amount of these bills he brought suit against Pemberton & Co., and filed a statement, in which he alleged as follows: 'Plaintiff sues the defendants to recover money paid out and expended to their use under the following circumstances: Plaintiff bought from the defendants in the autumn of 1890 twenty-four lots of ground on the south side of Clifford street, in the Twenty-Ninth ward of the city of Philadelphia, between Thirty-First and Thirty-Second streets, having a frontage of three hundred and ninety-five feet on Clifford street, and extending in depth ninety feet to Hollingsworth street; the defendants agreeing to pay for the sewer, gas, water, curb, and street pavement on all the aforementioned streets. Subsequently the said Clifford street was paved and curbed in front of the said lots, and the defendants refused and neglected to pay for the said curbing and paving as agreed, whereupon liens were filed against the said lots for the money due for the said curbing and paving, and the plaintiff was thus compelled to pay for the same, and did so pay. He now claims to recover from the defendants the sum of $4,375.98, being the amount paid by him for said paving and curbing, together with interest from February 25, 1892. Plaintiff avers that he has never been paid this sum, or any part of it, and that it is all justly due and payable.' To this the defendants pleaded, and gave notice of special matter, as follows:

" 'And now, March 31st, 1892, defendants, by Elias P. Smithers, their attorney, plead non assumpsit, set-off.

" 'Notice of special matter. To Messrs. Lewis and Landreth, Attorneys for Plaintiff —Sirs: Please take notice that, under the plea filed in the above case, the defendants will offer to prove, as special matter: That the defendants, being the owners of about twenty-four acres of land in the Twenty-Ninth and Thirty-Second wards of the city of Philadelphia, and being desirous of improving the same by the erection of houses thereon, and thereby increasing its value, at the time mentioned in the statement, in consideration and upon the express condition that the plaintiff, for the purpose of aiding them in improving their said ground as aforesaid, should and would, within one year from the date of said sale, erect on each of the said twenty-four lots to be sold to him a substantial three-story brick dwelling house, did sell to plaintiff part of said twenty-four acres, to wit, the said twenty-four lots mentioned in the statement, at a fair price, and clear of all incumbrances then existing, and did agree to take in payment therefor thirty-two houses and lots on Federal, South Twenty-Sixth, Ellsworth, and Alter streets, in the Twenty-Sixth ward of the city of Philadelphia, at a price above their cash value, and subject to incumbrances amounting to $29,400; and for the consideration and upon the express condition aforesaid, to wit, that the plaintiff would, within one year from the time of said sale, erect on each of said lots so sold to him a substantial three-story brick dwelling house, for the purpose of aiding defendants in developing their said land, the defendants, as one of the terms of said sale, did agree that they would pay for the sewer, gas, water, curb, and street pavement, when the same should be done on the streets on which the lots sold to plaintiff fronted. That the said plaintiff did not within one year from the date of said agreement, and hath not since, erected a substantial three-story brick dwelling house, or any other building, on said twenty-four lots, or on either or any of them, and hath not otherwise improved the same, and that the said defendants have expended large sums of money in improving their remaining part of their said twenty-four acres on the faith of said agreement with plaintiff, and did pay for certain of said street improvements, which were done within one year from the date of said agreement, divers sums

Digitized by Google

of money, amounting to $797.27, for water pipe and sewers. That by reason of the failure of said plaintiff as aforesaid to keep and perform the said condition and stipulations of said agreement of sale which were to be kept and performed by him, defendants have suffered damages as follows, to wit: In the sum of $797.27 paid for water pipe and sewer in front of said property so sold to plaintiff; in the sum of $4,300 paid by them to carry the remaining property, which they were unable to sell by reason of plaintiff not having kept his agreement as aforesaid; in the sum of $3,000 for injury to market value of their remaining property caused by plaintiff's not having built on the lots sold him as aforesaid; and in the sum of $5,750 in the excessive value paid for said property conveyed to them by plaintiff as an inducement to said agreement with plaintiff; making total damages suffered by defendants by the failure of plaintiff to perform his part of said agreement the sum of $13,847.27, which sum defendants intend to defalk against the plaintiff's demand in the suit.

Total amount of damages to defendants	$13,847 27
Amount sued for by plaintiff	4,375 98
Amount due defendants	$ 9,471 29

" 'Said defendants will demand, upon the trial of said cause, a verdict and a certificate against the plaintiff for said sum, as justly and legally due the said defendants, according to the statute in such case made and provided.

" 'Very respectfully, yours, [Signed] Elias P. Smithers, Attorney for Defendant.'

"Issue was joined, and the case was referred to Charles B. McMichael, by agreement of the parties. The plaintiff, who was first called to the stand, testified that he bought from the defendants, in the autumn of 1890, twenty-four lots of ground on Clifford street, in pursuance of an agreement, and this agreement was in writing, and was offered in evidence, and a copy of it is annexed to this report, marked 'C. B. M., Exhibit No. 1, May 13, 1892.' He further testified that street improvements were, at the time he testified, made, but that the defendants had not paid for them; proceedings had been instituted against him, and a lien entered by the parties who made the improvements; and that he subsequently paid the amount, and took a receipt for the same, which receipt was offered in evidence and marked 'Exhibit C. B. M., No. 2, May 13, 1892,' the amount paid being $4,375.98. Mr. Landreth, on behalf of the plaintiff, also put in evidence a deed of Clifford Pemberton, Jr., et al. to John McConaghy, for twenty-four lots of ground, Twenty-Ninth ward, Philadelphia, dated September 20, 1890, and recorded in Deed Book G. G. P., No. 682, p. 252, marked 'C. B. M., Exhibit No. 3, May 13, 1892.' The plaintiff was cross-examined at considerable length, and more particularly upon the point that his attention had been called, prior to the agreement in writing, to the covenant which was afterwards put into the agreement, that houses should be built within one year; and his attention was called also to a letter dated March 14, 1892, inquiring of him when he expected to begin the erection of the twenty-four houses, and stating that the agreement of Pemberton & Co. to put in street improvements depended upon plaintiff's building within a year. The plaintiff did not, however, recollect distinctly the conversations to which his attention was called, nor did he recollect receiving the letter referred to. He was also asked why he did not build houses as he agreed to do, and he gave two reasons: (1) That he thought there were too many houses in the neighborhood; and (2) that as he had paid fully, in the trade, for the street improvements, he was not bound to build the houses until the street improvements were in, and that he thought it just that the street improvements, as long as he paid for them, ought to be done first. He also testified that the building of houses could not go on while street improvements were being made. Plaintiff here rested his case, and, in the opinion of the referee, he made out a prima facie case, which entitled him to be reimbursed for the outlay upon street improvements he had made. A very large amount of testimony, covering a great many pages, and taking up a great deal of time, was taken on behalf of the defendants, to a large amount of which objection was made, and exceptions noted; and the referee admitted most of the testimony offered, thinking it proper that, as his opinion and decision was to be reviewed by the court, testimony, about which there might be grave doubt as to the propriety of its admission, should be taken, subject to such objection and exception, that his errors might be corrected by the appellate court. There were two lines of testimony, however, upon which the referee decided adversely to the defendants' right to take the testimony: First. The defendants offered to show that the properties which Mr. McConaghy had exchanged for the unimproved lots of Messrs Pemberton & Co. under the agreement of August 4, 1890, were not worth the values placed upon them by McConaghy, and a large amount of the claim of set-off was based upon the theory that the defendants had a right to show that the properties which they had taken in barter or exchange for their own land were not worth what they thought they were when they took them. As there was no pretense of any fraud or imposition upon the part of the defendants; as they were, according to their own testimony, experts in the real-estate business, had been engaged for a considerable period of time in large operations, were sui juris, and abundantly competent to look after their own interests:

Digitized by Google

and as the agreement, so far as the exchange of land for houses was concerned, was fully executed before any dispute arose between the parties; and as no complaint had ever been made of any unfairness in the dealings in this regard,—the referee felt bound to reject, when objection was seriously made to it, all testimony tending to show that the properties traded by Mr. McConaghy for land of Messrs. Pemberton & Co. were worth less than both parties seem to have thought them worth at the time of the trade. Second, a large number of experts were called on behalf of the defendants, and while the referee admitted their testimony, generally, upon the questions of improvement to a neighborhood by the building of houses, yet he excluded their opinions as to the amount of damage suffered by the defendants in this particular case. The testimony of Mr. Clifford Pemberton, Jr., was to the effect that he was a member of the firm of Pemberton & Co., and that he had made an agreement of exchange with Mr. McConaghy on the 4th August, 1890; that Mr. McConaghy had not complied with the clause of that agreement that he was to build houses on the lots within a year. Mr. Pemberton also testified at considerable length as to the tract of ground which he and his partners were improving and developing, and that, in his view, the balance of his property was damaged by the failure of Mr. McConaghy to build houses within a year; that, in his opinion, the cost of carrying a certain number of houses should be charged to Mr. McConaghy, for his failure to build houses according to his agreement. On page 49 of the typewritten notes of testimony, he says: 'The cost of carrying property, including houses and lots unsold on account of Mr. McConaghy's failure to build, was seven houses at $400, making $2,800, and fourteen on Thirty-First street, with interest, $1,500; making a total of $4,300. Then, general damage to the value of the balance of our houses and lots, $3,000.' And he says, further, in explanation, that the development of the property was retarded by the failure of McConaghy to build, to the extent of that amount of money. He also testified that there was another item of $797.26, actual cash paid out for street improvements, which he thought should be recovered back. Mr. Pemberton was also cross-examined at great length. Then Mr. Frank Mauran, one of the defendants, was examined. His attention was called to the clause in the agreement, 'Houses to be built on Clifford street lots by the party of the second part within one year,' and he also stated that Mr. McConaghy had not complied with that stipulation in the agreement; that he broke ground on April 14, 1892. Mr. Mauran testified further that McConaghy's attention was called, before the agreement was executed, to the stipulation that houses were to be built within one year, and that after the agreement was executed his attention was also called to it. Then the testimony of quite a number of experts was taken as to the effect of building or not building houses in a neighborhood. The plaintiff was heard in rebuttal of some of the points testified to by the defendants, and expert witnesses were called on behalf of the plaintiff, who expressed opinions differing from those of the experts for the defendants.

"This is a brief view of the case, as presented before the referee. Notwithstanding the amount of testimony taken, the questions in the case narrow themselves down to two. It is undoubted that the plaintiff is entitled to recover the amount expended for street improvements, unless there was a breach of a covenant by the plaintiff, and damages flowed from the breach of the plaintiff's covenant. These damages, the defendants claim, exceeded in amount the value of the street improvements paid for by the plaintiff, and the defendants claim that they have a right to set off these damages in this case, and to have a certificate for an amount in excess of the plaintiff's claim for nearly $10,000, or, to speak exactly, $9,471.29; and it seems equally clear to the referee that the plaintiff may have been excused for his breach of covenant by the breach on the part of the defendants of a mutual and dependent covenant. Let us examine the contention of the defendants. The agreement between the parties was executed by mutual conveyances. The lots owned by Messrs. Pemberton & Co. were conveyed to McConaghy, subject to certain building restrictions, which do not appear in the agreement of sale, and which do not affect that agreement. And McConaghy conveyed the real estate he had agreed to convey, subject to certain liens, which were known to Pemberton & Co. The putting in, by the parties of the first part, of the street improvements, which it was known to the parties would amount to a considerable sum, was part of the consideration moving from Pemberton & Co. to McConaghy to induce the trade or barter of houses for their land; and the building of houses within one year by McConaghy on the Clifford street lots seems to have been also part of the consideration moving to Pemberton & Co. from McConaghy for the exchange by Pemberton & Co. of land for the houses of McConaghy. And, to a certain extent, they were mutual and dependent covenants. McConaghy, the plaintiff, did not deny that there was a specific covenant on his part to build houses within one year, and that that covenant had been broken; but he alleged, as an excuse, that the street improvements—that is, the street paving—were not completed until about September, 1891, and that he was therefore excused for noncompliance with his covenant to build houses within a year, for, as he had paid, by way of exchange or barter of houses, for all the

Digitized by Google

street improvements, he was entitled to wait until they were completed before he began to build the houses. This seems to the referee a reasonable view to take of this matter, and that Messrs. Pemberton & Co. cannot take advantage of the failure of McConaghy to build houses within one year, while they themselves were behindhand or in fault in regard to the street improvements. It may be that this was a matter not entirely within their own control, but it certainly was a matter of great importance to McConaghy that the street improvements should either have been put in, or have been in a fair way to be finished, by the time his houses were finished; otherwise he might have houses on his hands which he could not sell or rent, property without any pavement or roadway not being desirable. The opinion of the referee is, therefore, that these two conditions or covenants were mutual and dependent one upon the other, but that the plaintiff, McConaghy, is excused for his nonperformance of his covenant to build houses within one year by the failure of Messrs. Pemberton & Co. to put in the street improvements. After the street improvements were finished, although they were not paid for as agreed by the defendants, Messrs. Pemberton & Co., McConaghy went on with reasonable promptness to build houses, and houses have been built by him upon the lots in question. The referee is of the opinion, and so reports, therefore, that in the view of the case that the covenant on the part of Pemberton & Co. that the sewer, gas, water, curb, and street pavements would be put in by them on front and rear and side streets, and the covenant on the part of McConaghy that houses were to be built on Clifford street lots by McConaghy within one year, were mutually dependent upon each other, McConaghy was excused for noncompliance with his agreement to build houses in the time specified, because Pemberton & Co. had failed to carry out their agreement to put in street improvements within that time. And the decision of the referee is that the plea of the defendants is not sustained, and he therefore gives judgment for the plaintiff.

"There is another view of the case, however, and one on which the greatest reliance was placed by the counsel for the plaintiff; that is, that regarding the covenant to build houses within one year by McConaghy as a binding covenant on him, and admitting that there had been a breach of that covenant, and that damages might be recovered for that breach if any actual damages were proved, no sufficient testimony had been brought before the referee, from which he could find that the defendants, Pemberton & Co., had suffered any loss from the failure of McConaghy to build houses within one year. However reluctant the referee might be to decide the case upon such a theory, if the equity were on the side of the defendants, yet on a careful examination of the agreement itself, and of the testimony given on behalf of the defendants, and of the rules of law and adjudicated cases, he is of opinion that no damages have been proved to have flowed from the breach of this covenant, except those speculative and remote in their character. The contention of Messrs. Pemberton & Co. is that houses were to have been built and finished on all the lots within one year, or at least this is the result of the propositions advanced by their learned counsel for them; for it was contended that if houses had been built on these lots the neighborhood would have been improved, and Messrs. Pemberton & Co. would have been enabled to sell their other houses at good prices, but, as the lots remained vacant, they could not sell the houses at any price. But this view requires us to read into the covenant words which are not there. Certainly, Mr. McConaghy would have complied with the letter and spirit of his agreement if he had commenced the building of two or three houses. He had not agreed to build all the houses within one year. The simple agreement was that houses were to be built within one year. And even the opinions of the experts have hardly gone so far as to contend that the erection of two or three houses would have affected the sale of a number of other houses in the neighborhood in a dull and off year for building operations, as this year was testified to have been. Nor does the referee think, with all respect to the opinions of the defendants themselves, and all the experts who have been called, that any damages have been satisfactorily proved to have resulted from the failure on the part of McConaghy to build houses within one year. The plaintiff requested the referee to rule that the defendants had made out no legal and valid defense, and that judgment must therefore be entered for the plaintiff for the full amount claimed. And this point on behalf of the plaintiff is sustained.

"Both the plaintiff and defendant submitted briefs of authorities to the referee, and the cases have been examined by the referee; but he is of opinion that the decision of the present cause must depend more upon the construction of the agreement which was in evidence before him, and the facts proven before him, than upon the citation from cases where the exact point has not arisen. A few of the cases directly in point, and referred to by counsel, are, however, respectfully called to the attention of the court as having guided the referee in reaching his decision. They are Byrne v. Stewart (Pa. Sup.) 17 Atl. 19, where it was held that 'an overestimate by a vendor of the value of an article which he sells does not create a cause of action against him, nor is it a defense to a suit for the price agreed to be paid'; the view of the supreme court in that case being that, where the vendee has an equal opportunity with the

Digitized by Google

vendor to look into the matter and form an opinion as to the value, evidence should not be admitted as to what the actual value was, although, if there were any facts within the knowledge of the vendor which have been concealed, the rule is varied. Representations made by the vendor to the vendee which were false, and which induced him to buy the property, would be a partial defense to an action for the value of the property, and might be evidence as to the value. Upon the point that speculative damages cannot be recovered or set off, Bank v. McKee, 2 Pa. St. 318; Sitgreaves v. Griffith, 2 Wkly. Notes Cas. 705; Sloan v. Chamberlain, 7 Wkly. Notes Cas. 536; Van Kleeck v. Pickering, 11 Wkly. Notes Cas. 238,—were cited and relied on. Upon the point that the defendants are bound to show actual absolute loss, occasioned by the failure to build within a time certain, 1 Sedg. Dam. 245, 246; Express Co. v. Egbert, 36 Pa. St. 360; Fleming v. Beck, 48 Pa. St. 309; Griffin v. Colver, 16 N. Y. 489,—were relied on. Upon the points that damages must not be speculative, that profits are only recoverable when they are reduced to a certainty, and that the opinions of witnesses, whether expert or not, are not to be received as to the amount of damages, the following cases were cited: Imperial Coal Co. v. Port Royal Coal Co., 138 Pa. St. 45, 20 Atl. 937; Duffield v. Rosenzweig, 144 Pa. St. 520, 537, 23 Atl. 4; Id., 24 Atl. 705; Bank v. McKee, 2 Pa. St. 318; Mitchell v. Allison, 29 Ind. 43; Bissell v. Wert, 35 Ind. 55; Schermerhorn v. Tyler, 11 Hun, 551; Cooke v. Brockaway, 21 Barb. 331; Wilcox v. Leake, 11 La. Ann. 178; City of Logansport v. McMillen, 49 Ind. 493; Van Deusen v. Young, 29 N. Y. 9; Robinson v. Kinne, 1 Thomp. & C. 60; McGean v. Railroad Co., 117 N. Y. 219, 22 N. E. 957; Avery v. Railroad Co., 121 N. Y. 31, 24 N. E. 20; Atkins v. Railway Co. (Sup.) 10 N. Y. Supp. 432; Gilbert v. Cherry, 57 Ga. 128; Railroad Co. v. Varner, 19 Ala. 185; Norman v. Wells, 17 Wend. 137; Lincoln v. Railroad Co., 23 Wend. 425; Brown v. Railroad Co., 12 R. I. 238. The defendants' counsel cited in support of a proposition that, as the parties had in contemplation at the time the agreement was made the benefits to accrue to the defendants by the building of the houses by the plaintiff within a certain time, the damages arising from the breach were not too remote: 6 Am. & Eng. Enc. Law, p. 5; Fleming v. Beck, 48 Pa. St. 309; Coal Co. v. Foster, 59 Pa. St. 365; Rogers v. Bemus, 69 Pa. St. 432. In Fleming v. Beck, Judge Agnew, in delivering the opinion of the court, said, 'There is no error in the charge that loss of profits, as consequential damages, could not be recovered'; and, after stating the facts of the particular case before him, he goes on as follows: 'Mr. Sedgwick, in his work on Damages (page 78), says, "Both the English and American courts have generally adhered to the denial of profits as any part of the damages to be compensated, and that whether in cases of contract or tort." He further says: "Independent, however, of all authority, I am satisfied, upon principle, that an allowance of damages upon the basis of a calculation of profits is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community,"—the reasoning for which he then proceeds to give. The same doctrine is stated in 2 Pars. Cont. 458, 459. I think the rule in such cases is well stated in the case of Hadley v. Baxendale, 9 Exch. 341, 26 Eng. Law & Eq. 398. There Alderson, B., says: "Now, we think the proper rule in such a case as the present is this: Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive, in respect to such breach of contract, should be such as may fairly and reasonably be considered, either arising naturally, i. e. according to the usual course of things, from such breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."' The inference of the defendants' counsel from this rule that Mr. McConaghy could fairly be inferred to have had in his mind at the time he made the contract that, if he did not build houses within a year, he would be chargeable with a large part of the cost of carrying Messrs. Pemberton & Co's. building operations is hardly reasonable. In the case of Coal Co. v. Foster, 59 Pa. St. 365, the plaintiff contracted to furnish the defendant, on the 1st of February, an engine to draw coal cars on a track of unusual width. The engine was not delivered until May. The defendant gave evidence that an engine for such track could not be hired, and that he had to transport his coal by horses. In that case it was held that evidence of the difference of cost of transportation between horse power and by the engine during the delay on the part of the defendant was admissible on the question of damages. Judge Agnew, delivering the opinion of the court, says: 'The true inquiry which arose, under these circumstances, was whether the damages thus claimed were the necessary consequence of the failure to perform the contract in time, and whether they were presumptively in the view of the plaintiffs at the time of making their contract to finish and deliver the engine in running order on the defendant's track by the 1st of February. The damages ordinarily recoverable are those necessarily following the breach, which the party guilty of the breach must be presumed to know would be the probable consequence of his failure. The rule is well expressed by Strong, J., in Express Co. v. Egbert, 36 Pa. St. 364. They must be a proximate consequence of the breach, not merely remote or possible. There is no

Digitized by Google

measure for losses of the latter kind.' And, after discussing the rule at considerable length, he says that the loss in the case before him was immediate, and the necessary consequence of nonfulfillment. The referee in the present case is unable to reach the conclusion that such damages as were attempted to be proved before him were even presumptively in the mind of Mr. McConaghy at the time he made his agreement with Pemberton & Co. In the case of Rogers v. Bemus, 69 Pa. St. 432, cited on behalf of the defendants, Agnew, J., delivering the opinion of the court, while he reversed the court below for excluding evidence of what a mill would fairly have rented for, which the defendants, by their breach of contract to lay foundations, had delayed the plaintiffs from operating, restricted the testimony as to damages to that which was the direct result of the neglect and refusal of the defendant to perform his covenant.

"All of which is respectfully submitted.

"Charles B. McMichael, Referee."

Following, among others, are defendants' assignments of error: "(1) Because the learned court erred in dismissing the tenth exception of defendants to the referee's report, which was, 'because the referee finds that plaintiff is excused from the performance of his covenant to build houses within one year by the failure of defendants to first pave and curb Clifford street.' * * * (4) Because the court erred in dismissing the twentieth exception of defendants, which was, 'because the referee finds that no damages have been proved to have flowed from the breach of plaintiff's covenant, except those speculative and remote in character.' * * * (8) Because the court erred in dismissing the third exception of defendants which was, 'because the referee refused to allow the defendants to show that the properties which plaintiff had exchanged for defendants' lots were not taken at a price above their value in consideration that plaintiff would undertake to build upon the Clifford street lots within a year.' (9) Because the learned court erred in dismissing defendants' fifth exception, which was 'that the referee excluded the testimony of expert witnesses for defendants as to the amount of damages suffered by the defendants.'"

Elias P. Smithers and Pierce Archer, for appellants. Francis A. Lewis, Lucius S. Landreth, and John G. Johnson, for appellee.

PER CURIAM. The very able argument of the learned counsel for the appellants has failed to convince us of any error in the report of the referee. His report is so well sustained by the treatment he has given of the questions at issue that after a most patient and attentive reading of it, in connection with the arguments of counsel, we have reached the conclusion to affirm the judgment upon the findings and conclusions contained in the report. Judgment affirmed.

McNEAL v. REBMAN et al.

(Supreme Court of Pennsylvania. May 13, 1895.)

RIGHTS IN ALLEYWAY—CONVEYANCE OF FEE—EFFECT.

A conveyance of an alleyway in fee, as "a strip of ground" which had been "reserved" for use as an alley by owners of lots on the "westerly side" thereof, which granted the right to use the same subject to such reservation, conveyed the entire interest of the grantor in the alley, to the exclusion of any right to subsequently use the same as owner of a lot abutting on the alley's southern end.

Appeal from court of common pleas, Philadelphia county.

Trespass by Rebecca McNeal against Godfrey Rebman and others to recover damages for obstructing an alleyway. From a judgment for defendants, plaintiff appeals. Affirmed.

Edward B. Garrigues was the common owner of the whole tract upon which the alleyway in question was located. In May, 1836, he conveyed to Henry I. Childs a lot now owned by defendants, on the west side of the alley, and also the alley in fee simple as a strip of ground; "the said described strip of ground having been reserved by the said Edward B. Garrigues, to be left open as an alley, passage, and water course, for the common and uninterrupted use and privilege of the owners and occupiers of the ground bounding on the westerly side thereof, together with the free and uninterrupted use, right, liberty, and privilege of said alley, passage, and water course, in common with the owners and occupiers of the lots respectively situate on the westerly side thereof, so long as the same shall be used as an alley or passage as aforesaid; subject the last-described piece or strip of ground, to the right of way or passage over the same, as aforesaid, to the only proper use and behoof of the said Henry I. Childs, his heirs and assigns, forever." The deed was recorded, and in the following September, Garrigues conveyed a lot abutting on the south end of the alley to Charles McNeal, plaintiff's predecessor in title, describing it as partly bounded by the alley on the north, "together with the free use and privilege" of the alley.

M. Hampton Todd, for appellant. William W. Porter and Frederick J. Geiger, for appellees.

PER CURIAM. It cannot be doubted that when the former owner, Garrigues, on May 2, 1836, conveyed the fee-simple title to the soil of the alley to Childs, he deprived himself of all right or power to grant to any one, by a subsequent conveyance, any easement in the alley in question. Having no ownership of the land, he could confer no right to use it. But the case in this regard is strengthened by the consideration that in the same deed to Childs he recited his previous reservations of the right to use the alley granted to the owners and occupiers of the ground bounding on

Digitized by Google

the westerly side of the alley, and repeated the grant of the same privilege to Childs, with the same limitation to the lots on the westerly side of the alley. These grants necessarily excluded the plaintiff's lot, which abutted on the south at the end of the alley. There is no occasion to resort to any extrinsic testimony to explain the meaning of these several conveyances, as they are perfectly free from doubt. The plaintiff's predecessors took his title with full record notice of all the prior grants, and was bound by them. When the learned court below left to the jury the question of the notorious use of the alley by the occupiers of the McNeal lot at the time of the conveyance to Childs, every opportunity to recover that was possible was extended to the plaintiff. But the jury found against her, and disposed finally of any such aspect of the case. There was no proof of title by adverse user, but, on the contrary, it was fully proved that the alley had been closed by high board fences for very many years. We discover no merit in the plaintiff's claim in any point of view. Judgment affirmed.

COMMONWEALTH v. MANN, Prothonotary.

(Supreme Court of Pennsylvania. May 20, 1895.)

FEES OF COUNTY OFFICERS—TAXATION—STATUTES—CONTEMPORANEOUS CONSTRUCTION.

1. Act March 31, 1876, providing that all fees receivable by county officers of counties containing over 150,000 inhabitants shall belong to the respective counties, except such fees as are levied by the state, repealed Act March 10, 1810, whereby county officers of all counties were required to pay to the state one-half of all fees collected by them in excess of $1,500.

2. Act March 31, 1876, providing that fees received by county officers shall belong to the several counties only when such counties contain a population of over 150,000, is not repugnant to Const. art. 9, § 1, which provides that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.

3. In construing a statute, the construction placed upon it for 20 years from the time it became a law, by those whose duty it was to construe it, and who were affected by it, is proper for consideration.

Appeal from court of common pleas, Dauphin county.

Action by the commonwealth against William B. Mann, prothonotary of the courts of Philadelphia county. From a judgment rendered on appeal from the settlement of the auditor general and state treasurer, defendant appeals. Reversed.

J. W. Catharine, James Alcorn, and F. C. Brewster, for appellant. B. M. Nead, for the Commonwealth.

DEAN, J. It is, perhaps, doubtful whether the party defendant in this case should not have been Philadelphia county; but, as the county agreed with defendant to be answerable in the event of an adverse judgment, he waived his right to object that a suit could not be maintained against him. Therefore we shall consider the case as raising the question whether either is answerable. Before the passage of the act of March 10, 1810, the fees of this officer all belonged to him, and out of them he paid the expenses of his office. On that date, however, was passed an act entitled "An act taxing certain offices." The first section of the act directs that, with other county officers, the prothonotaries of the courts of common pleas of the commonwealth "shall, from and after the first day of October next, keep or cause to be kept a fair and accurate account of all the fees received for services performed by them or any person employed by them in their respective offices; and shall annually thereafter furnish a copy of such account upon oath or affirmation to the auditor general; * * * and whenever the amount of any of the said accounts shall exceed the sum of fifteen hundred dollars, the auditor general shall charge the said officers respectively fifty per cent on the amount of such excess; which sum so charged shall be paid by them into the treasury for the use of the commonwealth." Under this act the state took one-half the aggregate fees in excess of $1,500, without any deduction by the officer for clerk hire, stationery, or other expenses incident to the performance of the duties of the office; but by the act of 5th of April, 1842, the officer, in addition to the $1,500, was authorized to deduct these expenses, and the state took only one-half the remainder. It will be noticed that the acts of 1810 and 1842 were general acts, applicable to every county in the commonwealth. But by act of April 2, 1868, they were repealed as to all counties except Allegheny, Lancaster, Montgomery, Philadelphia, Beaver, and Washington; so that, as to Philadelphia, the act of 1810, as qualified by the act of 1842, remained in force. The next general legislation on the subject is the act of 31st of March, 1876, passed, as declared in the title, "to carry into effect section five of article fourteenth of the constitution, relative to the salaries of county officers, and the payment of fees received by them into the state or county treasury in counties containing over one hundred and fifty thousand inhabitants." The first section enacts: "That in all counties in this commonwealth, containing over one hundred and fifty thousand inhabitants, all fees limited and appointed by law to be received by each and every county officer therein elected by the qualified voters of their respective counties or appointed according to law, or which they shall legally be authorized, required or entitled to charge or receive, shall belong to the county in and for which they are severally elected or appointed." This is the first thought or intent of the act,—all fees which the officer shall be authorized, required, or entitled to charge or receive shall be-

Digitized by Google

long to the county; not one-half the fees over $1,500 and expenses, but all the fees. There can be no question as to the meaning. They were such fees as had been received by him before the act of 1810, all of which he kept as his own. Those received afterwards, $1,500 of which, and half over that amount, he kept as his own; those received after 1842, when, in addition, he kept as his own an amount equal to his office expenses. All he was "entitled to charge or receive" now belong to and must be paid to the county. Is this manifest purpose qualified by the language which follows in the same section: "And it shall be the duty of each of said officers to exact, collect, and receive all such fees to and for the use of their respective counties, except such taxes and fees as are levied for the state, which shall be paid to and for the use of the state?" When it is remembered that the act put all county officers in counties of over 150,000 inhabitants in the salaried list, the purpose of the introduction of the words, "except such taxes and fees as are levied for the state," is obvious. Taxes levied for the state on personal property and other objects of taxation are paid to the county treasurer; liquor license fees are also paid to him; the tax on probate of wills, recording of commissions, and the collateral inheritance tax, levied for the state, are paid to the register of wills and the recorder; the tax levied by the act of 1830 on writs, for the state, is received and paid over by the prothonotary; and the state might, for economy and convenience, direct that other taxes levied for its use should be paid to these or other county officers for transmission to the state treasury; hence the necessity for this exception. But to our mind it neither qualifies, nor was it intended to qualify, the previous declaration that all fees the officer was entitled to charge or receive as a county officer should belong to the county. The second section of the act then prescribes how the account of fees shall be kept, and directs that on the first Monday of each month the officer shall pay to the county treasurer "all fees so received during the preceding month," and "he shall make oath * * * that the said transcript contains a true and correct list of all the fees received, earned or chargeable upon the county for services rendered in his office, either by himself, deputies or clerks during the preceding month." Thus the act still assumes, in accord with the first section, that all the fees pertaining to the office belong to the county, and must be paid by him to the county. The third and fourth sections declare it a misdemeanor in the officer to neglect to keep accounts, to make returns, or pay over the money; to swear falsely; to neglect to charge fees according to law. The fifth section enacts that the officers, their deputies and clerks, shall be paid specific salaries, and these shall be paid monthly from the county treasury. The sixth section provides that the salary of the officer shall only be paid out of the aggregate of the fees paid into the treasury by him the preceding months, after deducting the amount due deputies and clerks: and, if there be not enough left to pay him, then he shall get only the aggregate of net fees received; but also providing, if there be any excess in subsequent months, the deficit shall be made up from the excess during his term. His compensation cannot be greater than the aggregate of net fees during the term. The seventh and eighth sections relate to the determination of the number of deputies and clerks, and the fixing of their salaries. The ninth section provides that "each of said officers shall make a separate return to the state treasurer, of all collateral inheritance taxes collected or earned for the state by him, if any have been so collected or earned, and of all taxes due the state on any writs or legal proceedings or fees otherwise belonging to the state collected or earned by him, and the amount so returned by any of said officers as received by him for the state shall be separately paid into the state treasury quarterly." The tenth section provides for access to the books and accounts by the proper officers. The eleventh directs that the county, at its own cost, shall provide office furniture, books, and stationery. The twelfth, thirteenth, and fourteenth specifically fix the salaries of the officers. The fifteenth is a repetition of the first, somewhat elaborated. The sixteenth and seventeenth sections declare certain offices county offices, and provide for the quarterly payment of the officers. The eighteenth and last section, having in mind the fact that existing laws provide for entirely different means of compensation of county officers, as well as wholly different methods of accounting, directs that "all county officers affected by it shall settle their accounts under existing laws," up to the expiration of the term of the then incumbents.

We have noticed these different sections of the statute because they show another scheme, covering all possible phases of the subject embraced by the act of 1810. The act of 1876 takes up the same subject, and by more, as well as more elaborate, provisions, undertakes to specifically designate the ownership of the fees, the duty of the officer, and the limitation on his salary. The case turns on the question whether the acts of 1810 and of 1876 can stand together. They are both legislation on the same subject; both affirmative statutes. This is not exactly the case of a new statute repealing an old one, in whole or in part, because of repugnancy. It is a new statute on the same subject, embracing provisions similar to those of the old for its enforcement, elaborating them, and introducing a more complete system, with a wholly different purpose. Theretofore the commonwealth had title and right to half the money beyond certain deductions. The officer had title to the other half. He collected and accounted

Digitized by Google

to the commonwealth for her share. She now relinquishes her title to any part, and by unmistakable language deprives the officer of all title; vests the whole in the county; constitutes the officer the mere channel through which it reaches the declared owner, the county. We are far from intending to infringe on the well-settled rule that a later statute on the same subject will not repeal an older one by implication, unless they be plainly repugnant. But if a statute embrace the essential provisions of an antecedent one on the same subject, and formulate a new system, the intention that the new shall be a substitute for the old is manifest, although there be no expressed intention to that effect. It is so held in Com. v. Cromley, 1 Ashm. 179; Goodenow v. Buttrick, 7 Mass. 140; Com. v. Cooley, 10 Pick. 39; Johnston's Estate, 33 Pa. St. 511, and many other cases. The constitutional and legislative intention to introduce an entirely new system as to fees collected by county officers in the large counties is just as manifest as it was to introduce in Philadelphia a new system as to aldermanic or magistrate's fees. Section 12, art. 5, says: "In Philadelphia * * * they [magistrates] shall be compensated only by salaries to be paid by said county. * * * All fees, fines and penalties in said courts, shall be paid into the county treasury." As to county officers, the same thought is expressed. "All county officers shall be paid by salary," and they "shall pay all fees which they may be authorized to receive into the treasury of the county or state, as may be directed by law." Then, as to the latter, came the directions of the law: "All fees limited and appointed by law to be received by each and every county officer * * * shall belong to the county," with no retransfer of the right to any portion to the commonwealth. In answering this question, it is proper to have in mind the circumstances which moved the legislature, in 1876, to pass any law on that subject. The section of the constitution referred to in the title peremptorily directed that: "In counties containing over one hundred and fifty thousand inhabitants, all county officers shall be paid by salary; and the salary of any such officer and his clerks heretofore paid by fees shall not exceed the aggregate amount of fees earned during his term, and collected by and for him." The same section directed that: "All county officers who are or may be salaried, shall pay all fees which they may be authorized to receive, into the treasury of the county or state, as may be directed by law." Then, immediately following, in section 6 of the same article, is this injunction: "The general assembly shall provide by law for the strict accountability of all county, township, and borough officers, as well for the fees which may be collected by them, as for all public or municipal moneys which may be paid to them." The subject of section 6 being so palpably the same as that of section 5, it is scarcely separable in thought, and may fairly be treated as part of it. The purpose of the act of 1876, as disclosed in its title, was to obey the mandate of the constitution. (1) All county officers in counties containing over 150,000 inhabitants must be paid by salary; no longer by fees. (2) The salary was limited. It must not exceed the aggregate amount of fees earned during the term, and collected by or for them. (3) They must not keep any part of such fees, and credit them on salary, but must pay over all of them into the treasury of the county or state, as may be directed by law. (4) The legislature was to provide by law for a strict accounting by them, not only for all fees collected by them, but for all other public money paid to them. The act of 1876 following so soon the constitution of 1874, it may be presumed the legislature knew the old law, the mischief or abuses under it, as well as did the members who framed the constitution, and the people who adopted it. The large compensation of officers paid by fees in large counties for years before was felt to be a wrong on the public. Though the grievance was not so sore as farming out the taxes in France before the French Revolution, it was getting to be of the same character. The compensation of the officer and revenues of the state were only limited by the amount of fees the officer could wring from unfortunate litigants. He had every temptation to pile up fees, and then extort them. As the commonwealth halved the money with him, it made no rigid inquiry as to how he got it. Individuals were practically defenseless, for lawyers were averse to incurring the displeasure of the officer by resisting illegal exactions from their clients. It is difficult for those who have come to the bar since to realize the abuses of the fee system in large counties before that time. But the convention of 1873 understood the matter, and so did the legislature of 1876. The latter, aware of the mischief, was in full sympathy with the convention in legislating the remedy, and in that spirit was framed the act of 1876. The legislative intention was to sweep away, as directed by the constitution, a pernicious system, by removing, as far as possible, all motive for illegal exactions. It in no way affects the force of the mandate that it embraces only counties containing over 150,000 inhabitants. The evil, at the adoption of the constitution, was only serious (or thought to be so) in counties of large population. When, as to such counties, the legislature, as part of a new system, declared "all fees" which the county officers were "entitled to charge or receive shall belong to the county in and for which they were severally elected or appointed," it meant, and could only mean, all the fees pertaining to the county office, and which, from the character of the office, the incumbent earned and received. It did not mean one-half the fees over and above a certain amount, or the act would have said so. It did, by exception, save fees and taxes specially levied for the state; but the language of the exception seems to carefully guard against affecting the scope of the words first used: "And it shall be the duty of each of

Digitized by Google

said officers to exact, collect and receive all such fees to and for the use of their respective counties, except such taxes and fees as are levied for the state." This would have been but little more significant if it had said, "except collateral inheritance taxes, state tax on writs, wills, commissions and license fees." And that this is the meaning is obvious from the provision in section 9. Section 2 had required the officer to keep a special account of all the money received for fees, and pay all the moneys so received monthly into the county treasury; but outside of these fees payable to the county monthly were other moneys not belonging to the county. So this section directs the officer "shall make a separate return to the state treasurer of all collateral inheritance taxes, * * * all taxes due the state on any writs or legal proceedings, or fees otherwise belonging to the state," and these shall be paid by him into the state treasury quarterly. He was to account to the county and pay over monthly, to the commonwealth quarterly. Then comes the last section, which assumes the act is a substitute for prior legislation, by directing that it shall take effect only on the expiration of the terms of those then in office, and they shall settle their accounts under the old system up to that date. We are of opinion that the act of 1876, as to Philadelphia county, that county having over 150,000 inhabitants, was intended as a substitute, in its application to county officers, for the act of 1810, and that the latter, of necessity, was repealed by it; that, by the act of 1876, all the fees which the defendant, as prothonotary, was entitled to charge or receive, belonged to the county.

It is argued, by the learned attorney general, with some force, that this construction of the act of 1876 tends to inequality,[1] because large counties will have the whole excess revenue derived from fees, while the officers in the smaller counties will continue to contribute a share to the commonwealth's treasury. But this inequality is more apparent than real. The larger county becomes answerable, under the act, for all the expenses of the office and all salaries. The nearness of the county to the officer, it having a voice in determining not only the number of deputies and clerks, but their salaries, and having, to a large extent, control of the expenses, there is established a motive to watchful, economical supervision. Besides, the fact is well known that litigation tends towards the larger counties. Our courts are courts of the commonwealth. Corporations and large business concerns have offices in the large counties, and can there be easily served with process. There, in personal actions, where the cause has arisen in other counties, suits are often brought and determined. Consequently the expense of maintaining courts outside of that which is reimbursed by fees is heavier in such counties, and the legislature may have thought it but right to relinquish the commonwealth's claim on a share of the fees. But, whatever may have been the motive, the legislature, in so doing, had the power to, and by no uncertain words did, give up to the county what, before the act of 1876, the commonwealth had claimed.

While we do not think this interpretation of the act of 1876 at all doubtful, so as to require the aid of contemporaneous construction, the fact that the same construction has been given it from the time it became a law—for nearly 20 years—by all whose duty it was to construe it, or who were affected by it, is worthy of notice. In speaking of contemporaneous exposition of a statute, Judge Endlich, in his valuable work on Statutes (section 357), says: "But, further, the meaning given by contemporary or long professional usage [to a statute] is presumed to be the true one, even when the language has etymologically or popularly a different meaning. Those who lived at or near the time when it was passed may reasonably be supposed to be better acquainted than their descendants with the circumstances to which it had relation, as well as with the sense then attached to legislative expression." And further on in the same section he says: "It often becomes, therefore, material to inquire what has been done under an act; this being of more or less cogency, according to circumstances, for determining the meaning given by contemporaneous exposition." And for the text he cites many authorities, both in this country and England. And further, in note to same section: "In construing statutes applicable to public corporations, courts will attach no slight weight to the uniform practice under them, if this practice has continued for a considerable period of time." In the case before us, as is intimated by the learned judge of the court below, the construction given to the act by the officers or county to be charged in their own interest is not entitled to much weight; but when that construction has been acquiesced in by the commonwealth from the date of the act until the institution of this suit, if the construction were doubtful, this would have much weight. The many auditor generals, attorney generals, and state treasurers, whose sworn duty it was through all these years to see that the revenues of the state were accounted for and paid over, were grossly neglectful in not exacting payment if the act of 1810 were still in force. It would be highly unjust to impute to them such neglect. Evidently they considered, and rightly, so, the act of 1810 repealed by the act of 1876 on the expiration of the term of those then in office. The contemporaneous exposition of the act, and the long uniform practice under it, show that, in their opinion, it took the place of the old act, and that nei-

[1] Const. art. 9, § 1, provides that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

Digitized by Google

ther the county officer nor the county was longer answerable for one-half of the excess of office fees, for all were declared to belong to the county. The appeal is sustained, and the judgment is reversed.

STERRETT, C. J., and GREEN, J., not sitting.

COMMONWEALTH v. SHIELDS, Register.

(Supreme Court of Pennsylvania. May 20, 1895.)

Appeal from court of common pleas, Dauphin county.

Action by the commonwealth against William G. Shields, register of wills of Philadelphia county. From a judgment rendered on appeal from the settlement of the auditor general and state treasurer, defendant appeals. Reversed.

J. W. Catharine, James Alcorn, and F. C. Brewster, for appellant. B. M. Nead, for the Commonwealth.

DEAN, J. For the reasons given in Com. v. Mann, 31 Atl. 1003, the appeal in this case is sustained, and the judgment is reversed.

COMMONWEALTH v. LATTA, Clerk.

(Supreme Court of Pennsylvania. May 20, 1895.)

Appeal from court of common pleas, Dauphin county.

Action by the commonwealth against James W. Latta, clerk of court of quarter sessions of Philadelphia county. From a judgment rendered on appeal from the settlement of the auditor general and state treasurer, defendant appeals. Reversed.

J. W. Catharine, James Alcorn, and F. C. Brewster, for appellant. B. M. Nead, for the Commonwealth.

DEAN, J. For the reasons given in Com. v. Mann, 31 Atl. 1003, the appeal in this case is sustained, and the judgment is reversed.

COMMONWEALTH v. GREEN, Recorder.

(Supreme Court of Pennsylvania. May 20, 1895.)

Appeal from court of common pleas, Dauphin county.

Action by the commonwealth against Thomas Green, recorder of deeds of Philadelphia county. From a judgment rendered on appeal from the settlement of the auditor general and state treasurer, defendant appeals. Reversed.

J. W. Catharine, James Alcorn, and F. C. Brewster, for appellant. B. M. Nead, for the Commonwealth.

DEAN, J. For the reasons given in Com. v. Mann, 31 Atl. 1003, the appeal in this case is sustained, and the judgment is reversed.

STERRETT, C. J., and GREEN, J., not sitting.

ELK COUNTY BANK v. RIDGWAY BANK.

(Supreme Court of Pennsylvania. May 20, 1895.)

DISSOLUTION OF ATTACHMENT—CERTIORARI.

The action of the court in dissolving an attachment issued under the act of 1869 cannot be reviewed on certiorari.

Appeal from court of common pleas, Elk county.

Attachment by Eliza A. Hall and others, doing business under the firm name and style of the Elk County Bank, against D. C. Oyster and others, late partners doing business under the firm name of the Ridgway Bank. From a judgment for defendants, plaintiffs bring appeal. Affirmed.

J. Ross Thompson and Ames, Whitmore & Bible, for appellants. Geo. R. Dixon, Geo. A. Allen, and L. Rosenzweig, for appellees.

PER CURIAM. This so-called "appeal" is in fact merely a certiorari, and must be so treated. It brings up for review nothing but the record proper, which does not include the evidence on which the court acted in dissolving the attachment. Under the act of 1869, that action of the court below was a matter within its discretion, and we have nothing before us to show that the discretion was abused. Wetherald v. Shupe, 109 Pa. St. 389, 2 Atl. 220; Black v. Oblender (Pa. Sup.) 15 Atl. 708; Hoppes v. Houtz, 133 Pa. St. 34, 19 Atl. 312. Decree affirmed, and appeal dismissed, with costs to be paid by appellants.

MIXEL v. BETZ.

(Supreme Court of Pennsylvania. May 20, 1895.)

EXCEPTIONS—FAILURE TO TAKE—REFUSAL TO SET ASIDE VERDICT—NOT REVIEWABLE.

1. Where no exception to the ruling complained of was taken on the trial, and none was since allowed, the ruling cannot be considered.

2. The action of the trial court in refusing to set aside a verdict will not be reviewed.

Appeal from court of common pleas, Cumberland county.

Trespass by Theodore Mixel against Dr. Israel Betz for malpractice. From a judgment for plaintiff, defendant appeals. Affirmed.

The assignments of error considered in the opinion are as follows, viz.: "Second error: The court erred in its charge to the jury as follows: 'It appears that a little girl of the plaintiff, a child of four or five years of age, fell and broke her arm in November, 1890, or 1891,—it does not seem altogether clear whether it was 1890 or 1891, but we do not think it very material,—and that Dr. Betz was applied to for medical aid. He treated the patient for several weeks. The fractured bone did not unite, but inflammation ensued. The bone between the shoulder and the elbow died, and a year thereafter was removed by Dr. Stewart.' Third error: The court erred in the following paragraph from its charge: 'Take the case, then, and, keeping in mind all that you have heard from the mouths of the different witnesses, and under the testimony given before you, and the law as you have heard it, about which there is no difference of opinion between counsel, render such a

Digitized by Google

verdict as you believe will accord with the obligations you have assumed as jurors.'"

Stuart & Stuart, for appellant. S. M. Leidich and J. M. Weakley, for appellee.

PER CURIAM. We are by no means free from misgivings as to the correctness of the conclusions reached by the jury in this case, but a motion for a new trial is under the control of the court below. Our business is with the alleged errors in the trial. The exclusion of a question asked of Dr. Stewart is the subject of the first assignment of error, but the exclusion was not excepted to at the trial, and no exception has since been allowed. The offer is, for this reason, not upon the record, and we cannot properly consider it. The second is to the statement made by the learned judge in his charge, that it was not very material whether the arm was broken, and Dr. Betz was applied to in 1890 or in 1891. We see no error in this. The subject to which the attention of the jury was directed was not so much one of date as one of the character and adequacy of the examination made. The same must be said of the third assignment. There really was no difference of opinion between counsel about the legal principles applicable to the action. The plaintiff's right to recover rested on the care or negligence of the defendant. This was a question of fact about which counsel did differ, but, on the legal questions, the fact that no exception is now taken to the instructions given to the jury upon them, satisfies us that the appellant sees in them nothing of which he can justly complain. We can sustain neither of the assignments. If the jury reached a mistaken conclusion, we have no means for correcting it. The learned judge of the court below seems to have been satisfied with the verdict, and we must be. The judgment is affirmed.

BRYSON v. HOME FOR DISABLED AND INDIGENT SOLDIERS et al.

(Supreme Court of Pennsylvania. May 20, 1895.)

PENSION MONEY — PAYMENTS REQUIRED OF INMATES OF SOLDIERS' HOME.

Voluntary payments of United States pension money, made to the soldiers' and sailors' home at Erie by an inmate thereof, in pursuance of an agreement under which his admission to the home was obtained, cannot be recovered.

Appeal from court of common pleas, Erie county.

Assumpsit by James Bryson against the Home for Disabled and Indigent Soldiers and Sailors of Pennsylvania at Erie, and the trustees of the home, Major W. W. Tyson, commander. From a judgment for defendants, plaintiff appeals. Affirmed.

J. Ross Thompson, for appellant. F. Carroll Brewster and E. L. Whittelsey, for appellees.

WILLIAMS, J. The plaintiff sued to recover certain sums of money which he alleged he had been compelled to pay to the home out of his quarterly installments of pension money received from the United States. These exactions he alleged were illegal, and in plain violation of the spirit, if not the letter, of the pension laws. An affidavit of defense was made by the commanding officer of the home, in which he set out the following facts: First, the adoption of a rule by the board of managers of the home requiring the inmates to turn over 80 per cent. of their pension money to the treasurer of the institution; second, that upon the admission of the plaintiff he signed an agreement in writing binding himself to comply with the rules of the home, of which he knew this to be one; third, that the payments for which he now sues were made by him voluntarily, in accordance with the contract so executed by him on his admission. The learned judge of the court below held this affidavit to be sufficient to prevent a judgment on motion, and this appeal is from that ruling. The learned gentleman who represents the appellant has argued with great earnestness that the rule under which the money was paid to the treasurer is wholly unauthorized. We are not inclined to decide that question at this time. It is not necessary to the decision of this case. If the payments shall turn out to be voluntary, as is alleged, and in pursuance of an agreement under which the plaintiff's admission was obtained, and that admission depended upon the contract, and not upon the positive provisions of the statute organizing this institution, then the plaintiff cannot recover. The record before us does not afford the means of determining these questions. They will be developed on the trial. Meantime all that we can now decide is that the affidavit is to be taken as absolutely true; and, assuming its truth, we think, so far as this record enables us to see, that the court below was right in refusing the motion for judgment, and its action therein is now affirmed.

OGONTZ LAND & IMPROVEMENT CO. v. JOHNSON.

(Supreme Court of Pennsylvania. May 20, 1895.)

DEED—BUILDING RESTRICTIONS—OPEN PORCH.

A roofed porch, built on brick foundations, and permanently attached to the whole front width of a house, though unenclosed, is within the prohibition of a building restriction in a deed that all buildings shall be erected not less than a certain number of feet back from the fence line.

Appeal from court of common pleas, Montgomery county.

Bill by the Ogontz Land & Improvement Company against Amos Johnson for an injunction. From a decree for defendant, plaintiff appeals. Reversed.

The bill set forth that the plaintiff conveyed to defendant a lot of land subject to the

Digitized by Google

restriction "that all buildings upon the said lots shall be erected not less than fifteen feet back from the fence line"; that defendant was erecting a building upon the lot, contrary to the restriction, and within seven feet of the fence line; and alleged irreparable injury, and prayed for an injunction. The answer admitted the purchase of the lot, the restriction in the deed for the same, the erection of the building, but denied that the building was erected contrary to the restriction; admitted the building of three brick foundation piers in front of the building to support a frame porch, which was proposed to be attached to the front thereof; averred that the front line of the proposed porch would be seven feet from the fence line; that it would be an open, uninclosed porch; that the porch could not in any way affect the use and enjoyment of adjoining lots; that it was not a building, within the meaning of the restriction in the deed; and prayed for the dismissal of the bill.

Following is one of plaintiff's assignments of error: "Second. The court erred in holding that the porch erected by the defendant, the same having been erected with and attached to the house, with the front line thereof seven feet from the fence line, was not a violation of the restriction in defendant's deed."

Edw. F. Kane, for appellant. William F. Solly, for appellee.

MITCHELL, J. Both the bill and the answer are in very brief and general terms, and the facts in regard to the porch in controversy do not, therefore, appear with precision as to details. The answer, however, admits that the porch is to be a permanent part of the house, built upon brick foundations, and projecting to within seven feet of the fence line. Prima facie, this is in violation of the building restriction. The terms of this are not in dispute. They are that "all buildings upon the said lots shall be erected not less than fifteen feet back from the fence line." The intention of this clause is plain. It is to widen the entire space betwen the house lines, and secure the light, air, and open view incident to a wide street. The language is "all buildings," and that means all substantial parts of all buildings. While merely incidental encroachments on this space by steps or eaves or ornamental projections might not amount to violations of the agreement (see City of Philadelphia v. Presbyterian Board of Publication, 9 Phila. 499), yet a porch extending the whole width of the house, as a substantial and integral part of it, is clearly so. If it can occupy eight feet of the reserved space, it could as well occupy the whole fifteen feet to the fence line, and thereby destroy the open, uniform, general effect meant to be secured. We agree with the learned judge below that "whether a porch or piazza attached to a dwelling house is a building, or a constituent part of the dwelling, depends on the manner of its construction, and the uses to which it is to be applied"; but we do not think the fact of its being open or inclosed is the ruling factor. It is one item of evidence only, and each case must depend on its own circumstances as shown by the whole evidence. As already said, the details as to this porch do not precisely appear, but it is to be gathered from the answer and the arguments of both parties that it is an integral part of the house, built with it, on brick foundations, roofed, and permanently attached to the whole width of the front. The fact that it is open at the sides and in front will not save it from being an obstruction to light, air, and uniformity of effect, and as such contrary to the restriction. Decree reversed, bill reinstated, and injunction directed to be awarded, with costs.

WILHELM, Sheriff, v. FAYETTE COUNTY.

(Supreme Court of Pennsylvania. May 27, 1895.)

COMMITMENT—SHERIFFS' FEES.

Act April 2, 1868, providing that the sheriff shall receive as a fee on commitment for any criminal matter 50 cents, entitles the sheriff to that sum for each of several persons received on one commitment for the same matter.

Appeal from court of common pleas, Fayette county.

Case stated by William H. Wilhelm, sheriff, against the county of Fayette. From a judgment for plaintiff, defendant appeals. Affirmed.

R. F. Hopwood, for appellant. D. W. McDonald and James R. Cray, for appellee.

PER CURIAM. This case stated embodies all the facts upon which the judgment of the court below is based. As sheriff of the county and keeper of the common jail, the plaintiff received into his custody 95 persons, charged before a justice of the peace, in one information, with the murder of Joseph H. Paddock, and duly committed for trial by said justice, as evidenced by 18 separate commitments, containing from three to eight names each. The sole question was whether plaintiff was entitled to a commitment fee of 50 cents for each of the 95 persons thus committed and received by him, or a fee of 50 cents for each of the 18 separate commitment papers, or only a fee of 50 cents for the entire number of 95 persons named in said several commitments. The act of April 2, 1868, fixing the feebill under which the contention arose, reads, inter alia, thus: "Fee on commitment for any criminal matter, 50 cents." The learned judge of the court below construed this to mean a fee of 50 cents for each person received on commitment, without regard to the fact that they were all committed for the same criminal

Digitized by Google

matter, or the further fact that a separate commitment was not made out for each separately. In this, we think, he was so clearly right that discussion of the subject is unnecessary. Judgment affirmed.

HOGG v. CONNELLSVILLE WATER CO.

(Supreme Court of Pennsylvania. May 27, 1895.)

RIPARIAN RIGHTS—DIVERSION OF WATER — TRESPASS FOR DAMAGES.

A lower riparian owner is not required to be in possession of his lands in order to maintain trespass against an upper owner to recover damages for diverting the waters of the stream.

Appeal from court of common pleas, Fayette county.

Trespass by John T. Hogg against the Connellsville Water Company to recover damages for diverting water. From a judgment for plaintiff, defendant appeals. Affirmed.

Defendant's assignments of error are as follows:

"First. The court erred in affirming the plaintiff's first point, which point and answer are as follows, to wit: 'That under the evidence the plaintiff is entitled to recover at least nominal damages.' Answer: 'That is affirmed.'

"Second. The court erred in affirming plaintiff's fourth point, which point and answer are as follows, to wit: 'That, if the jury should find that the plaintiff is entitled to damages, they should estimate them from the date of the taking of the water down to the date of this trial.' Answer: 'This is affirmed.'

"Third. The court erred in refusing defendant's first point, which point is as follows: 'That, if the plaintiff is entitled to recover at all, in this action, he can only recover nominal damages.'

"Fourth. The court erred in refusing defendant's second point, which point is as follows: 'That the plaintiff is not entitled to recover in this action for any money expended or expense incurred in making repairs, or in scooping out the channel of the dam above the confluence of the McCoy run with the race leading from the dam to the mill of plaintiff.'

"Fifth. The court erred in refusing defendant's third point, which point is as follows: 'That the plaintiff is not entitled to recover in this action for any money expended or expense incurred by plaintiff's lessees in scooping out the channel or making repairs on the dam above the confluence of McCoy's run with the race leading from said dam to plaintiff's mill.'

"Sixth. The court erred in not sustaining defendant's objection to the following questions asked John T. Hogg to wit: 'Q. Is that water supply sufficient for the cattle pasturing in there? A. Not all the time. Q. Has that fact made any difference, Mr. Hogg, in the renting by you of this land for pasture? A. Yes, sir. Q. I will ask you now to state what, in your judgment, has been the yearly loss to you by reason of being deprived of this water by the water company. Mr. Boyd: Well, if your honor please, I object to that question; it is not a matter for estimation; it is a matter that ought to be shown by figures. Mr. Lindsey: How else can he do it than that? He is the owner of the land; he has been receiving the revenue from it; and he is able to state how much he has lost by reason of being deprived of this water. The Court: Objection overruled, and bill sealed. Q. What has been the annual loss in rentals by reason of the loss of the water? A. Two hundred dollars per year. Q. Do you know, Mr. Hogg, what year the water company first deprived you of the water? A. I believe it was in 1883. Q. Well, sir; I will ask you if that deprivation has continued from that time until the present. A. Yes, sir.'

"Seventh. The court erred in not sustaining defendant's objection to the following questions asked John T. Hogg, to wit: 'Q. I will ask you, sir, if the deprivation of water by this water company has made any difference to you in the annual rental value of that mill? A. Yes, sir. Q. How much difference, Mr. Hogg, has it made? A. Well, in the way of repairs and expense—Q. Were you required to keep them up under your agreement? A. Yes, sir. Q. Very well, then, how much has it made? A. Two hundred dollars per year. Mr. Boyd: I object to that, your honor. I don't think it is competent. Q. What was the character of the repairs that were necessitated by reason of their taking this water? A. Well, to keep the water ways in order. Q. Very well, then, what difference did it make in the annual rental of your property? The Court: I don't quite understand your proposition. Mr. Lindsey: It would be, perhaps, plainer, your honor, if I offered the article of agreement. We propose to show what it has cost him, which is, of course, a diminution of the rental value of the property during the time these people have held it under this lease. I offer in evidence article of agreement, made 10th day of December, 1883, between John T. Hogg and James Calhoun and others, for the purpose of showing the rental value of this mill. This to be followed by evidence showing the difference in rental value by reason of the deprivation of this water by this water company. Mr. Boyd: I object that it is not competent, for the reason that it appears to have been entered into after the stream was diverted, from any testimony in the case; and I don't see its relevancy at all, or that it tends to prove anything that he alleges here, or in any way tends to prove that he would be entitled to any damages in this case. The Court: This lease was made after the construction of the works, as I understand? Mr. Lindsey: Yes, sir. The Court: I don't see the competency of that, but we will receive it for the present, and we will control it afterwards. Mr. Boyd: Give me an exception. The Court: Yes,

Digitized by Google

sir. Article of agreement admitted and read, and marked "Exhibit 2," of this date, February 2, 1894.'

"Eighth. The court erred in not sustaining defendant's objection to the following question asked John T. Hogg, to wit: 'Q. What has it cost you annually to keep up this water course, repairs, and water power at this mill? Mr. Boyd: We object. The Court: Objection overruled, and bill sealed. A. About two hundred dollars per year.'

"Ninth. The court erred in not sustaining the defendant's objection to the following question asked Conrad Hoop, to wit: 'Q. I will ask you whether or not, sir, there has been a sufficient flow of water there for the use of the cattle that have been pasturing there in the dry season. Mr. Boyd: I object. The Court: That, I think, is proper. Objection overruled, and bill sealed. A. There was no water at all passing through my dam last summer for two or three months, only when it rained; possibly for just an hour or two afterwards.'

"Tenth. The court erred in not sustaining defendant's objection to the following question asked David Newcomer, to wit: 'Q. I will ask you, then, what would be the annual value of that farm for pasturage purposes,—the Hogg farm? The difference between the annual rental value of this land before the erection of this dam, and after the erection of this dam? Mr. Boyd: I object. The Court: Objection overruled, and bill sealed.'

"Eleventh. The court erred in not sustaining defendant's objection to the following questions asked James Stafford, to wit: 'Q. Mr. Stafford, I will ask you what, in your opinion, would be the rental value of Mr. Hogg's land before the water was taken from it by the water company and after it was taken, by the year? The Court: That is not limited as suggested in the business of pasturing. Mr. Lindsey: Oh, yes; I intended to put that in, of course. Q. Using it as Mr. Hogg has, for pasture? Mr. Boyd: I object that the question is not competent, and he has not qualified himself to give an opinion. The Court: Oh, he was examined before. We don't want to repeat all the cross-examination again. Q. What, then, would be the difference in rental value? A. Well, do you mean annually? Q. Yes, sir; annually, for each year. The Court: Since 1883. A. Well, as near as I can guess—of course I cannot give any accurate calculation— Q. I just want your judgment. A. I would suppose about two hundred dollars.'

"Twelfth. The court erred in not sustaining defendant's objection to the following questions asked Paul Cropp, to wit: 'Cross-examination by Mr. Boyd: Q. You don't know that the supply of water had anything to do with that,—the difference in the number pastured there? A. Well, I wouldn't want to just say that. I suppose it. Re-direct examination by Mr. Lindsey: Q. Have you ever heard that? A. Yes, sir; I have. Mr. Boyd: Hold, I object to that. Mr. Lindsey: It seems to me, your honor, that that would be competent, if he heard it in any way. If he has a knowledge in any way, it would justify him in saying so. The Court: It seems to me that that would be competent, Mr. Boyd. Mr. Boyd: I don't see anything to distinguish that from any other hearsay testimony. The Court: I think he has a right to say, not what any one said to him, but simply the fact that he heard some other person say so and so; I mean in a general way; that he knew of persons taking cows out, and heard that that was the cause of it, without going into any of the particulars. Q. Do you know of people removing and taking away their cows? Mr. Boyd: I object that it is not competent. The Court: Objection overruled, and bill sealed. A. Yes, sir. Q. Did you hear the reason alleged for taking them away? A. Yes, sir; scarcity of water.'

"Thirteenth. The court erred in not sustaining defendant's objection to the following questions asked David Carson, to wit: 'Q. Do you know of the owner or lessees of the mill being obliged to widen and scoop out the channel since the building of this dam? Mr. Boyd: I object. The Court: Well, as far as the question is concerned, it seems to me that it might be competent. Objection overruled, and bill sealed. A. I have seen him scoop it out at different times nearly every summer.'

"Fourteenth. The court erred in not sustaining defendant's objections to the following questions asked Robert Sechrist: 'Q. Do you know the value of land for pasture there about Connellsville? A. I know the value of that land for pasture. Q. How long have you known it,—the land? A. In the neighborhood of twenty years. Q. Well, sir, is the pasturage worth more or less than it was before the water was shut off? Mr. Boyd: I object that it is not competent. The Court: Oh, that is in line, I think. Objection overruled, and bill sealed. A. It is worth less. Q. Do you know what it was worth before the dam was built a month? A. I think it was $2.50 per month, as near as I can remember. Q. Do you know what it is now? A. $2.00 is what Mr. Hogg charges.'

"Fifteenth. The court erred in not sustaining defendant's objection to the following questions asked Robert Sechrist, to wit: 'Q. From your knowledge of this land—you say you know the value of it for pasture land—I will ask you what would be the difference in the annual value for pasturage before the dam was built and after the dam was built. Mr. Boyd: I object. The Court: Admitted, subject to the same objection as before. A. I should say about two hundred dollars per annum.'

"Sixteenth. The court erred in sustaining the objection of the plaintiff to the following question by the defendant to J. A. Morrow, to wit: 'Q. From your weiring or measurement on the McCoy run, to what extent would it go towards running the mill inde-

Digitized by Google

pendent of the water from the river? Mr. Lindsey: I object to that, for the reason that this witness never saw McCoy's run until after the reservoir was built. The Court: But, as I understand him, he took the measurement of the water above the reservoir. The great objection to it is that they took a single day, which amounts to nothing practically, basing his opinion upon that particular test of the flow of the water. I think it is not competent. Mr. Boyd: Your honor will give us an exception. The Court: Yes, sir.'

"Seventeenth. The court erred in charging the jury as follows: 'If the property had been rented before, and if he was unable to rent it for as much afterwards as he was before, you would have a definite means of determining the measure of his damages, because there would be something which is a mere matter of calculation; but, occupied as it was by Mr. Hogg, upon which he was carrying on a business such as has been stated, there is no means of getting at the exact loss to him, because it is like any other matter of business.'

"Eighteenth. The court erred in charging the jury as follows: 'On the other hand, the defendant company has a number of witnesses who say that, in their judgment, the plaintiff was not injured at all; that there was plenty of water there after that, and that he lost nothing by reason of the want of water. So you will take all that, then, and determine what would be a fair and just compensation to Mr. Hogg for the deprivation of this water upon his land, considering the use to which he was putting it at the time, and has been putting it ever since.'

"Nineteenth. The court erred in charging the jury as follows: 'Having fixed that element of damage, you will then go to the other; that is, the mill. And you will remember when the case first opened there was some discussion as to what was the proper testimony to be given in the case. A lease was offered in evidence,—Mr. Hogg having leased the property,—and if he got the same rent afterwards as he did before, of course he was not injured in the mill. That is very simple and plain. And when the suggestion was first made, I was disposed to rule that Mr. Hogg could have no element of damage in that; but the counsel pointed out the fact that this lease was made with the condition that Mr. Hogg was to keep the race course—the mill race—in condition to supply a flow of water as heretofore; and that seemed to me to be as if he guarantied it. For instance, if he rented it for the same amount as he had rented it previously, and guarantied the same amount of water, and it was not supplied, and the mill lay idle for that reason, why, there would be a loss upon that; and therefore I allowed them to prove what additional cost there was in maintaining this flow of water in the McCoy run. And that is a point you will determine,—not what it cost to keep the race open, but what amount of that cost was caused by a want of water coming from McCoy's run.'"

Boyd & Umbel, for appellant. Lindsey & Johnston and W. A. Hogg, for appellee.

PER CURIAM. In view of the facts which the testimony in this case tended to prove, there is nothing in either of the 19 specifications of error that requires a reversal of the judgment. It is conceded that, for the purpose of supplying water to the people of Connellsville for domestic and other purposes, defendant company diverted from its regular channel a considerable quantity of water, which otherwise would have flowed through and over plaintiff's lands, lying on either side of the stream below the point at which the water was diverted. It was also shown by competent evidence that, in consequence of said diversion of the water, plaintiff sustained damages. Without referring in detail to the testimony bearing on that and other questions involved in the issue, it is sufficient to say that it presented a proper case for the consideration of the jury; and it was fairly submitted to them by the learned judge who specially presided at the trial, with substantially accurate and adequate instructions. We find nothing in either of the specifications that requires discussion. Judgment affirmed.

FIRST NAT. BANK OF JAMESTOWN v. SCOFIELD et al.

Appeal of MADDEN.

(No. 391.)

(Supreme Court of Pennsylvania. May 20, 1895.)

MORTGAGES — AGREEMENT AS TO FORECLOSURE—CONVERSION OF SECURITIES—ACCOUNTING.

In a proceeding against a married woman and her husband to foreclose a mortgage, the former's affidavit of defense stated that she became liable to plaintiff as guarantor of notes on which her husband was indorser, and, to secure the same, pledged certain mortgage securities with plaintiff, and executed a mortgage on her individual property, being that described in the mortgage in suit; that it was then agreed in writing that only in case of a deficiency after enforcing the securities was the mortgage to be foreclosed; that thereafter the mortgage in suit was executed to plaintiff by defendant and her husband because of the invalidity of the former mortgage, and was delivered to her attorney, who also represented plaintiff, with the understanding that it should be used only to protect defendant in case the former mortgage was attacked by her husband's creditors; that plaintiff had converted certain of the securities to its own use, and disposed of the same; that property described in one of the mortgage securities, and worth more than the mortgage debt in suit, was turned over to plaintiff, to save foreclosure of such mortgage; and that plaintiff has never accounted therefor, nor for oil taken by him therefrom. *Held*, that the affidavit was sufficient to take the case to the jury.

Appeal from court of common pleas, McKean county.

Digitized by Google

Scire facias upon the application of the First National Bank of Jamestown, N. Y., against Anna B. Scofield and Carl W. Scofield, defendants, and the Tidal Oil Company, terre-tenant, upon a mortgage. From a judgment for plaintiff, Oscar E. Madden, receiver of the Tidal Oil Company, appeals. Reversed.

Affidavit of Defense by C. W. Scofield.

"State, City, and County of New York—ss.: Carl W. Scofield, being duly sworn, deposes and says:

"First. That he is a resident of the city of New York, and one of the defendants in this action, and that Anna B. Scofield, the other defendant, is his wife; that the terre-tenant is the Tidal Oil Company, a corporation existing under the laws of the state of West Virginia.

"Second. That this is an action brought in the court of common pleas of McKean county, Pennsylvania, to foreclose a certain mortgage, dated on or about the 13th day of November, 1891, and that the facts connected with the execution and delivery of the said mortgage are as follows: On or about the 16th day of September, 1891, the deponent then being liable as an indorser upon certain negotiable promissory notes discounted by the plaintiff for deponent, and being at the said time financially embarrassed, Anna B. Scofield, codefendant herein, at his request, and at the request of the plaintiff, entered into a certain contract in writing with the plaintiff, whereby she, the said Anna B. Scofield, undertook, promised, and agreed to keep and save the plaintiff, its successors and assigns, free and harmless by reason of any notes or bills receivable held by it for value upon which the name of the deponent appeared as an indorser, or which the plaintiff had discounted for the deponent, and whereby she further guarantied the payment of such notes or bills receivable held for value by the plaintiff, a copy of which agreement is hereto attached and made part of this affidavit; that, for the purpose of securing the said indebtedness of deponent, she thereby pledged to the plaintiff herein certain promissory notes or bills receivable, made by the following named persons, to wit:

F. E. Wood	$ 62,491 25
S. B. Miller	5,000 00
W. H. Pickett & Co.	5,000 00
Allen Coyle & Co.	12,416 34
H. E. Brown	18,416 61
A. R. Blood	11,050 00
J. A. Waterhouse	4,062 50
Total	$118,436 70

—Together with certain mortgages given to secure the said several notes respectively; and that only for the purposes aforesaid did the said Anna B. Scofield deliver to the plaintiff possession of the said notes or bills receivable, and the said mortgages given to secure the same.

"Third. That the plaintiff, among other things, agreed in the said contract that the defendant Anna B. Scofield should continue to conduct and carry on her business in the regular way; that she was at that time engaged in the business of oil producing, and was the owner of certain oil property, among them the 'Bordell Farm,' so called, described in the mortgage sought to be foreclosed herein; that thereafter, and upon the said 16th day of September, 1891, the said Anna B. Scofield made, executed, and delivered another certain mortgage upon the said property, which this deponent thereafter, to wit, upon the 18th day of September, 1891, caused to be recorded in the county of McKean; that at the said time, and for several weeks previous thereto, both the deponent and the said Anna B. Scofield were ill and in a highly nervous state, and altogether unfit to attend to their business; and that on or about the 20th day of September, 1891, deponent left Jamestown, in the state of New York, and proceeded to Ocean Grove, in the state of New Jersey, for rest and recuperation.

"Fourth. That during the month of September, 1891, and for many years prior thereto, one Arthur C. Wade, Esq., of the law firm of Cook, Fisher & Wade, Esqs., of Jamestown, New York, was and had been deponent's confidential and legal adviser, and had the full confidence of the deponent; that during the same time, and also during the times hereinafter mentioned, the said Arthur C. Wade was the legal adviser of the said Anna B. Scofield; that on or about the 13th day of November, 1891, the deponent and the defendant Anna B. Scofield, being at that time out of health, and both suffering from severe attacks of nervous prostration, and being entirely unfitted and incapacitated from attending to business of any kind, met the said Arthur C. Wade, at his request, at the Aberdeen Hotel, in the city of New York; that at that meeting the said Arthur C. Wade stated to the deponent and the said Anna B. Scofield that the mortgage executed on the 16th day of September, 1891, hereinbefore referred to, upon the Bordell property, by the defendant Anna B. Scofield, was void and of no effect; that deponent's creditors were liable at any time to successfully attach it; that the plaintiff did not wish or desire any further security, yet, for the purpose of protecting the property of the said Anna B. Scofield and her equity therein, he, the said Arthur C. Wade, as her legal adviser, and as the legal adviser of the deponent, advised him and her to execute and deliver, on the said 13th day of November, 1891, the mortgage upon which this action is brought; and that the deponent and the defendant Anna B. Scofield relied upon and believed the said statements.

"Fifth. That at the time the said Arthur C. Wade, being also and at the same time the agent and attorney of the plaintiff here-

Digitized by Google

in, agreed, on behalf of the said plaintiff, that the plaintiff would hold the said mortgage solely for the protection of the said Anna B. Scofield; that thereupon, and relying upon the representations and statements of the said Arthur C. Wade, and with a full confidence in his integrity and honesty, and for the reasons and purposes hereinbefore set forth, and not otherwise, and without any consideration whatsoever in money or money's worth moving from the plaintiff to this deponent, or to the said Anna B. Scofield, this deponent and the said Anna B. Scofield executed and delivered to the said Arthur C. Wade, as agent for the plaintiff herein, the mortgage upon which this action is brought, in the form and manner in which the said mortgage had heretofore been prepared by the said Arthur C. Wade, and at that meeting submitted to the deponent and the said Anna B. Scofield for execution.

"Sixth. That the property covered by the said mortgage was part of the property used and occupied by 'the said Anna B. Scofield in her business as an oil producer, and that it was not within the contemplation of any of the parties that the plaintiff should have any remedy whatsoever against this property or any other of the oil properties of the said Anna B. Scofield without first exhausting the securities deposited as aforesaid with the plaintiff under the contract hereinbefore referred to; that the plaintiff was and is bound to collect such bills receivable, and to apply the proceeds thereof to the liquidation of whatsoever claims they may have against the deponent, before they proceed against the property covered by the mortgage herein; but that the plaintiff has hitherto failed and neglected so to collect the said bills receivable, and to apply the proceeds thereof as aforesaid, as in equity and good conscience it ought to do.

"Seventh. That among the said bills receivable so as aforesaid transferred by the said Anna B. Scofield to the plaintiff is a certain line of notes as aforesaid made by one F. E. Wood, for $62,491.25, secured by a mortgage upon certain property situated in Allegany county, New York, consisting of about six hundred acres of fee and leasehold oil lands, containing ninety producing oil wells, more or less, and that this property is worth more than the whole of the deponent's liability to the plaintiff; that the said property has heretofore, and before the commencement of this action, come into the possession of the plaintiff herein, and is now in the possession or under the control of it or its agents; that the said property is worth more than the deponent's liability to the plaintiff upon all paper discounted by the plaintiff for the deponent; and, as deponent is informed and verily believes, is available to be applied to the payment thereof, and can readily be sold for an amount at least equal to such indebtedness.

"Eighth. This defense is made in behalf of the said Tidal Oil Company, the terre-tenant, as well as in the behalf of the defendants named in the writ of scire facias, deponent being a stockholder and director therein.—All of which facts the defendants and terre-tenant expect to be able to prove on the trial of this case. Wherefore, deponent submits that the plaintiff herein should in the first instance carry out its contract with the said Anna B. Scofield and with this deponent, and should resort to the collateral security as aforesaid, in exoneration of its demand against the plaintiff, before resorting to the foreclosure of the mortgage herein. And further deponent saith not. Carl W. Scofield.

"Subscribed and sworn to before me, this 30th day of August, 1894. A. A. Greenhost, (46) Notary Public, N. Y. Co. [Notarial Seal.]"

Agreement.

"The article of agreement made and entered into this 16th day of September, 1891, by and between Anna B. Scofield, of the town of Ellicott, county of Chautauqua, and state of New York, party of the first part, and the First National Bank of Jamestown, N. Y., party of the second part, witnesseth: That whereas, C. W. Scofield did heretofore transfer to the said party of the first part all his right, title, and interest in and to certain promissory notes or bills receivable made by the following named persons, viz. F. E. Wood, S. B. Miller, W. H. Pickett & Co., Allen Coyle & Co., H. E. Brown, A. R. Blood, and J. A. Waterhouse, and the mortgages given to secure said notes or bills receivable, respectively, to pay certain indebtedness of the said C. W. Scofield, to the party of the first part, and upon the further consideration that said first party would guaranty the payment and collection of all notes and bills receivable held by the said second party, and indorsed by said C. W. Scofield, or which said second party had discounted for him, said C. W. Scofield; and whereas, the said first party did, in consideration of such transfers, undertake, promise, and agree to guaranty the collection and payment of any and all notes or bills receivable held by the said second party, and indorsed by said C. W. Scofield, or discounted by it for him, and to save said party of the second part, its successors or assigns, free and harmless by reason thereof: Now, therefore, in consideration of the premises, and the sum of one dollar in hand duly paid by the said party of the second part to the said party of the first part, the receipt and payment whereof is hereby acknowledged and confessed, the said party of the first part has agreed, and does hereby undertake, promise, and agree, to and with the said party of the second part, its successors and assigns, to keep and save the said party of the second part, its successors and assigns, free and harmless by reason of any of the notes or bills receivable held by it on which the name of C.

Digitized by Google

W. Scofield appears as indorser, or which said party of the second part has discounted for him; and she, the said party of the first part, for a like consideration, hereby guaranties the payment of such notes or bills receivable held by said party of the second part; and, for the purpose of securing the same, she does hereby pledge to said bank all such notes, bills receivable, and mortgages so as aforesaid transferred to her by C. W. Scofield, and all moneys due or to grow due thereon; and, for the purposes of this pledge, she does hereby deliver to said bank full and absolute possession thereof. In case any of said notes held by said bank, the payment and collection of which the said first party hereby guaranties, shall not be paid, the said second party, its successors and assigns, shall proceed to the collection thereof by due process of law, and to the enforcement or any securities it may have therefor, unless it is arranged between the parties hereto that some other course shall be for the best interest of all concerned, and such other course be adopted. Whatever deficiency shall or may arise upon any of such notes or bills receivable so as aforesaid held by said bank, or the mortgages given as security therefor, the said party of the first part hereby agrees to make good, together with the costs and expenses incurred in reference thereto. The said party of the first part shall proceed to conduct and carry on her business in the regular way and manner, but not in any manner to impair the security hereby created. This instrument shall not be construed to affect the homestead where said first party now resides, or to create any liability that may or can be enforced by execution or otherwise, by any levy, attachment, or seizure, of or upon said homestead. It is further agreed that the said bank shall from time to time as requested, but not at unreasonable times, render to said party of the first part a statement of any and all collections made upon said notes, bills receivable, or mortgages hereby pledged, and any and all costs, expenses, or charges incurred in connection therewith, if any. In witness whereof, the said parties hereto have set their hands and seals, the day and year first above written. [Signed] Anna B. Scofield. [Seal.] First National Bank of Jamestown, N. Y. [Seal.] By E. Morgan, Cashier.

"Filed and entered September 11th, 1894."

Affidavit of Anna B. Scofield.

"State, City, and County of New York—ss.: Anna B. Scofield, being duly sworn, doth depose and say that she is a resident of the city of New York, and one of the defendants in the above-entitled action; that she has heard read the affidavit herein of her husband, Carl W. Scofield, and knows the contents thereof; and that the allegations therein contained are true. And further deponent saith not. Anna B. Scofield.

"Subscribed and sworn to before me, this 30th day of August, 1894. Sutherland B. Huxtun, Notary Public, Kings County. Certificate Filed in New York County. [Seal.]

"Filed and entered September 11, 1894."

Supplemental Affidavit of Defense.

"State of New York, City and County of New York—ss.: C. W. Scofield, one of the above-named defendants, being duly sworn, according to law, deposes and says that the notes and securities transferred by the above-named Anna B. Scofield to the above-named First National Bank of Jamestown, N. Y., as set forth in the agreement of September 16th, 1891, a copy of which is filed with the original affidavit of defense in this case, and made a part thereof, were, as deponent is informed and believes, and expects to be able to prove on the trial of this case, transferred by the said First National Bank of Jamestown, N. Y., to the Fredonia National Bank, of Fredonia, N. Y., at a date prior to the bringing of this suit, and up to the time of the bringing of this action neither of said banks had proceeded to collect, nor to enforce the collection of, any of said securities; that the possession of the Allegany county properties mentioned in said original affidavit of defense was surrendered by F. E. Wood, the then owner, to the said plaintiff, for the express purpose of avoiding foreclosure proceedings under the mortgage, securing the notes mentioned in the said agreement of September 16th, 1891, and the proceeds of the oil therefrom is not applied to the payment of the indebtedness of the said Wood on his said notes, nor to liquidate the indebtedness of deponent to the said First National Bank of Jamestown, N. Y., by either of said banks, as deponent is informed and believes, and expects to be able to prove on the trial of this case; that the series of notes sought to be foreclosed signed by J. A. Waterhouse were indorsed by deponent, and discounted by the said plaintiff, before the making of the agreement of September 16th, 1891, to wit, on or about the sixth day of August, 1891; and it was not contemplated by any of the parties to this suit that the giving of said mortgage by the said Anna B. Scofield and this deponent was in any wise to affect the terms of said agreement, nor was it to arrange that some other course should be pursued for the best interest of all concerned thereunder, but, on the contrary, it was expressly agreed between the said Anna B. Scofield, this deponent, and A. C. Wade, as attorney for the said plaintiff, that no other course than that prescribed in said agreement should be adopted for enforcing the payment and collection of the securities mentioned in said agreement, except as set forth therein, all of which deponent expects to be able to prove on the trial of this cause.

"Sworn to and subscribed before me, January 12th, 1895. Sutherland R. Huxtun, Notary Public, Kings County. Certificate filed in New York county.

"Filed and entered January 15th, 1895."

Digitized by Google

Samuel T. Neill and R. & H. E. Brown, for appellant. Samuel Grumbine, for appellee.

STERRETT, C. J. Our consideration of the affidavits of defense relied on in this case has led us to a different conclusion from that reached by the learned judge of the common pleas. While some of the averments contained therein are not as clear and specific as they might have been, we think that, considered as a whole, the affidavits fairly and with sufficient clearness present a state of facts which entitles the defendants to a trial by jury. For the purposes of this appeal, it must be assumed that they are prepared to introduce testimony tending, at least, to prove all their material averments. That being so, they should not be deprived of the opportunity of presenting their defense.

In view of the fact that the case goes back for trial, it is neither necessary nor desirable to refer specifically to the allegations of fact upon which the defendants rely. They are sufficiently set forth in the affidavits; and, assuming them to be true, it is enough to say they are sufficient to carry the case to a jury. The assignments of error are sustained. Judgment reversed, and procedendo awarded.

FIRST NAT. BANK OF JAMESTOWN v. SCOFIELD et al.

(No. 28.)

(Supreme Court of Pennsylvania. May 20, 1895.)

Appeal from court of common pleas, McKean county.

Scire facias upon the application of the First National Bank of Jamestown, N. Y., against Anna B. Scofield, Carl W. Scofield, and others, upon a mortgage. From a judgment for plaintiff, defendants Scofield appeal. Reversed.

Samuel T. Neill and R. & H. E. Brown, for appellants. Samuel Grumbine, for appellee.

STERRETT, C. J. This appeal, by defendants Anna W. Scofield and her husband, is from same judgment as the appeal of Madden, No. 391 of January term, 1895 (31 Atl. 1012), in which an opinion reversing the judgment, etc., has just been filed. Both appeals were argued together, and involve substantially the same question. For reasons briefly stated in the opinion referred to, the judgment should be reversed, not only as to the terre-tenant, represented by the receiver, etc., but also as to these appellants. Judgment reversed, and a procedendo awarded.

FRANK et al. v. MOREHEAD et al.

(Court of Chancery of New Jersey. May 8, 1895.)

CONFLICT OF LAWS—SALE OF PARTNERSHIP ASSETS—VALIDITY.

1. Notes made by a firm were indorsed by the wife of one of its members, a resident of New Jersey, who also gave a mortgage of her separate estate to secure them. Another of the members, who resided in New York, and to whom the notes and mortgage were given to be discounted in New York to procure funds for the partnership, fraudulently delivered the notes and mortgage to plaintiffs, who resided in New York, as security for a pre-existing debt for which he was liable. *Held*, that the rights of the holder of the notes and mortgage are to be determined by the laws of New York.

2. A bill of sale of the stock in trade, given by two partners of a firm to a third partner, is valid between the parties, though no possession was taken under it, and it was probably executed to prevent creditors from seizing the goods under attachment as the property of one of the members of the firm,—a nonresident debtor.

Bill by Martin Frank and others against Alida B. Morehead and others for foreclosure of a mortgage securing notes. Cross bill by defendant for cancellation of the mortgage and notes. Held for further hearing.

Mr. Bradner and Bradford Semble, for complainants. Adrain Riker, for defendant Mrs. Moorehead.

EMERY, V. C. Upon consideration of the pleadings and proofs in this case I have reached the following conclusions:

First. The notes secured by the mortgage of which foreclosure is sought by the bill were delivered to the defendant Jackman for the purpose of being discounted by him in New York, to procure funds for the business of W. G. Morehead & Co. and W. R. Morehead & Co., two firms, each composed of William R. Morehead, William G. Morehead, and the defendant Jackman. The mortgage given by the defendant Alida Morehead, wife of William R. Morehead, upon her separate estate, to secure the notes, was procured upon that understanding or agreement as to the purpose of the notes, and her indorsement of the notes was made upon that understanding and agreement. The allegation in the bill that the notes were given to secure indebtedness by William G. Morehead & Co. to the defendant Jackman is disproved.

Second. The defendant Jackman, after the receipt of the notes and mortgage, and without authority or consent of William G. Morehead, William R. Morehead, or of the indorser and mortgagor, Alida Morehead, and before the maturity of any of the notes, assigned the mortgage and notes to the complainants as collateral to secure the payment of notes, amounting to over $10,000, made by the A. H. Jackman Manufacturing Company, and indorsed by Jackman as joint maker, which had been given to complainants for goods sold to Jackman or to the company on Jackman's credit. These notes are unpaid. This delivery of the notes and mortgage took place in the city of New York, in the state of New York, where Jackman resided and the complainants carried on business, and where Mr. Frank, the complainant who transacted the business, also resided. Such delivery to the complainants for this purpose was a fraudulent misappropriation of the notes and mortgage. The claim made at the hearing that the firms of

Digitized by Google

William R. Morehead & Co. and William G. Morehead & Co. owed the Jackman Company several thousand dollars at the time of the assignment to complainants, and that, therefore, the assignment of the notes and mortgage to secure this debt of the Jackman Company was not a misappropriation,—even if it be admissible against the allegations of the bill that the debt of the firms was due to Jackman,—is not sustained by the evidence. The proofs show that, at the time of issuing these notes, the Jackman Company had already received notes from the firms for about the amount of their indebtedness, which notes were still outstanding, and not due, so that the notes now in question could not have been intended to be appropriated by the Jackman Company for payment of its debts. Besides, the direct evidence in the cause, and the course of dealings between these parties, negative any such intention.

Third. On the assignment of the mortgage and notes the complainants received them solely as security for a pre-existing debt or liability of the A. H. Jackman Company and of Jackman, and without parting with value or other credit, or relinquishing any previous security.

Fourth. Under the law of New York, which is applicable to the case, and which was proved as a fact in the cause, the complainants are not bona fide holders of the notes for a valuable consideration, and the notes and mortgage, and are therefore subject to the equities of the defendant Alida Morehead.

Upon these conclusions of fact the defendant Alida Morehead would seem to be entitled to a decree that the mortgage is void, and should be canceled, and that her indorsement on the notes should be canceled. But it also appears by the evidence that on July 11, 1893, William R. Morehead and William G. Morehead, the other partners in the firm, executed and delivered to Jackman, the remaining partner, a bill of sale for the stock in trade of the said firms, located in the store at Newark and in the store at Middletown, N. Y. Possession does not seem to have been taken under the bill of sale by Jackman, and the evidence makes it probable that it was executed to prevent creditors of the firm in New York from seizing the stock of goods under attachment as the property of William R. Morehead, a nonresident debtor. If this was the purpose, it would still be valid between themselves. On July 20, 1893, and at the time of receiving the notes and mortgage, the complainants received from Jackman an assignment of this bill of sale as collateral security for the notes of the Jackman Manufacturing Company, then in their hands. William R. Morehead, in August, 1893, declined to allow the complainants to take possession of the Newark store under the assignment of the bill of sale, unless they would deliver up the notes and mortgage; and on failing to reach an agreement for settlement, William R. Morehead and William G. Morehead, individually and as partners, executed a chattel mortgage upon the property in the Newark store to the defendant Alida Morehead, to secure her against liability on these notes and mortgage, and their cancellation and delivery to her upon demand. The affidavit to the mortgage stated that the whole $10,000 was due. The evidence in the cause leaves it uncertain whether or not the stock was sold out under her chattel mortgage. She is the only witness examined upon this subject, and her evidence leaves the matter in doubt. She says that she did not foreclose it, but also that she did sell it out. "I took the stores, and supposed I sold them." On redirect she says she does not know whether her mortgage was foreclosed, or some other chattel mortgage.

In this situation of the case, and before making any final decree, I desire to hear counsel further on these points: (1) Whether an inquiry should not be directed to ascertain the facts as to the dealings (if any) of Mrs. Morehead, as mortgagee, with the stock included in the chattel mortgage, and whether, as a condition of granting the relief of cancellation, she is to be held equitably accountable to the complainants for anything under the chattel mortgage. (2) If such inquiry is directed, whether any amendment of the answer to the cross bill or other pleadings is necessary in order to raise the question properly on the record (3) Whether decree for complainants in cross bill should extend further than cancellation and delivery of mortgage and cancellation of her indorsement on the notes. I will hear counsel any motion day on notice.

LANDIS et ux. v. ASHWORTH, Collector, et al. (two cases).

(Supreme Court of New Jersey. Feb. 21, 1895.)

SCHOOL DISTRICT—BOUNDARIES—DESIGNATION BY COUNTY SUPERINTENDENT—RIGHT OF WOMEN TO VOTE—SPECIAL LEGISLATION.

1. Under the statutes of this state, school districts are political organizations possessing the power of taxation.

2. Whether or not the action of the county school superintendent in defining the territorial boundaries of a school district will of itself, under our laws, constitute the district and its inhabitants a political organization, if the inhabitants of the district so defined assent to such organization, and assume the functions thereto appertaining, the corporate entity becomes complete.

3. The school laws are not rendered special or local or otherwise unconstitutional by the fact that under them a higher grade of education may be afforded to the children in one district than that offered to those in another.

4. By virtue of the act of April 8, 1887 (P. L. 1887, p. 149), women may vote at school meetings for all purposes except the election of officers.

(Syllabus by the Court.)

Digitized by Google

Certiorari at the prosecution of Charles Landis and Matilda T. Landis, respectively, against James P. Ashworth, collector, and the trustees of school district No. 44, Cumberland county, to review a school tax. Tax affirmed.

Argued November term, 1894, before MAGIE, LIPPINCOTT, and DIXON, JJ.

Chas. R. Landis, in pro. per. R. P. Fuller, for defendants.

DIXON, J. This certiorari brings up for review a tax levied in 1893 against the prosecutor for school purposes in school district No. 44 of Cumberland county. The tax is assailed upon the ground that a school district is not a political division of the state possessing powers of local government, and therefore, under the decision in Baldwin v. Fuller, 39 N. J. Law, 576, 40 N. J. Law, 615, taxes for public purposes cannot be levied exclusively upon the persons and property within it. This contention seems to us not well founded. School districts are formed for the purpose of aiding in the exercise of that governmental function which relates to the education of children, and to that end the legal voters of each district are intrusted with specified powers of local government, and the trustees whom they elect are made a body corporate to represent the district and its inhabitants. These characteristics mark them as political organizations. Lydecker v. Englewood Tp., 41 N. J. Law, 154. They were so regarded in State v. Deshler, 25 N. J. Law, 177, where Mr. Justice Elmer said, "School districts are only smaller municipalities, and their officers are public officers." It is also urged that district No. 44 has no legal existence, because its boundaries were defined, not by the legislature itself, but by the school superintendent of Cumberland county. There is in our constitution no express prohibition against the delegation by the legislature of its power to form political organizations in the state, except that which forbids the exercise of legislative power by any person belonging to or constituting the executive or judicial department of the government. We need not now consider whether such a prohibition is to any extent implied; for it seems clear that the legislature may permit the inhabitants of a defined territory to accept or reject such an organization for themselves (President, etc., of City of Paterson v. Society for Establishing Useful Manufactures, 24 N. J. Law, 385), and that by such acceptance under legislative sanction the corporate entity becomes complete. The evidence shows that school district No. 44 was defined in the year 1872 in accordance with the statute then in force, and from that time to the present the inhabitants of the district, and the trustees and officers selected by them, have constantly exercised the power granted by law to such bodies. Moreover, in numerous statutes passed since that time the legislature has recognized the corporate character of school districts formed in the same way, and thus, by ratification, has established what it might originally have ordained. Under these circumstances, the legality of the district's incorporation is now beyond question.

The statutes upon which the tax under review depends are likewise impugned as being opposed to the constitutional amendments adopted in 1875, which enjoined upon the legislature the duty of providing for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the state between the ages of 5 and 18 years, and forbade the passing of private, special, and local laws providing for the management and support of free public schools. The prosecutor insists that the laws delegating to each school district the power of determining for itself what amount, beyond the state appropriation, shall be raised by tax therein for the support of public schools in the district, and the power of building schoolhouses and employing teachers, result in affording different degrees of instruction to the children in different districts, while it is the duty of the legislature to see that the same facilities for education are furnished to every child in the state. Hence, it is argued, the laws are special and local. That the generality of a statute is not to be tested by the uniformity of the results flowing from the exercise of the powers which it confers, provided the same powers are bestowed upon all political bodies of the same class, was distinctly decided in Cleveland's Case, 52 N. J. Law, 188, 19 Atl. 7. The school laws, under which this tax was levied, come within the range of the decision. Nor can I think that the constitution requires the legislature to provide the same means of instruction for every child in the state. A scheme to accomplish that result would compel either the abandonment of all public schools designed for the higher education of youth, or the establishment of such schools in every section of the state within reach of daily attendance by all the children there residing. Neither of these consequences was contemplated by the amendment of 1875. Its purpose was to impose on the legislature a duty of providing for a thorough and efficient system of free schools, capable of affording to every child such instruction as is necessary to fit it for the ordinary duties of citizenship; and such provision our school laws would make, if properly executed, with the view of securing the common rights of all, before tendering peculiar advantages to any. But beyond this constitutional obligation, there still exists the power of the legislature to provide, either directly or indirectly, in its discretion, for the further instruction of youth in such branches of learning as, though not essential, are yet conducive to the public service. On this power, I think, rest the laws under which special opportunities for education at public expense are enjoyed.

Digitized by Google

Lastly, the tax is said to be illegal, because women voted at the school meeting by which its amount was determined. The statute of April 8, 1887 (P. L. 1887, p. 149), expressly gives to women the right to vote at any school meeting in any district wherein they may reside, provided they be citizens of the United States, of the age of 21 years, and have resided in the state 1 year and in the county 5 months. Because of the clause in our constitution which limits to male citizens the right of voting for officers, this statute cannot have effect to the full purport of its terms; but I see no good reason for denying to it whatever force is consistent with the constitutional provision. We should assume that the legislature had the constitution in mind when it passed the act, and intended only such an enactment as it was competent to make. We think women can lawfully vote at school meetings for all purposes except the election of officers. The tax is affirmed, with costs.

EDISON UNITED PHONOGRAPH CO. v. STATE BOARD OF ASSESSORS.

(Supreme Court of New Jersey. Feb. 21, 1895.)

TAXATION OF CORPORATION—MANUFACTURING BUSINESS IN STATE.

On proof that the capital stock of a manufacturing company was invested in purchasing the right to manufacture a patented article in New Jersey, in Great Britain, in France, in Germany, in Austria, and in other countries, for sale and use only beyond the limits of the United States and Canada, and that the only manufacturing actually carried on under the right is conducted by another company in New Jersey, it will not be inferred that one-half of the capital stock is invested in manufacturing carried on within this state.

(Syllabus by the Court.)

Certiorari at the prosecution of the Edison United Phonograph Company against the state board of assessors to review and set aside taxes for 1891 and 1892. Taxes affirmed.

Argued November term, 1894, before LIPPINCOTT and DIXON, JJ.

C. Parker, for prosecutor. W. Y. Johnson, for assessors.

DIXON, J. The only reason formally assigned and the only argument presented by counsel for setting aside the taxes assessed in 1891 and 1892 against the prosecutor, under the corporation tax act as amended March 16, 1891 (P. L. 1891, p. 150) and March 17, 1892 (P. L. p. 136), are that the proviso of the statute exempts it as a manufacturing corporation having 50 per centum of its outstanding capital stock invested in manufacturing carried on within this state. The counsel for the prosecutor regards the matter as decided by the opinion of this court in State ex rel. North American Phonograph Co. v. State Board of Assessors, 54 N. J. Law, 430, 24 Atl. 507. But this view is erroneous. Conceding that, according to what was there said, the present prosecutor must be deemed "a manufacturing company carrying on business within this state" because its relations with the Edison Phonograph Works are similar to those existing between the corporation just named and the North American Phonograph Company, it still remains to be determined whether the prosecutor had, at the date of these assessments, 50 per centum of its outstanding capital stock invested in manufacturing carried on within this state. As the exemption claimed depends upon the proviso of a statute which, but for the proviso, would reach the prosecutor, the burden rests on the prosecutor to show itself to be within the proviso.

According to the evidence laid before us, the prosecutor's capital stock amounted to $1,000,000, of which, at the times when these taxes were levied, $999,000 had been invested in patent rights purchased from Thomas A. Edison and the International Graphophone Company. Under these patent rights, the Edison Phonograph Works was engaged, by contract of March 11, 1890, with the prosecutor, in manufacturing phonographs and other speaking machines for the prosecutor at the factory of the "Works" in Orange, N. J.; but no part of the prosecutor's capital was invested in that factory or its operation, except as it was invested in the patent rights under which the speaking machines were made, and except that some tools, belonging to the prosecutor and valued at $8,413.10, were used by the "Works" in the factory. Evidently, then, the principal question is as to the amount which the prosecutor had invested in the right which was necessary for the manufacture in New Jersey. To that extent, and to that extent only (outside of the tools before mentioned), can it be fairly said that the prosecutor's capital is invested in manufacturing carried on within New Jersey. So far as it was used in acquiring the right to manufacture elsewhere, it was not invested in manufacturing within this state. The testimony does not show very plainly what rights they were which the prosecutor acquired for its investment of $999,000; but the fact seems to be that those rights included the right to manufacture speaking machines in New Jersey, in Great Britain, in France, in Germany, in Austria, and in some other countries, and to sell and use such machines only in foreign lands beyond the limits of the United States and Canada. This being the scope of the rights purchased, is it reasonable to infer that one-half of the price was paid for the right to manufacture the machines in New Jersey for sale and use outside of the United States and Canada? The case affords no special data for answering this inquiry, and we are left to general inference merely. In view of the fact that all the instruments made in New

Digitized by Google

Jersey must be transported great distances to foreign lands before they can be sold or used, it would seem that the right to manufacture them here must be of slight value compared with the value of the right to manufacture them in or near to the countries where the market must be found. For example, the right to make them in Great Britain, for sale and use in Great Britain and in continental Europe, is probably more valuable than the right to make them in New Jersey for the same market. And it is reasonable to believe that this is true likewise of the right to manufacture in France and in Germany. Since all these rights were acquired by the prosecutor's purchase, we are not at liberty to infer that the major part of the price was paid for the least valuable of the privileges. Our conclusion is that the prosecutor has not shown that one-half of its capital stock is invested in manufacturing within this state, and therefore has not established its right to exemption from taxation. No claim for deduction under the statute is made, either in the reasons filed or in the brief of counsel, and hence that matter need not be considered. The taxes are affirmed, with costs.

STATE (UNITED NEW JERSEY RAILROAD & CANAL CO. et al., Prosecutors) v. MAYOR, ETC., OF JERSEY CITY et al.

(Supreme Court of New Jersey. Feb. 25, 1895.)

EXEMPTIONS FROM GENERAL TAXATION—RAILROAD PROPERTY.

1. The lands known as "Harsimus Cove," in Jersey City, described in an act entitled "An act to enable the United Railroad and Canal Companies to increase their terminal facilities in Jersey City," passed March 30, 1868 (P. L. 1868, p. 551), and by virtue of said act acquired by said companies, can only be subjected to taxation to the extent prescribed in such act, unless the same be used for other than railroad, canal, depot, transshipping, or landing purposes; and, if the city authorities of Jersey City desire to subject it to general taxation for local and municipal purposes, the burden rests upon them to show that it is used for other purposes than those named in the act.

2. So long as it continues incident to and reasonably necessary or convenient for such purposes as those to which the act of the legislature devoted it, and not actually used for other purposes, the exemption from general taxation remains.

(Syllabus by the Court.)

Certiorari at the prosecution of the United New Jersey Railroad & Canal Company and the Pennsylvania Railroad Company against the mayor and aldermen of Jersey City and another to review the proceedings of the commissioners of adjustment of said city. Decree for prosecutors.

Argued at the November term, 1894, before DIXON, MAGIE, and LIPPINCOTT, JJ.

James V. Vredenburgh, for prosecutors. John A. Blair and Spencer Weart, for defendants.

LIPPINCOTT, J. This writ of certiorari brings up for review the proceedings of the commissioners of adjustment of Jersey City, appointed under an act entitled "An act concerning the settlement and collection of arrearages of unpaid taxes, assessments and water rates, or water rents, in cities of this state, and imposing and levying a tax, assessment and lien in lieu and instead of such arrearages, and to enforce the payment thereof, and to provide for the sale of lands subjected to further taxation and assessment," approved March 30, 1886 (P. L. 1886, p. 149), by which the commissioners adjusted and imposed a local tax on certain lots of land belonging to the prosecutors, situate in the city of Jersey City.

The questions raised and discussed involve the legality of the original imposition of the tax by the city authorities, as well as the validity of the proceedings of the commissioners in adjusting the same. These lands belonging to the prosecutors are known as lots Nos. 9 to 14, inclusive, in Block 177, and also lot B, Block 15, upon the city tax assessment map. The lots 9 to 14 in Block 177 have been assessed for city, municipal, and county taxes for the years 1868 and 1869 for the sum of $249.35, and lot B, Block 15, has been assessed for the same purposes for the years 1884 to 1892, inclusive, for the sum of $11,176.96; and the adjustment was made for these sums on the basis of the original taxation, without any interest added. These lots of land all lie within the boundaries of the Harsimus Cove tract or grant of land, as acquired by the prosecutors from the state by virtue of the provisions of an act of the legislature entitled, "An act to enable the United Railroad and Canal Companies to increase their terminal facilities at Jersey City," passed March 30, 1868 (P. L. 1868, p. 551). By the preamble of this act the tract is recited as having been acquired by the prosecutors "for the accommodation of the business of the companies, more room for depots, storage and other railroad and canal purposes," and by the first section of the act it is provided that the acquisition is "requisite and necessary for the transaction of their business." By the second section of the act it is provided that "said United Companies, their officers and agents shall have supervision and control of the wharves, piers, canals, buildings and other improvements which they may erect on the said property and may charge such wharfage and other rates for the use thereof as the said directors may deem reasonable, or as may be agreed upon with the parties desiring to use the same; and that all acts and parts of acts heretofore passed which limit the amount of land that may be held by the

Digitized by Google

United Companies, or either of them, for the purposes of their charters respectively, or which subject such lands, if exceeding a certain quantity to any other tax than that which is imposed upon the said companies respectively by their respective charters or acts of incorporation, are hereby repealed, provided however, that such parts of said property, and the improvements to be made thereon as shall be used for other than railroad, canal, depot, transhipping or landing purposes (but no other portions thereof) shall be subject to local and municipal taxation." Under this act, whether these lands be taxable for the local and municipal purposes of Jersey City depends upon whether they are used for other than railroad, canal, depot, transshipping, or landing purposes, for, if only so used, then they are clearly exempt from such taxation. Now, as to a portion of these lands, that is, the lots 9 to 14 in Block 177, there appears to exist no question requiring more than mere formal determination. It does not clearly appear in the testimony in this case to what uses these lots are devoted, but at the outset it is conceded by the city that the taxes on these lots for the years 1868 and 1869 have heretofore been the subject of judicial inquiry in this court, and that their continuance on the tax records of the city has been an error, and their consideration by the commissioners of adjustment an inadvertence growing out of a mistaken certification to them of these taxes as arrearages by the city collector. At the November term, 1876, a decision of this court was rendered that these lots were not used during the years 1868 and 1869 for other than railroad, canal, depot, transshipping, or landing purposes, and, therefore, for those years, they were free from taxation, and that by rule of this court of that term these taxes were set aside. Therefore there were no arrearages for those years, and none for the commissioners to adjust, and the act to which reference is made, under which they were appointed, conferred no power upon them in relation to these taxes. It gave them no power to levy taxes or to make original assessments. In re Commissioners of Elizabeth, 49 N. J. Law, 497, 10 Atl. 863. The action of the commissioners as to lot B, in Block 15, was based on the fact that there appeared upon the tax-record book of the city collector an arrearage of taxes thereon for the years 1884 to 1892, inclusive, amounting to the sum of $11,175.96. This lot B in question by the evidence mostly remains land under water, as it existed at the date of conveyance by the state to the United Companies. A small portion of the westerly end thereof is above high tide, and on that portion the Erie Railroad Company, by permission of the prosecutors, has a track laid for the purpose of transshipping cattle from the trains of cars through the cattle pens into an abattoir established to the south of this property by the Central Stock Yard & Transit Company. The abattoir of this company in question does not stand upon lot B, the property in question, but upon other property leased from the United Companies, and upon which local taxes are assessed and paid. The abattoir property stands about 10 feet south of the southerly line of the lot B in question here. The portion of lot B next to the abattoir is used to some extent for the purposes of transshipment of cattle to boats, both alive and dead, which are delivered from the cars of the prosecutors into the pens connected with the abattoir. The whole plot is used for no other than railroad, canal, depot, transshipment, and landing purposes, and, perhaps, not throughout its entire extent for these purposes, but for no other. Unless it be taxable under the act entitled "An act for the taxation of railroad and canal property," passed April 10, 1884 (P. L. 1884, p. 142), this property is exempt from any local taxation, and is taxable only by the state board of assessors, under the 18th section of the charter of the New Jersey Railroad & Transportation Company, which was incorporated by act of March 7, 1832 (P. L. 1832, p. 96), which provides for a special tax to be paid into the state treasury yearly and every year. In the case of the United Railroad & Canal Co. v. Commissioners of Railroad Taxation, 37 N. J. Law, 243, the act of 1868 was construed, and in that case it was held that the conveyance by the state of the lands described in the act was not a grant of a franchise, nor was it a charter within the sixth section of the general corporation act. The thing granted was held to be the premises described, with all the rights and privileges annexed, and that the exemption from general taxation was one of the rights which gave value to the thing or estate granted; that by the operation of the grant this right annexed to the land passed as an appurtenance to the subject granted; it is a part of the thing granted, and cannot be modified or repealed without the consent of the grantee. In other words, so far as this property is concerned, there exists in behalf of the grant an irrepealable contract of exemption on the subject of taxation. These lands, therefore, can only be subjected to taxation in the manner and to the extent prescribed in the act of 1868, which is in all respects a public act, of the provisions of which the local taxing authorities must take notice, and if, under this grant of 1868, any other than the taxation therein provided is to be sustained, the burden is upon the taxing authorities to show that it is used for other than the purposes specified in this act. In this case the evidence is entirely wanting in probative force in the direction of other uses; the evidence reveals that it has not at any time been used for any other purposes. It is urged that, because it is used by the Central Stock Yards & Transit Company for the transship-

Digitized by Google

ment of cattle received, as consignee of the cattle transported to this abattoir by the cars of the prosecutors, therefore the use provided by the act has been abandoned. This conclusion is not sustained, but, even if it was, it could have no force, for its use is one within the limits of the grant; a use of the character provided for the benefit, perhaps, of the consignee, but in the business of the railroad, a part of which is the delivery of its freight to its patrons. But this subject need not be followed. The rule laid down in this court in the case of the Pennsylvania R. Co. v. Jersey City, 49 N. J. Law, 540, 9 Atl. 782, affirmed in 51 N. J. Law, 564, 20 Atl. 60, disposes of this objection. In that case a grain elevator was constructed upon the lands granted by this same act of 1868, for the purpose of transshipment and relieving the cars of their lading, and if the grain passing through the elevator was not called for by the consignee, and it was retained, a charge was made by the railroad company for storage. The insistment was that this was a use other than those mentioned in the act. The court, citing with approval the case of Transportation Co. v. Hancock, 35 N. J. Law, 537, said: "If, however, any doubt existed as to the meaning of the words 'for railroad purposes' as used in the exemption clause of the act of 1868, it would be removed by reference to the preamble of the act. The preamble recites 'that the United Companies require for the accommodation of their business more room for depot, storage, and other railroad and canal purposes at Jersey City.'" "Thus the legislature expressly recognized the appropriation of the land to storage as a use of it for railroad purposes. At the time of the passage of this act the United Companies had constructed their road to Jersey City. It was not for the construction of the road that the grant was made, but it was, as expressly set forth, to give greater facilities for the accommodation of the business of the road. Room for depots and room for storage were classed together as necessary railroad uses." State v. Mayor, etc., of Jersey City, 41 N. J. Law, 471; State v. Binninger, 42 N. J. Law, 528.

It is further contended by the defendants that this property is subject to taxation by the local authorities of Jersey City, for local municipal purposes, under the act of 1884 (P. L. 1884, p. 142), to which reference has already been made. This can only be on the ground that, if the land is not actually used for railroad or canal purposes, it shall be assessed. But the difficulty with this contention is that the act of 1868 exempts it from local taxation unless it be used for other than the purposes described by the act. The act of 1868 has been held to be a contract between the state and the United Companies by which, for a stipulated price, lands were conveyed to the companies upon certain terms and conditions therein specified. The state has accepted the payment of the full consideration from its grantee, and is not now in a position either to repudiate, or to permit any of its political subdivisions to repudiate, any of the terms of the contract which inures to the benefit of the grantee. Pennsylvania R. Co. v. Jersey City, 49 N. J. 545, 9 Atl. 782. Aside from the question whether the land is not now used for railroad purposes, which I think the evidence fairly establishes, yet, if held vacant, it is still within the exemption of the terms of the grant, which the state is not by subsequent legislation at liberty to extinguish. The learned chancellor, in the case of United New Jersey, etc., Co. v. City of Jersey City, in the court of errors and appeals of this state, 55 N. J. Law, 129–131, 26 Atl. 135, said: "It is the land which the legislature in its wisdom has deemed to be reasonably necessary to answer the ordinary and emergent uses of a railway and insure the continued and convenient and safe accommodation of the public. Its dimensions are limited by the law which devotes it to a special purpose." It being within the legislative grant and the exemption therein provided, it cannot be said that because it is not actually devoted to the construction, maintenance, and management of the railroad it is used for other purposes, or is not used for railroad purposes, and thus become the subject of local taxation. So long as it remains incident to and reasonably necessary or convenient for such purposes, and not actually devoted to other purposes, the exemption remains.

It is also contended that the prosecutors are in laches, and therefore have lost their remedy. The commissioners of adjustment took cognizance of these alleged matters of arrearage on October 29, 1888, and held the same under consideration until November, 1893, at which time they made and filed their report. This report was not confirmed until December 13, 1893. I do not think the prosecutors were in laches in not obtaining this writ pending the consideration of these taxes by the commissioners. The prosecutors had the right to assume that the judgment of the commissioners would be in their favor. The certiorari was sued out on March 17, 1894, which was about three months after the confirmation of the report, and before any further proceedings were taken by the city in the enforcement of the taxes. The conclusion is that the prosecutors were in no laches.

The taxes brought up by the writ, with the proceedings of the commissioners of adjustment relating thereto, may be set aside with costs.

Digitized by Google

STATE (STAFFORD, Prosecutor) v. MILLS et al.

(Supreme Court of New Jersey. Feb. 25, 1895.)

JUDGMENT OF JUSTICE—CERTIORARI TO REVIEW—AFFIDAVITS AS TO FACTS—ATTACHMENT—NONRESIDENT DEBTOR—WHAT CONSTITUTES.

1. On a certiorari to review the determination of a justice of the peace, on a motion to quash an attachment against a nonresident debtor, on the ground that the debtor was a resident, if the justice cannot certify the facts upon which his judgment on the motion was founded, a rule may be granted to take affidavits of the facts upon which the determination of the justice was made, and of the facts before him at that time, which affidavits can be used at the argument of the certiorari to review the determination of the justice in the matter.

2. One may be an absconding debtor, and yet may have a residence in this state, which will prevent an attachment issuing against him as a nonresident debtor. Mere inconvenience in the service of summons or other process furnishes no reason why an attachment should issue against one as a nonresident debtor. Temporary absences for business or pleasure is not an abandonment of one's abode or place of residence.

3. The time when the writ of attachment is issued and served is the time as of which the residence of the debtor is material.

(Syllabus by the Court.)

Certiorari, at the prosecution of Charles F. Stafford, against William S. Mills, Alexander V. Manning and others, to review the action of a justice of the peace in refusing to quash an attachment.

Argued at November term, 1894, before DIXON, MAGIE, and LIPPINCOTT, JJ.

Stockwell & Satterthwait, for prosecutor.
Edward M. Evans, for defendants.

LIPPINCOTT, J. This writ brings up for review a judgment of William S. Mills, Esq., a justice of the peace in and for the county of Mercer, on a motion to quash a writ of attachment issued by him in a suit wherein the prosecutor was the defendant, and Alexander V. Manning and others were plaintiffs. The affidavit upon which the writ was issued stated that Stafford was a nonresident of the state of New Jersey. After the attachment was issued, an affidavit by Stafford was filed with the justice that, at the time of the issuing of the attachment, he was a resident of the state, and motion was made on that ground to quash the writ. The motion was heard by the justice, and he refused it. The certiorari is to review his determination. He has not certified the facts upon which he based his decision, but he certifies that he is not clear as to all the facts found by him on the motion to quash, not having made any written memoranda thereof. According to proper practice, a rule was granted by this court to take affidavits of the facts upon which the determination of the justice was made, and of the facts before him at that time, to be used upon the argument of the certiorari; and these affidavits are now before us. After the denial of the motion, the justice proceeded to try the cause upon the merits, without any appearance of the defendant, as provided by the statute, and gave judgment against him, from which judgment an appeal was taken to the district court of the city of Trenton, where the appeal was dismissed for want of jurisdiction, and the cause remitted to the justice.

It is now clear that, if an appeal from the determination of a justice be improperly taken, the party aggrieved may still have his remedy by certiorari, after dismissal of the appeal, if the appeal be dismissed for want of jurisdiction. Leeds v. Mueller, 51 N. J. Law, 467, 17 Atl. 954. And, in a case where an appeal is taken, a dismissal of it does not deprive the prosecutor of his remedy by certiorari, when that remedy exists. Manufacturing Co. v. Carty, 53 N. J. Law, 336, 21 Atl. 851. The determination of the trial of fact by a justice, upon a motion to quash a writ of attachment, pursuant to section 69 of the attachment act, is reviewable on certiorari. The practice is clearly laid down by Mr. Justice Magie in Bisbee v. Bowden, 55 N. J. Law, 69, 25 Atl. 855.

The testimony taken on the rule in this cause shows clearly that the prosecutor was a resident of the city of Trenton at the time the attachment was issued, and had been such resident for over two years previous. He had been keeping house in the city of Trenton, on Montgomery Place and Lamberton street. He had voted at the previous election in the city of Trenton and at other elections before that one. About the time this attachment was issued, he failed in or gave up his business of keeping a billiard saloon in the city of Trenton, broke up housekeeping in Lamberton street, and went to his brother's house, at 128 Center street, in Trenton, to live with him there, aiding and assisting his brother in his business; and he has continued to live there ever since. These facts are practically undisputed. Much evidence has been taken not pertinent at all to the question involved in this case, but with perhaps much more pertinency if the attachment had been issued against him as an absconding debtor. In fact, the evidence was taken as well to apply to two such cases now under advisement in this court.

When an attachment is issued against one alleged to be a nonresident debtor, the fact of nonresidence must be established, or the attachment will be set aside. One may be an absconding debtor, and yet may have a residence in the state, which will prevent an attachment issuing against him as a nonresident debtor. Mere inconvenience in the service of summons or other process furnishes no reason why an attachment should issue against one as a nonresident debtor. Temporary absences for business or pleasure is not an abandonment of one's abode or place of residence. The rule is that an attachment will not lie against the debtor as

Digitized by Google

a nonresident where he is actually a resident of the state, although the affidavit be made in good faith. Clark v. Likens, 26 N. J. Law, 307; Bisbee v. Bowden, 55 N. J. Law, 69, 25 Atl. 855, and cases cited. It was alleged in the evidence, and with much show of truth, that he was preparing to send his goods from his house to Philadelphia. He had taken steps in that direction which quite clearly indicated that purpose, but it did not appear that he intended to change his residence; and, even if this were so, it would give no right of attachment against him as a nonresident debtor. Kugler v. Shreve, 28 N. J. Law, 129–134. It was proved that his wife lived in Philadelphia, and kept a boarding house there, as her own business, and that he visited her there often, and she often visited him at his house in Trenton. The fact of the wife's residence in Philadelphia could not affect the character of his residence elsewhere. Baldwin v. Flagg, 43 N. J. Law, 498. If, at the time of the issuing this writ of attachment, he had the intention of removing and changing his residence to another state, that fact would not be sufficient to sustain the writ. Kugler v. Shreve, 28 N. J. Law, 129. The time when the writ was issued and served is the time as of which the residence of the debtor is material. Baldwin v. Flagg, 43 N. J. Law, 498. His residence being clearly within this state, it continued until a new one was gained elsewhere. Bonnel v. Dunn, 28 N. J. Law, 155. At the time of the issuing and service of this writ of attachment, the defendant Stafford was a resident of this state, and therefore the writ must be quashed, with costs against the defendants Alexander V. Manning, Joseph M. Manning, and John W. Manning, including the one-third of the costs of taking and printing the testimony.

BULLOCK v. BULLOCK.

(Supreme Court of New Jersey. March 31, 1895.)

FOREIGN DECREE FOR ALIMONY—ACTION THEREON.

An action at law may be maintained in this state upon a decree for alimony made in New York if the New York court had jurisdiction of the subject-matter and of the person of the defendant.

(Syllabus by the Court.)

Action by Anna E. Bullock against Thomas O. Bullock. Demurrer to complaint overruled.

Argued June term, 1894, before BEASLEY, C. J., and VAN SYCKEL and LIPPINCOTT, JJ.

E. Q. Keasbey, for plaintiff. James Buchanan, for defendant.

VAN SYCKEL, J. The declaration in this case is founded upon a decree of the supreme court of New York directing the payment of alimony by the defendant to the plaintiff at $100 per month. The declaration alleges that there is due upon said decree the sum of $1,600, and that the defendant promised to pay the amount so due. The declaration further avers that the supreme court of New York is a court of general jurisdiction, and that it had jurisdiction over the parties and the subject-matter of the suit, the said defendant having been duly served with process, and having appeared and answered the bill of complaint in that court. To this declaration the defendant filed a general demurrer.

In Van Buskirk v. Mulock, 18 N. J. Law, 184, Chief Justice Hornblower held that at the common law an action of debt will not lie on a decree of a court of equity for the payment of money. In the recent case of Insurance Co. v. Newton, 50 N. J. Law, 571, 14 Atl. 756, this court discussed that question, taking the contrary view, and citing a number of cases in support of it. In Evans v. Tatem, 9 Serg. & R. 252, Chief Justice Tighlman gave a foreign decree in equity the conclusive force of a judgment between the parties to a suit on it in Pennsylvania. The same rule prevails in the courts of Massachusetts and New York. Howard v. Howard, 15 Mass. 196; Rigney v. Rigney, 127 N. Y. 408, 28 N. E. 405. The question as to the conclusive effect of the decree is no longer an open one in this state. In the recent case of Bullock v. Bullock, 30 Atl. 676, the court of errors and appeals, while refusing to establish a decree for alimony made in New York as a lien upon lands in New Jersey, declared "that the decree in New York conclusively determined the status of the parties to that action, and that the marital relation previously existing between them had been absolutely dissolved. If, by the direction to pay alimony, an indebtedness arises from time to time, as such payments become due, an action at law will lie thereon, and the decree will furnish conclusive evidence of such indebtedness." The allegations in the declaration show a sufficient legal basis for the plaintiff's action, and the demurrer should be overruled, with costs.

CHASE v. CARYL.

(Supreme Court of New Jersey. April 3, 1895.)

DOCUMENTARY EVIDENCE—RECORD OF MORTGAGE IN FOREIGN STATE—EXEMPLIFICATION—CUMULATIVE EVIDENCE—HARMLESS ERROR.

1. Under the statute of the state of New York entitled "Of the proof and recording of conveyances, and the cancellation of mortgages" (1 Rev. St. N. Y. c. 3, marg. p. 756), which expressly classes mortgages on real estate, as "conveyances of real estate," and includes them within that term; and which provides also that, when duly acknowledged and proved, they may be read in evidence without any further proof; and which also provides that the record thereof, when duly recorded, in accordance with the statutes of that state, in the office of the clerk or register of the county wherein the lands lie, or a transcript

Digitized by Google

thereof, duly certified, may be read in evidence with like force and effect as the original,—the record of a mortgage on real estate is a record, within the scope and meaning of the term "records," as used in article 4, § 1, of the constitution of the United States; and it can be exemplified under the act of congress of March 27, 1804, and read and used in evidence in the courts of this state with the same faith and credit, and with such force and effect, as is given the record by the statute of the state of New York.

2. Where evidence cumulative in its character is erroneously admitted by a trial judge in the progress of a trial, on a rule to show cause, upon review, the verdict will not be set aside, if the facts erroneously admitted are otherwise legally proved by competent evidence, and there is otherwise sufficient legal evidence to warrant the jury in finding a verdict.

3. Quaere: Is a deposition of a party in the trial of a suit in another state, and which is incorporated in the record of that suit, competent to be read in evidence in this state, in an action between the same parties, as a part of the exemplified record of such suit in the other state?

(Syllabus by the Court.)

Action by Hattie C. Chase against Julius H. Caryl, executor of Nelson Chase, deceased. Verdict for defendant. On rule to show cause why new trial should not be granted. Rule discharged.

Argued February term, 1894, before BEASLEY, C. J., and MAGIE, GARRISON, and LIPPINCOTT, JJ.

Gilbert Collins, for plaintiff. Edward Q. Keasbey, for defendant.

LIPPINCOTT, J. This suit was on a bond, in the penal sum of $20,000, given by Nelson H. Chase to William Dunning, dated December 1, 1877, conditioned for the payment of the sum of $10,000, in six months from the date thereof, with interest thereon from date. The bond was assigned by William Dunning to his daughter, Hattie E. Chase, on January 9, 1891, and this suit was commenced by her the next day. The assignment contained a covenant that the whole of the principal sum of $10,000 was due, with interest thereon from the date of the bond, and this was the amount claimed in the bill of particulars annexed to the declaration. The defendant pleaded non est factum and payment. The suit was by the plaintiff against the executors of her deceased husband, Nelson H. Chase; and the defense was that the bond, with an accompanying mortgage, of the same date, on real estate in the city of New York, had been executed by Nelson H. Chase to Dunning as collateral security to indemnify Dunning against liability for his indorsement of two certain promissory notes, of $2,000 each, given by Nelson H. Chase, and that such notes had, since the execution of the bond and mortgage, been paid. It was contended on the trial that both the bond and mortgage were given for this purpose; that the notes had been paid, satisfied, and surrendered, and that the mortgage had been canceled; and that the bond had thus become satisfied. The evidence reveals the undisputed fact that the mortgage which, it is contended, accompanied the bond, has been satisfied, canceled, and discharged of record. It is also beyond dispute, upon the facts proved as well as conceded in the case, that the promissory notes given by Chase and others, and upon which Dunning was an indorser, and to secure whose indorsement, it is contended, the mortgage was executed, have been paid and satisfied. There is no necessity for a review of the evidence upon these points, for these conclusions are undisputed. The plaintiff distinctly contends that the bond and accompanying mortgage, if there existed any accompanying mortgage, were not executed as such collateral security, but, even if so, such security was only a part of the consideration thereof; that there were other considerations, valuable and sufficient, upon which to base a recovery for the difference between the amount of the promissory notes and the amount of the bond; and that the cancellation and discharge of the mortgage upon the notes being paid cannot affect her right of recovery of this difference. Besides, the plaintiff denies that the mortgage accompanied the bond, and claims that the bond was for a consideration, entitling her to recovery thereon. Thus the issues tried between the parties to the bond were clearly defined. Upon these issues variant and disputed evidence was submitted to the jury by the trial judge. There was evidence, both positive and circumstantial, bearing upon these disputed contentions. The verdict of the jury was for the defendant.

It would appear to be useless to review the evidence. An examination of it clearly sustains, upon legal principles, the verdict of the jury upon the questions of fact submitted. Aside from the alleged errors in the admission of evidence produced on the part of the defendant, there can arise no complaint as to the instructions to the jury contained in the charge of the court. The question whether any mortgage accompanied the bond was clearly and distinctly left to the jury for its determination. So, also, was the question of the consideration of the bond, and the purpose for which the bond and mortgage, or either of them, were executed. So, too, was the question, if it was found that the mortgage accompanied the bond, whether the consideration was other than to secure Dunning against liability upon his indorsements. Every phase of fact upon which a liability of the defendant might arise was left to the determination of the jury, without any indication on the part of the judge as to the direction in which their finding should be made. Upon the instructions the jury were left to determine the consideration of the bond upon which suit was brought, and to find a verdict either for the plaintiff or for the defendant. No error of law whatever has been perceived in these instructions. It will be noted that no interest whatever was ever paid on this bond, or any sum ever paid on account of the principal of this bond, if the contention of the plaintiff be true, and suit was not commenced thereon un-

Digitized by Google

til about 13 years after it was due, and not till after Chase, the obligor, was dead. The trial justice notes these facts, in his charge to the jury, as facts, along with the other evidence, for the jury to consider in determining whether the bond, at the time the suit was commenced, represented a real obligation. This is alleged as error. It was entirely proper for him to submit to the jury the force of these facts, along with the other evidence in the case. These facts did not debar recovery, and the jury were so instructed; but the claim was a stale one, being prosecuted after an ample opportunity had been afforded to establish it during the lifetime of the obligor. The main reliance of the plaintiff to establish liability was the evidence of Mr. Dunning, who had, undoubtedly, the day before suit was brought, assigned this bond to his daughter, the plaintiff, in order that he might be a competent witness. And, besides, the assignment contained a covenant that the whole amount—both principal and interest—was due thereon, and to that extent he was an interested witness; and it certainly was no error for the court to so instruct the jury, leaving, as was done, the weight, force, and effect of his evidence, and the facts noted, to the uninfluenced consideration of the jury. I cannot conclude that the charge, in this or in any other respect, brought to the attention of this court, misled the jury. Comment of a trial judge upon the facts, in order to illustrate and enforce the application of proper principles of law, if the facts are left to the jury to determine, and the comment or statement of facts is not such as to mislead the jury, does not constitute legal error. Therefore, the conclusion reached is that the trial court correctly instructed the jury.

The bond and the assignment thereof were produced by the plaintiff, and proved, and then the plaintiff rested. In order that the defendant make out the defense claimed, it was deemed necessary, at the outset, to prove the existence of the mortgage claimed to have accompanied the bond. The defendant proved, without objection, the statute of the state of New York in relation to the recording of conveyances of real estate, and mortgages thereon. 1 Rev. St. N. Y. c. 3, marg. p. 756,—an act entitled "Of the proof and recording of conveyances of real estate and the cancellation of mortgages." (Jan. 1, 1830.) This statute provides for the recording of conveyances of real estate, and mortgages thereon, in books in the offices of the county clerks in the several counties of the state (in New York county, the register's office), after being duly acknowledged by the parties executing them, in accordance with the statutes. The statute provides that the term "conveyances," as used in the statute, shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected, in law or equity, except last wills and testaments, leases for a term not exceeding three years, and executory contracts for the sale or purchase of land, and then provides, that "every conveyance acknowledged or proved, in the manner above prescribed, by any of the officers before named, may be read in evidence without further proof thereof, and shall be entitled to be recorded, * * *" and that "the record of a conveyance duly recorded, or a transcript thereof duly certified, may also be read in evidence with like force and effect as the original conveyance." 1 Rev. St. p. 759. The first section of article 4 of the constitution of the United States provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and congress may by general laws prescribe the manner in which such acts and proceedings shall be proved, and the effect thereof." Under the act of congress of May 26, 1790, such provision, in accordance with the constitution, was made, prescribing the manner in which such acts and proceedings should be proved respecting the records of the courts of the several states, but the act goes no further. Rev. St. U. S. par. 906. The act of March 27, 1804, goes further, and prescribes the mode of proof of records that are not the records of any court. It, in substance, declares that all records and exemplifications of books which may be kept in any public office in any state or territory of the United States, or of any county subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other state or territory, or in any such county, by the attestation of the keeper of said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which said office may be kept, or of the governor, or certain other officers, and that the said attestation is in due form, and by the proper officers. There is also a provision for the authentication by the county clerk of the commission and qualification of the justice. This act also declares that "the said records and exemplifications, so authenticated, shall have such faith and credit given them in every court and office within the United States, as they have by law or usage in the courts or offices of the state, territory or county as aforesaid from which they are taken."

As part of the evidence tending to prove the existence of the mortgage, alleged to have accompanied the bond, and the contents of the same, the defendant offered in evidence an exemplified copy of the mortgage, as recorded, in full, with the proper legal acknowledgments of execution indorsed thereon, in the register's office of the county of New York. This exemplification was admitted by the trial court, against the objec-

Digitized by Google

tion of the plaintiff, as proof going to the establishment of the existence of the mortgage; an exception was taken; and the question thus arises,—that is, whether this exemplified copy of this record was legal evidence in this state. This forms the only legal question worthy of serious discussion or adjudication in the cause, as to the admission of evidence. The record copy of the mortgage was exemplified in the manner prescribed by the statute, and no objection was taken to the form of the exemplification. This offer of the exemplified record copy of this mortgage was objected to on the ground that the constitutional provision cited and the act of 1804 do not apply to the "record" of a mortgage, and, even if admissible as such record, it affords no proof of the existence of the mortgage; that the most it could show was that such a mortgage had been recorded in New York. It will be observed that the statute of the state of New York provides that the record could be read in evidence with like force and effect as the original conveyance, and the conveyance, if acknowledged according to the New York statute, could be read in evidence without further proof thereof; and it is to be further observed that this mortgage was acknowledged in accordance with the New York statute. The question here presented is whether a copy of a mortgage duly executed and acknowledged or proved in accordance with the laws of the state of New York, and duly recorded in accordance with the statute thereof, and which copy of the record, when certified, can be read, without further proof, in evidence in that state, with like force as if the original was produced and proved, is a record which, when authenticated under the act of congress referred to, can be evidence in another state, in accordance with the provisions of the constitution requiring "full faith and credit" to be given in each state to the public records and judicial proceedings of every other state. This question cannot be intelligently determined without considering the object of statutes which required records of certain instruments to be made in public offices of the state, or the counties thereof. It would appear that there was some other and more important object than that of mere notice. I think this is well expressed in a single sentence by Chief Justice Gibson in the case of Brotherton v. Livingston, 8 Watts & S. 334, when he says, "The object of recording acts is not only to give notice, but to perpetuate the writing, and proof of its execution." Had notice been the only object, the common-law evidence of execution would not have been dispensed with, as it has, by the act of 1715 (this being a statute of Pennsylvania similar to the statute of the state of New York), which provided that an exemplification of a recorded deed should be allowed in all courts to be as good evidence as the original.

A review of some of the cases in which this and kindred questions have been discussed may not be without some profit. It has been held that a mere registry of a mortgage is not, as such, a record evidence of its recitals; but in Transportation Co. v. Suydam, 17 N. J. Law, 25–59, the distinction between a mere registry of a mortgage and the record of a deed was clearly enunciated. The registry of a mortgage, under the then existing registry statutes, was not evidence of the recitals of the mortgage, there being no provisions in the statutes at that time for recording mortgages in full, with acknowledgment and proof, as provided in the case of deeds. The statute of this state passed June 7, 1799, required that a deed of conveyance of lands, together with the acknowledgment of proofs, shall first be recorded, word for word, with all interlineations and words visibly written, or erasures, etc., and the record thereof is made evidence as available in law as if the original were produced and proved; but then it must appear by the record that the acknowledgment or proof is according to the statute. If otherwise, the entries by the clerk are unauthorized, and not evidence. If so recorded, then a copy of record is evidence of the terms, covenants, and conditions of the deed, and of the estate thereby created. But, without a provision of the statute making it so, the record of a mortgage would not be such evidence. And the registry of an abstract of a mortgage was not, under the statutes, such a record; and a copy of it could not be used as evidence of the contents of the mortgage, but only to show, if admissible at all, that an abstract of the mortgage was registered. And, therefore, this sort of record is not competent evidence to prove an indebtedness, or for any other purpose, except merely to show the fact that such a mortgage has been registered, as a ground for the legal inference of notice thereof to a purchaser or subsequent incumbrancer. At common law it was certainly, in itself, no evidence at all; and if it became necessary to prove the contents of a mortgage, except in connection with the question of notice, it could only be done on a common-law principle,—first by proof of loss or destruction of the original, and then by evidence of its contents. Den v. Gustin, 12 N. J. Law, 43; Transportation Co. v. Suydam, 17 N. J. Law, 25–60. The statute of the state of New Jersey now provides for the recording of a mortgage in full, and that a transcript of such record, duly certified, shall be received in evidence in any court of this state in the same manner and to the same effect as a record, or the transcript of a record, of a deed is received. Revision, p. 706, § 18. A certified copy of a deed, under our statute, is received in evidence, and is as good, effectual, and available in law, as if the original deed or conveyance were produced and proved.

Digitized by Google

Revision, p. 158, § 29. "A certified copy of an abstract of mortgage shall be received as secondary evidence in any court of this state, in the same manner as the record of deeds is now received, and shall be proof of the facts therein stated." Supp. Revision, p. 489, § 1. The record of a power of attorney to convey lands, recorded in the state of New York, was not evidence to establish title to lands in New Jersey. But the reason was that the record could not have been evidence in the state of New York for this purpose, and therefore was not good in New Jersey for that purpose. State v. Engle, 21 N. J. Law, 347. Entries in the book of a county treasurer of a county in Wisconsin were refused admission in this state upon an exemplification, but sworn copies were admitted. The entries in this case were not such as, by the statute of Wisconsin, were made prima facie evidence of the facts therein stated, and the exemplifications were refused admission on the ground that there was no proof of any provision of the law of Wisconsin showing what the effect of these entries was when offered in evidence in Wisconsin. Condit v. Blackwell, 19 N. J. Eq. 193–197. The exemplification of a deed from another state was refused admission in the state of Virginia. The reason given was that the exemplification was not in due form. Drummond v. Magruder, 9 Cranch, 122. A copy of a deed of trust from the records of the probate court of Alabama, where it had been recorded, was not admissible in evidence in a suit in Mississippi without accounting for the absence of the original, there being no statute in Alabama authorizing the use of copies. The registry acts of that state merely require the registration for the purpose of giving notice. Nor had any statute of the state of Mississippi enlarged the operation of the statute of Alabama in that state. Griffin v. Reynolds, 17 How. 610. In Russell v. Kearney, 27 Ga. 96, an exemplified copy of a deed or instrument of a marriage settlement from another state was refused admission in the courts of Georgia. It did not appear that there was any statute in either state making copies of the record evidence. In Quay v. Insurance Co., Anth. 287, an exemplification of a registry of a mortgage in New Jersey was refused admission in the courts of New York because the statutes of New Jersey relative to the recording of mortgages contained no provision making the registry, or copy thereof, evidence. The mere registry was not sufficient. This was before the passage of the statute providing that a certified copy should be evidence. In Russell v. Kearney, 27 Ga. 96, the general rule was applied that the production of the original writing, which was a marriage settlement, must be required until an excuse has been given for the nonproduction. The settlement was admitted to the jury by the trial court on the idea, probably, that the admission was sanctioned by the act of congress of May 26, 1790, or by the act of March 27, 1804. But, upon review, it was held that neither of those acts extend to the case of the exemplification of the record of a private writing, such as a deed. Such a writing, after being recorded, leaves the office of record, and returns to the hands of the private owner. It is still as much an original as ever, and must therefore be better evidence of itself than the copy of the record can be. It does not appear that the statute of North Carolina provided that the record, or the certified copy thereof, should be received in evidence. It was merely held that the certificate of the officer in North Carolina was not sufficient to admit it in Georgia. The court did not appear to have considered the effect of a statute which provided for a record, and the objects thereof, and the admission of an exemplification of the same. A record of a marshal's deed in Alabama is not proof in the courts of the state of Georgia, so as to admit the deed in evidence without proof of execution. Papot v. Railroad Co., 74 Ga. 810. This was an offer of the deed itself, it having been first recorded under the laws of Alabama; but the court held that the fact that it had been merely recorded in Alabama did not dispense with proof of its execution, and to the same effect when a mortgage was offered in Baskin v. Vernon, Id. 870. Besides, it does not appear that the statute of Alabama made the copy evidence.

From these cases, which turn upon peculiar statutes, incidents, and circumstances developed in each case, we turn to the examination of cases in which the question of what private instruments are or can be "records," under the provisions of the constitution, in order to be the subject of exemplification, and used in evidence in other states than those in which the writing is recorded. The object of recording acts appears to be twofold. One object is to give notice, but that is not the only object. It is not only to give notice, but to perpetuate the writing, and proof of execution. Had notice been the only object, then, under most of these recording acts, the proof of a common-law execution of a deed, mortgage, or other instrument would not have been dispensed with as it has been by these acts which provide that all exemplifications of a recorded deed shall be allowed in all courts to be as good evidence as the original. Brotherton v. Livingston, 3 Watts & S. 334. Statutes providing for recording in full differ very much from those relating to the mere registration of an abstract, which, without the certificate of acknowledgment, the effect is only to give notice. This distinction was clearly drawn in Transportation Co. v. Suydam, 17 N. J. Law, 25–30, and at that time, in this state, there was no statute at all for the recording of mortgages in full. But it is not clear that even

Digitized by Google

a registered abstract of a mortgage cannot be the subject of exemplification under the act of congress, and be admitted in evidence upon any question in relation to which such registry would be pertinent and relevant, and that it may be pertinent and relevant at times cannot be disputed. In Garrigues v. Harris, 17 Pa. St. 344, it was held that the record of a mortgage of land in New Jersey, though but an abstract of the mortgage, still, the record being according to the law of New Jersey, it is competent evidence, when authenticated according to the act of congress. The court says that: "If the claim be denied by the court, the decision is subject to be reviewed in the supreme judicial tribunal of the federal government, where the states are not regarded as foreign states, and where the question must be decided as a question of domestic, and not foreign, law. On questions of this character the state courts are bound by the rule of decision that governs the tribunal of review. The act of congress of March 27, 1804, gives to this office copy the effect it would have in the courts of New Jersey, and necessarily draws into cognizance here, as a question of domestic law under our government, the law and usages of that state. We are required to take judicial notice that the recording of an abstract of a mortgage is all that there is enjoined, and that a certified copy of that record is competent evidence in that state. It is therefore competent evidence here, when authenticated, as this document was, according to the act of congress." In this case the record was objected to, and it was held that, even though it was only an abstract, it was a record in New Jersey, and the court must take notice of it, as a record of what it purported to contain. In King v. Mims, 7 Dana, 267, it was held in Kentucky that where, by the laws of Virginia, a deed was required to be recorded, to give it validity, the production of an exemplified copy from the record was sufficient proof of the execution of the deed; the original in that case being produced, but not proved. In Pennel v. Weyant, 2 Har. (Del.) 502, it was held that an office copy of a deed is such a record as must be authenticated under the act of congress, to make it evidence. In this last case Judge Harrington said the act of March 27, 1804, made under the constitutional provision, does embrace records of deeds, and gives them the force of evidence everywhere, when certified according to its forms. An authenticated act done before a notary public in Louisiana in 1838 for the conveyance of lands situate in the republic of Texas may be proved by a copy authenticated under the act of congress of March 27, 1804. Watrous v. McGrew, 16 Tex. 506. This doctrine was approved in White v. Burnley, 20 How. 235; and such a record in that case was held to be admissible on common-law principles, and also as exemplified under the act of March 27, 1804. An exemplified copy of a record of a power of attorney in Virginia was admitted as evidence in the courts of Kentucky. Rochester v. Toler, 4 Bibb, 106. An authenticated copy of a will of another state is admissible. McIntire v. Funk, 5 Litt. (Ky.) 83. An exemplified copy of a deed in South Carolina was admitted as evidence in the courts of Kentucky. Id. 38. An exemplification from another state is not admissible merely by the force of the statutes of such state. It must be authenticated, unless there be local legislation or adjudication according to the act of congress; but, when the act of congress is substantially complied with, it may be received, if it appears that the registry, or record made, was in conformity with the laws of the state, which fact must be duly proved. Whart. Ev. 118. In Snyder v. Wise, 10 Pa. St. 158, the question was whether the record kept by a justice of the peace in his docket was within the meaning of the act of 1790 in regard to records and judicial writings; and the court said, though it was clear the document in question did not come within the description of those mentioned in the act of congress of March, 1804, as records and exemplifications of office books which may be kept in any public office in any state, these are obviously among the public writings recognized by the common law as invested with an official character, and therefore susceptible of proof by secondary means, but which are not of the nature of judicial records or judgments. Of this kind are acts and orders of the executive of the state, the acts of the legislative bodies and journals of either branch of the legislatures, and registries kept in public offices, books which contain the official proceedings of the corporation which the public at large is concerned with, parish registers, and the like. Books of enrollment of deeds, with parish registers, are among the official registers or books of a public nature which may be proved by sworn or certified copies. In short, the rule may be considered as settled that every document of a public nature which there would be any inconvenience in removing, and which the party has a right to inspect, may be proved by duly-authenticated copy. The records of deeds and mortgages required to be recorded or enrolled are regarded as records within the state in which they are recorded. Dick v. Balch, 8 Pet. 30–33; Transportation Co. v. Suydam, 17 N. J. Law, 25–29. See cases collected in 5 U. S. Dig. (1st Series) 780–784. A mortgage becomes a matter of record by being recorded in the county where the lands are situated, and scire facias may be issued from the circuit court of said county to foreclose it. Alvis v. Morrison, 63 Ill. 181. In Massachusetts an office copy of a deed is generally admissible in evidence, where the party claiming under it is not the grantee. Ward v. Fuller, 15 Pick.

Digitized by Google

185. Between natural persons, the production of such a copy is evidence of the execution of the deed by the person whose deed it purports to be; of its delivery; of its date and acknowledgment; and, in the absence of other evidence, of the seisin of the grantor. This involves the presumption or inference of fact that the seal was the seal of the grantor; that it was affixed by him, or by his authority; that he signed his name, or authorized it to be signed for him in his presence; that the certificate of the magistrate is genuine; and that the grantor was seised of the lands which the deed purports to convey. Chamberlain v. Bradley, 101 Mass. 188. In Pennsylvania, in 1759, a copy of a deed enrolled in the king's bench in England, proved before the lord mayor of London to be true, was allowed to be given in evidence in Pennsylvania in support of the title to lands in that province. Hyam v. Edwards, 1 Dall. 1. Under St. 27 Hen. VIII. c. 16, and St. 7 Anne, c. 20, deeds were enrolled, and made matters of record. And the policy existed in this country long before statutes were enacted for recording deeds and mortgages. In West New Jersey, provision was made for it in the concessions and agreements of the proprietors in 1786 (L. & S. 541), and in East New Jersey it was provided for by statute in 1698 (L. S. 368). Den v. Richman, 18 N. J. Law, 43. The system grew up with this country, and the records made in pursuance of it were necessary and familiar public records in every state of the Union. See 20 Am. & Eng. Enc. Law, 528. Copies of deeds of bargain and sale recorded under laws of the state, exemplified, are as good and competent evidence as the originals themselves. Dick v. Balch, 8 Pet. 30. In the state of New York, a mortgage, the execution of which has been duly acknowledged in accordance with the statute relating to such matters, is entitled to be recorded. The statute of that state to which reference has been made further provides that the mortgage may be read in evidence without further proof thereof, and that the record, or a transcript duly certified, may also be read in evidence with like force and effect as the original mortgage. This is a plain provision of the statute. It becomes a public record of that state, standing, for all purposes, with as full force and effect as the original. The record, without further proof under this statute, is entitled in that state to as full credit as the original would be. A certified copy of the record has the like force and effect in evidence as the original. It is classed by the statute as a conveyance, and it not only operates as notice, but it is an instrument pertaining to, and a muniment of, title. It is prima facie evidence of its existence, and of the subject-matter therein contained, as between the parties to the mortgage and their privies. Any other holding would render the statute, as to its operative effect, nugatory; and it is to such records, as evidence, it would seem, that the constitution refers when it declares that full faith and credit shall be given to them. Desty, Fed. Const. 259; Bump, Const. Dec. 284. Under similar statutes to that in the state of New York, the records of deeds and mortgages are treated as evidence when the question arises within the jurisdiction of the states where they are found. They are proved in evidence by the admission of certified copies. They are not merely records made for convenience and notice, but the record is made after due acknowledgment of execution, and the record, as between the parties, is made evidence of the existence, execution, the conveyance of the lands therein described, the indebtedness thereby created, and the covenants and agreements therein contained; and it is reasonable to conclude that copies of such records, when duly exemplified, should be received in evidence in every other state, under the constitution and the act of congress. The conclusion reached is that the recorded mortgage in question, an exemplified copy of the record of which was offered in evidence and admitted in this case, was such a record as is reasonably brought within the scope of the term "record," as used in article 4, § 1, of the constitution of the United States, and that there was no error in the admission of the exemplified copy of the record as evidence of the existence of the mortgage, the record, and contents thereof.

During the progress of the cause another question arose, which was much discussed upon the hearing of this rule. Upon the question of whether this mortgage was executed by Chase to Dunning as collateral security to indemnify Dunning against liability on his indorsements of the promissory notes of Chase, the deposition of Dunning, taken in the course of a trial of a suit in partition in the state of New York, and incorporated in the record of the suit, was offered in evidence, and admitted, against objection. The copy of the record of the suit containing the deposition was duly exemplified under the act of congress. The declaration of Dunning at that trial, in substance, was that upon the notes being paid the mortgage was satisfied, and would be canceled and discharged; and these declarations were considered pertinent to the question of whether both the bond and mortgage were executed only to indemnify him against the indorsements. Now, it is not necessary here to determine whether this evidence in this partition suit was competent, or not, as exemplified. Had it been competent, it would have been merely cumulative. The effect was twofold,—to prove the existence of the mortgage accompanying the bond, and, secondly, to prove that both bond and mortgage were given only to secure him against his indorsements.

Digitized by Google

Upon both these points this evidence was merely cumulative. If the facts were otherwise legally proved by competent evidence, the admission of the incompetent evidence alone would not warrant a new trial. Tullidge v. Wade, 3 Wils. 18; Horford v. Wilson, 1 Taunt. 12; Doe v. Tyler, 6 Bing. 561; Prince v. Shepard, 9 Pick. 176; Myers v. Hollingsworth, 26 N. J. Law, 186. This evidence was merely cumulative. The fact of the declaration made at that trial by Dunning was plainly proved by parol by several witnesses; and the evidence of these witnesses as to the declarations made by Dunning at that trial was practically undisputed, whatever may have been the inference to be drawn therefrom, or the force and effect of the evidence, which questions were referred to the jury for their determination. Under these circumstances, if the admission of this copy of the record, containing this deposition, was erroneous, no injury or prejudice arose to the plaintiff. On this rule to show cause the deposition of Dunning can be disregarded, and still the declarations of Dunning appear by undisputed evidence, and there was sufficient legal evidence to warrant the jury in finding a verdict. In fact, it is conceded by the plaintiff that such declarations were made; but it is contended that they were made under a mistake or misapprehension, or that the inference drawn from them by the defendant is a wrong inference. These questions were left squarely to the jury for their determination. The conclusions reached in this case therefore require that the rule to show cause should be discharged, with costs.

ROARTY v. SMITH et al.

(Court of Chancery of New Jersey. April 27, 1895.)

RIGHT TO PARTITION — TENANTS IN REMAINDER — CONSTRUCTION OF WILL — DURATION OF TRUST — DEATH OF BENEFICIARY NAMED.

1. Where all the lands of which partition is sought by tenants in remainder of several undivided shares are held by a single particular estate, partition cannot be had without the consent of the tenant of that particular estate.

2. Where a testator devised and bequeathed his entire estate to trustees to collect the income therefrom, and divide the net income in specified proportions among his children for their respective lives, and, at the death of each child, gave and devised a specified portion of the corpus of the estate to the child or children of the child dying, or, and in the event of there being none, to others, *held* that, upon the death of each child, the estate which the trustees formerly had in that portion of the corpus which was given to the child or children of the deceased child, or to others if there should be no child, ceased.

(Syllabus by the Court.)

Bill by Susan Roarty against Michael Smith, trustee, and others. Decree for complainant.

The bill seeks the partition or sale of four parcels of land of which John McDermott died seised on the 21st of October, 1885. By his will, he devised and bequeathed his entire estate to Lorenzo W. Elder and Michael Smith and the survivor of them, in trust to keep the personal estate invested in good interest-bearing securities, and take charge of the real estate, receive its rents, issues, and profits, maintain it, and divide the net annual income from the whole property in the proportions of three-twentieths thereof to each of his children, Mary, William, Susan, Michael, and Edward, during their respective lives, and two-twentieths thereof to his son Patrick during his life if he should appear within five years and claim it, and, if he should not appear within that time and claim it, one-twentieth each additional to Susan and William, and two-twentieths thereof to the testator's granddaughter Lizzie McAlpine, daughter of Mary, above named, for her life, and one-twentieth thereof to the testator's granddaughter Mamie Roarty, the daughter of Susan, above named, for her life. Following the provision for such trust, the will proceeds to provide that, "after the death" of each child and grandchild named, the testator gave, devised, and bequeathed to the then surviving child or children of such decedent, or if there should be no such child or children, to others indicated by the will, a proportion of the corpus of his estate equal to the proportion of the income to which the decedent was theretofore entitled. Lorenzo W. Elder assumed the trusteeship alone, but died, and thereupon Michael Smith qualified as trustee, and now survives, and is acting as such trustee. The testator's daughter Mary died on the 5th of June, 1889. His son William died on the 9th of October, 1889; his son Michael died on the 6th of October, 1890; his granddaughter Lizzie died on the 24th of September, 1892; and the son Patrick has not been heard of for many years. Under the will, in virtue of the deaths referred to, the complainant takes an undivided share in the corpus of the estate, as well as three, or perhaps four, twentieths of the income, and, because of such interest in the corpus, now seeks partition of the lands in question. Her right to compel such partition is denied by the trustee.

Gilbert Collins, for complainant. Abel I. Smith, for defendant Smith.

McGILL, Ch. The trustee's claim is that he is entitled to a particular estate in the whole of the lands of which partition is desired, which will endure until the last surviving life beneficiary shall die. He argues that, as each of said beneficiaries is to have a certain proportion of the whole net income, it is necessary for the trustee, in order to effectuate that right, to continue to the end of the trust to take the entire income, retaining his estate in the whole corpus for that purpose; and, having such particular estate, he alone is entitled to the present actual possession of the property; and, that

Digitized by Google

being so, he may, as the law stands to-day, by withholding his consent to a partition, which the due execution of his trust requires, and he consequently does, defeat the object of the bill.

Let us first understand the law. Joint tenants and tenants in common were not at common law compellable to make partition. By force of statutory law existing at the opening of the present century, to which reference is made in Stevens v. Enders, 13 N. J. Law, 271, partition became compellable between (a) those who held, as joint tenants or tenants in common, estates of inheritance in their own right or in the right of their wives; (b) those who held as tenants in common or as joint tenants for life or years; (c) or where one had an estate for life or years, and another of freehold or inheritance; (d) and a tenant by the curtesy. Stevens v. Enders. But such partition did not extend to persons taking in remainder, vested or contingent, because they were neither in actual possession nor entitled to immediate possession in severalty after the partition should be made. The object of the enactment was simply to remove the inconvenience of joint possession, and give the present use in severalty to those who, before the partition, should be entitled to it jointly. It follows, as was held in Burroughs v. Dunlap, reported with Stevens v. Enders, that, under that enactment, there cannot be a partition at all where the whole estate in possession is held in one interest. In 1816 a statute was enacted to give power of sale where partition could not be effected without great prejudice to the owners, but it was held not to be applicable to a case where, by the limitations of the estates, remainders existed. Stevens v. Enders, supra; Young v. Rathbone, 16 N. J. Eq. 224, 226. By the enactment of March 6, 1852 (P. L. 157; Revision, p. 801, § 25), a means was afforded to render a partition between tenants in possession binding upon the tenants in remainder or expectancy (Smith v. Gaines, 39 N. J. Eq. 545, 548); and a supplement to that act, in 1861 (P. L. 318; Revision, p. 802, §§ 26–29), authorized a sale of lands in which the undivided shares were limited over in the manner specified in the act of 1852, provided an actual partition will impair the value of the lands one-fourth part thereof; amended in 1891 (P. L. 423) so that it should be allowed if the land is so circumstanced that a partition thereof cannot be made without great prejudice to the owners or persons interested in the same. By a statute, in 1858 (P. L. 478; Revision, p. 802, § 30), the several tenants in remainder in fee of lands which are held by a particular estate for life or lives, or less, are allowed, with the assent of the tenant of the particular estate, to have partition, or, under proper circumstances, sale.

It is perceived, upon this review of the law, that the decision in Burroughs v. Dunlap, referred to, remains undisturbed, and that if the defendant Michael Smith has such an estate in the whole property left by John McDermott as he claims, and he cannot under his trust consent, or does not consent, to a partition, then the complainant will be unable to secure the object of her bill, and the bill must be dismissed; but if his estate in any undivided part of the property has ceased upon the death of one or more of the beneficiaries under the trust created by the will, and others have become the owners of that undivided part, and are entitled to present actual possession thereof jointly with the trustee, those persons may enforce partition, and by it bind the trustee, and, as well, those who take in remainder the undivided part he yet holds.

The vital question to be solved, then, concerns the extent of the trustees' estate, and that is to be determined by the intention of the testator with respect to it. His apparent scheme was that his children and his two grandchildren mentioned in the will should receive income only for their respective lives. To accomplish that purpose, he bequeathed and devised his estate, real and personal, to trustees, to so manage it that an income should be derived which they should divide, and pay in specified proportions to the beneficiaries indicated, during their respective lives. The terms of this provision, standing alone, lead to the inference that the estate of the trustees was to continue in the whole property to the termination of the trust. But the provision is immediately followed by a consideration of the ultimate disposition of the corpus of the estate, in which he prescribes that, "after the death" of each of the several life beneficiaries, he "gives, devises, and bequeaths" a portion of his estate equal to the proportion of the income had by the deceased beneficiary, or, if there should be no such child or children, then to others as specified. He does not expressly provide for a pro tanto termination of the trust estate in his property upon the death of a beneficiary of the income for life; but from the disposition of a portion of the corpus at that time, which is inconsistent with the continuance of the trust estate in that part of the corpus, I think a controlling implication arises that his intention was that, as each life right to income should fall in, a specified proportion of the corpus should be cut off from the whole, and that only the portion left should remain under the trust. The estate taken by the trustees was to be merely that which should suffice for the execution of the trust pursuant to the testator's intention. At first they were to take the whole property, but, when the daughter Mary died, they no longer needed three-twentieths of the estate to enable them to perform their duty, and thereupon their estate in that three-twentieths ceased. In the same manner, when the sons William and Michael and his grand-

Digitized by Google

daughter Lizzie died, eight or nine twentieths more of the property passed out from the trustees' estate. The surviving trustee's particular estate now extends to only a fractional part of the whole estate. He is a tenant in common with the complainant and others, who, jointly with him, are entitled to present actual possession of the land in question. I am of opinion that the bill will lie. There will be a reference to determine the title and interest of the respective parties, and whether partition can be had without great prejudice.

STATE (CHAMBERLAIN et al., Prosecutors) v. BOARD OF EDUCATION OF CRANBURY TP. IN MIDDLESEX COUNTY.

(Supreme Court of New Jersey. Feb. 25, 1895.)

SCHOOL DISTRICT — APPROPRIATION OF MONEY — ERECTION OF SCHOOLHOUSE—MEETING OF INHABITANTS—FEMALE SUFFRAGE.

1. A vote to appropriate money for school purposes, and to issue bonds, includes the power to raise the same by special assessment upon the property of the school district.

2. Money can be voted for the purpose of purchasing land and erecting a school building, at a special meeting of the inhabitants of a school district, duly called.

3. The purchase of land and erection of a schoolhouse includes fencing and grading the lot, supplying the school property with drinking water, and equipping the schoolhouse with school furniture.

4. By ballot is a legal method of voting to raise money at any school-district meeting. Act 1889, p. 132, enjoining the use of the ballot in voting to raise money, is not repealed by Act 1894, p. 506.

5. Act 1887, p. 149, which confers upon females the right to vote at any school meeting, although unconstitutional so far as it assumes to confer the right to vote for school trustees, is valid in respect to all other privileges granted, including the right to vote to raise money and to issue bonds.

(Syllabus by the Court.)

Certiorari by the state at the prosecution of James M. Chamberlain and others against the board of education of Cranbury township, Middlesex county, to review a special assessment for school purposes. Judgment for defendant.

On August 22, 1894, the board of education of the township of Cranbury, in the county of Middlesex, ordered the district clerk and president of the board to prepare and post notices to call the legal voters of the school district of the township of Cranbury together at a special school meeting, at three o'clock on September 15, 1894. The propositions to be set out in the notice as those upon which the voters were to express their sentiments were fixed by the board of education. The notices contained the following propositions: (1) To vote and appropriate the sum of $1,600 to purchase a lot of land; (2) to vote and appropriate the sum of $400 for grading and fencing the said lot, and furnishing drinking water supply; (3) to vote and appropriate $4,000 for erecting a schoolhouse on the lot; (4) to vote and appropriate the sum of $500 for purchasing suitable furniture for the school building; (5) to authorize the board of education, in order that immediate funds may be procured for the purposes above mentioned, to issue school bonds in the corporate name of "The Board of Education of the Township of Cranbury, in the County of Middlesex," to the amount of $6,500, payable at such time and in such amounts as the legal voters at such meeting may direct, with interest at a rate not to exceed 6 per centum per annum, payable semi-annually; (6) to vote and appropriate for the purpose of purchasing free school textbooks the sum of $300; (7) to vote and appropriate, for the purpose of paying for the services rendered to the board by the district clerk, at the monthly ratio of $100 per year; (8) to vote and appropriate for the purchasing of crayon, brooms, pails, and other necessary school supplies, and meeting the expenses of cleaning and caring for the school rooms the sum of $100. The amount thought to be necessary for above purposes is the sum of $7,000. On the day fixed for the meeting, each of these propositions was printed upon one ballot. Each proposition, except the one concerning the issuing of bonds, was preceded by the words: "That we order to be raised by special assessment on the inhabitants of the township of Cranbury school district, and their estates, and the taxable property therein, the sum of —— dollars." The number of ballots upon which the voters favored all of the propositions were a majority of all those cast. Among those who voted at this meeting were women. The proposition in respect to the issuance of bonds, as printed upon the ballots and voted for by the majority of the voters, was as follows: "Resolved, That the board of education of the township of Cranbury, in order to raise immediate funds for the purposes above mentioned, be authorized, and we do hereby authorize said board, to issue school bonds in the corporate name of 'The Board of Education of the Township of Cranbury, in the County of Middlesex,' to the amount of $6,500, in order to raise said needed amount immediately, in the denomination of $200 each, at a rate of interest not to exceed six per cent. per annum, payable semiannually at the National Bank of Cranbury. The bonds hereby authorized to be issued are to fall due and paid two each year during the first ten years, and three thereafter until all are paid, and the necessary amount raised at the annual meeting of each year until all the outstanding bonds, and the accrued interest thereon, shall have been paid."

Argued at the November term, 1894, before GARRISON and REED, JJ.

A. H. Strong, for prosecutors. H. B. Willis, for defendant.

REED, J. The proceedings ordering the raising of the amount mentioned in the propo-

Digitized by Google

sitions carried at the special meeting, are first attacked upon the ground that the measures voted for were aside from and in excess of the notice of the purpose of the special meeting. This position is rested upon the fact that the notice contains no mention of the purpose to raise the amount to be voted for by special assessment, but only mentions the purpose to issue bonds, by which the amount to be appropriated was to be immediately raised. It is insisted that votes to raise the several amounts by special assessment are not within the scope of the notice. It is also insisted that a vote to raise such sums by a special assessment, in addition to the vote to issue school bonds to the amount of $6,500, provided for the raising of a total amount, which is in excess of the amount designated in the notice. In respect to the first of these points, it is entirely clear that the part of the several propositions which provides that the respective sums voted for were to be raised by levy upon the property of the school district was redundant. The votes to raise and appropriate this amount for the purpose indicated in the propositions carried with them, as a legal consequence, that such moneys should be immediately or remotely raised by a special tax levy. It follows, therefore, that notice that voters would be called upon to express their sentiments in respect to the respective propositions to vote and appropriate money contained an implied notification that, if such money was voted, it would be raised according to the statute, namely, by tax levied upon the school district. In respect to the second point, I cannot see how anyone reading the propositions as they were carried at the election could imagine that the sums to be raised by the tax levy were to be in addition to the sums which were to be raised by the issue of bonds. The sums voted for were to be raised by special tax, but when that tax was to be levied depended upon whether bonds were to be issued, and, if bonds were to be issued, then it depended upon the times when such bonds should mature. The purport of the proposition was that bonds were to be issued for a sum sufficient to cover the aggregate appropriations for the purchase of land and the erection of a schoolhouse, and that the money to pay these bonds was to be levied by special assessment, according to the provisions of sections 19 and 20, p. 514, of the act of 1894. These sections, read in connection with section 11 of the same statute, leave the meaning of the ballots entirely free from obscurity.

The next point made against the legality of the proceedings is that no money can be ordered to be raised for the purpose of purchasing a lot or building a schoolhouse except at a meeting held for the election of school trustees. The meeting in the present instance was specially called by the board of education, and was not a general meeting for the election of school trustees. The power to make the appropriations for the purpose mentioned seems to be settled by previous adjudications. It will be perceived by a comparison of sections 39 and 86 of the revised act of 1874 (Revision, p. 1070) with the amendatory act of 1894, page 506, that the power of the board of education, under the provisions of the latter act, is left in the same condition as the power of the trustees under the former act, in respect to the subject-matter now in question. The time of holding the general meeting is changed by the act of 1894. Under the act of 1874, the general meeting for the purpose of determining what additional tax, if any, shall be levied upon the school district was directed to be held on that Tuesday of the week following the annual town meeting. In the act of 1894, such meeting, and the meeting for the election of trustees, are directed to be held upon the same day, namely, the third Tuesday in March. In all other respects section 86 of the act of 1894 and section 86 of the act of 1874, with some changes in the phraseology, remain substantially the same. So, also, it will be perceived that subdivision 11 of section 39 of the act of 1874, which subdivision provides for the calling of special meetings by the school trustees, is left undisturbed in the act of 1894, as subdivision 10 of section 39. Now, in respect to the powers of the board of school trustees under the act of 1874, it has been held that by virtue of the powers conferred in section 39, subd. 11, the trustees had the power to call a meeting at any time when in their judgment the interests of the district might require it, for the purpose of building schoolhouses and appropriating money for that purpose, as well as for the purpose of raising money by bonding the district. Stackhouse v. Clark, 52 N. J. Law, 291, 19 Atl. 462. It will also be seen that this same section stood in the general act of 1867 (Nixon, Dig. 69), and that section 80 of the act of 1867 is substantially section 86 of the acts of 1874 and 1894. Now, the power to vote for the building of a new schoolhouse at a special meeting, under the act of 1867, was recognized in the case of Duryee v. Greenleaf, 34 N. J. Law, 441. So it seems that the power to pass and adopt these propositions at a special meeting was plenary.

The third point made against the proceedings is that section 88 of the act of 1894 only empowers the voters to issue bonds for the purpose of purchasing land or building a schoolhouse, but not for the purpose of fencing, grading, furnishing, procuring a water supply, and the other purposes mentioned in the notices. Now, it will be perceived that in the notices, and the propositions which are certified to be those carried at the special election, it is explicitly stated that the bonds were to be issued to raise funds for the following appropriations: For purchasing a lot; for grading and fencing it, and for providing a proper drinking water supply; for erecting a schoolhouse, and for purchasing school furniture. An inspection of the ticket carried shows that the sum of $6,500, the amount to

Digitized by Google

be raised by the issue of bonds, covers the amount appropriated for these items only. Now, these were all matters of expenditure included within the language of section 88. The grading, fencing of the lot, digging of a well, or providing other means for supplying the school with water, the equipping of the schoolhouse with school furniture, all were a legitimate part of the construction of a schoolhouse and the proper equipment of a school property.

It is in the next place insisted that the method of voting adopted was illegal. This point is directed at the use of the ballot in voting upon the question whether the amounts of money should be appropriated for the purposes named. This method of voting, it is urged, could only be adopted by the permission or direction of some statute, and that no such statute exists. I am unable to accede to the soundness of either of the two propositions included within this insistence. I am of the opinion that such a method of the expression of the popular will could be adopted by those assembled without legislative permission. I also think that there existed a statute which made such a method of voting, when the question to be decided was whether money should be raised for purchasing land or building schoolhouses, imperative. In opposition to the legality of the use of the ballot without legislative authority, one case only is cited. This is the case of Faulkner v. Elger, 4 Barn. & C. 449, in which case three judges of the court of king's bench expressed a doubt whether an election by ballot to fill a vacancy in a curacy in a parish, was legal. The ground upon which the judges thought the use of the ballot to be unwarranted was because of its secrecy. It was said that, if it should subsequently be ascertained that some person who had voted was disentitled to vote, it would be impossible to tell how he had voted. The effect of the illegal vote upon the result would therefore be unascertainable. The case, however, was decided upon another point, and so the remarks of the judges were obiter. This case was decided in 1835, and neither before nor since, so far as I know, has the question been mooted in any court. I think that the inconvenience resulting from the ballot was in that case unduly magnified. If a vote be taken at a meeting of any considerable number of people, whether taken viva voce or by marking, it would afterward be difficult to ascertain how each person had voted. No system of voting would secure an accurate method of discovering this but a system which compelled each voter to attach his name to the vote. Yet it would not be pretended that such a system is requisite to legalize an election. As a question of public policy, the advantages arising from the use of the ballot entirely override its disadvantages. The independence it secures to the voter has commended it to the taste and judgment of the people, so that during the last half century it has become the almost universal method of registering public sentiment. Unless restrained by some statute, I see no reason why this method may not as well be adopted as any other by a majority vote of those present at a meeting. This was what happened in the present instance, for after the meeting was organized, it was moved and resolved to vote by ballot. But I also think that this method of voting was, in the present instance, mandatory. The second section of the act of 1889, p. 132, directs "that at each and every annual or special school meeting, held in any school district in this state, the legal voters thereof should vote by ballot, and not otherwise, to raise money for any school purpose whatever." The counsel for the prosecution argues that this section was repealed by a supplement to the act, entitled "An act to establish a system of public instruction," which supplement was passed in 1894. Pamph. Laws 1894, p. 506. It is not insisted that there was any express repealer contained in the last mentioned statute. It is insisted that the act of 1894 repeals section 2 of the act of 1889 by implication. The line of argument by which this view is supported is this: The first section of the act of 1889 required the school trustees to be elected by ballot at the annual school meeting. Now, section 18 of the supplement of 1894 directs that all elections for school trustees shall be by ballot; that two tellers shall be appointed, who shall receive, and, with the chairman of the meeting, shall count, the votes; that the secretary shall record the name of each person voting; that the polls shall be open for an hour at least; that the ballots shall be either printed or written; and that, if a trustee is to be elected to fill an unexpired term, the ballot should designate which of the persons voted for is for the full term and which is for the unexpired term. This act contains no reference to the manner by which voting to raise money at any meeting shall be conducted. It is insisted that this express direction in respect to the use of the ballot in the election of trustees, accompanied by a silence in respect to other proceedings at any school meeting, impliedly repeals the previous statute, requiring the use of the ballot in voting to raise money. Now, as repeals by implication are not favored, the intention of the legislature to effect this purpose must clearly appear. It cannot be successfully contended that the mere fact of the re-enactment of the first section of the act of 1889 operates as a repealer of the second section. Powers v. Shepard, 48 N. Y. 540. The ground taken is that the act of 1894 is a revision of the school law,—at least, a revision of the law so far as concerns the manner of voting at school meetings; and therefore furnishes the sole rule with regard to this subject. I do not so regard it. It is in no sense a revision. It does not pretend to be a statute reducing antecedent acts to one system. It is a mere amendatory act of the general statute, chan-

Digitized by Google

ging here and there a section of that statute, and introducing some new features, and changing or enlarging in details the provisions of some former acts. It is preceded by another supplement of the same general act, passed on the same day, and is followed by still another supplement of the same act, also passed on the same day. There are additional supplements passed at the same session, one of which, on page 125 of the Laws of 1894, provides that at the election of trustees at school meetings, the board of education may designate the time of the opening and closing of the polls. Now, this last act is undoubtedly modified by the act of 1894, not because the latter is a revision of the former, but because it is a later act, in some respects inconsistent with the former. It is impossible to regard the act of 1894 as revisory of the preceding acts, and section 18 of the act of 1894 can have no greater force than if it stood alone. Standing alone, it would not operate to repeal the second section of the act of 1889. Nor can I see why the voter could not vote upon all the propositions upon one ballot. Each voter had the privilege of expunging or modifying any one or more of the several propositions.

The last objection raised is that women were permitted to vote in sufficient numbers to change the result of the election. The act of 1887, p. 149, confers upon women the right to vote at any school meeting in any school district of the state wherein they reside. In so far as this statute assumed to confer the right upon women to vote for school trustees, it has been adjudged unconstitutional. Kimball v. Hendee (N. J. Sup.) 30 Atl. 894. The argument now presented is that the statute, being void in part, is a total nullity; that it is impossible to eliminate the void part, and leave existing any substantial independent enactment. In support of this contention, two federal cases are invoked, namely, U. S. v. Reese, 92 U. S. 214, and the Trademark Cases, 100 U. S. 82. In the first-named case, congress had passed an act which imposed a penalty upon election officers who prevented any voter from qualifying, or who refused to receive his vote, and imposed a punishment upon any person who bribed, intimidated, or obstructed any citizen from qualifying or from voting. The court held that the act was too comprehensive, and that the power to pass it was derived from the fifteenth amendment, which extended only to a prohibition of any discrimination against voters made on account of race, color, or previous condition of servitude; and that the act in question included in its general terms acts done, aside from those acts which were so discriminatory. The supreme court held that the act could not be restricted so as to be confined to punishment for those acts concerning which congress could have constitutionally legislated. In the second-named case, congress had provided a punishment for the violation of trademarks, but it was held that some of the trademarks for the violation of which this punishment was provided could not be constitutionally registered. It was ruled that, inasmuch as the language of the act was too broad, the whole act was void. It will be perceived that both of the statutes were penal and criminal acts, and it was upon this ground that the rigor of construction was put. "This is a penal act," said Chief Justice Waite, in delivering the opinion in the first case, "and must be considered strictly;" and Mr. Justice Miller, in delivering the opinion in the second case, remarked: "While it may be true that, when one part of a statute is valid and constitutional and another part is unconstitutional and void, the court may sustain the valid part where distinctly separable so that it may stand alone; but it is not within judicial power to give the words used by congress a narrower meaning than was manifestly intended, in order that crimes may be punished which were not described in language that brings them within the constitutional power of that body." The distinction between the rule of severability as applied to criminal acts and as applied to statutes imposing mere civil obligations, or conferring rights and privileges, is perceived by a comparison of the rulings in both cases with other federal decisions. In Packet Co. v. Keokuk, 95 U. S. 80, an ordinance imposing wharf duties was upheld so far as it did not conflict with the power of congress to regulate commerce, although, as was remarked, it might be conceded that the ordinance was too broad, and that some of its provisions were unwarranted. So in the case of Railroad Co. v. Schutte, 103 U. S. 118, it was held that, although a part of an act which purported to confer power to execute and exchange state bonds in aid of railroads was unconstitutional, yet this did not avoid another part of the act, which gave a lien on the property of the railroad company to secure such bonds. So in Vial v. Penniman, Id. 714, the statute which relieved a certain class of debtors from liability to be imprisoned and have their property seized was held not to be in conflict with the constitutional provision prohibiting legislation which impaired the obligation of contracts, so far as respected that part of the act which relieved the debtor from imprisonment. It was held that this part was severable from the part which relieved the debtor's property from liability to seizure. A comparison of these federal decisions will display a marked difference in the manner in which the severability of void parts of a statute is viewed when the act is criminal in its character and when it is civil. Mr. Sutherland remarks that the rule is more stringent in regard to criminal statutes, citing the remarks of Johnson, J., in Wynehamer v. People, 13 N. Y. 378. Suth. St. Const. § 172. In criminal statutes, it is deemed unfair to put upon the citizen the

Digitized by Google

risk of judging what acts included within a statute are punishable and what dispunishable on account of the partial unconstitutionality of the statute. The present act is one conferring privileges upon a class of the public. The question is whether it can be assumed that the legislature would not have conferred the power to take part in any matter at any school election if it had known that in one matter the power granted was nugatory. The statute, as already observed, contained a grant of privileges broader and more comprehensive than the legislature had the ability to enact. The facts in this case are analogous to the facts in the cases of Mayor, etc., v. Dechert, 32 Md. 369, and Reid v. Morton, 119 Ill. 118, 6 N. E. 414. In the first of these cases, the act which professed to confer upon the mayor all the powers of a justice of the peace was held void so far as it invested him with judicial functions, but it was held good so far as it conferred upon him police powers, although both powers were conferred by the same section. In the second of these cases, an act by its terms conferred jurisdiction upon a court over certain matters, not only within the city, but in a township outside the city. The act was held void as to a grant of jurisdiction outside the city limits, but good as to the conference of jurisdiction within the city. In the present case, I think there is nothing to display on the part of the legislature an intention not to confer upon females all the powers which the act professes to confer, which were within the ability of the legislature to confer. I think it cannot be said that the legislature would not have passed an act conferring power upon females to vote at all, because the power conferred to vote upon one matter is nugatory. The assessment is affirmed.

GENZ v. STATE.

(Supreme Court of New Jersey. Feb. 21, 1895.)

CONSTITUTIONAL LAW—PLEA ON TRIAL FOR MURDER.

1. The supplement to the crimes act enacted in 1893, directing that, if to an indictment for murder a prisoner shall plead guilty, such plea shall be disregarded, and a plea of not guilty be substituted, and the case tried before a jury, is constitutional.

2. The provision is favorable to the accused, and does not deprive him of any right that is indefeasible.

(Syllabus by the Court.)

Case certified from court of oyer and terminer, for advisory opinion; Lippincott, Hoffman, and Kenny, Judges.

Paul Genz was indicted by the grand inquest of the county of Hudson, summoned for the September term, A. D. 1894, of the court of oyer and terminer and general jail delivery of said county, for the alleged murder of Clara Arnim, on the 28th day of August, A. D. 1894, at the city of Hoboken, in said county. Being arraigned on said indictment at said term, the prisoner pleaded guilty. The court refused to receive such plea, but disregarded the same, and ordered a plea of not guilty to be entered to such indictment; whereupon, after due procedure, the prosecutor of the pleas of said county moved the trial of said indictment before a jury upon such plea of not guilty ordered entered as aforesaid. The prisoner objected to such a trial, on the ground that such was not his plea, and that it was the duty of the court to proceed to sentence him upon his plea of guilty. This court, finding a case of doubt and difficulty presented, remanded the prisoner, and hereby certifies to the supreme court for its advisory opinion the following question: "Under the act of the legislature of New Jersey of March 1, 1893, being chapter 36 of the Laws of 1893, and the facts above recited, can Paul Genz be subjected to a trial for the murder of Clara Arnim upon a plea of not guilty ordered entered by the court in disregard of his plea of guilty?"

Argued November term, 1894, before BEASLEY, C. J., and VAN SYCKEL, DEPUE, and ABBETT, JJ.

Chas. H. Winfield, for the State. Gilbert Collins, for defendant.

BEASLEY, C. J. (after stating the facts). The certificate prefacing this opinion presents for our consideration but a single inquiry, and that is whether a defendant in an indictment for murder has an inalienable right to plead guilty to the charge. It is the supplement to the crimes act approved March 1, 1893, that has given rise to the question. By the sixty-eighth section of the act, as it stands in the Revision, the crime of murder is defined, and is distributed into two classes, that is, murder of the first and second degree; and to this adjustment is added the following provision: That "the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate, by their verdict, whether it be murder of the first or second degree; but if such person shall be convicted on confession in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly." This latter procedure in case of a confession of the culprit has been changed by the recent statute, the modification being expressed in these words, viz.: "And in no case shall the plea of guilty be received upon any indictment for murder, and if, upon arraignment, such plea of guilty should be offered it shall be disregarded and a plea of not guilty entered, and a jury, duly impaneled, shall try the case in manner aforesaid: provided, however, that nothing herein contained shall prevent the accused of pleading non vult or nolo contendere to such indictment; the sentence to be imposed, if such plea be accepted, shall be the same as that imposed upon a conviction of murder of the second degree." The fault found with this substituted method of pro-

Digitized by Google

ceeding is that by it the defendant in the given case is deprived of his right to confess his guilt or to put in his plea to that effect.

It neither has been nor could it be contended that the prerogative thus claimed had its origin or confirmation in any provision of the constitution of this state. In that instrument the rights of the criminal are specifically set forth. They are these: He cannot be charged with a criminal offense unless on the presentment or indictment of a grand jury; he is to have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor; to have assistance of counsel in his defense; and after acquittal he cannot be tried for the same offense. It is obvious that none of these enumerated privileges lend the least support to the right now asserted; and, this being admittedly so, it is difficult to understand how such right is to acquire the quality of indefeasibility. In the learned brief placed in our hands in behalf of the defendant, counsel says: "I do emphatically deny the right of the legislature to require the court to order a plea of not guilty to be entered against the plaintiff's protest." And his argument then proceeds with an attempt to show that at common law "there were certain substantial advantages from a confession." But, granting this assumption, how does it even tend to show that such right is above legislative control? Common-law procedures, as such, are plainly not inviolable. Many of them have been abolished, and most of them have been modified by legislation. They must receive a constitutional impress before it can be said that they stand above the reach of the lawmaker. If we were, therefore, to concede that, by force of the ancient English system, the defendant in a criminal arraignment was permitted to confess his guilt in open court, and that such right was advantageous to him, there seems not the faintest reason for a contention that such right could not be abrogated or modified at the legislative will. But, in point of fact, the faculty of the prisoner to confess his crime in open court when charged with murder was never at common law a serviceable prerogative. The procedure merely provided a ready and facile road to the gallows. In form, the indictment always charged the crime of murder; and consequently, if the plea confessing guilt was put in, as an immediate and inevitable consequence the sentence of death was pronounced. It seems quite fantastical to contend that such a course of law as this is of such inestimable value to the prisoner that the legislature cannot deprive him of it. There seems to be no reasonable ground whatever for such a contention. The statutory provision here put in question is altogether favorable to the prisoner. From the earliest times, in these capital cases, judges have manifested a disinclination to proceed to judgment on the mere admission of the prisoner of his guilt. Thus Blackstone says: "Upon a simple and plain confession, the court hath nothing to do but to award judgment; but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject, and will generally advise the prisoner to retract it, and plead to the indictment." 4 Bl. Comm. 331. It will be observed, therefore, that the modification which the statute in question has effected is to substitute for the advice of the judge the mandate of the law, that the citizen shall not be adjudged to death upon his own confession, but that, in favorem vitae, the state shall prove in all respects to the satisfaction of a jury the crime laid in the indictment. Let the oyer be instructed to proceed with the trial on the record as it now stands.

NEW JERSEY TRACTION CO. v. DANBECH.

(Supreme Court of New Jersey. April 12, 1895.)

STREET RAILROADS—INJURIES TO CHILD RIDING BY INVITATION.

1. It is the duty of street-railway companies to prevent children from entering into their cars, except under proper safeguards.

2. A boy of 10 years old entered a car upon the invitation of its conductor, and was thrown from the front platform by the carelessness of the driver. *Held*, that the company was liable.

(Syllabus by the Court.)

Action by John J. Danbech against the New Jersey Traction Company. Verdict for defendant. Rule to show cause why a new trial should not be granted discharged.

Argued November term, 1894, before BEASLEY, C. J., and VAN SYCKEL, DEPUE, and ABBETT, JJ.

A. Q. Keasbey & Sons, for the motion. Samuel Kalisch, opposed.

BEASLEY, C. J. The facts of this case to which the law is to be applied are few, and, so far as those are concerned that can operate as efficient in the present inquiry, are undisputed. John J. Danbech, the plaintiff in the action, being a boy who had not attained his tenth year, entered into one of the street cars of the defendant on the invitation of the conductor. This official called the plaintiff in, his purpose being to get him to buy for him a paper of cigarettes. The boy got upon the front platform, and stood there, and this is his account of the affair: "The conductor called me to the car, and asked me to go and buy him a package of cigarettes, and I said, 'Yes.' I jumped upon the car. He had his hands in his pockets, to give me the money, * * * and the car gave a lurch, and the conductor jounced against the door, and then against me, and knocked me off." He further says that, while he was on the front platform, "the car gave a lurch, and the driver struck the hors-

Digitized by Google

es to pull them on the track, and they started at a terrible rate, and that threw them on the cobble stones; that threw the conductor over to the door against" him (the plaintiff); and, in consequence of that, he (the plaintiff) was thrown from the car, and the injury complained of resulted. In view of the case thus made, the jury was instructed by the judge conducting the trial to this effect: That the conductor had been placed by the defendant in charge of the car, having the power and control over it, and it was his duty to regulate its movements; and that, if the plaintiff had entered the car on the invitation of the conductor, he was there then of right. He was not a trespasser, nor was he a mere licensee. And the jury were then instructed that, if they found that to be the situation, thereby a duty was imposed on the defendant, which was this: "To exercise all reasonable care to prevent injury coming to the plaintiff in consequence of the position of danger he had been invited to assume; and, secondly, to abstain from doing any act which might increase the danger necessarily incident to the position he was induced to assume." The verdict of the jury was for the plaintiff.

The argument of the counsel of the traction company against this result was mainly based on the theory that the act of the conductor in inviting the boy to get on the car was not in any sense the act of the company, and that the latter, consequently, did not thereby assume any duty with respect to him. It was insisted that the duty of the conductor was well understood. It was to let passengers in and out of the cars, and to collect their fares, and he has no authority to ask persons to come upon the cars except as passengers. But it is not necessary at the present time to consider these assumptions, for the case before the court must be decided on an entirely different ground. The question is not as to the duty of the defendant towards persons of mature years, but what is that duty with respect to children. It might be quite reasonable to declare as a rule of law that a grown person has no right to enter a car except as a passenger, and, if he does so as the friend of the conductor, that such a situation creates no relationship between such person and the car company, and that the latter is under no obligation to see to his safety; while it might be unreasonable in the extreme to apply the same rule to a child under similar circumstances. Very few of the rules that regulate the conduct of a man with his fellow could be applied with the least show of reason to his intercourse with children. It is the legal duty of every one dealing with a child to protect it against its own indiscretion. Many cases have been decided upon this principle. The truth of this remark is exemplified by the well-known case of Lynch v. Nurdin, 1 Adol. & E. (N. S.) 422. Lord Denman, in his opinion, states the facts. It was an action of tort for negligence by the defendant's servant in leaving his horse and cart half an hour in the open street, at the door of a house in which the servant remained during that period. It was shown that, while the servant was indoors, the plaintiff and several other children came along, and began to play with the horse, and climb into the cart and out of it; and, while the plaintiff was getting down from it, another boy made the horse move, in consequence of which the plaintiff fell and was injured. The suit was maintained, although it was obvious that the plaintiff had contributed by his own conduct to the production of his own injury, and consequently, if he had been of age, his action on this account would have miscarried. The chief justice thus defines the ratio decidendi: "But the question remains, can the plaintiff then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care. The child, acting without prudence or thought, has, however, shown those qualities in as great a degree as he could be expected to possess them." The application to the facts now presented to this court of the principle thus propounded and realized is manifest. The defendant has introduced, and is in the habit of using, in the public streets of a city, a machine of a highly dangerous character; and, as children have the right to frequent such streets, it is the duty of the company to provide, in all reasonable ways, for their safety so far as the same is imperiled by the business it thus transacts. It cannot be reasonably contended that if the master be liable for the carelessness of his servant for leaving a dangerous machine in a street, where it is likely to be meddled with by children, he will not be liable if his servant permits children to meddle with such machine. In such transactions the knowledge of the servant of the situation aggravates his negligence. It is the plain duty of these street-railroad companies to prevent children, except under proper safeguards, from entering their cars; and, if this duty be neglected, they become responsible for the consequences.

We think, therefore, that at the trial in this case the judge applied to it the legal rule when he told the jury that, if the plaintiff was in the car by the invitation of the conductor, thereby it became the duty of the company and its agents "to exercise all rea-

Digitized by Google

sonable care to prevent injury coming to the plaintiff in consequence of the position of danger he was invited to assume." This doctrine is in harmony with the decisions. In the case of Muehlhausen v. Railroad Co., 91 Mo. 332, 2 S. W. 315, it was held that a child who was permitted to ride without the payment of fare had the rights of a passenger to the extent, at least, that he was entitled to the diligence due to a person of his age and discretion. A precisely similar rule was enforced in Buck v. Light & Power Co. (Mo. Sup.), reported in 18 S. W. 1090; the facts being that a small boy was riding in the car at the invitation of the driver, and there was a recovery on the ground just mentioned, that the company was bound to take the same care of him that it did of its other passengers. The following cases afford exemplifications of the enforcement of the same principle: Ekman v. Railway Co., 34 Minn. 24, 24 N. W. 291; Railroad Co. v. Stout, 17 Wall. 657; Railroad Co. v. Moore, 83 Ga. 453, 10 S. E. 730; Wilton v. Railroad Co., 107 Mass. 108.

The damages appear to be somewhat large, but, in a legal point of view, cannot be said to be so exorbitant as to justify the interference of the court. Let the rule be discharged.

STATE (GRANT, City Treasurer, Prosecutor) v. WATSON.

(Supreme Court of New Jersey. Feb. 21, 1895.)

ILLEGAL SALE OF LIQUORS—EVIDENCE.

1. In an action for violating an ordinance which forbids an unlicensed person to sell liquor, it is not incumbent on the prosecutor to prove affirmatively that the defendant was not licensed.

2. If there is an exception in the enacting clause of a statute or ordinance, the plaintiff in an action on that clause must show that his adversary is not within the exception; but if the exception is in a subsequent clause of the same section, or in a subsequent section of the same statute or ordinance, or in a subsequent enactment, that is a matter of defense, and the plaintiff need not show that the defendant is not within the exception.

(Syllabus by the Court.)

Certiorari to court of common pleas, Union county; McCormick, Hyer, and Wiley, Judges.

Certiorari by the state, on the prosecution of the treasurer of the city of Plainfield, against Michael Watson, to review a judgment of acquittal of defendant for the violation of a liquor law. Reversed.

Argued November term, 1894, before MAGIE, LIPPINCOTT, and DIXON, JJ.

Craig A. Marsh, for prosecutor. Walter L. Hetfield, for defendant.

DIXON, J. The prosecutor seeks the reversal of a judgment rendered in the common pleas of Union county, on trial of an action brought by him against the defendant for violating the eleventh section of the liquor ordinance of the city of Plainfield. The section ordains that "if any person not licensed * * * shall sell any spirituous liquors * * * such person shall be deemed guilty &c.: provided, nothing in this ordinance shall be construed to apply to druggists filling prescriptions." The court below charged the jury to find the defendant not guilty, on the ground that the prosecutor had failed to prove that the defendant was not licensed; and the parties have stipulated that, if this court shall be of opinion that the burden was on the prosecutor to prove affirmatively that the defendant was not licensed, and that he was not a druggist filling a prescription, the judgment of the common pleas shall be affirmed; otherwise, it shall be reversed, and a new trial ordered.

The burden of proving an allegation that the defendant was not licensed did not rest upon the prosecutor, because it was a negative averment, the truth or falsity of which was peculiarly within the knowledge of the defendant, and which would be difficult of proof by the prosecutor if true, and easy of disproof by the defendant if untrue. Greeley v. City of Passaic, 42 N. J. Law, 87; Jackson v. Camden, 48 N. J. Law, 89, 2 Atl. 668. Nor was it incumbent on the prosecutor to prove that the defendant was not a druggist, etc. The clause of the ordinance permitting druggists to sell without license was not placed in the enacting clause by which the offense was described and forbidden, so as to bring the case within the rule applied in Hoffman v. Peters, 51 N. J. Law, 244, 17 Atl. 113, but stands in an entirely separate proviso. To maintain an action on such an ordinance, it is enough for the prosecutor to show that the defendant is within the enacting or prohibitory clause, and the burden is on the defendant to prove himself within the exception. Farwell v. Smith, 16 N. J. Law, 133; McGear v. Woodruff, 33 N. J. Law, 213; Clark Thread Co. v. Freeholders of Hudson Co., 54 N. J. Law, 265, 23 Atl. 820. The contrary dictum in State v. Startup, 39 N. J. Law, 423, is not in harmony with the general tenor of judicial decision. The judgment must be reversed.

In re WARTMAN.

(Supreme Court of New Jersey. April 4, 1895.)

DISBARMENT OF ATTORNEY.

In proceedings for the disbarment of an attorney, evidence that he had issued a writ of replevin on a chattel mortgage, given by one of his clients to collect the sum secured by such mortgage, after it had been paid, contradicted only by testimony that certain payments on the mortgage debt were received as his fee, and in that event establishing the fact that he had charged an indigent woman $44.50 for a loan of $30 for 60 days; together with evidence that he had unlawfully procured a judgment to be entered on a bond given him by one of his own clients, and had induced another client to purchase and pay for the property sold under execution issued on this and other judgments, retaining the money so paid under a promise, never afterwards fulfilled,

Digitized by Google

or attempted to use it in exonerating the rents and profits of the property of the execution debtor from sequestration, and subjecting them to the payment of a claim due such purchaser,—was sufficient to sustain the charge of malpractice and unprofessional conduct.

Proceedings for disbarment of John W. Wartman, under rule issued by the court upon 16 ex parte affidavits. Rule made absolute.

Argued at February term, 1895, before VAN SYCKEL, MAGIE, and GARRISON, JJ.

John W. Wescott and S. M. Wain, against the rule.

PER CURIAM. At the November term of this court, upon the presentation of 16 ex parte affidavits, a rule was entered directing John W. Wartman, an attorney and counselor of this court, to show cause why he should not be disbarred from the practice of his profession, because of his unprofessional conduct in 14 particular instances, the specification of which was formulated by the justice then presiding. Under this rule a large mass of testimony has been taken, and at this term the arguments of counsel on the part of the accused attorney have been heard. Each of the specifications referred to some act of the accused as an officer of this court, that, if proven, would constitute "malpractice" within the meaning of the practice act. Revision, p. 849, § 5. In regard to some of these charges the proof comes down to a direct issue of veracity between the attorney or those who were, or who say that they thought they were, his clients. In respect to these cases no opinion is formed or expressed.

In another class of charges there is some conflict of testimony, but there is also a considerable body of admitted fact as to which no doubt whatsoever exists; so that, standing on the firm ground thus afforded, certain conclusions are compelled and others are practically unassailable by reason of the corroboration thus afforded. Take, for instance, the ninth specification, the substance of which is that Wartman issued a writ of replevin on a certain chattel mortgage made by Mrs. Lydia Bender, the amount of which had been paid to him. The replevin suit went to trial before the circuit court, and the jury found from the testimony that the whole of the sum secured had been paid by Mrs. Bender, to the attorney. Assuming, however, that the question is still an open one, the undisputed facts are that Mrs. Bender borrowed through Wartman the sum of $100, to secure which she made a chattel mortgage upon her bed and bedding and a few other household articles. That she paid him at the time the mortgage was executed the sum of $5 in cash, and that he retained out of the principal the sum of $15, so that $80 was all she in fact realized. That within a short period after the mortgage came due, which was in 60 days, she paid to him in cash, in small amounts, the further sum of $24.50; so that he actually received $44.50 before he issued the writ of replevin on the mortgage to collect the whole of the principal sum. This state of facts is admitted to be true,—is, indeed, sworn to by the attorney, whose claim is that the sum so paid was for his fee; hers being that she paid these and other sums in full discharge of the mortgage debt. Taking the case on the attorney's testimony alone, he exacted nearly 50 per cent. of a loan as his fee for obtaining and extending it for a few months. The specification, however, is not for extortion, but for fraud. In this aspect the significance of the undisputed facts is their bearing upon the credibility of the attorney's testimony, who, on the witness stand, gave his reasons for claiming that he had, "with possibly one exception, the largest practice in the state." The dilemma is this: Either he, an attorney with such a practice, extorted the exorbitant fee of $44.50 for a loan of $80 from an indigent woman, who to obtain it was forced to pledge her bedding and other small effects, or else her testimony is practically undisputed, in which case the specification is proved. This was the verdict of the jury who heard the testimony in the replevin suit, and, upon the direct issue of professional conduct, is the one we also have reached, it being, in view of all the proofs, more credible that the money was paid upon the loan itself than that an honorable attorney, in extensive practice, would take from a needy woman a fee of nearly 50 per cent. for a paltry loan for a few months. This case is cited as a sample of those in which the testimony is somewhat in dispute.

As an illustration of another class in which the proof, documentary or of record, admits of no dispute, the seventh specification may be cited. This specification is to the effect that Wartman obtained from Christopher Gallagher the sum of $256.69, upon his promise that he would procure from the chancellor of this state an order giving said Gallagher the right and power to collect from the sheriff of Camden county certain money then in the hands of the said sheriff, being rents collected from the property of Charles Elliot, and also giving him the power to collect the rents that might thereafter become due for said property. Nevertheless he, the said Wartman, willfully and wrongfully omitted to procure such an order, or to endeavor to procure the same. To understand this charge, certain preliminary matters must be known. These are in no dispute, and rest either in matters of records or in admitted fact. To state them chronologically: On July 6, 1890, Anna E. Elliot, filed her bill for alimony against her husband, Charles H. Elliot, Wartman being retained by the husband. February, 1891, an order for alimony at $3 a week was made, the husband to give bond for $250, with surety. Wartman becomes surety on this alimony bond, and takes for

Digitized by Google

his indemnity the straight bond of Charles H. Elliot for $250. Elliot at this time owned real estate that rented for $68 a month, and paid the alimony until late in 1892. January 20, 1893, Elliot leaves the state, and on February 6, 1893, a petition to the chancellor shows that the alimony is 18 weeks in arrears. On February 7, 1893, an order to show cause is made against Elliot, for contempt for failure to pay the alimony. Application is made on behalf of the wife for sequestration of the rents of Elliot's property. Her counsel agrees with Wartman to continue this application to March 20, 1893. On March 20, 1893, the wife's counsel again agrees with Wartman to continue the application for sequestration of rents to April 17, 1893. On the day following, to wit, March 21, 1893, Wartman enters judgment on the money bond given to him for indemnity by Charles H. Elliot, who had left the state. It is to be observed that up to this time Wartman has not been called upon to respond to any demand made upon him as surety, and that, by reason of the pendency of the application for the sequestration of his client's rents, there is no imminence of such a demand. The affidavit upon which the judgment was entered is in these words: "The true consideration of the bond, etc., is for the amount of the bond of Charles H. Elliot, in which deponent became bounden in the sum of two hundred and fifty dollars, for which Charles H. Elliot is now indebted to deponent in the sum aforesaid." On the day following, an execution was issued by Wartman against his own client for the amount of this judgment. On April 5, 1893, Wartman, as attorney for Jacob Elliot, the father of Charles H. Elliot, entered a judgment for $600, for money loaned by Jacob to his son. On April 17th the sheriff was ordered to sequester the rents, and on May 1st he began to collect them. On May 26, 1893, the sale took place under the executions against the property of Charles H. Elliot. This brings the narrative down to the appearance of Christopher Gallagher in this transaction. By the admitted facts, Gallagher, who is a wealthy liquor dealer in Philadelphia, and a friend of Jacob Elliot, was induced by Jacob to visit Wartman, with the double purpose of aiding the Elliots and of securing a small claim of his own—about $256—against Charles H. Elliot. Continuing now with the undisputed facts, Gallagher, at Wartman's suggestion, bid $275 at the sale. The property is knocked down to him, and he gives the sheriff his check for the costs,—$38.69. He then goes to Wartman's office, and gives to him a check for $263, both checks being produced in evidence. The execution on Wartman's judgment is satisfied by the sheriff upon the payment aforesaid of his fees, to wit, $38.69. Wartman retains the $263 paid him by Gallagher. At this point it should be noted that Wartman, having no lawful right to any sum on his judgment, this money was payable to his client Jacob Elliot, on his judgment. To continue with the undisputed facts, on July 3, 1893, Wartman presents a petition in Gallagher's name to the chancellor, asking for the release of the property from the sequestration. To which the vice chancellor (Green) replies by asking him for some authorities for such an order in aid of a mere volunteer. On July 17th, Wartman writes to Gallagher that he has filed his petition with the chancellor. On August 14, 1893, a receiver is appointed for the rents of Charles H. Elliot's property, to apply them on the alimony, and the sheriff pays over $242 of rents to the receiver, who pays up the alimony. September 23, 1893, a bill is filed by the mortgagee of Elliot's property to foreclose, and later on, in 1894, the lands were sold for the sum of $4,200, which is less than the incumbrances.

The foregoing facts being undisputable, the question is: "Did Wartman represent to Gallagher when he obtained from him the bid of $275 that he, Wartman, would get from the chancellor an order entitling Gallagher to the rents of Elliot's property?" Gallagher swears circumstantially that he did; Wartman denies it. In view of the uncontradicted facts above rehearsed, there can be no reasonable doubt of the truth of Gallagher's statement—First. Because Gallagher's own testimony, with its explicit references to the sequestration of rents by the sheriff, and to the proposed release thereof upon his paying to Wartman the amount of the alimony bond, coming as it does from a layman, shows conclusively that he must have been so informed by the attorney in interest. Second. Because, as between the attorney (who, in any event, was striving to obtain cash for a judgment unlawfully entered, and in fraud of his own clients) and a disinterested stranger, credence belongs to the one who was acting from honest impulses alone. Third. Because, immediately after the sale, Wartman made, in behalf of Gallagher, an application for the very order that Gallagher said was held out to him as the inducement to part with his money. It would be impossible for Gallagher to testify minutely about a proceeding so unusual unless the information had been imparted to him professionally. Throughout, in all essential particulars, Gallagher's testimony is fully corroborated, and we can entertain no shadow of doubt but that he gave to Wartman the sum of $263 solely because of the representations contained in the specification.

The remaining question is whether Wartman, having taken Gallagher's money, in the language of the specification "willfully and wrongfully omitted to procure such an order, or to endeavor to procure the same." Upon this point there can be but one opinion, since he omitted totally to make any use whatsoever of the money paid to him for the only purpose for which he held it, viz. to exonerate the rents of Elliott's property from the

Digitized by Google

sequestration. Wartman did not claim to Gallagher that he had earned the sum of $250, realized at the sale. It was under the most favorable light the cashing of his indemnifying bond, in order that it might thus be more available in inducing the chancellor to take it on the alimony and release the rents. No such use was ever made of it by Wartman, who simply put Gallagher's money in his pocket, and entirely suppressed all mention of it in the futile and inadequate petition that he presented to the vice chancellor. Under no circumstances was this money his. It was a fraud on Elliot, Jr., whose lands he sold to raise it; it was a fraud on Elliot, Sr., whose lawful judgment was on the lands. It was a fraud on Gallagher to omit to allege the payment of this money by him in some manner calculated to advance his interest in the premises, which is the point specified as malpractice. Such conduct on the part of an attorney must be deemed "willful" since it enabled him to retain money without giving for it any consideration whatsoever, and "wrongful" because of the subsequent failure to return it to its rightful owner. We find this specification to be fully sustained in every particular. This being so, no useful purpose will be served by a more extended report of the results of our examination.

In announcing the conclusion to which the mind of each judge, after a careful study of the proofs, has been irresistibly impelled, we are conscious of a keen sense of the painful duty of courts of justice in cases of this nature. Our duty, however, is too plain to admit of parley. The special confidence reposed by the court in one of its officers having been betrayed by the official conduct of him in whom it was reposed, the statute fixes the penalty. The rule to show cause is to be made absolute. The licenses of the attorney must be revoked, and his name put off the rolls of this court.

COOPER v. COOPER et al.

(Court of Errors and Appeals of Delaware. June 27, 1887.)

CONSTRUCTION OF WILL — DESCRIPTION OF DEVISEES—"SURVIVOR OR SURVIVORS"—INSERTION OF WORDS—INTENT OF TESTATOR.

1. Testator devised to each of his five children certain land for life, remainder to the children of each, in tail, the share of any child dying without issue that could take as his immediate devisees to go to "the survivor or survivors" of his children during their natural lives; and after their decease to the children of such "survivor or survivors," "forever, [and] of any of my children who may be dead leaving children claiming their parent's share, to be equally divided between [the child or children of] my surviving child or children as aforesaid, and the child or children" of "any that may be dead, claiming the right of their parent or parents, share and share alike"; and then followed a devise over in case all his children should die without descendants. The next item declared an intention to create cross remainders among his children, so that they and their children should continually inherit, and that no other person should take any part of the estate while any of his children or their lawful issue should remain. *Held*, that the parenthetical words should be inserted to elucidate testator's meaning, and that the words "survivor and survivors" should be construed to mean "other" and "others," so that, on the death of the sole surviving child, the share of a child previously deceased without issue should be equally divided among all of testator's grandchildren then living per stirpes.

2. When the insertion of certain words in a will elucidates the testator's intention, in construing the will the court may treat those words as inserted.

Case reserved from superior court, Kent county.

Ejectment by Doe, on the demise of Andrew B. Cooper, against Roe, casual ejector, and Ellis P. Miller and others, tenants in possession, and Ezekiel W. Cooper and others, real defendants.

Edward Ridgely and Beniah Watson, for plaintiff. Nathaniel B. Smithers and George V. Massey, for defendants.

SAULSBURY, Ch. Richard Cooper, at that time a prominent citizen of Kent county, in this state, duly made and published his last will and testament on January 23, 1816, and died, without having revoked the same, in 1818. He left to survive him a widow and five children, viz. Ezekiel, Sarah, Richard J., Ignatius T., and William H. To each of his five children he devised in severalty portions of his real estate, in similar terms, which terms may be sufficiently understood by reference to the different items of his will in which the several devises are contained. The sixth item is as follows: "I give and devise to my son, William Hughlett Cooper, * * * for and during his natural life, and not to be taken nor construed to be any longer or greater estate. And, from and after his death, I give and devise all the foregoing lands and premises unto the several children, respectively of my son William H. Cooper, both males and females, if he should leave any at the time of his death which are lawfully begotten of his body, unto them, his said children, and the heirs of their bodies respectively forever. I give and bequeath to my son William H. Cooper a legacy of three hundred dollars, in order to make up the deficiency in the value of the real estate devised to him with that devised to my other children." Similar devises of his real estate for their natural lives, and not to be taken nor construed to be any larger or greater estate, were made to his other children respectively, and from and after their deaths, respectively, were made unto their several children respectively, of the portions of real estate devised by the testator to his children respectively. It is this item of the testator's will to which we are now to give a construction.

The seventh item of the will is as follows: "Provided, nevertheless, in case any one, or more of my said children shall happen to die without leaving child or children, lawfully

Digitized by Google

begotten of their bodies that can take and hold my real estate, as my immediate devisees agreeable to the true intent and meaning of this my will, then in such case, I give and devise the lands and premises, above devised, to such child or children which may, or shall happen to die as aforesaid unto the survivor, or survivors, of my said children, during their natural life, and after their decease I give and devise the lands and premises as aforesaid, to the child or children, both males and females respectively of such survivor, or survivors, lawfully begotten of their bodies forever of any of my children, which may be dead leaving such child, or children, such child, or children claiming such part, or share as the parent, or parents, of such child, or children would have claimed, if living, to be equally divided between my surviving child, or children as aforesaid, and the child, or children lawfully begotten, of any that may be dead claiming the right of their parent, or parents as if living, share and share alike, as tenants in common, and not as joint tenants, and to the respective heirs, as aforesaid, forever; and it is further provided, and it is my will, and desire, and intention, that if the whole of my children should die without leaving lawful child or children, or legal descendants of such child, or children, so that the whole of the lawful issue of my own body should become extinct, then and in such case, I give and devise the remainder, and remainders, reversion and reversions of my whole estate in the manner and form following: [Here follow devises to divers persons in fee and in tail not being children or descendants of the testator.]" The eighth item of the will is as follows: "Be it known that it is my express intention in this my will to create and establish cross remainders on and in the aforesaid estates, lands and premises among my several and respective children and their children lawfully begotten, so that my children and their children as aforesaid shall inherit so long as any of them shall remain." In a codicil to his will dated July 27, 1816, the testator declared that it was his intention and will that the whole of his estate, both real and personal, should go to, and be divided to and among, his children and the lawful issue of their respective bodies so long as any of them should remain; and that no other person in remainder should take or inherit any part thereof so long as any of his children or their lawful issue should survive. Ezekiel Cooper, one of the children of the testator, died in 1828, leaving to survive him four children, one of whom is Andrew B., the plaintiff. The testator's daughter Sarah died in 1830, leaving to survive her three children. Richard J., another of his children, died in 1835, leaving to survive him one child. William H. Cooper, another child of the testator, died in 1847 without issue. Ignatius T. Cooper, another child of the testator, and the surviving one of the testator's children, died in 1884, leaving to survive him five children, viz. Richard G Ezekiel W., William H., Alexander B., and Ignatius T.

The question for us to decide is whether Andrew B. Cooper, the plaintiff in the action of ejectment in the superior court in and for Kent county, in the state of Delaware, a son of Ezekiel Cooper, a child of the testator who died in 1828, is entitled to any, and, if any, what, estate in possession devised by the testator to his son William H. Cooper for life, who died in 1847 without issue. In deciding this question it is necessary to consider every provision of the testator's will having a relation thereto. First, I remark that it is apparent, from careful consideration of the proviso contained in the seventh item of the will, that to a clear and full understanding of that proviso the word "and" should be read between the words "forever" and "of" in the thirteenth line of said proviso on the plaintiff's brief and in the twelfth line on the defendants' brief. The court, in construing that proviso, is justified and has authority to consider that that word was intended or meant by the testator so to be introduced and was omitted from accident or inadvertence, and its insertion, in a proper consideration of this provision of the testator's will, whether absolutely necessary or not, would clearly elucidate his meaning, and render clear that which otherwise might by others be considered doubtful or uncertain. That it is perfectly competent for the court to construe the will as though this word was inserted, if they believed such an insertion would manifest more clearly the testator's intention, is too clear to need authorities, and will not, I presume, be seriously questioned by any one familiar with the rules of correct interpretation. Properly to interpret the will of the testator, and to give full effect to all of its provisions, we must bear in mind that he has declared therein that it is his intention that the whole of his estate, both real and personal, shall go to, and be divided to and among, all his children and the lawful issue of their respective bodies, so long as any of them shall remain, and that no other person in remainder shall take or inherit any part thereof so long as any of his children or their lawful issue shall survive. He also declared it his expressed intention in his will to create and establish cross remainders in the aforesaid estates, lands, and premises among his several and respective children, and their children, lawfully begotten, so that his children and their children shall inherit so long as any of them shall remain. It was manifestly the intention of the testator to preserve his estate to his children, and to their children, and to the issue of their children, to the exclusion of all others not of his family, as long as any member of his family should exist, and, though there was a devise over to perso-

Digitized by Google

not members of his family, he expressly provided that those named in such ulterior devise should take nothing under the same until his entire descendants should become extinct. Equality of benefit among his children and their children and the issue of his children is a marked characteristic of the testator's will. To give effect to the testator's will in this respect it becomes necessary to ascertain the true meaning of the words "survivor" or "survivors," as used therein. It must be observed that the children of his children respectively, and the issue of such children, were intended to be objects of the testator's bounty, and of equality in the enjoyment of that bounty, is as plainly evidenced as is this intention in respect to his immediate children. Now, can it be reasonably supposed that the equality of benefit in any portion of his estate to any of his children's children or their issue should depend upon the uncertain event of the parent of such children or issue being the last survivor of all the children of the testator? Could the mere accident of survivorship of any one of the children of the testator destroy that equality of interest in all his grandchildren and their issue which the testator clearly indicates and expresses throughout his whole will to be his intention? Is it possible that such an accident shall confer upon the children of Ignatius T. Cooper, one son of the testator, who in this case happened to be his surviving child, such absolute advantage of benefit, under his will, over the children of Ezekiel, Sarah, and Richard, also standing in the same relation to the testator and equally objects of his bounty? Did the testator intend any such superiority of advantage to the issue of Ignatius T. over the issue of his other children, simply because the former happened to survive in point of time the latter? What, then, is the meaning of the word "survivor" or "survivors," as used by the testator in his will?

The following principles have been decided and considered in well-adjudged cases. If there be an absolute gift to several persons, with the gift to the survivors if any die without issue, "survivors" must be construed in its ordinary sense. The defendants claimed the benefit of this principle or rule because they are the children of Ignatius T. Cooper, who was the surviving son of the testator, and contend that they, by reason of the survivorship of their father, became, under the will of their grandfather, entitled to that portion of his real estate devised to William H. Cooper, their uncle, who died without issue. It must, however, be observed that the gifts or devises to the five children of Richard Cooper, the testator, were not in themselves absolute; and this fact, when taken in connection with other portions of the testator's will, does not bring the contention of the defendants clearly within the principle above announced. Another principle of interpretation is that where there is a gift over, to take place only in the event on which the property is limited to the first legatees, among whom there is to be survivorship, happening in respect to all these legatees, "survivor" will be construed "other," so as not to cause an intestacy. Now, in the present case, as there was a devise over to persons not members of the testator's family, and as the testator declared in his will that such persons should not take any portions of his estate so long as any of his descendants should remain, it would follow, if the contention of the defendants be correct, that, had Ignatius T. died without children or issue, there must have been an intestacy as to that portion of the testator's real estate devised to William, and this notwithstanding there might have been children or issue of Ezekiel, Sarah, and Richard, who were descendants of the testator at the time of the death of Ignatius without children or issue. Another principle of interpretation is that where there is a devise to sons and the heirs of their bodies, and, if any die without issue, to the survivors and the heirs of their bodies, and, if all die without issue over, survivorship shall be referred to the stirpes and not to the first taker, and the share of a son dying without issue will go among the issue of a son previously deceased and the surviving sons. In such a case, says Mr. Theobald, in his able and excellent treatise on Wills, "the testator has expressed his intention of benefiting the line of issue, and the survivorship contemplated is one between the respective stirpes, and not between the first takers merely, and this, coupled with the gift over, which can only take effect if all the sons die without issue, is sufficient to enlarge the meaning of the word 'survivor.'" The same principle will be applied to the case where the will gives life estates with limitations expressly to issue, followed by a gift on failure of issue of any of the tenants for life to the surviving tenants for life for their lives, and then to their issue, and an ultimate gift over on failure of issue of all the tenants for life. "There is here," says the same distinguished author, "the same evidence of intention to benefit the issue, and the gift over shows that survivorship is contemplated, not merely between the first takers, but between the respective stirpes." I have carefully examined the cases of Hurry v. Morgan, L. R. 3 Eq. 152, Badger v. Gregory, L. R. 8 Eq. 78, Waite v. Littlewood, 8 Ch. App. 70, In re Palmer's Settlement Trusts, L. R. 19 Eq. 320, and many other adjudged cases, and find this last principle fully supported by well-adjudged cases.

The consideration of the question as to when the word "survivor" or "survivors" shall be construed "other" or "others" may be confirmed by reference to the case In re Keep's Will, 32 Beav. 122. The master of rolls said

Digitized by Google

in that case "that there was no question but that the rule of law as laid down by modern authorities that the word 'survivors' is to be confined to the literal signification of survivors at the period spoken of by the testator, in every case where it is possible to do so without violating the clear meaning of the rest of the will, and that the burden of proof lies on those who contend for a different construction to show from the words of the will, taken together, that the true meaning of the word as used by the testator is 'others,' and not 'survivors.'" This is a fair statement of the question of construction. The plaintiff in the action in the superior court, by which the question to be decided has been reserved for our decision, must show that the true meaning of the words of the will of Richard Cooper, his grandfather, as used by the testator, is "other" or "others," and not "survivor" or "survivors," in their restricted sense; and that applying the words strictly would be violating the clear meaning of the rest of the will; and that the clear meaning of the rest of the will requires an enlarged meaning of the word "survivor" or "survivors." The master of the rolls, however, in Re Keep's Will, while adhering rigidly to the rule that the word "survivors" is to be construed strictly when it is possible to do so, was of opinion that the testator had plainly expressed his intention that the word "survivors" in the will he was considering meant the other nieces among whom he had divided the ten-elevenths of his residue, and made a declaration accordingly. It may not be amiss to refer to the case of Smith v. Osborne, 6 H. L. Cas. 374, where it was decided that in a will the gift to two designated devisees as tenants in common in tail, and that, if either should die without issue, then to the "surviving" devisee, that word must be taken to mean "other." Opposed to this rendering of the word "survivor" or "survivors" as being "other" or "others," the counsel for the defendants refers us to the case of Pomfret v. Graham, 19 Ch. Div. 186. In this case, Hall, vice chancellor, said in the conclusion of his opinion: "I say now, looking at all the authorities and considering all the opinions expressed by the judges, that when I have such a case as the present before me I ought not to decide it upon the view that has been said by one judge to be an absurdity, that the gift over to survivors for life with remainder to children is alone enough to construe 'survivors' as 'others.' I am of opinion that I ought to hold, where that is the sole circumstance to be relied upon, the word must have given to it its natural and ordinary meaning, and, that being so, hold that the word 'survivor' or 'survivors' must be so read in this case." But is this an authority upon the question at issue? In the will before Vice Chancellor Hall there was no gift over. There was no express provision, as in the will of Richard Cooper, that it was the testator's intention to create cross remainders between his devisees and their issue. Surely, a gift over to survivor for life, with remainder to children which seems to have been the sole circumstance for consideration by Vice Chancellor Hall, is not the sole circumstance, or any material circumstance, to be considered in the construction of the will of Richard Cooper. In the case of Wylie v. Lockwood, 86 N. Y. 291, to which we have been referred, there was no intention to create cross remainders by the testator between his devisees, and no devise over after the death of all his children without issue, or after all his descendants should become extinct, as was the case in the will of Richard Cooper. These are material differences, which distinguish that case from the case before us. But it is unnecessary to refer further to adjudged cases.

In my opinion, the intention expressed by Richard Cooper in his will to create and establish cross remainders on and in the estates, lands, and premises among his several and respective children and their children, lawfully begotten, so that his children and their children should inherit so long as any of them should remain, and the expression of his will and desire and intention that if the whole of his children should die, without leaving lawful child or children, or legal descendants of such child or children, so that the whole of the lawful issue of his own body should become extinct, and the gift and devise of the remainder and remainders, reversion and reversions, of his whole estate to divers persons in fee and in tail, not being children or descendants of the testator, entitles the plaintiff in the action of ejectment, as a son of Ezekiel Cooper, one of the children of the testator, to an estate in possession of one-eighth part of the lands devised to William H. Cooper, another child of the testator, who died in 1847, without issue.

HOUSTON, J. In the interpretation of a last will and testament the duty of the court is to ascertain, as far as it can do so to its own satisfaction, the true meaning and intention of the testator from the words in which he has expressed it, and to give effect to that meaning and intention, if practicable; and the more uncertain and obscure the meaning of it may be, the greater is the danger of resorting to mere speculation or conjecture for a correct solution of its construction. But, notwithstanding the multiplicity of words and the uncertainty of meaning which characterize the seventh item of the will in question, I can safely say that it is clear to my mind from the whole context of it that the testator intended in the first place to devise to each of his five children, viz. Ezekiel, Sarah, Richard J., Ignatius T., and William H., the several portions of his real estate mentioned respectively in the second, third, fourth, fifth, and sixth items of it, in severalty for life, remainder to the lawful children of each of them in tail in the portion so devised; "but in case any one or more of my said children

Digitized by Google

should happen to die without leaving child or children lawfully begotten of their bodies that can take and hold my real estate, as my immediate devisees, agreeable to the intent and meaning of this my will, then in such case I give and devise the lands and premises above devised to such children which may or shall happen to die as aforesaid, unto the survivor or survivors of my said children during their natural life; and after their decease I give and devise the lands and premises, as aforesaid, to the child and children, both males and females, respectively, of such survivor or survivors, lawfully begotten of their bodies forever, of any of my children which may be dead leaving such child or children, such child or children claiming such part or share as the parent or parents of such child or children would have claimed, if living, to be equally divided between my surviving child or children, as aforesaid, and the child or children lawfully begotten of any that may be dead claiming the right of their parent or parents as if living, share and share as tenants in common, and not as joint tenants, and to the respective heirs as aforesaid forever; and it is further provided, and it is my will and desire and intention that if the whole of my children should die without leaving lawful child or children, or legal descendants of such child or children, so that the whole of the lawful issue of my own body should become extinct, then and in such case I give and devise the remainder and remainders, reversion and reversions of my whole estate in the manner and form following." The testator then devises over the estate to others, and then adds as follows in the eighth item of the will: "Be it known that it is my express intention in this my will to create and establish cross remainder on and in the aforesaid estates, lands and premises among my several and respective children and their children, lawfully begotten, so that my children and their children, as aforesaid, shall inherit so long as any of them shall remain." And afterwards, on the 22d day of July, 1816, he executed and annexed a codicil to his will, in which he subjoins the following declaration: "I do also declare that it is my intention and will that the whole of my estate, both real and personal, shall go to and be divided to and amongst my children, and the lawful children of their respective bodies, so long as any of them shall remain; and that no other person, in remainder, shall take or inherit any part thereof so long as any of my children or their lawful issue shall survive." I have said that, upon the whole will, the first intention of the testator was clear to give the lands devised in the sixth item of it in severalty and in equal portions, so far as pertained to the value of them, to his five children named, for the life of each of them respectively, with remainder after the death of each of them to the lawfully begotten children of each of them in fee tail general. And the next intention of the testator was equally clear, I think, that if any one or more of his said children and devisees for life under the first devise should die without leaving child or children, lawfully begotten of their bodies, then and in such case he gave and devised the lands and premises so devised to such child or children which should happen to die as aforesaid unto the survivor or survivors of his said children during their natural life; and this shows that none of his said children were to take even in that event by survivorship more than an estate for his life or their lives in any part of the lands and premises originally devised severally to his said children for life respectively, with remainder to their children respectively in fee tail, and also that none of his grandchildren should take any interest or estate in possession in any portion of the lands and premises devised to any one of his children who should die without leaving any lawful child or children, during the lifetime of any one or more of his said children, but that the survivor or survivors of them should take such portion of the lands and premises so devised during their natural life. These intentions are all indicated and expressed with sufficient clearness and certainty in the terms of the will to be readily apprehended and understood.

But the question is as to the next intention, and what is the meaning of the limitation and devise over which immediately follows this in the will? It is as follows: "And after their decease, (that is to say, of the survivor or survivors of my said children who are to take it during their natural life,) I give and devise the lands and premises, as aforesaid, to the child or children, both males and females, respectively, of such survivor or survivors, lawfully begotten of their bodies, forever, of any of my children which may be dead, leaving such child or children, such child or children claiming such part or share as the parent or parents of such child or children would have claimed, if living, to be equally divided between my surviving child or children, as aforesaid, and the child or children, lawfully begotten, of any that may be dead, claiming the right of their parent or parents as if living, share and share alike, as tenants in common, and not as joint tenants, and to the respective heirs, as aforesaid, forever." I must say that I have found it impossible to give any sensible or reasonable interpretation to this devise in the will with the inherent errors apparent in the wording of it, one of which, by the omission of the word "and," either destroys the grammatical structure of the sentence in which the omission occurs, or strips it of any intelligible meaning whatever, while the other omission of a few more words in another sentence of it is so palpable as to make nothing less than nonsense of it as it now stands in the will. For I agree with the learned counsel for the plaintiff that we cannot give effect to, or, in fact, any sense or meaning to, the following words of the will, "and after their decease,

Digitized by Google

I give and devise the land and premises, as aforesaid, to the child or children, both males and females respectively, of such survivor or survivors, lawfully begotten of their bodies forever, of any of my children which may be dead, leaving such child or children claiming such part or share as the parent or parents of such child or children would have claimed if living," without inserting the conjunction "and" between the word "forever" and the word "of" which immediately follows it in the foregoing paragraph by reason of its omission, and which, with the word "and" there inserted, would read, "and after their decease, I give and devise the lands and premises as aforesaid, to the child or children, both males and females respectively, of such survivor or survivors, lawfully begotten of their bodies forever, and of any of my children which may be dead leaving such child or children, such child or children claiming such part or share as the parent or parents of such child or children would claim if living." or, in other words, intending to declare in case of a survivorship for life of any one or more of the portions among his children by death of any one or more of them without leaving a child, then, on the death of such survivor or survivors of his said children, the child or children of such survivor or survivors of his said children, and the child or children of any of his children which may then be dead leaving lawful child or children, should take the portion or portions so held for life by such survivor or survivors of his said children per stirpes, and not per capita, and in fee tail general.

There is also, as I have before remarked, evidently a similar error by the omission of intended words in the concluding part of the first and greater part of the devise which we have just before repeated, and which immediately follows it, and is separated from the preceding part of it simply by a comma, "to be equally divided between my surviving child or children as aforesaid, and the child or children lawfully begotten of any that may then be dead, claiming the right of their parent or parents, as if living, share and share alike, as tenants in common, and not as joint tenants, and to the respective heirs as aforesaid forever." This was evidently intended by the testator to be but one continuous devise over of any portion of the lands and premises which might happen to have been devised to any one or more of his said children who should happen to die without leaving child or children lawfully begotten of their bodies, and which in that case was or were given to the survivor or survivors of his said children during their natural life, after the decease of survivor or survivors of his said children, to such of his grandchildren as he wished to share in such portions of his lands and premises as might thus survive to any survivor or survivors of his said children for life, after the death of such survivor or survivors, and when, of course, all of his said children would be deceased. This was the special contingency, in case it should occur, which he was evidently providing for in this devise of the will, for, notwithstanding the length of it and the multitude of words employed in it, it is one single, continuous, and contingent devise of that contingent estate devised to the survivor or survivors of his said children for life in the portion or portions devised to any one or more of them who should happen to die without leaving child or children, lawfully begotten of their bodies; it was to provide for the limitation and devise over of these contingent estates for life in the survivors of his said children in case they should occur as apprehended and provided for, on the death of the last survivor of them; and, to show that it was evidently intended by the testator to be one such single and continuous devise of such a life estate or life estates on the death of all his said children, it is nowhere divided by any other mark of punctuation than a comma from the commencement to the conclusion of it. But to make this part of the devise consistent with all of the preceding part of it, and even possible in the contingency contemplated by the testator, must we not also insert before the words "my surviving child or children as aforesaid," and after the word "between," in the beginning of this part of the devise, the words "the child or children of"? And may we not suppose that in writing the will, or, perhaps, in preparing a fair copy from the original draft of it, these words were inadvertently omitted from it. For as the words stand in the will,—"to be equally divided between my surviving child or children as aforesaid, and the child or children lawfully begotten of any that may be dead," etc.,—it was a matter of absolute impossibility, apparent upon the face of the devise itself, that there could be any of his said children surviving when this devise by the very terms of it was to take effect, for it was not until "after the decease of the survivor or survivors of his said children" that this devise over of the lands and premises to any of the children who should die without leaving a child or children was to go to the survivor or survivors of them for life, and it was, of course, not until after the death of the last survivor of them, if there had been more than one survivor of them when his son William H. Cooper died without child or children, that any of the testator's grandchildren were to share in the possession of any part of the lands and premises devised in the first place to him. It was therefore an impossible and absurd devise, and wholly inconsistent with the manifest intention obvious upon the face of it, and must fail for that reason unless we give it a reasonable construction in accordance with that evident intention apparent upon the face of the devise, and consistent with all the preceding and succeeding parts of the will, by inserting the words I have suggested in the place and connection where they were manifestly omit-

Digitized by Google

ted, contrary to the meaning and intention of the testator. With those words inserted, the subsequent and concluding part of the devise in question will read as follows, and render the whole devise intelligible and consistent from the beginning to the end of it: "To be equally divided between the child or children of my surviving child or children as aforesaid, and the child or children lawfully begotten of any that may be dead, claiming the right of their parent or parents, as if living, share and share alike, as tenants in common, and not as joint tenants, and to the respective heirs as aforesaid forever." Without these presumptions to explain and rebut the obscurity and contradiction apparent on the face of the devise itself as it stands, I have been wholly unable to say what meaning it possesses, or whether it in fact possesses any intelligible or practicable meaning whatever. And yet I have a strong conviction that the two corrections suggested, if made in the words of it, would make it what he intended it should be when he made the will. His son Ignatius T. Cooper was the sole survivor of his said five children in the year 1847, when his son William H. Cooper died without issue, and this court, at the June term, 1857, held that Ignatius T. Cooper, as such sole survivor, took under this devise, on the death of his brother William H. without leaving child or children, an estate during his natural life in the portion of the lands and premises devised by the testator to his son William H., and which he held in pursuance of it until his death in the year 1884. Doe v. Townsend, 1 Houst. 365. Ignatius T. was, of course, the last survivor of the testator's said children, and, on the death of William H. without leaving any child, succeeded to the lands and premises devised to him for the term of his life, as this court unanimously ruled in that case; and, if there be any intention to be deduced with more certainty than any other from the obscure and defective language and grammar in which the devise now before the court is expressed, it certainly seems to me to be more in accordance with the general scope and design of the other parts of the will about which there is no dispute to give to this devise the intention and construction which I have herein given to it.

As I have before observed, it clearly appears from the other parts of the will that it was the desire and intention of the testator, in devising his real estate to his five children, to divide it in value equally between them, giving to each an estate for life in his or her several portion, with remainder to the children of each in tail, with the special limitation or qualification, if any one or more of his said children should die without leaving a child or children, he gave the lands so devised to such child or children to the survivor or survivors of his said children during their natural life, and under which the land so devised to his son William H., who was the only one of the five children who died without leaving any child, on his death passed to his son Ignatius T. for life, and who was then the only survivor of his said five children; but in this was the only exception which he made in his will to his scheme and purpose to devise and divide the lands equally between them all for life, with remainder in tail to the children of each respectively, subject only to this special and limited impairment of the equality of the division among his children and their children after their death, during the lifetime of the survivor or survivors of his said children in case of the death of any one or more of them without leaving a child. And is there anything in the will to warrant the opinion that he intended to depart any further than this from the equality of division which he first made between them and their children respectively in the main devise in the will, or that he intended in the event which has occurred that the lands and premises which were so devised to his son William H. should, on his death without leaving a child, not only accrue by survivorship to Ignatius T., then his only surviving child, for the term of his natural life, but should also accrue on the death of the latter to the exclusive benefit of the children of the latter, if there should be any child or children or descendants of either of his other five children then living? But that it was the intention of the testator that on the death of his last surviving child, Ignatius T., the lands which had survived to him for the term of his life on the death of his son William H. without leaving a child should be equally divided between all the children of his said children then living, per stirpes, share and share alike, as tenants in common, and not as joint tenants, and their respective heirs forever, is rendered still more certain and conclusive by the declaration made by him in the eighth item of it, as follows: "Be it known that it is my express intention in this my will to create and establish cross remainders on and in the aforesaid estates, lands, and premises among my several and respective children, and their children lawfully begotten, so that my children and their children, as aforesaid, shall inherit so long as any of them shall remain." And such was the importance which he attached to the express intention therein declared that he was not content with so expressing it once only, but afterwards substantially repeats it in equally explicit and positive terms in the codicil executed on the 22d day of July, 1816, and appended to the will, as follows: "I do also declare that it is my intention and will that the whole of my estate, both real and personal, shall go to and be divided to and amongst my children and the lawful issue of their respective bodies, so long as any of them shall remain; and that no other person in remainder shall take or inherit any part thereof, so long as any of my children or their lawful issue shall survive." One might even suppose that the eighth item of the will in which the testator so particu-

Digitized by Google

larly and forcibly declares his express intention to create and establish in his will cross remainders in the aforesaid estates, lands, and premises among his several and respective children, and their children lawfully begotten, so that his children and their children should succeed to the title and possession of them under the devises of the will so long as any of them should be in existence, was directly suggested by the ruling of the court of king's bench in the case of Doe v. Wainewright, 5 Term R. 427, in a case of cross remainders somewhat similar to that in this case.

WILLIAMS et al. v. COCHRAN et al.

(Superior Court of Delaware. May, 1888.

FORECLOSURE OF MORTGAGE—RIGHT OF PURCHASER TO RENTS.

Where the rent of land is payable in crops, a purchaser of the land on foreclosure of a mortgage in a United States court is entitled to the rent payable out of the crop maturing at the date of sale; and Rev. Code, c. 3, p. 680, § 28, providing for the apportionment of rents in the case of sheriff's sales, does not apply.

Attachment fieri facias by Nathaniel Williams and the Walton & Whann Company against William A. Cochran and others. Robert R. Cochran, garnishee, sets out a claim by Catherine H. Pascault to the funds in his hands, and he prays the court to decide the rights of the claimants.

The garnishee's answer was as follows: "On the 19th day of March, 1888, in a cause then pending in the circuit court of the United States for the district of Delaware, in which cause Catherine H. Pascault was plaintiff, and said William A. Cochran and Thomas F. Bayard, trustee, were defendants, being No. 107 in equity, and being an action for the foreclosure of a certain mortgage given by said William A. Cochran and wife to said Catherine H. Pascault, the said court adjudged and decreed, inter alia: That said mortgage was a lien upon the lands and premises therein described, situate in said county; that said defendant, William A Cochran, should, on or before the 1st day of May then next ensuing, pay into said court the moneys secured to be paid in said mortgage, together with accrued interest thereon, and costs of said action, or, in default of such payment, within said limited time, said mortgaged premises should be sold by a trustee appointed by said court to make such sale, and to make return thereof to said court, and that, upon confirmation of said sale by said court, and the compliance with the conditions of said sale by the purchaser, the said trustee should execute and deliver to the purchaser at said sale a good and sufficient deed, conveying to said purchaser in fee simple the said mortgaged premises, with the improvements and appurtenances thereto belonging, free, clear, and discharged of and from all liens and incumbrances created or suffered by the said defendant William A. Cochran, excepting a certain mortgage held by Thomas F. Bayard, trustee, and free, clear, and discharged of and from all claim of the said William A Cochran, or any person or persons claiming under him, thereon or thereto, by way of equity of redemption or otherwise, except as aforesaid, and the said William A. Cochran and all persons claiming under him should be thenceforth absolutely debarred and foreclosed of and from any such claim or demand, except as aforesaid. That thereafter, said William A. Cochran having failed to pay unto said court the said moneys in compliance with said decree, said premises in said decree mentioned were, in pursuance of said decree, on the 5th day of June in said year, duly sold by said trustee at public auction to said Catherine H. Pascault. That thereafter, on the 21st day of June, A. D 1888, said sale was by said court approved and confirmed, and it was ordered and decreed by the court that the trustee do execute and deliver to the said Catherine H Pascault, said purchaser, a deed conveying to her in fee simple the said premises, with the improvements and appurtenances thereunto belonging, free, clear, and discharged of and from all liens and incumbrances created or suffered by the said defendant William A Cochran, excepting the said mortgage held by the said Thomas F. Bayard, trustee, and free, clear, and discharged of and from all claim of the said William A. Cochran, or any person or persons claiming under him, thereon or thereto, by way of equity of redemption or otherwise. That thereafter on the —— day of June, A. D. 1888, said court awarded its writ of possession to said Catherine H. Pascault for putting her in possession of said premises, the tenant thereof being he, the said Robert R. Cochran, said garnishee, claiming to hold the same as tenant under the said defendant William A. Cochran by lease or contract posterior to the time whereon said premises were sold as aforesaid. That thereafter, on the —— day of ——, A. D. 1888, said trustee executed and delivered to the said Catherine H. Pascault, said purchaser, a deed conveying to her in fee simple the said premises in accordance with said decrees of said court, to which deed said Robert R. Cochran said garnishee, asks leave to refer, and to make a part of this, his answer. That since said sale said Catherine H. Pascault hath continued the owner and possessor of said premises until the 22d day of January, A. D 1889. That from the 25th day of March 1887, to the 25th day of March, 1888, he, the said Robert R. Cochran, was and continued the tenant of said premises, and so hath continued tenant of said premises to the present time, as tenant from year to year. That on the 30th day of March, according to the return of the sheriff, a writ of attachment fieri facias was served upon him, is-

Digitized by Google

suing out of the said superior court upon a judgment recovered in said court by Nathaniel Williams against said William A. Cochran et al., being writ No. 75, Att. Fi. Fa., to May term, 1888, upon which judgment there is an unpaid balance of —— dollars; which said writ was intended to, and did in fact, stop in his hands the rent, if any, due the said William A. Cochran as his landlord and lessor. That he, the said Robert R. Cochran, had, before the service of said writ as aforesaid, to wit, about the 3d day of October, A. D. 1887, planted a wheat field upon said premises and farm, one-half of the crop from which thereafter maturing and harvested, amounting to about four hundred bushels, being the landlord's rent and share thereof, he, the said Robert R. Cochran, hath sold for four hundred dollars, which proceeds of which wheat he now holds subject to said attachment. That he also, on or about the 27th day of April, A. D. 1888, planted about forty acres of said farm to corn, the crop from which, when harvested, amounted to about one thousand bushels, which corn is now in the crib upon said farm, and one-half thereof belongs to his landlord as rent. That said Catherine H. Pascault, by virtue of said decree of said circuit court, and the sale, proceedings, and deed of said trustee thereunder to her made as aforesaid, claims to be entitled to said shares of said wheat and corn crops so held by him, the said Robert R. Cochran, as subject to said writ of attachment, or to her proper and proportionate part thereof, as the owner and landlord of said farm and premises. That the said Robert R. Cochran, said garnishee, is unable to determine the person legally entitled to said rent, or the proportions thereof if the same should be apportioned; and prays said court to determine whether said Nathaniel Williams, said plaintiff in said attachment, or said Catharine H. Pascault is entitled to the said rent, and to what proportions thereof, if the same should legally be apportioned. And he, the said Robert R. Cochran, holds said rent subject to the order of said superior court."

Davis & Biggs, for plaintiffs. H. H. Ward, for mortgagee and purchaser.

HOUSTON, J. In the cases of fi. fa. attachment of Nathaniel Williams v. William A. Cochran et al. (No. 75, to May term, 1888), and of the Walton & Whann Company v. William A. Cochran (No. 99, to the same term of this court), and which were heard before us at the last, and were held under advisement by us until this, term, full arguments in writing having in the meantime been submitted to us by the counsel in them, and which attachments were laid in the hands of Robert R. Cochran, as garnishee and tenant of William A. Cochran, to attach whatever share of the rents, if any, the latter might be entitled to in the premises in question under all the facts disclosed in the record of the cases before us, and in which the garnishee, in his answer to the respective attachments, submits the question to the court whether the plaintiffs in them, the said Nathaniel Williams and the Walton & Whann Company, or the said Catherine H. Pascault, the purchaser of the premises under the proceedings and decrees for the sale of them in foreclosure of the mortgage in the circuit court of the United States for the Delaware district, referred to in the record, and to what proportion of said rent, if the same should legally be apportioned; and concluding his answer in each case with the statement that he holds said rent subject to the order of this court. There is but one answer the court can give to this question, and that is that this is no case for any apportionment of the rent in question, under the provisions of our statute, because the sale of the premises was neither by the sheriff or by virtue of execution directed to him, but it was made under a decree of foreclosure in the circuit court of the United States for this district of a mortgage upon the premises, and by a trustee of that court, appointed for that purpose, and they were purchased at a sale by the mortgagee for a sum of money less than the amount of principal and interest due upon it. We therefore order the rents referred to in the answers of Robert R. Cochran, the garnishee, as in hands, be paid to the said Catherine H. Pascault, the purchaser of the premises under the mortgage. We consider the ruling in this case to be well sustained by the cases cited in the argument of the counsel for her; for what was said by the court in the case cited by him of Wilson v. Delaplaine, 3 Har. (Del.) 499, which was an action in this court for money had and received, being for a part of the year's rent of intestate land sold by the orphans' court up to the time of sale claimed by the administrators of the intestate, is as applicable in this as it was in that case, viz. that "the rule of the common law that rent follows the reversion is admitted on both sides. But it is contended for the administrators that this rule ought to be or is modified by our acts of assembly apportioning rent in certain cases. We are of the opinion that those acts do not apply to the present case, and the principle of the common law applies. The rent follows the reversion. The reversion is vested in the purchaser by virtue of the sale and assignment under the orphans' court at the time when the rent falls due, for rent is indivisible. None of it is due until the expiration of the time during which it is accruing. The legislature have changed this in the particular case of a sale by the sheriff by virtue of execution process on judgment or decree, and they have apportioned the rent in that case between the debtor and the purchaser; but the provision extends no further. And in case of a sale of intestate land, under an

Digitized by Google

order of the orphans' court, which is but a mode of dividing the land among the heirs of the intestate, the purchaser takes all the estate of the intestate with its incidents, the accruing rent being one of them." Id. 500. And the reason for this ruling is only the stronger when the land is mortgaged, and the sale of it is under a decree of foreclosure of the mortgage in an equity proceeding in the circuit court of the United States for the district by a trustee appointed to sell it, as in this case, where the lien of the mortgage was as binding, both in law and equity, on the accruing rents and profits of the premises, as it was upon the land itself; for by the common law the nonpayment of the mortgage money at the time fixed upon by the parties was in the nature of a forfeiture of the estate by the mortgagor, and authorized the mortgagee to enter immediately, and to take the emblements. But in equity he held them, as he did the land, only as a security for the payment of the mortgage debt; and upon redemption he was bound to account for such emblements. Having the legal right, however, and the land and its products being a security to the mortgagee for his debt, a court of equity will not deprive him of his legal right to the emblements until the mortgage money and interest is fully paid. Aldrich v. Reynolds, 1 Barb. Ch. 613; Jones, Mortg. § 1654; Shepard v. Philbrick, 2 Denio, 174; Houts v. Showalter, 10 Ohio St. 124. And to these citations we may add the authority of 4 Kent, Comm. 160, 161, and of 2 Story, Eq. Jur. § 1015. The conclusion of the court, therefore, is that the rents referred to in the hands of the garnishee, the said Robert R. Cochran, should be paid to the said Catherine H. Pascault, the purchaser of the premises at the sale thereof on the foreclosure of the mortgage of the same hereinbefore stated.

STATE v. HARRIGAN.

(Court of Oyer and Terminer of Delaware. Dec. 9, 1881.)

PROSECUTION FOR MURDER — JUSTIFICATION — MISCONDUCT OF JURY — DRINKING LIQUOR — ABSENCE OF BAILIFFS.

1. The use of intoxicating liquors by members of the jury during a trial for capital felony is not, unless so excessive as to disqualify them for the intelligent performance of their duty, ground for a new trial.

2. Where two bailiffs had charge of the jury in a trial for a capital felony, the fact that, while one was watching, the other went to his home, a short distance away, to sleep, does not vitiate the verdict.

3. On a trial for murder, it appeared that the jury had the range of the upper part of the building in which they were, and that all persons were excluded therefrom, when the court was not in session, except the crier and watchman, sworn as general bailiffs, and two boys who assisted the crier in cleaning up, and the evidence clearly showed that no improper communications in reference to the case were made to any member of the jury. *Held*, that there were no grounds for a new trial.

4. Under the defense of insanity, evidence of defendant's mental condition several months before the homicide is admissible.

5. Insanity produced by continued dissipation is a good defense.

6. The defendant must prove the defense of insanity.

7. On a trial for murder it appeared that the deceased had been in the habit of frequently visiting defendant's house; that defendant, believing him guilty of adulterous intercourse with his wife, had forbidden him to come any more; and that deceased had applied odious epithets to the defendant, and, upon being ordered away from his house, had offered to fight him. *Held*, that these facts did not justify the killing.

Jeremiah Harrigan was convicted of murder, and makes a motion for new trial. Denied.

WALES, J. (charging jury). The prisoner, Jeremiah Harrigan, is indicted for the crime of murder of the first degree. The law of this state has established two degrees of murder, with a different penalty attached to each. It has also provided that a person indicted for murder may be found guilty of either degree, or of manslaughter; and this makes it necessary that we should explain to you, as briefly and as clearly as we can, these several crimes. At the common law, murder was, and still is, defined to be when a person of sound memory and discretion unlawfully kills a human being, with malice aforethought, either express or implied. And the law of this state still recognizes this definition as the correct legal description of the crime, but makes the distinction between express malice and implied the dividing line between murder of the first degree and murder of the second degree; so that now the pre-existence of express malice is necessary to constitute murder of the first degree, and when the crime has been committed with implied malice only, it is murder of the second degree. Malice is the test of murder, and, in a legal sense, is the dictate of a wicked, depraved, and malignant heart, and of a disposition to do an evil act, and may be either express or implied in law. Express malice is where one, with a sedate, deliberate mind, and formed design, kills another, and may be proved, not only by words, threats, former grudges, and ill will, but also by the selection of a deadly weapon, lying in wait, and concerted schemes or plans to do him some great bodily harm. Implied or constructive malice is an inference or conclusion of law upon the facts proved, as when a person unlawfully and suddenly kills another, without premeditation or design, and without any, or without a considerable, provocation, such as would reduce the crime to manslaughter. In such a case the law implies malice. Whenever, therefore, a murder has been committed with the deliberate and premeditated purpose of killing, it is evidence of express malice, and is murder of the first degree; but when

Digitized by Google

the unlawful killing has been done suddenly, without premeditation or design, but without sufficient provocation to reduce it to manslaughter, then it is murder with implied malice, and is of the second degree. Manslaughter is the lowest grade of felonious homicide, and differs from murder in this: that voluntary manslaughter arises from the sudden heat of the passions, and is the unlawful killing of another without malice, either express or implied. It may be either voluntary, upon a sudden heat, or involuntary, but in the commission of some unlawful act. Generally, it is the result of an actual combat; but the law, in recognition of human weakness and infirmity of temper, makes some allowance for a sudden gust of passion or transport of rage caused by an actual assault, or a blow, or other great personal indignity. The act of killing, under such circumstances, is considered to have been done on adequate or sufficient provocation, and will be manslaughter only. But in every case of homicide, where provocation is pleaded in excuse or palliation, if there was a sufficient cooling time for passion to subside, reason to interpose, and the judgment to resume its sway, and the person provoked afterwards kills the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder. And though there was not sufficient time for the passion to subside, yet if the case be attended with such circumstances as indicate malice in the accused, he will be guilty of murder. So that if he provide himself with a deadly weapon beforehand, in anticipation of the fight, and not for the defense of his person, or if he took an undue advantage of the deceased, or if, though he were in the heat of passion, he should designedly select, out of several weapons equally at hand, that which alone is deadly, it is murder. Only sudden and great provocation will excuse the use of a deadly weapon. Insulting language, opprobious epithets, or gestures expressive of contempt, without an assault, actual or threatened, on the person, will not be sufficient, if a deadly weapon be used, to reduce the offense below murder. There must be something more than words or gestures to constitute a sufficient or adequate provocation in such a case. There is a special provocation recognized as adequate by the law, and that is where a husband finds a man in the act of adultery with his wife, and kills him. The killing, under such a provocation, was only manslaughter at common law; and the statute of this state makes it a misdemeanor merely, and punishable with slight penalties. But, even under this extreme provocation, the offended party must act at once, and in the first transport of passion. It is not necessary, however, that he should witness the act of adultery. If he saw the deceased in bed with his wife, or leaving it, or found them together in such a position as to indicate with reasonable certainty, to a rational mind, they had just then committed the adulterous act, or were then about to commit it, the effect will be the same; and if, under such circumstances, the mortal blow was given, the killing will be manslaughter merely. But no other knowledge on the part of the husband, however positive, of their adulterous intercourse, will suffice to mitigate and reduce the killing from murder to manslaughter. If, instead of killing the adulterer in the act, or at the time of the adulterous meeting, he kills him some considerable time afterwards, or on the ground of suspicion or belief, this will not avail as any excuse.

It will be your duty, gentlemen, to apply the rules and principles of law, as we have just stated them, to the facts of the case now on trial, in order to form a just and true verdict. As a starting point, it must be remembered that whenever a homicide has been committed deliberately, or without provocation, the law presumes that it was done in malice; and it is incumbent on the prisoner to show from evidence, or by inference from all the circumstances of the case, that the offense is of a mitigated character, and does not amount to murder. It is not denied that on the night of the 10th of last September, near the village of Hockessin, in Newcastle county, Jeremiah Harrigan took the life of Denis Shea by shooting him with a pistol. And it is also proved that the prisoner was an unlicensed vender of intoxicating liquors, and that Shea and his companions had gone to the prisoner's house, on the night of the homicide, with the ostensible purpose of buying a quart of whisky. The defense is threefold, to wit: First, that the accused was exasperated beyond endurance by the continued visits of the deceased to his house after he had forbidden him to come there; second, that the belief or suspicion that the defendant was guilty of adulterous interccurse with the wife of the deceased was a provocation for the act of shooting; and, third, that the accused, in consequence of long-continued and excessive use of intoxicating liquor, was either in such a condition of mental unsoundness, or bordering upon such a condition, immediately before and at the time of the shooting, as rendered him irresponsible for the act. It seems to be clear enough that several months before the homicide there had been a quarrel between the prisoner and Shea in the house of the former, and where Shea was boarding at the time; growing out of words spoken by the latter to the prisoner's wife, and in his hearing. The odious comparison made by Shea on that occasion between the accused and the "worthless character in Ireland" justified the prisoner in ordering him to leave the house, and never to come there again. Shea left at once, obtaining permission, however, from the prisoner to return for his clothes, consent being given that he could make one trip for this purpose. From the testimony of the little girls, Mary and Ellen Harrigan, it appears that Shea did go back more than once, but

Digitized by Google

how often is uncertain, and that he would be frequently seen in the vicinity of the prisoner's house, and inquiring whether he was at home; also that on two occasions he called at the house in the evening, when the accused and his wife were both absent. On the night of the homicide, Shea entered the house in the manner detailed to you by the witnesses Con. Creedon, Kelly, and Lucy. These men were present, and in conversation with the prisoner, who, on the mention of Shea's name, threatened, "if Shea came in, he would knock more of the hair off him." Just at that moment Shea entered, and, walking across the room, said, "That's my name." Immediately the prisoner rose from his chair, and told him to "clear out." The company suddenly broke up, Creedon and Lucy going out the front door, while Kelly and Shea left by the back door. The prisoner at the same time went upstairs, into another part of the house, having first obtained from his daughter Mary the key of a trunk or bureau. At the next scene in this drama these five men (the prisoner, Shea, Creedon, Lucy, and Kelly) are on the turnpike which runs past the prisoner's premises, between the barn and the house. Very few minutes could have elapsed, as Shea, after leaving the house, walking through the garden and around the barn, had just come into the road when the prisoner was heard calling out something not understood by any of the witnesses who saw him coming down from the house. Shea, in spite of the remonstrance and interposition of one of the party, went forward to meet the prisoner, when the latter was distinctly heard to say, "Denis, do you want to get killed?" who replied, "No, but I'll fight you." The prisoner then said, "You had better keep away," to which Shea responded, "Go home, Jerry; go home, Jerry," and at the same time, raising his foot, kicked at him. But the witness Lucy, who was the nearest to the men, could not say whether Shea hit the prisoner or not. In a second or two the pistol shot was fired, and Shea fell. The prisoner, passing the body of the deceased, came towards the witness, and said to Lucy, "The man is dead now." Being told that he had no right to shoot him, he said, "You ought to have kept him away," again saying, "The man is dead now." The three men who had accompanied Shea to the prisoner's house, and saw what has just been described, alarmed by the fall of their companion, and not knowing what the prisoner might do next, took to flight, and went to their homes. Early on the following Sunday morning, when the magistrate and constable went to the prisoner's house, they found him in an upper chamber, partly clothed, and lying on a bed. On being asked if he knew anything of the shooting on the previous night, he denied it, saying that he had come home drunk on Friday night, and had not been out of the house since, not feeling very well. He also denied the possession of a pistol, and further said that Shea had not been in his house for eight months. Later in the day, after the magistrate had decided to commit him, he acknowledged the commission of the act, and said, "It had to be done, and I'll have to stand the brunt of it." And afterwards, on the same day, while on the way to Newcastle, in conversation with the constable who had him in charge, and notwithstanding he had been cautioned not to talk, he said "he had to do this thing"; "that a man should be boss in his own house"; "I had to do it. If I had'nt done it this time, I would have had to do it some other time." To the question why he did it, he replied that he had heard this man talk about him to his wife, and compare him to a worthless, good-for-nothing character in Ireland; that he had then ordered him out of the house. When first seen on Sunday morning, at 7:30 o'clock, by Squire Jackson, Constable Williamson, and the witness Kinsley, the condition and manner of the prisoner were about as usual. He did not appear to be drunk or excited, though Williamson thought he bore the traces of hard drinking. The three companions of Shea testified that the prisoner was not drunk on Saturday night, but Fox told you that he had been drinking repeatedly all through that day, and there is testimony that he was intoxicated on Friday night, and was assisted by a policeman in Wilmington to an hotel.

We have called your attention to the acts, conduct, and conversation of the prisoner immediately before, at the time of, and after the commission of the homicide, so that you may be able to judge of his motives, and of his responsibility at that time. It is true, Dr. Mitchell said that he was called on the 8th of July to attend the prisoner, who was then suffering from the combined effects of the heat of the weather and whisky, and was approaching the condition of mania a potu: but although the doctor saw him once or twice subsequently, and as late as the 29th of the same month, he had never seen him in a pronounced attack of mania a potu. This was at least a month before the homicide, but it is part of the history of the case, and may be taken into account when considering the mental condition of the prisoner. It has been so repeatedly decided by the courts in this state, and everywhere else, that drunkenness is no excuse for crime, that it is only necessary to remind you that, if the contrary rule were once established or permitted, society would be at the mercy of any one who chose to excite himself by drink for the purpose of committing crime, and sheltering himself from its consequences by pleading intoxication. The frenzy of drunkenness will not excuse a criminal act, but actual insanity produced by continued dissipation will be a good defense. The insanity which is the result of long and excessive indulgence in the use of liquor must, in its effects, be similar to insanity produced by any other cause, to be a good legal defense; that is, it must amount to the depriva-

Digitized by Google

tion of reason and judgment, and make the prisoner utterly incapable of forming a deliberate and premeditated design, of entertaining a rational thought or motive, of intelligently performing any act, or of distinguishing between right and wrong. Proof of insanity in any of these respects will relieve the prisoner from criminal responsibility. And in this, as in every other case where insanity is set up as a defense, it must be proved affirmatively, to the satisfaction of the jury, and not be left to conjecture and surmise. In this connection you will bear in mind the testimony of Arthur Fox and of Mary Harrigan in reference to the state of the prisoner's mind throughout the whole of Saturday, on the night of which day the homicide was committed. These witnesses spoke of the prisoner's hallucinations during that day,—how he declared that he saw or heard burglars, and inquired where they were, and how he heard strange noises, which nobody else saw or heard. These representations, if true,—and you are the judges of the credibility of the witnesses and of the truth of their statements,—certainly show that the prisoner's mind and understanding were seriously affected and impaired. You will have to carefully weigh this evidence, and compare it with the testimony of Shea's companions as to the prisoner's condition late on the same night, and with the evidence of Jackson, Williamson, and Kinsley of his appearance the next morning; remembering that the legal presumption of the sanity of the prisoner continues and must stand until rebutted by proof to the contrary, satisfactory to the jury.

The crime of murder cannot be committed by one who is not of sound memory and discretion, for the law holds no person responsible for his acts or conduct who has been deprived of his reason and judgment by insanity, temporary or permanent. A person thus afflicted is to be treated as an object of compassion, and not as a criminal subject to legal punishment. You will review all the testimony on this subject as you heard it from the witnesses for the state and from those for the prisoner; but, gentlemen, you must consider this defense separately from any other, for, if the prisoner was insane at the time of the commission of the homicide, that will be sufficient to acquit him of crime, without considering any other matter of defense which has been presented to you in his behalf. If the existence of insanity has been proved to your satisfaction, the prisoner will be entitled to an acquittal on that ground, and, we may say to you, on that ground alone, because there is no evidence of any other justification, excuse, or palliation for the killing of Shea that will relieve him from criminal responsibility. The visits of Shea to his house in defiance of the prisoner's command to keep away; the suspicion or belief of his wife's infidelity, if he harbored such belief or suspicion, of which there is no proof; the odious comparison so often spoken of, and which naturally excited the prisoner's anger and indignation; nor the offer to fight,—no one or all of these causes, taken together, will be sufficient to justify or excuse the use of the deadly pistol. The going of Shea to the prisoner's house after what had occurred between them may have been improper and imprudent, but each visit was only a simple act of trespass, and does not justify the destruction of a human life. His remark about the prisoner may have been, and was, injudicious and ungrateful; but no language or words, however offensive and taunting, will justify an assault and battery, much less a pistol shot. There is no proof of adulterous intercourse between Shea and the prisoner's wife, nor that the prisoner's mind was affected by a floating suspicion of his wife's chastity. On the contrary, he disavowed any belief of his wife's dishonor. Aside, therefore, from the question of insanity, the prisoner is without defense, on the testimony, if you believe the evidence in regard to his threats and admissions. His acknowledged ill will towards the deceased; his threat, in the hearing of Quill, last August, that he would shoot Shea, or have his life; and his disclaimer, after the shot had been fired, of all regrets for what he had done,—are enough to account for the motive of the deed, and for the deed itself. This is the legal effect and result of the evidence, if you believe the witnesses for the state; but you are the sole judges of their credibility, and of the truth of each and every part of the testimony which you have heard. You may accept as proved such portions as, in your best judgment, you believe to have been established, and reject the rest. You will do this with a proper sense of your obligation to discharge your duty and render a verdict according to the law and the evidence. In saying that, without the defense of insanity, the evidence furnishes no excuse for the prisoner, we do not intend or mean to suggest to you of what crime, if any, you should find the prisoner guilty. This is your office, and not ours.

We have defined the several crimes of murder of the first degree, of murder of the second degree, and of manslaughter; and, in conclusion, we will recapitulate those definitions as they have been heretofore concisely stated by this court: First. Whenever there is design or intention deliberately proved in the mind to take life, and death ensues, it is murder with express malice, and therefore murder of the first degree. Second. When there exists no design or intention to take life, but death results from an unlawful act of violence on the part of the slayer, and in the absence of adequate provocation, it is murder with implied malice, and therefore murder of the second degree. Third. Voluntary manslaughter is the unlawful killing of another in the heat of blood, upon suffi-

Digitized by Google

cient or adequate provocation, and without malice.

Finally, you will not convict the prisoner of any crime unless his guilt has been proved to your satisfaction, beyond a reasonable doubt; and by this is meant a fair and honest doubt, which, after a careful and serious examination of all the evidence, will prevent you from being clearly satisfied of the prisoner's guilt.

Verdict, "Guilty."

Motion for a New Trial.

(Dec. 24, 1881.)

The reasons assigned in support of this motion may be reduced, in substance, to three: (1) The unauthorized separation of the jury during the progress of the trial; (2) the absence of one of the bailiffs having the jury in charge, the said bailiff having left the courthouse where the jury was kept, and gone home to sleep; and (3) the drinking of intoxicating liquor by the jury without the consent of court.

The first two reasons may be considered together, and we will say, at the outset, that the evidence produced to sustain them is not, in our opinion, sufficient to show that there was such serious misconduct on the part of either bailiffs or jury as to warrant the setting aside of the verdict. Two bailiffs are appointed to keep and attend a jury in the trial of a capital felony, in order that one may relieve the other, and there was nothing grossly improper and derelict in Bailiff Deakyne, after watching the jury until after midnight, going to his home, a short distance away, leaving the other bailiff, Frazer, in charge, and returning to his post at or before sunrise. It would have been more regular had both bailiffs remained in the same building, and near by the jury, but the short absence of Deakyne, under the circumstances, —the other bailiff remaining with the jury, who were in their beds,—could not possibly have worked any injury to the prisoner.

Then, as to the separation of the jury. Was there any such actual separation as ought to overturn this verdict? The purpose of keeping a jury in confinement during the trial of a capital felony is to shut out from them all extraneous and improper influences, and to prevent the approach of all unauthorized persons, so that their sentiments and judgments may not be affected by any communications to the advantage or prejudice of either the prisoner or the state. And therefore, although there may be an actual separation, yet if the proof is clear that there was no improper communication with the separated juror, or any conversation at all, the verdict will not be set aside for such irregularity. In the case before us there is no evidence of any actual separation. The jury had the range of the upper part of the courthouse, from which all persons were excluded, when the court was not in session, except the crier and watchman, who were sworn as general bailiffs, and two boys who assisted the crier in cleaning up. There is no ground for believing that any others had access to the jury, except those who delivered their meals, or were allowed by the court to speak to them on business in the presence of one of the bailiffs, or that any improper communications were made to them. The playing of cards by some of the jury with the boy Enos, for a few minutes, on the first evening of the trial, was an indiscretion not amounting to a grave fault, and was not repeated; but it does not appear that any conversation was held in reference to the prisoner, or on any subject other than the game in which they were engaged. The playing of cards or checkers, for amusement only, is a harmless diversion; and the boy testified positively that no remarks were made in reference to the trial. We throw out of view the testimony of young Cooper, who thought he saw one of the jurors on the balcony, and was hailed by him with the remark that "they were having a hard time of it," because he first said that this occurred after the jury had retired to their room to make their verdict, which we all knew could not have been the fact. He afterwards corrected this statement, but his memory was evidently at fault about the time, and his testimony is too indefinite to be depended on. The jury were in separate and adjoining rooms during the trial, at the recesses of the court, and at night, but were under the supervision of one or both of the bailiffs at all times; and the outer doors leading to the court room and the upper portions of the building were locked or guarded. They were allowed to walk in the court room, and may have separated in groups of twos or more, but this separation did not expose them to intrusion, and they were within sight or call of the bailiffs. Frazer and Deakyne expressly deny that they held conversations with any of the jury in reference to the case; and the crier testified that, to an inquiry made of him by one of the jurors concerning the prisoner, he replied that he knew nothing, and informed the juror that he must not talk to him on that subject. Nor does it appear that there was anything in either of the two newspapers found in the possession of the jurors on the second day of the trial, and taken from them, in the way of reports, rumors, or comments, that could possibly have affected their judgments in weighing and considering the testimony and forming their verdict. We have examined the authorities cited on these points by counsel in support of the motion, and find the general doctrine to be that actual separation of the jury, or communications or conversations from or with strangers, unexplained, will be good grounds for setting aside a verdict. The accidental approach of strangers, unless improper conversation is entertained, will not avoid a ver-

Digitized by Google

dict. The presumption of law, where outside communication has been proved, is against the purity of the verdict, but this presumption may be overcome by positive evidence. Now, here, all suspicion of improper communications is removed by direct evidence in every instance where there is proof of conversations or remarks, in the hearing of or by the jury, with the bailiffs, the crier, the boy Enos, and the watchman, who all swear positively that no allusions whatever were made to the case on trial. There is no evidence of any other conversations or remarks, and those of which we have any evidence appear to have been of a trivial or casual character. As we stated in the beginning, the evidence does not sustain the first two reasons assigned for a new trial.

The drinking of wine or of ardent spirits by the jury during the progress of the trial of a capital felony may or may not afford sufficient ground for a new trial after a verdict of guilty, depending upon the circumstances of the particular case. The cases of People v. Douglass, 4 Cow. 26, and of Brant v. Fowler, 7 Cow. 562, cited in support of this motion, are no longer considered as law by the court which decided them, having been overruled by Wilson v. Abrahams in 1 Hill, 207. The rule enunciated in the cases reported in Cowen—that the use of ardent spirits by the jury at any stage of the trial, in a civil or capital cause, will, per se, vitiate a verdict, is absolute and admits of no exceptions—is not now recognized as the correct and established doctrine. On the contrary, if it be proved to the court, or otherwise appears, that though some or all of the jury may have used small quantities of intoxicating liquors in the progress of the trial, but not in excess, or so as to disqualify them for the intelligent performance of their duties, such use, of itself, will not affect the verdict. In the prisoner's case it is not claimed or affirmed that any of the jury were rendered unfit, by their indulgence in liquor, for the faithful and proper discharge of their important duties; and, if this court had the slightest cause for suspecting that such had been the fact, we should not hesitate for a moment to grant a new trial. But the small quantity of whisky sent by the landlord of the hotel from which the jury were supplied with their meals, not exceeding one-half pint daily, for four or five days, was hardly enough to have seriously impaired the judgments of the few jurors who could have shared it among them. This indulgence in the use of liquor, though slight, was irregular; and the landlord who furnished, and the jurors who drank, the whisky are deserving of censure, and could be punished for contempt in acting as they did without permission of court. But it is not every irregularity of this kind, even in the trial of a capital felony, that will suffice to set aside a verdict of guilty. In Gregg v. McDaniel, 4 Har. (Del.) 367, which was a civil cause, the court ordered a new trial because intoxicating liquors had been introduced into the jury room after the charge of the court, and pending the deliberation of the jury on their verdict; following the earlier New York decisions, which, as we have seen, have been overruled. But in Gregg v. McDaniel it is not stated how much liquor was introduced, or by whom. If in any considerable quantity, or by a party to the action, and in whose favor the verdict was rendered, it would be a fatal objection, always. Under the same circumstances as were shown in that case, we should render a like decision; but there is no proof or allegation that on the last day of the prisoner's trial, and after the jury had been charged, and retired to their room to deliberate upon a verdict, any liquor at all was introduced or used. We are well assured that there was none. Applications for new trials are addressed to the discretion of the court, and in every case that discretion must be exercised, not alone with reference to general rules of law, but also to the special facts to which they are to be applied. We do not intend to lay down any rigid rule on this subject, which must be enforced in all cases, for, as we have already said, each case must depend on its own peculiar facts and surroundings. The court can, in any case, judge from the testimony, and from its own observation, of the reasonable probability of the jury having been influenced by outside communications, or in the least degree incapacitated by intoxicating liquor, when making up their verdict. In the presence of the court, and while the trial was in progress, the jury gave every mark of serious and thoughtful attention to the evidence, to the arguments of counsel, and to the charge of the court. The bailiff Frazer bore testimony to the unexceptional propriety of their behavior and conversation during the recesses of the court, and, in the absence of any sound reason or principle of law or practice establishing an authoritative and rigorous rule, admitting of no exceptions, we do not feel justified, by all the circumstances of this case, in interfering with the verdict. The general rule to be observed in considering an application of this nature is that every irregularity which would subject a juror to censure, whether in drinking, or separating, or the like, unless there be some reason to suspect that the irregularity may have had some influence on the final result of the cause, should not overturn the verdict. Wilson v. Abrahams, 1 Hill, 207; Rowe v. State, 11 Humph. 491. Applying this rule to the facts of the present case, after a careful examination of the testimony, and with the most solicitous regard for the rights of the prisoner, we are compelled to refuse this motion.

Digitized by Google

EATON et al. v. ROBINSON et al.

(Supreme Court of Rhode Island. May 18, 1895.)

CORPORATIONS—OFFICERS—COMPENSATION—FRAUD.

Officers of a corporation stand in a fiduciary relation to stockholders, and where salary is voted and paid them, nominally and partly for services to the company, but largely to deprive mortgagors of the corporation stock of their share of the profits, in case they succeed in their suit to redeem, they are not entitled to compensation, but must account for the whole salary.

Suit by Amasa M. Eaton and others against George H. Robinson and others for an account of moneys paid respondents as officers of a corporation. Both parties except to the master's report. Complainants' exceptions sustained in part.

For reports in this case and prior litigation in the matter, see Hazard v. Robinson, 2 Atl. 433; Clarke v. Robinson, 10 Atl. 642, 13 Atl. 124; and Eaton v. Robinson, 27 Atl. 595.

Amasa M. Eaton and Edwards & Angell, for complainants. Arnold Green, for respondents.

PER CURIAM. The master has found that the salaries voted and paid to the respondents, while nominally and partly for services rendered to the company, were partly and largely for the purpose of depriving the predecessors in title of the complainants of the results of the litigation, in the event that the litigation should prove successful. Counsel for the respondents maintains that the master erred in finding the latter purpose, because, as he contends, the respondents, at the time of the fixing of the salaries, could not have known that judgment in the suit at law would be taken for the full amount of the mortgage debt, instead of the excess only above the value of the stock pledged, whereby the right to redeem the stock arose. The salaries, however, were not fixed till after the right to redeem the stock had been claimed and suits for the purpose had been begun. We think that the master was justified in his finding.

In so far as the fixing and payment of the salaries were induced by the purpose to deprive the complainants' predecessors in title of their share of the rents and profits accruing to the corporation in case they should obtain the right to redeem the mortgaged stock, such action was oppressive, and must be treated as fraudulent. The respondents, as officers of the corporation, stood in a fiduciary relation towards the complainants' predecessors in title as stockholders in the corporation, analogous to that of trustee and cestui que trust, and were bound to the exercise of the utmost good faith towards them. If they acted oppressively, we think that the master erred in allowing them compensation. Davis v. Railway Co., 22 Fed. 883; Sellers v. Iron Co., 13 Fed. 20; Swartswalter's Account, 4 Watts, 77, 79; Berryhill's Appeal, 35 Pa. St. 245; note to Robinson v. Pett, 2 White & T. Lead. Cas. Eq. 550, 570, 600. In the cases cited by the master in which compensation was allowed to officers of corporations notwithstanding their maladministration, the objection that they were not entitled to compensation because of such maladministration does not appear to have been made. The master should have required the respondents to account for all sums withdrawn for salaries, with interest.

We see no reason for disturbing the allowance of $134 by the master for outlays by the respondents for the benefit of the corporation.

We overrule the respondents' exceptions and those of the complainants, except so far as consistent herewith.

STATE ex rel. BEAUDRY v. BOUCHER.

(Supreme Court of Rhode Island. May 10, 1895.)

BENEVOLENT SOCIETY—PHYSICIAN—ELIGIBILITY.

A person is eligible to the office of physician for a mutual benefit society, though he is not a member thereof, none of its by-laws requiring that he should be.

Quo warranto on the relation of Louis H. Beaudry against Gaspard Boucher to try title to the office of physician of a mutual society. Respondent demurs to the petition. Dismissed.

The petition was as follows: "Edward C. Dubois, attorney general of the state of Rhode Island, at the relation of Louis H. Beaudry, of Pawtucket, in said county, respectfully represents that the Union Saint John the Baptist, of Pawtucket, is a mutual aid and benefit society of said Pawtucket, duly chartered by the general assembly of said state; that one of the laws of said society regulating membership, being section 1 of article 4 of said laws, provides that no person shall become a member of said society unless his application for membership shall be indorsed in writing by five members of said association, who shall have known said applicant for at least six months before said indorsement; that by article 5 of said laws one of the officers of said society shall be a doctor of medicine; that at the regular meeting of said society for the election of its officers holden the —— day of September, 1894, said relator was duly elected to the office of doctor of medicine of said society for a term of six months thereafter, or until his successor should be elected and qualified, and that said relator accepted said office, and served as such officer; that said respondent, notwithstanding the premises, has usurped said office, contrary to the rules and laws of said society, in that said respondent was not duly elected a member of said society, to wit, that said Boucher did not have the written indorsement of five members of said society who certified that they had known, or did in fact know, said Boucher for six months preceding

Digitized by Google

said pretended election of said Boucher to membership to said society; that objection was duly made to the election of said Boucher to membership in said society for said reason; that, notwithstanding said objection, the said Boucher was on the ——— day of March, 1895, declared elected a member of said society, and also that said society on the same day elected wrongfully said Boucher, a doctor, member of said society, against protest there and then made; that said Boucher, not having been duly elected to membership in said society, was, and still is, ineligible for any office in said society, and to said office of doctor of medicine of said society, which he wrongfully holds and claims from said Beaudry. Wherefore he prays the consideration of this court in the premises, and that due process of law may issue against said Boucher to answer the premises, and to show by what authority he claims said office; and that said Beaudry may be reinstated in said office."

Hugh J. Carroll, for relator. Ambrose Choquet, for respondent.

PER CURIAM. The petition proceeds on the theory that to render a person eligible to the office of physician for the society it is necessary that he should be a member of the society. We find no such requirement in the by-laws, and are of the opinion, therefore, that the demurrer should be sustained, and the petition dismissed.

DODGE v. HOGAN et al.

(Supreme Court of Rhode Island. March 10, 1895.)

DISMISSAL OF SUIT — PENDING OF ANOTHER ACTION—INTERVENTION—WILLS—CONSTRUCTION —CONTINUING CHARGE—LIMITATIONS.

1. Pendency of a bill for partition, alleging that it could not be divided by metes and bounds without great injury, though reciting that two undivided thirds of it were subject to a charge for the support of respondent C., but praying only for division of the proceeds in case partition be ordered by sale, and not for determination of the rights of C. with reference to such charge, is not a bar to a bill by C. to determine the amount she is entitled to under the charge, the manner in which it shall be paid, and for an order directing and enforcing its payment.

2. Where C. brings suit for determination of the amount she is entitled to under a will which charges certain land with her support, and for an order to enforce its payment, W., for whose support the land is also charged by the will, is entitled to intervene, even if the charge in his favor is secondary.

3. Where testatrix devises land to her husband, and provides that, till her son shall have a business from which he shall derive an income sufficient for his support, said land shall be charged with such support, the will not only creates a personal duty to be performed by the devisee, his heirs and assigns, but creates a charge continuing so long as the duty continues.

4. Suit brought 19 years after death of testatrix, but less than six years after death of devisee, up to which time the duty of furnishing the son with support was performed, to enforce the charge for the period after the devisee's death, is not subject to the plea of limitation.

Suit by Charlotte R. Dodge, by guardian, against John W. Hogan and another, for determination and enforcement of complainant's rights under a charge on lands in the will of Charlotte Dean Dodge, deceased. Walter C. Dodge intervened for a similar purpose.

The plea of respondents and the will of deceased were as follows:

Plea: "The joint and several plea of John W. Hogan, Frank B. Hazard, and George E. Tillinghast, defendants, to the bill of complaint of Charlotte R. Dodge, plaintiff. Said defendants, by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true, in such manner and form as the same are thereby and therein set forth and alleged for plea to the whole of said bill, saith: That at the October term, A. D. 1892, of this court, the said defendant Hogan exhibited his bill of complaint in this honorable court against the others of said defendants and said complainant and George A. Burr and Ida E. Burr, his wife, for partition of the premises in his said bill described, being the same premises designated as 'Parcel One' in the said complainant's present bill mentioned, and praying for a sale of said premises for the purposes of such partition thereof, and for the determination by this court of the rights and interests of said complainant under the provisions of the will of her mother, Charlotte D. Dodge, as in the complainant's present bill mentioned; being the same matter as the plaintiff now prays to be determined and established by her said present bill. That since the filing of said bill by said Hogan the interest of said Burr and wife in said premises has been acquired by said Hogan, and the interest of this present complainant therein has been acquired by said defendant George E. Tillinghast, and this complainant appeared and put in her answer to said former bill by her guardian ad litem, George C. Chadwell, and that the said former bill and the several proceedings in the said former cause, as said defendants severally aver, now remain depending and as of record in this honorable court, and being cause No. 3,367 upon the equity docket herein, the said cause being yet undetermined and undismissed. All which several matters and things said defendants severally aver, and plead the said former bill, answers, and the several proceedings in the said former suit in bar to the said plaintiff's present bill, and humbly demand the judgment of this honorable court whether they shall make any further or other answer thereto, and pray to be hence dismissed, with their costs and charges in this behalf sustained."

Will: "Know all men by these presents, that I, Charlotte Dean Dodge, wife of Christopher G. Dodge, of the city and county of Providence, and state of Rhode Island, being of sound and disposing mind and memory, do make and publish this, my last will and testament, in manner following; that is to say:

Digitized by Google

First. I give and bequeath all my household furniture to my two daughters, Charlotte R. Dodge and Sarah A. Dodge, to be equally divided between them. I also give to my two daughters aforenamed the sum of five hundred dollars each, to be paid to them, respectively, as and when each of them shall be married. Second. I give and bequeath all the rest and residue of my personal estate to my said husband, Christopher G. Dodge. Third. I give and devise all the real estate of which I die seised and possessed, and to me belonging at my decease, to and unto my said husband, Christopher G. Dodge, and my children Mary E. Slocum, wife of Nathaniel W. Slocum, of Medford, Massachusetts, Charlotte R. Dodge, Sarah A. Dodge, Walter C. Dodge, and Ida E. Burr, wife of George Burr, of said city of Providence (the whole being subject to the tenancy by the curtesy of my said husband), in the following proportions: Two-thirds undivided of said real estate to my said husband, and one undivided third part thereof to my said children,—to have and to hold said real estate (subject to said tenancy by the curtesy) to my said husband and my said children, in the proportions and in manner specified as aforesaid, their heirs and assigns forever. The two-thirds devised to my said husband being however, subject to the charge of providing a suitable and comfortable support for my two daughters, Charlotte R. Dodge and Sarah A. Dodge, until such time as each shall be married, when and whereupon said charge, as to them, shall cease and determine; and also until such time as my son, Walter C. Dodge, shall engage in a business, or shall have learned a trade, from which business or trade he shall derive sufficient income to maintain and support himself comfortably, according to his station in life, said two-thirds of my real estate so given and devised to my said husband shall be charged with such support; and when my said son shall have the income aforesaid devised in manner aforesaid then said charge on said real estate shall, as to him, also cease and determine. Fourth. I nominate, constitute, and appoint my said husband, Christopher G. Dodge, executor of this, my last will and testament, hereby revoking and annulling all former wills by me made, and making and declaring this to be my last will and testament."

Albert R. Greene, Irving Champlin, and Warren R. Perce, for complainants. John W. Hogan, William H. Greene, and P. J. McCarthy, for respondents.

MATTESON, C. J. The court is of the opinion that the plea should be overruled. The bill in 3,367 is simply a bill for partition of the land therein described, setting forth that by reason of the size of the lot, and the location and character of the buildings on it, it cannot be divided by metes and bounds without great and disproportionate injury to its owners, and depreciation in value of their several rights and interests therein. It prays also, besides partition, for the appointment of an ad interim receiver to care for and manage the estate. It is true that it recites the fact that two undivided thirds of the land of which partition is sought are subject to a charge for the support of Charlotte R. Dodge; but it prays for no specific determination of the rights of said Charlotte with reference to such charge, but only for a division of the proceeds of the sale, in case the court should order partition by sale, among the respondents to the bill, in such manner as the complainant (court?) shall determine and decree. There is no suggestion that the receiver, when appointed, shall apply any portion of the income of the property to the support of the said Charlotte.

The bill in 3,438 is brought by said Charlotte to determine the amount she is entitled to under the charge, the manner in which it shall be paid, and also for an order directing and enforcing the payment while the charge exists. The two suits, it is evident, are for different purposes. The former does not necessarily embrace the matters which form the subject of the latter. The complainant is entitled to support out of the two thirds of the land charged therewith, whoever may be the owner. Partition by sale may be made subject to the charge.

(Nov. 16, 1893.)

The court is of the opinion that the charge in the will of Charlotte D. Dodge on the two-thirds of her real estate therein devised in favor of the complainant and of the petitioner gives him a sufficient interest in the suit to entitle him to intervene. Even if, as suggested by the complainant, the charge in his favor is secondary to that in favor of the complainant,—as to which no opinion is expressed,—he is nevertheless entitled to be heard on the question of how the charge is to be worked out, so that, if possible, effect may be given to that in his favor. The petition for leave to intervene is therefore granted.

(March 21, 1894.)

PER CURIAM. The court, misled by the statement of counsel, having fallen into a misconception of the scope of the plea incorporated into the answer of the respondent John W. Hogan, withdraws that part of its rescript of March 3, 1894, which relates to said plea. The question intended to be raised is whether or not the charge created by the will of Charlotte D. Dodge in favor of the intervener, Walter C. Dodge, is a continuing charge. We are of the opinion that it is; hence, that the plea of the statute of limitations should be overruled.

On Rehearing.

(June 1, 1894.)

After the filing of our amended rescript of March 21, 1894, counsel for the respondents

Digitized by Google

deeming that the court had misapprehended their position, asked leave to be further heard on the question raised by their plea of the statute of limitations, and, leave having been granted, filed on or about April 7, 1894, an additional brief. The argument of the respondents proceeds on the theory that the effect of the devise in the third clause of the will of Charlotte D. Dodge was merely to impose a personal duty on her husband, Christopher G. Dodge, as the devisee of the two-thirds of the real estate devised to him; and that 19 years having elapsed since the death of the testatrix, and the intervener having taken no steps to enforce the claim against his father, it is now too late for him to take advantage of the charge. They contend that a devise "subject to a charge" does not create an express trust; that the provision in the charge is indefinite and indeterminate, and hence that, until its amount or extent had been determined, it was a mere executory demand; that as a mere executory demand would be barred by the statute of limitations, at law, equity, following the analogy of the law, will not enforce it. The respondents' contention is based on a misconception of the effect of the devise, which not only created a personal duty to be performed by the devisee, his heirs and assigns, but secured the performance of that duty by a charge on the two-thirds of the real estate devised. That duty was to continue until such time as the intervener, who is, it is alleged, of feeble mind, should have engaged in business, or learned a trade, from which he should derive sufficient income for his comfortable support according to his station in life. The duty being a continuing duty, we think that the charge should be construed as coextensive with the duty, and therefore as a continuing charge, so long as the duty continues. The father of the intervener performed the duty while he lived, and there was therefore no occasion for the intervener to resort to the charge. Since the death of the father, on March 28, 1888, the duty has been unperformed. Consequently, the intervener, having obtained leave of the court, came into the suit on December 1, 1893, less than six years after the breach of the duty began, and seeks now to enforce the charge for the period which has elapsed since his father's death. We see no reason for changing the conclusion announced in our former rescript,—that the plea of the statute of limitations should be overruled

---

COMMONWEALTH v. ALLEGHENY COUNTY.

(Supreme Court of Pennsylvania. May 20, 1895.)

FEES OF COUNTY OFFICERS—ALLEGHENY COUNTY.

Act April 6, 1871, as amended by Act March 6, 1872, providing that all fees receivable by the county officers of Allegheny county shall belong to that county exclusively, repealed Act March 10, 1810, which provided that county officers of all counties should pay to the state 50 per cent. of all fees collected by them in excess of $1,500, in so far as the latter act related to Allegheny county.

Appeal from court of common pleas, Dauphin county.

Action by the Commonwealth against the county of Allegheny. From a judgment rendered on appeal from the settlement of the auditor general and state treasurer, defendant appeals. Reversed.

D. T. Watson, for appellant. Henry McCormick, Atty. Gen., for the Commonwealth.

DEAN, J. In 1894 the auditor general and state treasurer settled accounts against the prothonotary, register, recorder, and clerk of quarter sessions of Allegheny county, in which they charged these officers with one-half the fees received by them in excess of their salaries and clerk hire for the year 1893. As they had paid all the fees pertaining to their office which had been received by them for this year to the county, by agreement, the county assumed the responsibility, and was made party defendant in the suit. The case was tried before the common pleas of Dauphin county under the act of April 22, 1874, without a jury. Judgment having been given for the commonwealth in the sum of $13,193.15 (the amount claimed), the county presses this appeal.

Before the act of March 10, 1810, all the office fees of a county officer belonged to him exclusively; but that act, which is entitled "An act taxing certain offices," required him to pay over to the state 50 per cent. of all fees in excess of $1,500. Then, by the act of April 5, 1842, in addition to the $1,500, he was allowed to deduct his expenses for clerk hire and stationery. When passed, the act of 1810 was a general act, applicable to all the counties of the state, and so continued to be until the passage of the act of April 2, 1868. It was then repealed as to all counties except Allegheny, Lancaster, Montgomery, Philadelphia, Beaver, and Washington. Then the act of April 6, 1871, a local or special law for Allegheny county, was passed, which directed that all fees limited and appointed by law to be received by the county officers against whom this account was settled, as well as others designated in the act, should belong to the county of Allegheny, and that said officers should not "receive for their own use, or for any use or purpose whatever, except for the use of the county of Allegheny, any fees for any official services whatever." This was, in substance, the provision of the first section of the act. The officer no longer had title to a single dollar chargeable to litigants under the fee bill, except, by a proviso to the third section, the sheriff and coroner were allowed fees for mileage. By section 4, it was expressly provided that the common-

Digitized by Google

wealth's taxes on writs and its proportion of the fees received should be paid by warrant on the county treasurer. Section 7 of the act directed that the officer, and all his deputies and clerks, should be paid fixed and specific salaries, which were either determined by the act itself, as in case of the principal officers, or, as in case of deputies and clerks, by a board designated to perform that duty. The same section directed that the commonwealth's share of the fees should be deducted from the aggregate sum received, before the salary of the principal officer was paid; and, if not enough remained to cover the salary, then he should receive only such proportion as equaled the aggregate of fees earned during his term, after paying the deputies and clerks in full and the commonwealth.

It will be noticed what a radical change was made in the relations between the commonwealth and the officer as they had existed under the act of 1810. Before the act of 1871 the officer accounted to the commonwealth for, and paid to her, 50 per cent. of the fees in excess of $1,500. He was her debtor, and she looked to him alone for her money. Under the last-named act, she peremptorily ordered him to pay all fees into the county treasury, and at the same time announced she would look to the county for payment. In effect, the officer was no longer answerable to her, and the county was. This act was followed by a supplement to it of March 6, 1872, which expressly repealed the fourth section of the act of 1871. The repealed section, as already noticed, directed that the state's share of the fees, instead of being paid, as under the act of 1810, by the officer, should be paid by the county by warrant drawn on the county treasurer. The first section of the act of 1871 had declared all the fees should belong to the county, and be paid into the county treasury. The fourth qualified it by declaring that the commonwealth's proportion should be drawn out by warrant. This repeal left unqualified the positive declaration that all the fees belonged to the county. They were in the county treasury, and by the explicit declaration of the law, in the first section, belonged to the county. Then this sweeping disclaimer of right to any part was restricted, by the claim in the fourth section, to a proportion of these fees, to be paid by warrant on the county treasury; but now, by the repeal, this claim to a proportion is absolutely abandoned, leaving the unqualified renunciation of any claim to any proportion of such fees, as announced in the first section, standing in full force. But the act of 1872, as a repealing act, went further. The second proviso to the seventh section of the act of 1871 directed "that after ascertaining the amount due the deputies and clerks in each office, and the state's share of the fees, if there has not been a sum sufficient from fees received and paid in, or earned and due by the county for services rendered, to pay the full amount of the salary of the officer holding said office, he shall only receive such proportion of his salary as shall be equal to the aggregate of the fees received and earned during his term of office, after paying the deputies and clerks in full, and after also paying the share of the fees due the commonwealth; and all the moneys accruing from fees above the said salaries and the share of the state, shall accrue to the benefit of the county"; excepting, however, officers then in office elected before the year 1870, who should for the unexpired term of their office, be paid all fees earned after paying the salaries of clerks and deputies and the commonwealth's share of fees, as provided by act of 1871. This second proviso, the act of 1872 also expressly repealed; and, in lieu thereof, it was directed that all salaries, except those of county commissioners, officers elected in 1870, and a part of the salaries of judges of courts, should be paid from the county treasury out of the fees paid into the treasury, after ascertaining and deducting the amounts due deputies and clerks; and, if there were not enough left to pay the salary of the officer, he should only receive such proportion of his salary as equaled the aggregate of the net fees. The proviso directed the officer should receive his salary after deducting the salaries of deputies and clerks and the commonwealth's proportion of the fees. It is repealed. He is now to receive his salary after deducting those of his deputies and clerks only. There is no longer anything to be taken off for the commonwealth.

The court below determined that the act of 1810 was not repealed by the acts of 1871 and 1872 so far as relates to the right of the commonwealth to one-half the office fees. We are of a different opinion. The act of 1871 was, manifestly, a substitute for the act of 1810, so far as related to Allegheny county. Could they stand together, or could any material part of the act of 1810 stand if the act of 1871 were enforced according to its plainly expressed terms? The act of 1810 made the officer accountable to and debtor of the state. That of 1871 discharges him, and accepts the county as debtor. The first made an allowance to the officer of $1,500, and demanded one-half the excess. The second makes no allowance to the officer. The act of 1810 simply provided that the officer should account for and pay to the commonwealth one-half of all fees for services performed by him in excess of $1,500. When the act of 1871 declared that he should pay all fees into the county treasury, and the county should thereafter pay one-half to the commonwealth, without any deduction of a minimum salary for the officer, what was left of the act of 1810 to enforce? If the commonwealth demands from the officer an annual account, as provided in the old act, he replies: "I have, as you directed by the second section of the new act, accounted monthly to the county." If she demands payment of any proportion of the fees received, he replies: "I have none of

Digitized by Google

them, having paid all, as you directed by the second section of the same act, to the county monthly." If the mandate of the new statute be obeyed, there is nothing for those of the old to operate on. Nor is there ambiguity or doubt as to the import of the commands of the new statute. We do not need to wrestle over doubtful construction of dubious words and phrases. They admit of but one construction, are almost as peremptory and plain as the command of the centurion, and were obeyed as implicitly: "I say * * * to my servant, 'Do this,' and he doeth it."

If, then, the act of 1871 was plainly a substitute for the act of 1810, the act of 1872, by its repeal of the fourth section and second proviso to the seventh section, just as plainly relinquished all claim of the commonwealth to any part of the officer's fees. Without this fourth section and this proviso, under the act of 1871, the commonwealth would have been entitled to nothing. By their express repeal, that act is without them, and stands a palpable renunciation of any claim, under the act of 1810, to half the fees. Where the words of a statute are not doubtful, there is no need for construction. It is the duty of courts to follow explicit enactments of the legislature,—the taxing power. If it has clearly not taxed, we cannot, by a strained construction, tax. From 1872 down to 1894, both the county and commonwealth officers assumed the act of 1810 was repealed by that of 1871, and that, by the act of 1872, the commonwealth relinquished claim to any part of the office fees which theretofore it had demanded. In so doing, they did not adopt one of two doubtful constructions of the law; they only followed its manifest directions. It needs no aid now from contemporaneous construction. Standing on its unambiguous words, it could have received no other construction. The learned judge of the court below admits that he arrives at his conclusion in favor of the commonwealth with a great deal of hesitation. We arrive at ours with none. The appeal is sustained, and the judgment is reversed.

STERRETT, C. J., and GREEN, J., not sitting.

HEIDENWAG v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. May 13, 1895.)

LIABILITY OF CITY — INDEPENDENT CONTRACTORS —NEGLIGENCE.

1. A fireworks company contracted with a city to purchase and set off a display of fireworks for a certain sum for the entire service, and to pay all claims for personal injuries resulting from the fireworks, the city having no control whatever over the preparation or execution of the work. *Held* that, where the display included pieces in the setting up of which scaffolding was necessary, the city was not liable for a death occurring through the negligence of an employé of the company in erecting the scaffolding.

2. Since Act Aug. 26, 1721 (Brightly, Purd. Dig. 814, pl. 1), providing that if any person shall fire any squibs, rockets, or other fireworks within the city of Philadelphia without the governor's special license therefor, he shall, upon conviction, be fined, does not apply to an exhibition of fireworks made by the city itself, such an exhibition, conducted in the city under its authority, was not unlawful.

3. A wooden scaffolding was being erected over the sidewalks on a bridge, and both ends of the sidewalks were barred, but the roadway was open to travel. *Held*, that the city was not negligent in not having some one at each end of the bridge to warn passers-by of the danger.

Sterrett, C. J., and Williams and Dean, JJ., dissenting.

Appeal from court of common pleas, Philadelphia county.

Trespass by John J. Heidenwag against the city of Philadelphia to recover damages for the death of his infant son. From a judgment for defendant, plaintiff appeals. Affirmed.

Plaintiff assigned as error that the court erred in entering the nonsuit at the trial, and in subsequently refusing, in banc, to take it off.

Edmund Randall and James A. Flaherty, for appellant. Leonard Finletter, Asst. City Sol., and Charles F. Warwick, City Sol., for appellee.

GREEN, J. If the scaffolding erected on the Girard avenue bridge, from which the timber fell which killed the plaintiff's son, was an unlawful structure, the city was guilty of negligence in authorizing its erection, and cannot shield itself from liability by showing that the death of the boy was due to the negligence of an independent contractor. We are very clear that, under the contract which was made between the city and the contracting company which did the work, the contracting company was an independent contractor. By the terms of the contract, the company undertook to do the whole of the work, including the purchasing and setting off of the fireworks, for a designated sum to be paid for the entire service. It is true that nothing is said in the contract specifically about the erection of a scaffolding, but the specification annexed to the contract does stipulate that the display is to be made from Girard avenue bridge, and the mere inspection of the list of pieces to be exhibited proves conclusively that without a scaffolding the exhibition could not take place. The city, under the contract, could not exercise any control over the work to be done. None of its servants or agents could intervene to take any part in the erection of the proper works, or in the exhibition of the various pieces and designs. On the contrary, the company agreed to furnish "expert artisans" to do the work of firing, and they also agreed to pay all claims for damages for injuries to persons or property resulting from the fireworks. In the case of Painter v. Mayor, etc., of Pittsburgh, 46 Pa. St. 213, the subject of corporate municipal

Digitized by Google

liability for work done, and the payment of damages for injuries inflicted, by independent contractors, was thoroughly reviewed, in an exhaustive and able opinion, by Mr. Justice Strong. He showed most clearly that the city, in the circumstances of that case, was not liable. He said, among other things: "Is the city liable? We think not. The wrong was not done by any servants of the defendants. There is no room for the application of the principle respondeat superior. The defendants had no control over the men employed by the contractors, or over the contractors themselves. They could not dismiss them, or direct their work. The excavation was not illegal, and there was a superior to the workmen, to wit, the contractors. There cannot be more than one superior legally responsible. * * * It is now settled in that country [England] that defendants not personally interfering or giving directions respecting the progress of a work, but contracting with a third person to do it, are not responsible for a wrongful act done, or negligence in the performance of the contract, if the act agreed to be done is legal." In the case of Smith v. Simmons, 103 Pa. St. 32, this subject again came before us. A ditch was dug in a public street, by the license of a borough, to lay a water pipe for a citizen. The action was against the owner, to recover damages for a personal injury suffered by a woman who fell into the ditch at night because it was insufficiently guarded; and the question was whether the owner was liable, or his independent contractor, who did the work. We held that the contractor was liable, and the owner not. Mr. Justice Gordon, delivering the opinion, said: "Was the digging of the ditch in the public street of the borough of Susquehanna a nuisance per se? If not, if it was such a necessary work as was properly licensable by the borough council, then, as the second question, was the defendant chargeable with the negligence of his contractor who had charge of the work? * * * If the ditch dug for and at the instance of Dr. Smith was a public nuisance, then he, and all engaged in sinking it, were responsible for all damages resulting from it, and the doctrine of respondeat superior is out of the case."

It will thus be seen that if the work itself is without legal authority the principal is liable, as well as the independent contractor; and the question arises, what is the character, in this respect, of the work which was being done? It is alleged for the plaintiff that the scaffolding was an unlawful structure, and, being erected in a public highway, was a nuisance per se. The basis of this contention is an ancient enactment passed in the year 1721, when the state of Pennsylvania was an English province. By the fourth section of the act of August 26, 1721 (Brightly, Purd. Dig. 814, pl. 1), it is provided that: "If any person or persons, of what sex, age, degree or quality soever, shall fire any gun or other fire-arms, or shall make or cause to be made, or sell or utter, or offer to expose to sale any squibs, rockets or other fire-works, or shall cast, throw or fire any squibs, rockets or other fire-works within the city of Philadelphia, without the governor's special license for the same, of which license due notice shall first be given to the mayor of the said city, such person or persons so offending, and being thereof convicted before any one justice of the peace of the said city, either by confession of the said party so offending, or by the view of any of the said justices, or by the oath or affirmation of one or more witnesses, shall for every such offence, forfeit and pay the sum of five shillings." The remainder of the act provides a method of collecting the fine by distress and sale of the offender's goods, and, if that is unavailable, then, by the imprisonment of his body. Doubtless there were reasons in those days, when Philadelphia was a small town, and the governor resided within its limits, for requiring that his special license should be obtained whenever firecrackers were to be exploded, or fireworks exhibited. But, in the present state of our population and our business affairs, it seems rather ludicrous than otherwise that such a requirement should be considered necessary, as preliminary to every display of fireworks that may be contemplated by the city or by private persons. It is doubtful whether any license under this antiquated statute has ever been issued in the history of our commonwealth, and it is certain that it is universally disregarded. The subject is certainly a matter of mere police regulation, and is doubtless within the entire control of the municipal authorities; and it seems quite odd that, when a municipal corporation sees fit to authorize such a display, it should be reminded of its lack of power by a reading of this old law, which, if it be in force, would subject the city to a fine of five shillings, and a distress of its goods, and a possible imprisonment of somebody, for a violation of its provisions. It is true that this court has decided that this act is still in force, and that its provisions must be observed. In the case of Homer v. Com., 106 Pa. St. 221, we decided that parties who engaged in manufacturing fireworks in the city of Philadelphia without a license from the governor to do so were guilty of a violation of this law, and became subject to its penalties. But that decision related to another clause of the act than the one in question, and it concerned only the action of individual persons who were transgressing the provisions of the law. In this case it is the city itself, acting in its corporate capacity, that is the subject of consideration. There is nothing unlawful, intrinsically, in the preparation and exhibition of fireworks by a city acting as a municipality. Unless, therefore, the terms of the act of 1721 apply to incorporated cities, and include them within the prohibitions designated, the erection of the scaffolding in question was

Digitized by Google

not unlawful. We think it very clear that the act was not intended to apply to cities when acting in their corporate capacity. The prohibition of the act extends to "any person or persons of what sex, age, degree or quality soever." It will hardly be pretended that such a description embraces municipal bodies. It includes individual persons, living human beings, only. In providing the penalties, the act directs that "such person or persons so offending" shall be prosecuted and convicted before a justice of the peace, and upon conviction shall pay a fine of five shillings. The act further provides for the collection of the fine by a distress and sale of the offender's goods, if he have any, and, if not, then by the imprisonment of his body. These penalties, and their collection, are entirely appropriate to the cases of individual persons, but entirely inappropriate in the case of cities, or other municipal bodies. We therefore hold that the act of 1721 does not, in this respect, apply to cities, and that exhibitions of fireworks, when conducted under their authority, are not unlawful, and hence the work of preparing for them is not unlawful.

It was claimed that the city was negligent in not having policemen or other agents at the bridge to warn people off, and protect them from danger. But, unless it was the duty of the city to prevent any travel on the bridge while the scaffold was being erected, we cannot see how negligence can be imputed in this regard. We certainly do not think it was the duty of the city to suspend all travel on the bridge because an ordinary wooden scaffold was being erected on one side of the bridge. If we should say that in this case, consistency would require that we should say the same thing as to the erection of scaffolds along the streets in any other part of the city, which, of course, could not be done without practically suspending all the building operations which require the use of scaffolds. The evidence shows that many thousands of persons passed to and fro over the bridge while the scaffolding was being erected, and yet no other accident than this is shown to have occurred. It certainly was not the duty of the city to have policemen on hand to conduct each foot passenger across the bridge. That would have been impossible, on account of numbers, and it would have been ineffective to protect against this accident, in any event. No policeman could know, any better than any other person, that this particular accident would or might happen, and therefore could not warn anybody against it. The sidewalks were closed at the ends, but the roadways were open, and both railway cars and foot passengers were constantly passing and repassing. The stick that caused the death of the child fell in the roadway while it was being handled by the contractors' workmen. While this may be a very good reason for holding the contractors liable, we can discover no reason for holding the city liable. The case bears no analogy to the cases in which permanent or dangerous obstructions to travel are permitted by city authorities to remain in positions where the safety of travelers is imperiled. Judgment affirmed.

STERRETT, C. J., and WILLIAMS and DEAN, JJ., dissent.

COMMONWEALTH v. MERCHANTS' & MANUFACTURERS' NAT. BANK OF PITTSBURGH.

(Supreme Court of Pennsylvania. May 20, 1895.)

NATIONAL BANKS—TAXATION—EQUALITY OF BURDEN.

Act June 8, 1891 (P. L. 240), providing that banks paying a certain rate upon their shares of capital stock into the state treasury shall be exempt from local taxation, and that banks failing to do so shall be assessed, both locally and by the state, at a lower and uniform rate upon the appraised value of their shares, is not repugnant to Const. art. 9, § 1, which provides that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.

Appeal from court of common pleas, Dauphin county.

Action by the commonwealth against the Merchants' & Manufacturers' National Bank of Pittsburgh, Pa., to collect a tax. From a judgment rendered on appeal from the settlement of the auditor general and state treasurer, defendant appeals. Affirmed.

John Wilson, for appellant. Henry C. McCormick, Atty. Gen., and John P. Elkin, Dep. Atty. Gen., for the Commonwealth.

WILLIAMS, J. The complaint of the appellant is against the inequality of burden existing under the operation of the statute providing for the taxation of national banks.[1] The argument is that inequality of burden establishes the unconstitutionality of the law under which the tax is levied.[2] If the validity of our tax laws depends upon their ability to stand successfully this test, there are none of them that can stand. Absolute equality of burden is theoretically possible, but it has not been attained in practice in this state. It is a reasonable presumption that banks are honestly organized, and that each one enters upon its business career with an actual capital, exactly equal to the face value of all its shares of stock. A tax levied at any given rate per cent. on the shares would operate for a few months to produce substantially uniform results. But, once launched in business, each bank is affected by many circumstances and influences that are peculiar to it. One bank may accumulate its earnings in a large sur-

[1] Act June 8, 1891 (P. L. 240).

[2] Const. art. 9, § 1, provides that "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. * * *"

Digitized by Google

plus fund to be used in the business of the bank; another may divide its earnings in dividends semiannually among its stockholders. One bank may be managed with financial skill and economy; another may be conducted in a careless and extravagant manner. One may be located at an active business center, and have a large line of deposits and discounts; another may be located at an unimportant point, where money is scarce, and loans few. These and many other circumstances result in decided success in some cases, in the swallowing up of earnings in expenses in others, and in a positive impairment of capital in some others. The law that operated with practical uniformity of result at first, produces noticeable inequality as the results of differences in location and management begin to develop themselves, until results such as are brought to our attention in this case flow from the application of a uniform rate of taxation to the shares of stock at their par value. The inequalities are due to causes which the legislature could not be required to foresee or provide against, and for that reason they cannot be charged to the law. But the appellant complains that the law furnishes two modes and rates for taxing the stock of national banks, and denies that this can be constitutionally done. But the state finds it convenient and economical to tax its corporations and collect the taxes through its own proper machinery. To induce the banks to make their returns to the auditor general, and to pay their taxes into the state treasury, the state offers an inducement. It proposes to relieve all the banks from local taxation that elect to pay a certain rate per cent. upon their shares of stock directly into the state treasury. All the banks may come into this class. All that do are assessed with a uniform rate per cent., which they pay at one time and one place. Those that elect not to pay this rate are assessed at a lower and uniform rate upon the appraised value of their shares, and upon this valuation the local as well as the state taxes are assessed. We cannot say that this classification is unconstitutional, nor that the rate per cent. differs so widely as to invalidate the law. The rate is uniform for each class, and the aggregate of the taxes levied per share in both classes is as nearly the same as could well be estimated in advance of the action of the local authorities, which it is impossible to forecast with accuracy. The banks are themselves responsible for the existence of the second class. They are all invited to deal directly with the state. If they do not, it is fair to assume that their action is guided by what they believe to be their own pecuniary interest. Of a want of uniformity, which is the result of their own deliberate action, they certainly ought not to complain. Of a want of equality of burden that results from circumstances affecting particular banks, and is not produced by the application of the law, they cannot complain. We think the learned judge decided this case correctly, and the judgment is now affirmed.

STERRETT, C. J., and GREEN, J., not sitting.

HALE v. EQUITABLE AID UNION.

(Supreme Court of Pennsylvania. May 20, 1895.)

BENEFIT INSURANCE — AMENDMENT OF BY-LAWS — EFFECT ON CERTIFICATE.

A member of a benefit society who took a certificate, "subject to such laws, rules, and regulations as now exist or may hereafter be adopted by and governing" the society, under which she was to receive one-half the amount thereof in 12 years, "if living and in good standing," was not bound by a subsequent amendment of the by-laws which restricted the benefits to holders of certificates, both previously and subsequently issued, who should live to the expectation of life and become totally disabled, and limiting the payment then to be made to 10 per cent. of the amount of the certificate.

Appeal from court of common pleas, Warren county; Charles H. Noyes, P. J.

Assumpsit by Susan Hale against the Equitable Aid Union on a benefit certificate. From a judgment for plaintiff, defendant appeals. Affirmed.

In 1881 the plaintiff became a member of the defendant society, and took a benefit certificate therein for $1,800, "subject to such laws, rules, and regulations as now exist or may hereafter be adopted by and governing said corporation," and by which she became entitled to receive one-half the amount after twelve years, "if living and in good standing." The defendant alleged that an amended by-law was adopted in 1893, providing that "all persons holding benefit certificates * * * who shall live to the expectation of life, * * * and becoming totally physically disabled, shall be entitled to receive a one tenth part of the amount specified in their benefit certificate," and refused to pay the plaintiff more than $180.

Following, among others, are defendant's assignments of error: "Third. The learned court below erred in the answer to the defendant's first point, which point and answer are as follows, to wit: '(1) The plaintiff, as a member of the corporation defendant, was bound by the amendments to its by-laws providing for the payment yearly, upon the arrival at the period of expectation of life and total physical disability, of a one-tenth of the amount specified in her benefit certificate, instead of the payment of the one-half of the amount specified in said certificate at the arrival of such period.' Answer: 'Answered in the negative.' Fourth. The learned court below erred in not answering the defendant's second point in the affirmative, which point and answer are as follows, to wit: '(2) Under the agreement of

Digitized by Google

the plaintiff, contained in her application for a benefit certificate, "to accept said beneficiary certificate, subject to such laws, rules, and regulations as now exist or may hereafter be adopted, and governing said corporation," and the authority contained in article 6 of the defendant's charter of incorporation, to "enact such constitution, by-laws, rules, and regulations as from time to time shall be deemed necessary and proper for the government of such corporation, including the admission or election of members, their removal or suspension, the payment of dues, fees, penalties, benefits, management of all its funds and property, and from time to time alter and modify the same as shall be therein provided," the defendant corporation had the power to change the by-laws in force at the time the plaintiff became a member of the defendant corporation, and to adopt in lieu thereof the amendment, section 14, by-laws of 1893, which amended section is in part as follows: "All persons holding valid benefit certificates that have been or may be hereafter issued to them who shall live to the period of expectation of life as designated in section 2 of this act 'Synopsis,' and becoming totally physically disabled, shall be entitled to receive yearly a one-tenth part of the amount specified in their benefit certificate;" and such new by-laws, when adopted before the period of expectation of life, became binding upon the plaintiff.' Answer: 'As to the second point, I will refer to the general charge for my answer, in which it is fully covered.' Fifth. The learned court below erred in the answer to the defendant's fifth point, which point and answer read as follows, to wit: '(5) Under all the evidence in the case, the verdict of the jury for the plaintiff can only be for the sum of one hundred and eighty dollars ($180), with interest from July 21, 1893.' Answer: 'I answer this point in the negative. Under the whole case, gentlemen, I advise you that your verdict should be for the plaintiff for the sum of $900, with interest from the time when it became due, which the counsel have agreed upon.'"

Ball & Thompson and W. H. Tennant, for appellant. H. J. Muse, Sam'l T. Neill, and J. H. Donly, for appellee.

PER CURIAM. The controlling question in this case is whether the plaintiff was bound by the subsequent amendments to defendant's by-laws, providing for the payment yearly, upon arrival at the period of expectation of life and total physical disability, of one-tenth of the amount specified in her benefit certificate, instead of the payment of one-half of said amount at the time specified in said certificate. This question is to some extent involved in each of the assignments of error, but more particularly in the defendant's first, second, and fifth requests for charge, recited in the last three specifications; and it appears to have been correctly decided in favor of the plaintiff, not only in the general charge, but also in the learned judge's answers to said requests. In the former he correctly said, among other things, that a contract between an association, such as the defendant, and one of its members, cannot be impaired or altered by either of the parties thereto, except so far as the power to do so is reserved. The benefit certificate was accepted by plaintiff "subject to the right of the corporation to amend its by-laws, and to change the contract in so far as the by-laws make it, but not in so far as the contract is made by the benefit certificate itself. For these reasons, I think the plaintiff is entitled to recover, under the undisputed evidence, the one-half of the sum mentioned in the certificate." We find nothing in the record that would justify us in sustaining either of the specifications, and they are therefore dismissed. Judgment affirmed.

SMITH v. ERVIN et al.

(Supreme Court of Pennsylvania. May 20, 1895.)

DISSOLUTION OF PARTNERSHIP—EVIDENCE.

On an issue when a partnership was dissolved it appeared that the special partner gave notice of an intention to withdraw at the end of 1890, in the manner required by the partnership articles; that in January, 1891, the firm was involved, and he drew out only a portion of his capital, giving a receipt therefor, reciting that the balance was to be settled when certain accounts were closed out, and that he would prorate if any loss occurred in the closing out the accounts. During 1891 other payments were made to the special partner on account of his capital, but he claimed, in opposition to his partners, that the firm was not dissolved till 1892, and that when he gave the receipt he consented to the continuance of the partnership for another year; and in this he was corroborated by a general partner. In September, 1891, a general partner notified the special partner, in the manner provided by the articles, and on paper headed with all the parties' names as partners, of his intended withdrawal at the end of 1891, and on the trial explained that he gave notice to the special partner because of the latter's interest in the accounts. *Held*, that the partnership was not dissolved till the end of 1891. Williams and Mitchell, JJ., dissenting.

Appeal from court of common pleas, Philadelphia county.

Bill by Frank W. Smith against Spencer Ervin and another, trading as Ervin & Toland, for an account. From a decree for plaintiff, defendants appeal. Affirmed.

J. Bayard Henry and Richard C. Dale, for appellants. Frank P. Prichard and John G. Johnson, for appellee.

DEAN, J. On the 13th of January, 1890, Smith, Ervin, and Toland, in firm name of Ervin & Toland, formed a limited partnership as stockbrokers, under act of March 21, 1836, and supplements. The place of business was Philadelphia. Ervin and Toland were general partners, and Smith special. Capital, $166,000. Of this, $116,000 was to

Digitized by Google

be contributed by the general partners, and $50,000 by the special partner. The term of partnership was three years, but it was provided that it might be dissolved by any one of the partners giving three months' notice in writing to his copartners of his desire to dissolve at the end of the year. All were to be paid 6 per cent. interest semiannually on capital respectively contributed by them. After payment of all expenses in carrying on the business, and interest to each partner on the capital contributed by him, the special partner, Smith, was to receive 10 per cent. of the annual profits, and Ervin & Toland, the general partners, were to have the balance equally; this balance to be ascertained and divided at the end of each year. In addition, each of the general partners had the right to draw each month a sum not exceeding $500 for his personal expenses; this, however, to be charged to their personal accounts. At the date of the formation of the partnership the special partner, this plaintiff, paid in $30,000, and within a few months afterwards $16,464, leaving a deficiency in his stipulated contribution—$50,000—of $3,536. During the first year of the business, Ervin & Toland organized the "Reading Syndicate," and undertook to carry on margin for customers about 200,000 shares of Reading Railroad stock. They also took a partnership interest in about 7,000 additional shares of the same stock. In October of the same year, while the partnership was thus involved, Mr. Smith notified the general partners of his intention to withdraw his capital. Some time after this the general partners informed him of the condition of the firm's business; that the securities they were carrying had fallen greatly in the market, and the withdrawal of his capital meant heavy loss to all, and insolvency for the partnership. The conferences ran along until the close of the year. The books then showed a net loss of over $37,000. As a result of a thorough examination of the business by Mr. Smith, it was agreed between them that he should be paid $10,000 at once. For this he gave his receipt, thus: "Philadelphia, Jan. 9th, 1891. Received from Ervin & Toland ten thousand dollars on account of my capital, the balance of my interest to be settled as soon as possible, when certain accounts that show a shrinkage are closed out, I agreeing to prorate equally with Spencer Ervin and Edward D. Toland, my partners, if any loss is sustained in so closing these outstanding accounts. Frank W. Smith." Besides this $10,000, there was paid Smith during the year 1891 $8,000 more. The Reading stock steadily declined, and that owned by the partnership in June, 1891, showed a net loss of $72,000. In that month it began to go up, and the stock was gradually sold on the advancing market, until the last of it was closed out November 9th following. The net loss on this, and some other securities of less amount, footed up $21,942.89. Mr. Smith then received a statement from the firm of the business of 1891, taking as a basis the results of 1890, of which he had knowledge by personal examination of the books, and which year showed a net loss, according to trial balance, of over $37,000. In this statement he was allowed, for the year 1891, interest at 6 per cent. on $30,000, this sum being estimated as the average amount of his capital in the business for that year. At the same time he was charged with one-third the losses on the business of 1890, and credited with 10 per cent. of the profits of 1891. To this Mr. Smith made objections. He claimed the business for both years should be considered together, and, after allowing to each partner interest on the capital contributed by him, he, as special partner, under the partnership agreement of 13th of January, 1890, should be awarded 10 per cent. of the aggregate profit as shown at the end of the year 1891. He averred he had a right to be treated as a partner for the full two years, because there had been no dissolution until January 1, 1892, when the partnership ended by the formal withdrawal in writing of Mr. Toland. Ervin and Toland alleged the partnership was dissolved on January 1st, 1891, Mr. Smith having given them notice in October previous of his intention to withdraw, and having actually drawn out thereafter his capital, as fast as a prudent consideration for all their interests warranted. If the relation of Mr. Smith as partner ended 1st January, 1891, as Ervin and Toland claim, then he gets back the actual capital paid in by him, and about $1,000 more. Ervin and Toland get in profits something over $11,000 each. If there was no dissolution of the partnership until 1st January, 1892, then Mr. Smith gets $5,120 more than Ervin and Toland now admit is his due. The issue raised is as to the date of dissolution of the partnership, and is purely one of fact. The statement of the account and balance due Smith are determined as we determine that fact. By agreement of the parties the whole matter was referred to J. Levering Jones, Esq., to take testimony and make report as to law and the facts, as if a bill in equity for account had been filed. The referee took the testimony, and made a very clear and concise report on the facts. He says: "The primary question to be considered in this cause is, when did the partnership made on January 13, 1890, between Spencer Ervin and Edward D. Toland as general partners and Frank W. Smith as special partner, terminate?" He answers, "On 1st of January, 1891," and states the account, and suggests decree accordingly. His finding of fact was not approved by the learned judge of the court of common pleas, who, nevertheless, agrees with the referee that "the dispute in the case arises over the question, when was the firm dissolved as regards Mr. Smith?" He then draws the very opposite conclusion from the same evidence on which the referee based his conclusions. His

Digitized by Google

opinion is that the partnership terminated at the end of the year 1891, instead of at the beginning of it, and he directs the account to be stated accordingly. This leaves to us the duty of determining between them.

At the outstart it may be conceded the case is a close one on the evidence, and, if the referee and court had been in accord, under our well-settled rule not to disturb the findings of facts in the court below unless for manifest error, a decree for either party would probably have been sustained. There are two leading significant facts. One is wholly inconsistent with the claim now set up by plaintiff, the other with that now set up by defendants. The receipt for $10,000, signed January 9, 1891, by Smith, is, on its face, susceptible of no reasonable interpretation other than at that date, by his request, and by consent of the others, the partnership had terminated; and that he, according to the language of the writing itself, had the right to withdraw all the money he had paid in "as soon as possible, when certain accounts that show a shrinkage are closed out." The claim of Smith now, that his relation as partner was not severed until nearly 12 months afterwards, is flatly contradicted by this writing. Then, on the other hand, the act of Toland, on 26th of September, 1891, is an unequivocal assertion that Smith, nine months afterwards, was still a partner, and would so continue until January 1, 1892. On a paper headed with the names of Ervin and Toland as general and Smith as special partner, dated September 26, 1891, he serves this notice on Smith: "Dear Mr. Smith: This is a formal notice that I intend to withdraw from the firm of Ervin & Toland on January 1st, 1892. Yours, sincerely, Edward D. Toland." If Smith had ceased to be a partner, as Toland now claims, nine months before, at the end of the year 1890, judging of the usual operations of men's minds and their conduct in business affairs, there is no reasonable theory which will account for this contradictory act. It is consistent, and only consistent, with the idea that Toland believed Smith to be still a partner, and, acting in accordance with stipulation 6 in the partnership articles, desired to terminate the partnership on 1st January, 1892. That stipulation reads thus: "The partnership shall continue for a period of three years from the 12th of January, 1890: provided, however, that any one partner, whether general or special, may dissolve the said partnership by giving his copartners three months' written notice before the expiration of any calendar year, of his desire to terminate the same at the end of that year." That is, the partnership still existed. Mr. Toland desired to end it. He could only do so in the way provided in that agreement. He adopted that very way. On this supposition only is this conduct explicable. The explanation given by Mr. Toland in his testimony is this: "I simply gave Mr. Smith this notice, as during that period there were certain accounts which were in process of liquidation, in which we were all interested; and this was simply notice to him that I intended to retire from business on 1st of January, 1892." If the act had been equivocal, this explanation would have helped but little in ascertaining its true import; but, being manifestly significant of a continuing partnership, the explanation is wholly unsatisfactory. It is within common observation that a cautious, intelligent business man not seldom neglects those formalities which are indispensable proof of important transactions; but it is a rare case that such a man will take pains to formally assert a fact which does not exist,—a fact, too, highly prejudicial to his own interests. In effect, this conduct of Toland's was an assertion that Smith was still a partner, and therefore entitled to receive $5,120 more money than Toland now admits was due him. But Toland's conduct is not more significant of the continuance of the partnership to January 1, 1892, than Smith's receipt that it had determined in January, 1891; nor is Smith's explanation of that paper any more satisfactory. He says: "My partners represented to me that if I stayed in the firm, and the firm was allowed to go quietly on without disruption, we would undoubtedly, by virtue of new customers and new business which we had acquired, make up our loss, and most likely enjoy a good profit besides, during the coming year. * * * I said, 'If it seems impossible to do any business, and things do not get any better, and there is no business and no money, I will stand by you if I have to stand these losses equally.' Then they gave me this paper, and I carelessly signed it with that understanding, that the loss that I agreed to stand pro rata with them was a loss that was to be made up, if possible, by a continuation or extension of the partnership which I then had a right to dissolve." The substance of the explanation is that, wishing to terminate the partnership, and having the right to terminate it, he consented to its continuance, and then accepted a written agreement which expressed the very opposite. Agreements are presumed to express the assent of two minds to the same thing. This one, according to Smith's explanation, plainly expressed that to which neither assented.

In considering this vague and unsatisfactory explanation, however, we are not without some help from Mr. Toland. This interrogatory is put to him: "Q. I understand, then, that there was a partnership in 1890, which Mr. Smith, giving notice in the latter part of that year, desired terminated? A. Yes, sir. Q. But you continued it for another year, by agreement of all the parties? A. Yes, with the understanding with Mr. Smith that his capital could be liquidated as fast as possible, commencing with $10,000, January 9th." Then, further on, this question is put: "Q. In point of fact, the firm of Ervin & Toland,

Digitized by Google

formed under that written agreement of 1890, was not dissolved until December, 1891? A. Well, I don't know about that." Smith's explanation of his receipt is that it expressed the very opposite of what was agreed upon. Toland almost positively corroborates him in some parts of his testimony, and in no part of it contradicts him. Then, taking the two statements in connection with the unequivocal conduct of Toland nine months afterwards, in treating Smith as a partner by giving notice of his intention to terminate the partnership, we are moved, not without some hesitation, to adopt the conclusion of the learned judge of the court below that, taking all the evidence together, it shows there was no dissolution of the partnership until January 1, 1892. The decree is therefore affirmed, and the appeal is dismissed, at costs of appellant.

MITCHELL, J. (dissenting). The matters which led to this controversy having occurred between partners who were on entirely friendly terms, were unfortunately not carried on with the formality and precision desirable in business transactions, and it is not, therefore, surprising that the parties failed to have the same understanding at the time, and their recollections now differ. But, with the written documents as a basis, I am of opinion that the substantial agreement is clear. Mr. Smith desired to dissolve the partnership, and had the legal right to do so, but became convinced that it would involve very serious loss, not only to his partners, but to himself, to do so at that time. He therefore agreed that no public change should be made, but, as between the partners themselves, the notice was not withdrawn, and liquidation commenced at the beginning of the year 1891. The receipt shows this beyond all doubt. Smith received $10,000 of his capital, and the rest was to be repaid "as soon as possible, when certain accounts that show a shrinkage are closed out." The losses on these special accounts were to be equally divided, but it is nowhere said or indicated that general losses, or any losses at all on new business, were to be paid in part or in whole by Smith. The business of 1891 was a new business on a new basis, and, so far as the partners themselves were concerned, if it had proved a losing one, Smith could not have been charged with any share of the losses; and, on the other hand, he had no claim for any of the profits. I do not see the difficulty that my brethren find in regard to the notice by Mr. Toland to Mr. Smith in September, 1891. The firm of Ervin & Toland continued during 1891, so far as the public were concerned. The use of the firm heading and paper was therefore not only natural, but imperative. A change would have given notice to the public of what the circumstances required should not be known. And, as to the partners themselves, the firm still continued under the same name, so far as Mr. Ervin and Mr. Toland were concerned. It was this latter firm from which Toland desired to withdraw, and his doing so involved the winding up of the business to the public eye as well as in fact between the partners: and therefore the termination of the temporary arrangement which had run through the year 1891. In this arrangement Smith, of course, was interested, and he was entitled to notice of its intended termination. The letter of Toland to Smith was, therefore, not only a courteous and friendly, but a proper, business act. I would reverse this judgment, and approve the findings of the referee.

WILLIAMS, J., concurs in this dissent.

In re STEINMETZ'S ESTATE.

Appeal of DUFFIELD.

(Supreme Court of Pennsylvania. May 20, 1895.)

CONSTRUCTION OF WILL—SEPARATE USE—WIDOW'S SHARE.

1. Testator directed that his real estate be held, "as at present, undivided and unapportioned" during the life of his widow, and that each of his children should receive during that time a certain share of the net income; that, upon the widow's decease, the "children shall do as they think best" as to a continuance of that mode of managing the estate, but, should "they agree to a division of the estate," then the separate portions of the daughters "shall be separately secured to them and their use beyond the dictation of the husband of either of them." *Held*, that a separate use was created as to each daughter.

2. Testator left his whole estate in an active trust to keep it together, collect rents, make repairs, and pay incumbrances, "as though I myself acted in the premises." The widow was given one-third of the net income, and, upon her death, the joint administration of the whole estate was to be continued by the children if they saw fit. *Held*, that the widow did not take a fee in one-third of the estate.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of Daniel Steinmetz, deceased. Sur account of Philip J. Steinmetz and Charles G. Steinmetz, executors. From a decree of distribution, Martha S. Duffield, beneficiary, appeals. Affirmed.

William H. Peace, for appellant.

MITCHELL, J. Although the testator's direction that his daughter's portion of his estate should be held on a separate use trust might seem, on the literal wording of it, to depend on a contingency, yet his plain intent to the contrary appears from a view of his whole will together. He directs his real estate to be held, "as at present, undivided and unapportioned" during the life of his widow, and the interest of each child during that time is only in a share of the "net residue" of the income, after payment of taxes, necessary repairs, etc. This arrangement, as the testator calls it, is to continue during the life of his widow, and at her decease his "children shall do as they think best," i. e. as to a continuance of the

Digitized by Google

arrangement, but, should they "agree to a division of the estate," then the separate portions of the daughters "shall be separately secured to them and their use beyond the dictation of the husband of either of them." The purpose to create a separate use is thus clear, and, where that is so, no particular form of words is necessary. The fact that it is directed on the happening of the contingency of the widow's death and the refusal of the children to continue the joint arrangement is no more than a direction to put the trust into form when it may become necessary. So long as the estate was held together on the trust to collect and distribute the revenue, a formal separate use was not necessary. The daughters got only their shares of net income without it. But when the estate was to be divided, so that the daughters' shares should come to them in severalty, freed from the first administrative trust, then the separate use would be required, and was directed to be made. The contingency specified by the testator did not go to the creation of the separate use, but to the time and occasion for putting it into formal execution. The claim that the widow took a fee in one-third of the realty cannot be sustained. The whole estate is left in an active trust to keep it together, collect rents, make repairs, pay incumbrances, etc., "as though I myself acted in the premises," and the widow was to get one-third of the residue,—that is, of the net income. Not only is this all that is given in terms to the widow, but the direction that after her death the joint administration of the whole may be continued by the children, or, in case they determine to make partition, the daughters' portions shall be put in separate use trust, shows that it is all the testator intended to give. Decree affirmed.

TRIM et al. v. BRIGHTMAN.

(Supreme Court of Pennsylvania. May 20, 1895.)

DEVISE TO THE POOR—TRUSTEES—SUFFICIENCY OF DESIGNATION OF.

1. A devise for "the benefit of the poor of E. township, W. county, Pa.," to be "managed by the overseers of the poor in said county for the benefit of E. township," vested an estate in the "commissioners of the Rouse estate," they being the overseers of the poor in W. county.

2. A devise for "the benefit of the poor of E. township, W. county, Pa.," was properly sustained as a charitable use.

Appeal from court of common pleas, Warren county.

In the matter of the appointment of John Brightman, administrator c. t. a. of Ezra Trim, deceased. From the definitive decree affirming the appointment, W. P. Trim, acting on behalf of himself and the other heirs and the next of kin of Ezra Trim, deceased, appeals. Affirmed.

The following is opinion of the lower court (Charles H. Noyes, P. J.), viz.:

"The last will of Ezra Trim gives certain lands, specifically described, and all the residue of his estate 'to go to the benefit of the poor of Eldred township, Warren county, Pa.; to have the use and nothing more, * * * for their benefit and use, * * * and, when fully proven up, to be managed by the overseers of the poor in said county for the benefit of Eldred township.' The register appointed the appellee administrator c. t. a., on the nomination of the commissioners of the Rouse estate. If the residue of the testator's estate is well devised to them in trust, then this was right, otherwise the appeal by the next of kin should be sustained; for, if as to the residue he died intestate, the administrator should have been selected from the next of kin. A testamentary disposition for the benefit of the poor of a defined locality is clearly a charitable use, and will be sustained even although it would fall under the condemnation of some rule of law if it were a private or merely benevolent disposition. Although the objects of the testator's bounty be not in being, yet if they belong to a class so designated by the testator that its members may be ascertained by means of the testator's description, or if he has given discretion to some person or body of persons to select them, the gift will be sustained. Witman v. Lex, 17 Serg. & R. 88. The relief of the poor appears among the 'good and godly uses' recited in the statute 1 Edw. VI., c. 14. 'To the poor of Stratford,' was enough to carry the charitable gift of William Shakspeare to his townsfolk; and the poor of Eldred township, a definite municipality, is certain as words can make anything. Lawrence Co. v. Leonard, 83 Pa. St. 207. Now, is there any doubt as to the trustees designated by the testator? He has not given their correct corporate name, but he has used terms which describe them perfectly, and are applicable to no one else. They are, by express provisions of the act incorporating them, the overseers of the poor in said (Warren) county. The words 'for the benefit of Eldred township,' which the counsel for the appellants treat as part of the description of the trustees, are not so intended, but are plainly a repetition of the terms and purpose for which the overseers are to manage the property. It is true that this disposition will inure to the benefit of the taxpayers, but that is the effect of every benefaction which provides for any of the burdens of government; and it is also true that, inasmuch as Eldred township is not a poor district, some complication may arise in the administration of this trust so as to limit its benefits to the inhabitants of Eldred township, but these difficulties cannot prevent the vesting of the estate, nor does it appear that they cannot be overcome, without the application of the doctrine of cy pres. But, if they cannot, the power to

Digitized by Google

apply it in cases in which the testator's intent is clear and lawful is clearly possessed by the courts of this state, not only as part of their common-law power, but by the express provisions of the statute law. Act April 26, 1855, § 10 (P. L. 331); Act May 26, 1876 (P. L. 211). Notwithstanding the opinion of Judge Penrose in Alter's Estate, 4 Pa. Co. Ct. R. 558, which from his ability and experience is entitled to great respect, I am not convinced that the act of 1885 (P. L. 259) was intended or did in fact affect the power of the courts at all. The tenth section of the act of 1855 contains two provisions: That no disposition for charitable uses shall fail for certain defined defects, but that the same shall be carried into effect by the courts 'so far as the same can be ascertained and carried into effect, consistently with law and equity'; and, second, that such dispositions, so far as they cannot be carried into effect, shall be understood to be made subject to be disposed of by the legislature, and, failing such disposition, to go into the public treasury. The act of 1885 repeals the cy pres power thus assumed by the legislature, which existed only in cases where the courts could not sustain the disposition, and directs that in such cases the estate shall go to the heirs at law. The commissioners of the Rouse estate are a corporation expressly authorized to receive property by devise, and the purpose of their incorporation was to administer a similar charity. The testator's will, though not elegantly expressed, is not ambiguous or doubtful, nor is his disposition illegal; but, on the contrary, it is highly meritorious,—charitable in the broad and legal sense of the word. It is clearly our duty to sustain it. The appeal is dismissed, and the decree of the register affirmed, at the costs of the appellants."

J. H. Donly, for appellant. Wilbur & Schnur and Lindsey & Parmlee, for appellee.

PER CURIAM. The question involved in this appeal was rightly decided by the learned president of the orphan's court. For reasons given in his opinion, the trust created by the will of defendant's testator for "the benefit of the poor of Eldred township, Warren county, Pa.," should be sustained. Decree affirmed and appeal dismissed, with costs to be paid by appellant.

THAYER v. SEEP.

(Supreme Court of Pennsylvania. May 20, 1895.)

REFORMATION OF CONTRACT—EVIDENCE.

A party to a written contract who seeks to modify it on the ground of fraud or mistake must show, by precise and indubitable evidence, that the contract entered into was as alleged by him.

Appeal from court of common pleas, Crawford county.

Assumpsit by R. H. Thayer, surviving partner of Thayer Oil Company, composed of himself and Joseph Stetthelmer, against Joseph Seep. From a judgment for defendant, plaintiff appeals. Affirmed.

Among other of plaintiff's assignments of error was the following: "The court erred in charging the jury as follows: 'In order to justify the court or jury in modifying a contract entered into by the parties, and reduced to writing, it is necessary that the party alleging the fraud or mistake should show, by clear, precise, and indubitable evidence, that the contract was as alleged by the party seeking to modify it; and, until such evidence is offered, the party is not permitted to change or contradict his undertaking and obligation in writing.'"

Roger Sherman (Haskins & McClintock, of counsel), for appellant. Thomas Roddy and M. F. Elliott, for appellee.

PER CURIAM. In construing the contract in question as the same is written, the learned court was clearly right. The only question is whether the testimony introduced by plaintiff for the purpose of reforming the instrument so as to make it read as he claims the parties intended is of that clear, precise, and satisfactory character that is required in such cases. We think the learned judge was right in holding that it was not, and hence there was no error in withdrawing it from the consideration of the jury, and directing them to render a verdict for the plaintiff in accordance with the contract as written. Judgment affirmed.

PAYNE et al. v. SCHOOL DIST. OF BOROUGH OF COUDERSPORT et al.

(Supreme Court of Pennsylvania. May 20, 1895.)

CONSTITUTIONAL LAW—PLURALITY OF SUBJECTS—EXPRESSION OF SUBJECT IN TITLE.

1. That part of Act Feb. 8, 1871, entitled "A supplement to an act entitled 'An act to enable the board of school directors of the borough of Coudersport, in the county of Potter, to establish and maintain a graded school,'" which annexed the territory in the East Fork road district to the school district of Coudersport, was repugnant to the provision of Const. 1790 as amended (article 11, § 8), as containing more than one subject.

2. That part of said act is also in violation of said section of the constitution in that the subject thereof is not clearly expressed in the title of the act.

Appeal from court of common pleas, Potter county.

Bill by Eugene R. Payne and others, doing business in the firm name of Payne, Cochran & Co., against the school district of Coudersport borough, county of Potter, and others, for an injunction. From a decree for plaintiffs, defendants appeal. Affirmed.

Digitized by Google

The lower court's opinion is as follows:

"The plaintiffs' bill was filed June 9, 1894, praying for an injunction restraining the sale of certain lands, described in the bill, for arrears of school taxes, by the county treasurer for the benefit of the school district of Coudersport borough, for a decree that the defendants refund to the plaintiffs the sum of $925.65, school taxes unlawfully collected, and for further relief. A special and preliminary injunction was granted June 28, 1894, and, issue being joined, the cause was tried before the court July 10, 1894, at which date the injunction was by consent continued until further order. The material facts set forth in the bill are not denied in the answer, and, so far as not admitted, were established by the evidence without dispute. A simple statement of them will suffice, without any formal synopsis of the pleadings.

"Findings of Fact.

"The plaintiffs are the owners of some 14,000 acres of land described in the bill, and situate in the township of Eulalia, county of Potter and state of Pennsylvania, and distant some sixteen miles from the borough of Coudersport. By virtue of the provisions of the act of February 8, 1871, school taxes and taxes for school buildings were assessed against said lands by authority of the school directors of Coudersport borough school district for the years 1892 and 1893, amounting to $1,524.60. These taxes the plaintiffs have refused to pay, alleging that they are without authority of law, and the defendant Charles Coats, the treasurer of the county, has caused the lands to be advertised for sale. The lands of the plaintiffs are within the boundaries of the East Fork road district, as they are defined in an act entitled 'An act erecting the south part of Eulalia township, in the county of Potter, into a separate road district,' approved April 3, 1869. They are also among the lands enumerated in an act entitled 'An act to attach certain lands in Potter county to Coudersport school district for school purposes,' approved April 2, 1867, which last-mentioned act was repealed by the act of May 26, 1891 (P. L. 132). In addition to the taxes above referred to, there were assessed against the lands of the plaintiffs described in the bill for the benefit of the said school district defendant, for the year 1893, school-bond taxes amounting to $925.65. At the request of the plaintiffs, the defendant Coats, the county treasurer, sent to the plaintiffs, before any payment of taxes, a statement of all the taxes assessed against their lands in tabular form, which was marked by the stenographer 'Plaintiffs' Exhibit A,' and is made part of this finding. The various kinds of taxes were set opposite the numbers of the several warrants, under appropriate headings, as 'County Tax,' 'School Tax,' etc. One of these headings was the word 'Bond,' without more. The plaintiffs, not intending to pay any school taxes, included the taxes under this head in their check to the treasurer, and had no knowledge that the taxes under that head were in fact school taxes until the treasurer returned his receipt, in which the heading was altered to read 'School Bond,' and the taxes were so designated in the body of the receipt. The taxes so unintentionally paid were the school-bond taxes above referred to, and amounted to $925.65.

"Opinion of the Court.

"It is conceded that a threatened sale of lands for taxes, where the power attempting to tax has no jurisdiction or where the taxing authorities are acting contrary to law, will be restrained by injunction. St. Clair School Board's Appeal, 74 Pa. St. 252; Miller v. Gorman (N. S.) 38 Pa. St. 309; Markoe v. Hartranft, 6 Am. Law Reg. 487. The plaintiffs contend that the second section of the act of February 8th, 1871 (P. L. 31), which is the only authority for the assessment of the taxes in question, is in conflict with the eighth section of the eleventh article of the constitution of Pennsylvania, in force at the time of its passage,[1] and hence void. The section in question is as follows: 'That the whole of the territory contained in the East Fork road district, in the county of Potter, is hereby annexed to the said school district of Coudersport, and the board of school directors of said school district are authorized and empowered to levy and collect a school tax upon the assessed valuation of all property in said territory, the same as they levy and collect upon the property within the original bounds of said school district.' The act from which the above section is quoted is entitled 'A supplement to an act entitled "An act to enable the board of school directors of the borough of Coudersport, in the county of Potter, to establish and maintain a graded school."' The East Fork road district was established by an act of assembly approved April 8, 1869 (P. L. 706), entitled 'An act erecting the south part of Eulalia township, in the county of Potter, into a separate road district.' This act provides that certain warrants, including the lands of the plaintiffs in Eulalia township, together with certain other lands in Summit, Abbott, and West Branch townships, shall constitute a separate road district, to be known as the 'East Fork Road District.' It is to be noted that the lands in Eulalia township affected by the second section of the act of February 8, 1871, had been already 'attached' to Coudersport for school purposes by the act of April 2, 1867, with like power of taxation as is given in the later act. The act of 1867 was repealed by title in 1891. Either the legislature has accomplish-

[1] Const. 1790, as amended 1838, 1850, 1857, and 1864.

Digitized by Google

ed absolutely nothing by this repeal, or it must be construed to abolish the law which it repealed, though contained in a different act from that cited. This construction would repeal the identical law which is contained in the act of 1871. But, as the language of the repealing statute is plain, we have no warrant for resorting to construction. We must assume, therefore, even against reason, that the legislature intended precisely what it did, viz. to repeal a law already repealed and supplied by the act of 1871.

"The constitutional provision which it is alleged this statute violates is identical in meaning with the third section of the third article of the constitution of 1874. To determine whether an act offends against this provision, we must inquire whether it contains more than one subject; and, if not, whether the single subject of the act is clearly expressed in its title. The purpose of the first requirement was to prevent the passage of 'omnibus bills,' or, as it is expressed in the corresponding section of the constitution of New Jersey, 'to avoid improper influences, which may result from intermixing in one and the same act, such things as have no proper relation to each other.' Few bills are so elementary in character that they may not be subdivided under several heads; and no two subjects are so wide apart that they may not be brought into a common focus, if the point of view be carried back far enough. The quotation from the constitution of New Jersey furnishes the proper light in which to define the word 'subject.' Those things which have a 'proper relation to each other,' which fairly constitute parts of a scheme to accomplish a single general purpose, 'relate to the same subject' or 'object.' And provisions which have no proper legislative relation to each other, and are not part of the same legislative scheme, may not be joined in the same act. What was the legislative subject of the act of the 13th of April, 1869, to which the bill in question is a supplement? The title answers, 'To enable the board of school directors of Coudersport, in the county of Potter, to establish and maintain a graded school.' To this end, its first section authorizes the trustees of the Coudersport Academy to convey all its property to the school directors of Coudersport borough, to be used by them for the purpose of establishing and carrying on a common or graded school. The second section repeals certain laws of no moment here. The third authorizes the levy of two per cent. upon the valuation of all the taxable property in the district. The supplement in question, in the first section, provides that the school directors may charge tuition in the high-school department of the graded school and, in all of the departments, except to pupils residing in Coudersport borough and Eulalia township; and the second section is the one above quoted, annexing the East Fork road district to Coudersport for school purposes. The greater part of the territory contained in the East Fork road district had been, as we have said, attached to Coudersport for school purposes by a special act of assembly in 1867. This supplement, therefore, covers actually the subject-matter of two existing acts,—that of 1867, and the act to which it was a supplement. Provisions respecting the charge for the tuition of the graded school in Coudersport, and provisions attaching the territory to the school district of Coudersport, seem to have no proper relation. But it is argued with great force and ability by the learned counsel for the defendants that the means by which the general purpose of an act of assembly is to be accomplished are included within the subject of the act, and that they need not be specified in the title. This is undoubtedly a correct principle, and, if applicable here, will sustain the provisions of the act attacked by the plaintiffs. But there is in the section in question no allusion to the graded school, nor is there in the original act any reference to the territory outside the boundaries of the Coudersport school district. The taxes to be levied on the lands in East Fork are not directed to be applied to the graded school, and the directors may or may not use them for that purpose. Pupils resident in a portion of the annexed territory, viz. in Abbott, Summit, and West Branch townships, are expressly excluded by the terms of the act from all benefit of the graded school, except upon payment of tuition, in the same manner as pupils from other school districts. Doubtless the increase in the amount of taxable property resulting from annexation of the East Fork road district did facilitate the maintenance of the graded school in Coudersport. But can we regard that merely as a means to the end (the maintenance of the graded school in Coudersport) which is broader in its scope than the original object? If, to enable the school directors of Coudersport to maintain a graded school, they had been authorized to administer all of the school affairs in the county of Potter, such a regulation could hardly be justified as merely means to the end proposed by the bill. Where the means adopted to accomplish the purpose stated in the title of an act is itself a substantive regulation, affecting greater territory and broader interests than are disclosed by the title, the rule invoked by the defendant is not applicable. The original act of April 13, 1869, and the first section of the supplement of February 8, 1871, relate only to Coudersport, and to a single school in that borough. The second section of the supplement relates to Coudersport and the East Fork road district, which includes a part of three townships never theretofore connected in any way with Coudersport school district, and it affects not merely the graded school, but all the schools within the

Digitized by Google

territory mentioned. We are of opinion, therefore, that this section is in violation of the constitutional prohibition as containing more than a single subject.

"But if it may be fairly said that the two subjects are so related that they might be embraced within a single act, it is clear that the second provision of the constitution has not been complied with. For the title does not set forth any subject sufficiently broad to cover both of these provisions, but merely one of them, viz. that relating to the graded school. The title to a bill need not be an index to its contents, but it must be so broad as to cover all the provisions of the act, and not merely some of its subdivisions. One of the tests applied in the cases to determine the sufficiency of a title to a bill is the inquiry whether it fairly gives notice by its terms, to all persons interested, of the subject-matter of the act. If by its title it appears to affect only the residents of a certain locality, while in the body of the bill there are provisions affecting other territory, it has been held that the title is misleading and the act unconstitutional. Beckert v. City of Allegheny, 85 Pa. St. 191; City of Philadelphia v. Ridge Ave. Pass. Ry. Co., 142 Pa. St. 484, 21 Atl. 982; Ridge Ave. Pass. Ry. Co. v. City of Philadelphia, 124 Pa. St. 223, 16 Atl. 741. Where the title of a bill imports one subject, and the bill itself shows an additional subject to be its purpose, the title is misleading and the act unconstitutional. Rogers v. Improvement Co., 109 Pa. St. 109, 1 Atl. 344; Dorsey's Appeal, 72 Pa. St. 192; Hatfield v. Com., 120 Pa. St. 395, 14 Atl. 151. The title of this bill relates only to Coudersport. Assuming that the act of 1867 had made the warrants in Eulalia township part of Coudersport's school district, the title gives no notice that any legislation affecting the inhabitants of Summit, Abbott, or West Branch townships was intended. If the act was unconstitutional as to those townships, it cannot be sustained as to Eulalia, for the provisions of the second section are not severable. We cannot assume that the legislature would have annexed the warrants in Eulalia alone. In the application of plain and unquestioned principles to a great variety of cases some conflict naturally arises. The judge who decided the later cases had the advantage of a broader view than those who decided the earlier ones immediately following the adoption of that provision of the constitution. The case of Blood v. Mercelliott, 53 Pa. St. 391, relied upon by the defendants, was one of the earliest decided after the adoption of this provision of the constitution. It has been repeatedly declared to be upon the very border line; and, from the remarks which have been made concerning it in subsequent cases, it is by no means certain that the decision would be repeated were precisely the same facts to be again presented. But it is not decisive of the question before us, at all events, while the later cases seem to us to clearly point to the unconstitutionality of this section under consideration.

"As to the right of the plaintiffs to recover back the taxes paid inadvertently, the law seems quite clear. The presumption is that the taxes paid to public officers are applied to public purposes, and taxes so paid cannot be recovered back merely because the law under which they are levied is unconstitutional. Peebles v. City of Pittsburg, 101 Pa. St. 304. Where the payment is exacted by duress of the person or distraint of goods, and is made under protest, thus giving notice to the officers that it will be contested, the law will permit taxes illegally collected to be recovered back; but it never permits such recovery where the payment was voluntary. The facts in this constitute a voluntary payment. There was no duress, and no act of the officers which can be justly said to have misled the plaintiffs. The word 'Bond' at the head of the column, in the statement of taxes furnished, simply failed to give information sufficient to enable them to determine whether the taxes in that column were school taxes or not. It furnished no reason for presuming that they were not school taxes, and conveyed no erroneous information. Without making further inquiry, the plaintiffs saw fit to pay the taxes, and this was plainly a voluntary payment. But, even if otherwise entitled to recover back the taxes paid, the plaintiffs have a complete remedy at law; and it is a grave question whether this claim is so related to the controversy in equity as to justify the disposition of it in this suit as a part of that controversy. Our conclusions of law are the following:

"Findings of Law.

"(1) That the second section of the law, entitled 'A supplement to an act, entitled "An act to enable the board of school directors of the borough of Coudersport, in the county of Potter, to establish and maintain a graded school, approved April 18, 1869,"' approved February 8, 1871, is unconstitutional and void. (2) That the assessment of taxes upon the lands of the plaintiffs, described in the bill, by the directors of the school district of Coudersport, was without authority of law, and the threatened sale of said lands by the treasurer of the county would be illegal. (3) That the payment of $925.65 of school-bond taxes by the plaintiffs, although unintentional, was voluntary, and such payment cannot be recovered back in this suit. (4) That the plaintiffs are entitled to the injunction prayed for in the bill."

Larrabee, Lewis & Leonard, C. L. Peck, and Dornan & Ormerod, for appellants. James B. Benson, L. B. Seibert, Seth T. McCormick, and Henry C. McCormick, for appellees.

Digitized by Google

PER CURIAM. There was no error in entering the decree complained of, and, for reasons given in the opinion of the court below, it should be affirmed. Decree affirmed and appeal dismissed, with costs to be paid by appellants.

FEE v. BOROUGH OF COLUMBUS.

(Supreme Court of Pennsylvania. May 20, 1895.)

DEFECTIVE SIDEWALK—NOTICE TO REBUILD—KNOWLEDGE OF DEFECT—EVIDENCE.

1. In a suit against a borough to recover for personal injuries received on a defective sidewalk, where it appeared that, before the accident, defendant's street commissioner examined the walk, it was not error to charge that, if any defect then existed in the walk which was apparent to a person examining it with ordinary care, defendant had actual notice of such defects.

2. It was proper to refuse to charge that the fact that before the accident the defendant borough notified the property owners to rebuild the sidewalk in question was "no evidence" of express notice on the part of defendant of the alleged defects which caused the injury.

Appeal from court of common pleas, Warren county.

Trespass by Mary Fee against Columbus borough to recover damages for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff was injured on a sidewalk in the defendant borough, which was alleged to be defective. Before the accident occurred, defendant's street commissioner, Hiram Schramling, had examined the sidewalk, and notice to rebuild the same had been given to the owners thereof by defendant.

Defendant's assignments of error are as follows: "(1) The court erred in that part of the charge in which the jury were instructed as follows: 'Now, gentlemen, any defect which existed in the walk at the time when Mr. Schramling examined it, and which was apparent to a person examining it with ordinary care, of course the borough had actual notice of. Notice to him would be notice to the borough, under those circumstances. This would be an important question for you to determine: What was the condition of the walk at that time? He testifies that there were no such defects as are described by the plaintiff's witnesses at that time; substantially, that there were no broken planks and no loose planks that he discovered.'

"(2) The court erred in that part of the charge in which the jury were instructed as follows: 'There is evidence, too, that the burgess, Mr. Smith, was accustomed to walk over the walk about every day. That you may consider in respect to the question of actual notice of the defects in the walk. He testifies that he did not discover any such defects as described by the plaintiff, and he thinks he would have discovered them if there had been any there. All this is for you. You must determine from this conflicting testimony what the true facts are. What was the actual condition of this sidewalk at the time when the accident occurred, and how long had it existed prior to that time? If it was actually known, as I have said to you, by the officers, that the sidewalk was dangerous, and for an unreasonable time they neglected to repair it, or if it had been dangerous so long that, considering its situation, the amount of travel over the walk, the public place the walk occupied, and all the circumstances in the case, the officers, by exercising reasonable and ordinary care should have known of it, and failed to repair it, then they were negligent.'

"(3) The court erred in its answer to the defendant's fourth point, which point and answer are as follows: 'Fourth. The notice to the property owners to rebuild the walk is no evidence of express notice on the part of the borough of the alleged defects which caused the injury; and there is no evidence in this case of any express notice to the borough authorities of the alleged dangerous condition of this walk.' Answer: 'With these remarks, gentlemen, which cover the subject embraced in the defendant's fourth point, I answer that point in the negative.'

"(4) The court erred in its answer to the defendant's fifth point, which point and answer are as follows: 'Fifth. Unless the jury find that the alleged dangerous condition of the walk was so open, notorious, and apparent as to be noticeable to all who had occasion to pass the place or to observe the premises, and unless they disbelieve all the defendant's witnesses who testify that such was not the case, the verdict should be for the defendant.' Answer: 'Also the fifth point is refused, because it assumes that there is no evidence of any kind of actual notice of the condition of the walk, which is not as I view it.'

"(5) The court erred in its answer to the defendant's sixth point, which point and answer are as follows: 'Sixth. If the jury believe the testimony of the plaintiff and her witnesses upon the points that she was frequently over the walk while it was out of repair, and that the defects were open, notorious, and plainly to be seen, and if they believe that by taking the street she could have gone around the place where she fell, and would have reached her destination in safety, then she would be guilty of contributory negligence, and cannot recover, and the verdict should be for the defendant.' Answer: 'If there was a safe way around the defect in the walk, and this defect was known to the plaintiff, and apparently dangerous, she was guilty of negligence in going over the walk, instead of around by a safe way. Reasonable care and reasonable conduct, under all the circumstances, is what you should apply to this plaintiff, as well as to the defendant's officers.'

"(6) The court erred in its answer to the defendant's third point, which point and an-

Digitized by Google

swer are as follows: 'Third. If the jury believe that the plaintiff was suffering from a rupture before the 10th of May, 1893, there can be no recovery of damages for that cause.' Answer: 'Of course, gentlemen, that is correct. She cannot recover for anything which was not caused by the accident. She testifies that she had no rupture prior to that time. If you are satisfied, from all the evidence, that she did, and that this statement by her that the rupture was occasioned by the accident is not true, you will exclude that entirely from the case; and it would go a long way to discredit her testimony in every particular where she is contradicted by other witnesses. If you find that she has testified falsely in respect to that, of course it would make it very difficult for you to believe her wherever she is contradicted by other witnesses as to any other matter.'

"(7) The court erred in that part of the charge in which the jury were instructed as follows: 'There is evidence that the plaintiff had passed over the walk frequently. She did not testify, as I remember, that she had observed or noticed the dangerous condition of the walk, these loose planks, and so on, before this time; but whether she had noticed it—whether she ought to have noticed it—is for you. As I have said, she was not bound to the exercise of extraordinary care, but she was bound to use such care as a person of ordinary prudence, situated as she was, under like circumstances, would use; and, if she neglected that, it would be negligence.'

"(8) The court erred in that part of the charge in which the jury were instructed as follows: 'If she fell by reason of loose planks or other defects in the walk which were apparent, and should have been seen and repaired, or if the defects had been there long enough so that the borough officers either actually knew of the condition, or should have known its condition by the exercise of ordinary care, and the plaintiff was free from any negligence on her part, she would be entitled to recover.'"

W. M. Lindsey, J. O. Parmlee, and Albert B. Osborne, for appellant. Wilbur & Schnur and Allen & Sons, for appellee.

PER CURIAM. Considered in the light of all the testimony properly before the jury, there is no substantial error in either of the excerpts from the learned judge's charge recited in the first, second, seventh, and eighth specifications; nor do we think there is any error in either of his answers to defendant's requests for charge specified in the remaining four assignments. Questions of fact, necessarily for the exclusive consideration of the jury, were presented by the testimony, and properly submitted to them, with instructions which appear to be substantially accurate and adequate. We find nothing in either of the assignments of error that requires special comment. Judgment affirmed.

ST. MARY'S GAS CO. v. ELK COUNTY et al.

(Supreme Court of Pennsylvania. May 20, 1895.)

NATURAL GAS LANDS—PUBLIC CORPORATIONS—TAXATION—INJUNCTION.

In a suit against a county to restrain the sale of natural gas lands for local taxes, it appeared on the preliminary hearing that plaintiff was a corporation under Act May 29, 1885, which authorized it to produce and supply natural gas for all purposes, declared that the transportation of natural gas for public consumption was a public use, and made it the duty of the corporation to furnish consumers within its district with gas for such purposes as it might determine, and gave it the right of eminent domain; that there was no oil in the lands in suit; and that the gas therein was essential to the exercise of the corporations franchises, and was part of its capital stock, on which it paid a tax to the state. *Held*, that it was proper to continue the preliminary injunction until final hearing.

Appeal from court of common pleas, Elk county.

Bill by St. Mary's Gas Company against the county of Elk, T. J. Shaffer (treasurer), the school district of the township of Ridgway, the township of Ridgway, and the overseers of the poor of Ridgway township, for an injunction. From a decree continuing the preliminary injunction until final hearing, defendants appeal. Affirmed.

The plaintiff filed its bill in equity, averring that it was a corporation chartered under Act May 29, 1885, for the purpose of producing, dealing in, transporting, storing, and supplying natural gas for public consumption, and as such was taxed upon its capital stock under Act June 1, 1889, § 21, and supplements thereto; that it was the owner of natural gas in 694 acres of land in the defendant county, which was held and used by it for its corporate purposes only, and was wholly included in its capital stock; that it was a public corporation having the right of eminent domain, and that the gas in the lands was indispensable to the exercise of its corporate rights in supplying the same for public consumption; that the defendants illegally assessed taxes for local purposes upon the lands, which plaintiff refused to pay; and that the lands were advertised for sale, under Act March 13, 1815, for nonpayment of taxes,—and praying an injunction restraining such sale. The defendants answered, admitting the incorporation of plaintiff, but denying that it was a public corporation, and averring that the oil and gas in the land were liable to taxation. Plaintiff is a corporation chartered and organized under "An act to provide for the incorporation and regulation of natural gas companies," approved May 29, 1885, and is authorized by that act "to produce, mine, own, deal in, transport, store, and supply natural gas for either light or heat, or both, or other purposes, and have all the rights and privileges necessary or convenient therefor." The act also provides "that the transportation and supply of natural gas

Digitized by Google

for public consumption is hereby declared to be a public use, and that it shall be the duty of corporations organized or provided for under this act to furnish consumers along their lines, and within their respective districts, natural gas for heat or light or other purposes as the corporation may determine"; and "that any and all corporations that is or are now, or shall hereafter be engaged in such business, shall have the right of eminent domain for the laying of pipe lines for the transportation and distribution of natural gas." On the preliminary hearing there was no evidence to show that oil existed in the land or that it was oil territory. On the contrary, the evidence proved that it was not oil territory, and that oil was never discovered on it. The uncontroverted evidence of plaintiff showed that the gas in the land was necessary and indispensable to it in carrying out the public purposes for which it was incorporated, and was part of its capital stock, upon which it paid a tax to the state.

W. S. Hamblen, N. T. Arnold, W. W. Barbour, and Geo. R. Dixon (Thos. H. Murray, of counsel), for appellants. Harry Alvin Hall, for appellee.

PER CURIAM. We find nothing in this record that would justify a reversal of the decree continuing the injunction until final hearing of the cause. Decree affirmed and appeal dismissed, with costs to be paid by appellants.

SMITH v. HORN et ux.

(Supreme Court of Pennsylvania. May 20, 1895.)

BOUNDARIES—MANNER OF ASCERTAINMENT.

1. A lot was conveyed to A. with reference to "the northeast corner of ——— lot" as the beginning point, and described as a lot of certain width east of "——— lot"; and the grantee took possession of a lot, and built a fence on its western side, thus fixing a western boundary, which was never questioned by the grantor, who owned the lot adjoining on the west, or by any subsequent owner of the latter lot. Thereafter the east half of A.'s lot was conveyed to G., under whom defendants claimed; and, while G. was in possession, the lot lying east thereof was conveyed by A.'s grantor to one under whom plaintiff claimed, with reference to the eastern line of G.'s lot as the only certain line of description, and as the western boundary of the lot conveyed. *Held*, that it was proper, in fixing the western boundary of the lot conveyed to plaintiff's grantor, to determine what was the eastern boundary of G.'s lot, as she claimed and occupied it at the time of the conveyance to such grantor.

2. It was proper, in such case, not to instruct that since the only monument showing the western boundary of the lot conveyed to A. was the fence erected by him, and since A.'s lot was of a certain width, the eastern boundary of the east half of A.'s lot, as owned by G., was to be ascertained by sole reference to such fence.

Appeal from court of common pleas, Warren county.

Trespass by Sarah Cordelia Smith against Carl Horn and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

This action was brought against the defendants for taking down a gate and removing a fence erected by the plaintiff, between plaintiff's and defendants' lots, on land claimed by both parties. James T. Magee, under whom both parties claimed, was the owner of a piece of land in Tidioute borough, on the South side of Main street, which street is called in the deed of Magee the "Warren and Franklin Road." This strip of land lay between the road and the Allegheny river. Magee sold off lots along the road at different times and to different individuals, and the controversy in this cause arises as to the boundaries between two of these lots which adjoin each other. In 1849, Magee conveyed to Mr. Alger a portion of the land described as follows: "All that certain piece or parcel of land situated, lying, and being in the township of Deerfield, county of Warren, and state of Pennsylvania, known and described as follows, to wit: 'Beginning at a point on the south side of the Warren and Franklin road, and the northeast corner of ——— lot, running thence southwardly, along said ——— line, ten perches, to a post; thence eastwardly eight perches, to a post; thence northwardly, to a post on the said Warren and Franklin road; thence westwardly, along said road, to the place of beginning,—containing one-half of an acre of land, more or less.'" It was shown that Alger immediately took possession of a lot of land then owned by Magee, fenced it in, and built a dwelling house upon it near the northeast corner (the house now being occupied by defendants); that the west line of the lot, as so fenced by Alger, remains to the present time on the same line as established by Alger when he made his purchase; that the fence has been rebuilt once since, on the same line; and that the old and new fences have been recognized as the west line of the Alger lot continuously since his purchase. In 1852, Alger conveyed the east half of his lot to Mary Washburn, whose title, by several subsequent conveyances, became vested in the defendant Mrs. Horn. In 1861, Alger conveyed the west half of the lot to Seth Alger, who in 1865 conveyed it to Margaret H. Babbett, whose family still resides thereon. The lot adjoining this lot, as fenced by Alger on the west, Magee deeded to James A. Neil in 1852. This lot became vested by subsequent conveyances in the Magee heirs, who still reside thereon. The fence above referred to, as built by Alger for his west line, is the dividing line between the Babbett heirs, owning the west half of the Alger lot, and the Magee heirs, owning the lot adjoining on the west. Mary Washburn conveyed, in 1855, the said east half of the Alger lot to Esther Goodrich, who owned and occupied the east half from that date until 1878. In 1865, Magee conveyed a lot east of and adjoining Alger's location of his lot to Benjamin T. Hopewell and S. H. Evans. The

Digitized by Google

plaintiff claims under the Hopewell and Evans deed. At the date of this deed, Esther Goodrich, under whom defendants claim, owned the west half of the Alger lot. The description in the deed to Hopewell and Evans is as follows: "Situate in the borough of Tidioute," etc., "beginning at a post on the south side of Main street (formerly the Warren and Franklin road); thence southerly, by lands of Esther Goodrich, ten perches, to a post; thence easterly six perches and seven feet, to a post; thence northerly, by land of said first party, ten perches, to a post on the street; thence westerly, along the street, six perches and seven feet, to the place of beginning,—containing one-half acre, more or less; reserving the use of eight feet wide, along said Esther Goodrich's line, for a lane." James T. Magee having died, the plaintiff, claiming that the reservation of the right of way in the line of her title was personal to Magee, fenced up the lane with gates on the line of the street, and built a fence on what she claimed was the true division line between her lot and defendants' lot.

The following are defendants' assignments of error: "The court erred in their general charge in instructing the jury as follows: 'First. From all the evidence in the case, you are to determine where the eastern boundary of Esther Goodrich's land, as she claimed it, and occupied it in 1865, was, in order thereby to fix the western boundary of the land conveyed by Magee to Hopewell and Evans.' Second. The court erred in their general charge in instructing the jury as follows: 'If the tearing down of the fence testified to by the plaintiff, and the removal of the gate or gate post, was within the lines of the plaintiff's land, thus fixed, and outside of the lines of the land of Esther Goodrich, as she occupied and claimed it in 1865, then the plaintiff should recover in the case whatever damages she has sustained, unless you find that the defendants had a right to have that particular piece of land unobstructed by gates and fences by virtue of their claim that it was a free and open right of way between them.' Third. The court erred in their answer to the defendants' second point, which point is as follows: '(2) That the only monument on the ground showing the location of the western boundary line of the M. Alger lot is the old line fence, between this lot and the lot on the west, sold by Magee to James H. Neil, July 3, 1853; and the Alger lot is to be located with its full complement of eight rods east of that line fence.' Answer: 'Second. I answer this point in the negative. I leave the location of the Goodrich land, which is the controlling question, entirely to you, under all the evidence.' Fourth. The court erred in their answer to the defendants' fourth point, which point is as follows: '(4) That if the eastern line of the M. Alger lot is east of where the defendant removed the fence, the plaintiff cannot recover.' Answer: 'Fourth. That is affirmed, understanding the M. Alger lot to include and mean the Goodrich land.' Fifth. The court erred in their answer to the defendants' sixth point, which point is as follows: '(6) If the jury believed that James T. Magee, under whom both the plaintiff and defendants claim, and his grantees, the grantors of the plaintiff, consented for twenty-one years to the location of a lane, and the continuous use of it as a right of way, of a strip along the western boundary of their land, to be used as such way, in connection with a strip of land dedicated to the same use by the grantors of the defendants, from the east side of their land, then the defendants became entitled to the use and enjoyment of such lane as a right of way, and the plaintiff cannot recover in trespass for such use, or for removing obstruction placed therein by the plaintiff or others.' Answer: 'Sixth. This point you will notice is based upon the actual consent and agreement of the parties. If there is evidence here from which you could find that the parties actually did set apart a certain piece of ground for use of a lane, and they did use it together in common for a time, exceeding 21 years, it would be correct. But there is no evidence of any direct and express agreement between the parties concerning this lane.'"

W. W. Wilbur and Wm. Schnur, for appellants. D. I. Ball and C. C. Thompson, for appellee.

PER CURIAM. We find nothing in this record that requires us to sustain either of the assignments of error. When considered in connection with other parts of the learned trial judge's charge, and especially in the light of the facts which the testimony tended to prove, the instructions recited in the first and second specifications are substantially correct. The same is true as to his answers to defendants' points recited in the remaining three specifications. The description in the deed of February, 1865, from Magee, who is admitted to be the common source of title, is so vague and indefinite that it was necessary to resort to other evidence for the purpose of determining the location of the dividing line between the lots, etc. It thus became a question of fact for the consideration of the jury, under all the testimony; and the case appears to have been submitted to them with substantially adequate and proper instructions. Judgment affirmed.

PATTON v. CHURCH et al.

(Supreme Court of Pennsylvania. May 20, 1895.)

DEVISE DURING WIDOWHOOD—ESTATE CREATED.

A devise to a wife of a "homestead lot and buildings thereon," describing the same, "to

Digitized by Google

be occupied and used by her as and for a family home during her widowhood," created an estate during widowhood, and not a fee simple.

Appeal from court of common pleas, Crawford county.

Ejectment by James C. Patton against Pearson Church, Mary C. Wilcox, Ellen P. Cummin, Anna L. Church, and Alfred G. Church. From a judgment for plaintiff, defendants appeal. Affirmed.

Gaylord Church died in September, 1869, leaving a will, the first clause of which is as follows: "I give, devise, and bequeath unto my wife, Anna B. Church, my homestead lot and buildings thereon, with the appurtenances, situate in the city of Meadville, Pa., and also all my household goods and furniture, horses, cows, carriages, sleighs, harness, and the like, to be occupied and used by her as and for a family home during her widowhood." In 1888 the plaintiff, James C. Patton, purchased at sheriff's sale the interest of Alfred G. Church, one of the children of the testator. This was during the lifetime of the testator's widow, who never remarried, and who died in 1892.

The opinion of the lower court (Henderson, J.) is as follows:

"The spontaneous interpretation of the first clause of the testator's will is that it gives to his widow a limited estate, and not an estate in fee simple. Taking the whole clause together, and giving to each word its appropriate sense, the devise to Anna B. Church is during widowhood. The testator was a lawyer of ability and merited distinction, and must be presumed to have understood the significance of the terms used by him. If he had intended to devise a fee to his wife, no one knew better than he did how to express that intention in apt and effective words. The limitation of the estate devised to the use of the devisee during widowhood was doubtless intended by the testator in the sense in which the language would be ordinarily understood, and, as the devisee continued unmarried during the remainder of her life, she took a life estate under the will. By the eighth clause of the will all the residue of the testator's estate is devised and bequeathed to his wife and children in such shares and estates as they would take under the intestate laws of the commonwealth. It was contended in argument that this clause was inconsistent with the interpretation first given to the first clause. It does not seem so to me, however. The wife was to have the homestead during widowhood; if she re-married, she would be entitled to dower thereafter in the same property, and in any event the children would be entitled to the remainder. No disposition was made in the first clause of the fee, and the eighth clause was inserted to cover all property and estate not specifically devised or bequeathed. It is consonant, therefore, with the first. The interpretation indicated gives effect to all the words of the devise, and, judging from the language used by the testator, is that which he intended to convey. Judgment is accordingly entered upon the verdict in favor of the plaintiff."

Pearson Church, for appellants. F. P. Ray, for appellee.

PER CURIAM. The able argument of the learned gentleman who represents the appellants has not persuaded us that the interpretation of the will of Gaylord Church on the trial in the court below was erroneous. The reasons given in support of his ruling by the learned trial judge are so satisfactory to us that we affirm the judgment on the opinion filed on the disposition of the reserved question. The judgment is affirmed.

WILCOX v. DERICKSON et al.

(Supreme Court of Pennsylvania. May 20, 1895.)

ARTICLES OF ASSOCIATION — CONSTRUCTION — DECEASED PARTNER—LIABILITIES OF EXECUTOR.

A stipulation that the death of a partner shall not operate as a dissolution of the association, but that the decedent's shares shall thereupon vest in his executors, or administrators, or devisees of the stock, who shall succeed as in case of transfer on the books, in which case the assignee of stock is made subject to the rights and obligations of the original owner thereof, does not compel an executor of the deceased partner to accept the stock of his testator, so as to charge the decedent's general estate with firm debts contracted after his death.

Appeal from court of common pleas, Crawford county.

Assumpsit by George N. Wilcox against Charles M. Derickson and G. M. Derickson, executors of D. V. Derickson, deceased, impleaded with Cyrus Kitchen and others, partners as the Meadville Savings Bank. From a judgment for defendants, plaintiff appeals. Affirmed.

The opinion of the lower court is as follows:

"On the 20th of January, 1877, D. V. Derickson, the defendants' testator, became a member of a partnership association doing business in the name and style of the Meadville Savings Bank, by a transfer on the books of the association, in the manner prescribed by the articles, of five shares of stock originally held by A. P. Ingraham. He died on the 21st of July, 1891, leaving a will, in which he makes no specific reference to the stock in this bank. The executors have never accepted the stock, or in any manner acted as partners. The articles of association of the bank provide that it shall have a capital stock of $50,000, divided into 500 shares of $100 each; that the business shall be transacted by officers elected by the shareholders; that transfers of the stock may be made on the books in the manner provided by the articles; that the death of a member shall not dissolve the partnership; but that

Digitized by Google

his executor, administrator, or devisee shall succeed to his rights, in the manner provided in case of a transfer on the books. The plaintiff is a depositor and creditor of the bank, which owed him $2,742.27 on the 13th of January, 1894, when the bank failed, and closed its doors. All of this indebtedness was contracted by the bank after the death of D. V. Derickson. The question of law presented is whether, under these facts, and in view of the language of the articles of association, the executors are liable to the plaintiff for this indebtedness. It is, perhaps, not strictly correct to say that the death of one partner works no dissolution of the firm, where, by agreement of the partners, the business is to be continued notwithstanding the death, for a partnership cannot exist without partners; and a dead man's estate, apart from the persons to whom it has passed by law at his death, has no capacity to fill the place in the partnership made vacant by his death. Pars. Cont. (1st Ed.) 406–451. It is, however, well settled that the usual consequences of a dissolution, whether by transfer of the interest of a partner to another or by death of one of the partners, may be avoided by suitable provisions in the partnership agreement, or by provisions in the will of the dying partner, if agreed to by the survivors. If such is the agreement, the business may be continued after the death as before. The personal representative or devisee of the decedent may not demand an account until the termination of the partnership, by the terms of the agreement. And so much of the decedent's estate as is invested in the partnership venture, or is by him subjected to the demands of the partnership business, will pass into the hands of those to whom it is given by the law, clogged with the liabilities thus placed upon it by its former owner. These principles are well settled, both in our own state and elsewhere. Gratz v. Bayard, 11 Serg. & R. 41; Laughlin v. Lorenz, 48 Pa. St. 275; 17 Am. & Eng. Enc. Law, 1134; Lindl. Partn. 1353 (*805) note 1. It seems quite clear that the liability of a deceased partner's estate for debts contracted after his death, whether general or specific, rests not upon the common law of partnerships, or the ordinary liability of partners for firm debts, but upon the special provisions of the agreement made by the deceased partner, or the terms of his last will. A change of partners, whether by transfer or by death, necessarily involves a dissolution of the firm. If the business goes on with new partners in place of the old, this involves the organization of a new firm. So it was held in respect to transfers of stock in a banking partnership in Christy v. Sill, 131 Pa. St. 492, 19 Atl. 295, 297, and the reason is much stronger in cases of death than of transfer. All the cases which have held a deceased partner's estate liable to creditors of the partnership whose debts were contracted after the death have rested the liability either upon the terms of the agreement or the will, and not upon any common-law liability as partner. This being so, we are called upon to determine what liability the defendants' testator assumed when he accepted the transfer of the stock of Ingraham in this partnership. By so doing he substantially agreed to be bound by the terms of the partnership agreement. If the articles expressly declare that the whole estate of each partner shall be considered as embarked in the business, and shall continue liable for losses occurring after the death of the partner, then we may enforce the terms of this contract against the defendants, there being no question raised in behalf of creditors claiming prior liens upon the estate. But if the contract is silent upon the particular point involved here, or if its language is ambiguous and uncertain, how shall it be construed? This, in the light of the decided cases, is the real question which we are obliged to determine. In Burwell v. Mandeville's Ex'rs, 2 How. 560, it was held that nothing short of the most clear and unambiguous language would justify the court in holding the general estate of the testator liable for the debts of a partnership, continued under his will after his death, by reason of the manifest inconvenience of such a rule; Judge Story citing with approval the case of Ex parte Garland, 10 Ves. 110, in which the inconvenience was strongly put by Lord Eldon, the lord chancellor. In Stanwood v. Owen, 14 Gray, 195, the supreme court of Massachusetts, intimating strongly in the opinion that the general estate of a deceased partner is not liable for firm debts contracted after his decease, although by the articles death was not to dissolve the partnership, held that such debts could not be allowed to share with the individual debts of a decedent in the distribution of his estate. By the same court, in Phillips v. Blatchford, 137 Mass. 510, it is again intimated that no general liability to creditors of the firm exists unless representatives of the estate enter into the partnership, and themselves become partners. But it was held that the partnership agreement, in the case then before the court, practically amounted to a covenant on the part of each partner to indemnify his copartners against the payment of more than a ratable proportion of the partnership debts; and hence that one of the surviving partners, who had paid off more than his share of partnership debts, might recover against the executors for contribution. In Stewart v. Robinson, 115 N. Y. 328, 22 N. E. 160, 163, the principle announced in Burwell v. Mandeville's Ex'rs, supra, was applied to the construction of a partnership agreement; and it was held that the general estate of a deceased partner was not liable, notwithstanding provisions in the agreement for the continuance of the partnership, in the absence of clear language subjecting the general estate to such liability. The statement in 17 Am. & Eng. Enc. Law, 1135, that the rule of liability is different in case of a partnership hav-

Digitized by Google

ing transferable shares from that applicable to other partnerships, is not in the least sustained by the cases cited. Blodgett v. Bank, 49 Conn. 9, was a case in which the executors had actually entered into the partnership, and become personally liable as partners. Kottwitz v. Alexander, 34 Tex. 689, was somewhat peculiar in its facts, but the question indicated did not arise, and the one now under consideration is not deliberately treated.

"There is apparent in the cases a consciousness in the minds of the judges of the extreme inconvenience of subjecting estates of decedents to a liability which might unreasonably delay their settlement, and necessitate recalling legacies and devises from the hands of their recipients, years after they had been received, to satisfy demands which had no existence at the time of distribution; and a strong reluctance for these reasons to declare such a liability. A possible exception to these cases is our own case of Laughlin v. Lorenz, supra. In that case the principal question was not as to debts contracted after the death of a dying partner, but as to the rights of third parties growing out of the settlement, adjustment, and winding up of the partnership. Incidentally the liability for such debts was involved and was decided. The language of Judge Agnew, in his opinion, does contain an intimation that the rule which we have found all but uniform in all other courts, viz. that the general estate is not liable for such debts unless distinctly made so by clear language either in the contract or the will, is not correct; but the converse of it, viz. that the estate is to be regarded as liable unless expressly exempted by the contract or the will. But it is not clear that the learned judge really intended to sanction such a departure from the course of decision in other courts, nor that his mind was drawn to its consequences. The conclusion reached by him and his brethren may, and probably did, rest upon other considerations. It cannot be true that the general estate is liable unless this liability is limited by the contract or the will of the dying partner, unless it be also true that such liability flows from the partnership relation, and is, in substance, the ordinary common-law liability of each partner jointly and severally with each of the others for every debt contracted by the firm. Surely, a dead man cannot, in the eye of the law, have rights or incur liabilities. Nor can his property stand alone, by itself, disconnected from personal ownership, and sustain such liability. Nor is it reasonable or logical that a person should be held to be a partner with others without his own agreement to become such, express or implied. And, indeed, our supreme court has decided that executors cannot be so regarded in the absence of an agreement. Bank v. Pennock, 2 Mona. 166. Moreover, if such a liability exists by reason of the partnership relation, and the stipulation for its continuance after the death of one of the partners, how can the dying partner, by provisions in his will, exempt his estate from liability? If we are correct, as we think the great weight of authority makes clear, in saying that the liability of the estate of a deceased partner for debts contracted after his death, if any exists, flows from the express covenant or agreement of the decedent, or the express direction in his will accepted and agreed to by the survivors, then it seems reasonable, in view of the departure from the ordinary rule of law, and the extreme inconvenience of the contrary rule, that the intention substantially to embark his whole estate in the partnership, or to make it available to the partnership uses, should appear before the general estate should be held liable for such debts. What, then, is the true construction of the articles of copartnership to which the testator assented when he accepted a transfer of stock? The articles provide that the death of a stockholder shall not operate as a dissolution of said association: 'But the shares of such decedent shall thereupon vest in his executors or administrators or devisees of said stock, who shall succeed with like effect as provided in case of a transfer upon the books of the association.' It is provided, in case of a transfer, that 'the assignee or assignees of such share or shares shall thereby as to such share or shares succeed and become subject to all the rights and obligations of an original party thereto.' And it is further provided as follows: 'The holders of stock in this association either by an original subscription, transfer, or otherwise, shall, by virtue of such subscription, or acceptance of such transfer, be subject to and thereby take upon themselves the several and respective duties and obligations devolved and incumbent upon them as stockholders or directors, as the case may be.' While the language of the contract is that the partnership shall not be dissolved by a death, the meaning plainly is that the dissolution caused by death shall not involve the winding up of the partnership business, the settlement of the partnership account, nor the withdrawal of any portion of the capital. An easy means is provided, by which a new partnership, consisting of the surviving partners and one or more new members, who shall take the place of the dead partner, may be formed to continue the business. The assignee, in the case of a transfer, becomes a partner in this new firm by acceptance of the transfer on the books of the association. And it is to be noted that in case of death the executors, administrators and devisees of the stock are mentioned together, the like provision being made as to all. Unless we are prepared to hold that one to whom stock in such partnership is devised becomes a partner in the new firm, and subject to liability as such partner by virtue of the devise itself

Digitized by Google

without any acceptance of it on his part, or acquiescence in any way in the provisions of the partnership agreement, we cannot hold that executors or administrators become so liable merely because they are such. If the stock is accepted, and the relation of partner established between the survivors and the executors, the case is free from difficulty. But where it is not so accepted they cannot be charged with liability as partners, any more than could the devisee who has not accepted. We fail to discover in the language used in this contract any intention on the part of the contracting parties to subject their estates, in case of their death, to the vicissitudes of the partnership business, regardless of the wishes of those to whom the estate descends. Doubtless, the right to an account, and to withdraw the capital of the testator from the business, does not exist, by reason of the partnership agreement to the contrary. And so much of the testator's estate as was invested in the partnership remains, and is liable for the debts incurred in the business. Possibly the language of the partnership agreement may be construed as a covenant by each partner with the others to indemnify them against more than their proper share of loss. But there is nothing in the agreement which can give the creditors of the partnership, whose debts have arisen since the testator's death, a right to resort to his general estate. For these reasons we are of opinion that upon the case stated the law is with the defendants. Judgment is therefore directed to be entered in favor of the defendants in accordance with the agreement of the parties."

H. J. Humes, F. J. Thomas, G. W. Haskins, and John O. McClintock, for appellant. Geo. F. Davenport and J. W. Smith, for appellees.

PER CURIAM. The pivotal question in this case is whether the stipulation in the articles of association that death shall not dissolve the relation of the decedent and his estate to the bank compels an executor to accept the stock that had been held by his testator, and puts it out of his power to abandon it under any circumstances. The learned judge who tried this case in the court below answered this question in the negative. We are satisfied with the reasons he has given in support of his conclusion, and affirm the judgment on his opinion.

RENNINGER v. DWELLING-HOUSE INS. CO.

(Supreme Court of Pennsylvania. May 20, 1895.)

INCUMBRANCES—INSURANCE.

Where a devisee took property under a will at a certain price, to be paid in annual installments to the other heirs, the property was incumbered, within the meaning of a clause against incumbrances in an insurance policy.

Appeal from court of common pleas, Cumberland county.

Assumpsit by John M. Reninger against the Dwelling-House Insurance Company upon a policy of fire insurance. From a judgment for defendant, plaintiff appeals. Affirmed.

The only question for determination was whether the condition attached to the policy which provided that the policy should be void if the property be or become incumbered by a "mortgage, trust deed, judgment, or otherwise" was broken by the charge in the will of J. Martin Renninger, and the contract of insurance rendered void.

H. S. Stuart, M. C. Herman, and G. Wilson Swartz, for appellant. John T. Stuart and C. H. Bergner, for appellee.

PER CURIAM. There is but a single question in this case. The plaintiff took under his father's will a farm described as "the homestead," containing 157 acres, with all the buildings and improvements thereon, at the price of $8,000. This sum was to be paid in annual installments to the testator's other children. The buildings on this farm were insured by the devisee and the property described as unincumbered. The question thus raised is whether the $8,000 charged upon this property by the devisor was an incumbrance upon the title of the devisee. The court below held that it was. No reason for disturbing that conclusion has been suggested to us that would justify us in disregarding the judgment, and it is now affirmed.

HEPBURN et al. v. SPOTTS et al.

(Supreme Court of Pennsylvania. May 20, 1895.)

TRUST ESTATE—IMPROVEMENTS BY TRUSTEE—CHARGING ESTATE.

A trustee created by will paid $4,000 out of her individual property for the betterment of the trust estate, and upon her death, two years later, her individual estate paid but 70 per cent., and her creditors filed a bill to charge the trust property with the balance due for making such improvements in an amount not to exceed the value of the betterments paid for with said $4,000. It did not appear but that her creditors trusted her individually, or that she was insolvent when the debts were incurred, or that there was any fraud, and there was no evidence as to when her insolvency occurred. *Held*, that the bill was properly dismissed.

Appeal from orphans' court, Cumberland county.

Bill by Hopewell Hepburn and others against Peter Spahr Spotts and others. From a decree for defendants, plaintiffs appeal. Affirmed.

The will of Peter Spahr, after enumerating testator's property, provided as follows: "As soon as convenient after my decease, I direct that my daughter, Catharine Spotts, shall select from the above list of real property whatever of the said lots or parcels she

Digitized by Google

may choose to the full value of $25,000 at the valuation I have placed upon them respectively, and that a list, with a full and accurate description of each property in writing, shall be made of the properties she shall thus select, which shall be by her signed, acknowledged, and recorded at length in the office for the recording of deeds for Cumberland county; and the properties thus selected by the said Catharine Spotts I give, devise, and bequeath to her for the following uses and purposes: The said Catharine Spotts shall possess, occupy, and control the said properties, and receive the rent, income, and profits therefrom during her life, in trust for such child or children as the said Catharine Spotts may lawfully have begotten of her body at the time of her death, and for the issue of any child or children of hers that may die during her lifetime leaving issue, such issue to take per stirpes; and should she die without children or the issue of children living, then for such persons as at her death may be my heirs at law. That out of the proceeds of the said property, after paying the necessary expenses and repairs thereof, and affording such proper support for herself and family as she may deem necessary, she shall invest whatever income may remain in real property, or safe, interest-bearing securities, for the use and benefit of and in trust for the persons aforesaid. And if she shall deem it for the advantage of the said trust, I empower her at any time to sell any portion of the said real property at a price not less than the valuation I have placed on it, and to reinvest the money arising from such sale in other real estate or interest-bearing securities; and for the purpose of making such sales. I give to my said daughter, Catharine, full power to make conveyances of any such property to the purchaser in fee simple." In pursuance of such directions, Catharine Spotts selected the amount of property mentioned, including a brickyard formerly run by her father, which she continued to operate individually. Subsequently, and with the knowledge of her children, she sold certain of the property, and applied the proceeds, $5,000, to improving the property remaining, and she also paid for improvements thereon of the value of about $4,000, with brick manufactured by her. On her death the property was divided among the children, according to the terms of their grandfather's will. It was found on the settlement of Catharine Spotts' individual estate that she was insolvent, and certain of her individual creditors, on behalf of themselves and the other creditors, filed this bill against the children to compel them, as the holders of the trust property, to contribute, to the extent of their mother's personal expenditures for improvements, to the payment of her debts; alleging that the deficiency in the mother's estate was caused by such improvements on the trust property, and that the children received the benefit of the same.

The opinion of the lower court is as follows (BIDDLE, J.) viz.: "We stated during the trial that, upon analyzing the bill, we were of opinion that there is not a sufficient cause of action set out therein, and that notwithstanding the case was upon trial, we felt compelled to dissent from the adjudication of our predecessor in overruling the demurrer. The plaintiffs, however, were permitted to proceed with the taking of testimony, in order that a record should be made of the evidence which they offered, or proposed to offer, to sustain the complaint. The only grounds for the alleged liability of the defendants in this action are set forth in paragraphs 8 and 9 of the bill, and are, in substance, that the estate of Catharine Spotts was made insolvent by the use of complainants' money in the improvements of the trust estate, and that their claims are for work done, materials furnished, and money expended in making improvements and betterment to said estate, by which the income therefrom was greatly increased, and the value of the property enhanced to a very large extent, the enhancement exceeding the proceeds of the trust property sold by Catharine Spotts, and the unpaid balance of the indebtedness of her estate. There is no allegation of fraud on the part of Catharine Spotts, either individually or as trustee, or that work was done or materials or money furnished by complainants upon any other security than her personal responsibility. Upon what ground, then, can the trust estate be held liable for the payment of the balance of her debts? We fail to think of any. The complainants, however, contend that constructive fraud on the part of Catharine Spotts is deducible from the allegations in the bill, and from the evidence in support thereof, and that they should be permitted to recover upon that ground. But there are insuperable obstacles to sustaining this position.

"1. The dealings between the parties were upon a strictly business basis, and, there not being confidential or fiduciary relations of any kind existing, a case of constructive fraud cannot arise under the facts shown.

"2. The final betterments to the trust property were made in the year 1888 and the early part of 1889, and Catharine Spotts did not die until the 10th day of March, A. D. 1891. The court would not be warranted in assuming that she was insolvent at the time the improvements were made, with no other basis to go upon than that in 1892, upon distribution by an auditor, the net balance of her estate was $8,209.05, whilst the claims against it were $11,548.18. The shortage shown at that time under an enforced liquidation of her property would not justify us in making the inference asked for. It is to be noted that the bill does not allege her insolvency in 1888–89.

Digitized by Google

"3. Even if she were insolvent in 1888-89 (of which we have no evidence except as stated in 2, supra), and knew it (of which there is no evidence), her dealings with complainants were not such a fraud upon them that they could make it the basis of an action at law, unless they also showed artifice or false pretense. Rodman v. Thalheimer, 75 Pa. St. 232. Nor, at law, would it help their case to further show that at the time the obligations were incurred she did not intend to pay them. Smith v. Smith, 21 Pa. St. 367; Bughman v. Bank, 159 Pa. St. 94, 28 Atl. 209. Clearly, the complainants could not have reclaimed from Catharine Spotts, in her lifetime, the goods and chattels or money furnished by them; and we do not see upon what equitable principle they can now be permitted to recoup from the trust estate the unpaid portion of their bills. This is specially manifest inasmuch as there is no allegation either of fraud or of fraudulent intent in the transactions.

"4. The will of Peter Spahr was on record, and complainants had notice of its terms. There was neither fraud, accident, secret dealing, nor mistake on the part of anybody, except that complainants were mistaken in the expectation that Catharine Spotts would pay their bills. No fraud, actual or constructive, is either alleged, shown, or implied, and there is nothing in the case of which a court of equity can take cognizance. And now, 26th March, 1895, the bill is dismissed, at the costs of complainants."

John Hays and H. S. Stuart, for appellants. J. W. Wetzel, for appellees.

PER CURIAM. After a careful examination of the pleadings and the proofs in this case, we are led to concur with the learned trial judge in the conclusions reached by him. The relation of the expenditures made by the trustee to the subsequent inability of her estate to pay her liabilities in full, the extent to which her own individual resources were made use of in the improvements made upon the trust property, and the time when her insolvency actually arose, rest on inference so largely that the facts on which the plaintiffs base their right to recover are left in very great uncertainty. We think the court below was right in holding that the case actually presented on the pleadings and the evidence did not authorize the decree asked. His reasons are briefly and clearly stated in the opinion dismissing the bill, and they fully justify the decree made. It is now affirmed, at the cost of the appellants.

In re SCHWARTZ'S ESTATE.

(Supreme Court of Pennsylvania. May 20, 1895.)

ALLOTMENT UNDER A WILL—DECREE OF CONFIRMATION—JURISDICTION.

1. Under a will devising lands to the widow for life, and empowering her to divide the same among the sons, and providing that in case of no division before her death the lands should go to the sons and their heirs, upon the death of a son before a division the widow could allot his portion to his heirs.

2. The orphans' court has no power to confirm an allotment of lands made by a widow to the children under an express power, conferred by will, to do so in her discretion.

Appeal from orphans' court, Berks county.

In the matter of the estate of Levi Schwartz, deceased. From a decree refusing to ratify a division of the estate, Sarah Ann Schwartz, the widow, appeals. Affirmed.

The portion of the will of Levi Schwartz material to this proceeding is as follows: "Item. I give and bequeath unto my said wife the use, occupation, rents, issues, and profits (without account to be rendered for the same during her lifetime, subject, nevertheless, to the legacies hereinafter to Edwin H. Trexler and Manoah S. Long) of all my real estate of which I shall die seised, wheresoever the same may be situated, during her natural life. And I do hereby authorize and empower my said wife to let my said real estate, or any part thereof, to such person or persons, for such term or terms, and for such rent or rents, as she may deem proper, or divide and parcel out the same amongst my five sons—Reuben, Samuel, Jonathan, George, and Francis—upon such conditions and terms as she shall deem just and right. In case no such division be made during the lifetime of my said wife, then the same shall descend and pass to the said five sons and their heirs according to the intestate laws of the commonwealth of Pennsylvania relating to the partition of real estate." The petition of the widow alleged, inter alia, that she had allotted the real estate to the sons under the power in the will, and prayed that the allotment be ratified and confirmed.

D. Nicholas Schaeffer, for appellant. Fitz Daniel Ermentrout and Ermentrout & Ruhl, for appellees.

FELL, J. We agree with the learned judge of the orphans' court that the will of Levi Schwartz conferred upon his widow, the petitioner in this case, power to divide and parcel out his real estate among his five sons. We do not agree with him in the opinion that no division or allotment could be made by her to Sarah Ann Schwartz, the daughter of one of the sons, who died after his father. The mother had a life estate, with no testamentary power. The testator's object appears to have been to confer upon her the power, to be exercised at her discretion, to make partition. As a necessary incident of this power to divide upon terms and conditions to be fixed by her, she could determine the purports of each, the amounts to be paid as owelty, and the manner of payment. The gift to the sons, subject to the mother's life estate, is of a fee; the five

Digitized by Google

taking as tenants in common. The power was to distribute and divide among those in whom the estate was vested, and its exercise could not divest an estate, or reduce it from a fee to a life estate. Such a construction cannot be adopted in the absence of express words or necessary intendment, neither of which can be found in the will. Upon the death of one of the sons, the remainder vested in him by his father's will descended to his daughter, and an apportionment to her was a proper exercise of the power. Whether, under the power to subject the shares to terms and conditions, she could determine the relative proportions of the shares, and make an unequal distribution, it is unnecessary to consider, as the whole proceeding was outside of the jurisdiction of the court, and any expression of opinion upon the subject would be a mere dictum. The question of jurisdiction was distinctly raised by the supplemental answer to the petition. There is no express grant of power to the orphans' court which will support the decree asked for, and it cannot be sustained as an incidental power. Even a court of general equity jurisdiction does not possess the power here invoked. No decree can properly be made upon a conveyance by an executor or trustee under a power conferred by will, unless the aid of the court is required to supply some omission in the terms of the instrument creating the power; as in the case of a sale under a will directing a conversion, but not saying by whom it shall be made. In other cases the decree of the court would add nothing to the efficacy of the power if properly exercised, nor give it validity if improperly exercised. Here there is no trust. The power is a mere naked power, purely discretionary with the donee, and not subject to the control of any court. Perry, Trusts, § 248 et seq. Whether it has been properly exercised can be determined only when the question properly arises. If, after the death of the life tenant, proceedings in partition or ejectment should be instituted, no decree of the court made now would conclude the rights of the parties. The order of the court denying the prayer of the petition is affirmed.

OVERSEERS OF POOR OF BOROUGH OF BELLEFONTE v. SOMERSET COUNTY POOR DIST.

(Supreme Court of Pennsylvania. May 20, 1895.)

PAUPERS—MODE OF GAINING SETTLEMENT.

Act June 13, 1836, § 9, cl. 5 (Brightly, Purd. Dig. p. 1705, pl. 50), providing that any unmarried person, not having a child, may gain a settlement in any poor district if he or she "shall be lawfully bound or hired as a servant, within such district, and shall continue in such service during one whole year," does not require such person to reside in the district of his service, in order to gain a settlement therein.

Appeal from court of quarter sessions, Center county.

Proceeding by overseers of poor of the borough of Bellefonte against Somerset county poor district. From a judgment quashing the order of removal of a pauper, plaintiffs appeal. Affirmed.

Wilbur F. Reeder, for appellants. Beaver & Dale, for appellee.

STERRETT, C. J. This contention involves the construction of clause 5 of section 9 of the poor law of June 13, 1836, prescribing the manner in which "any unmarried person, not having a child," may gain a settlement in any district, viz. that he or she "shall be lawfully bound or hired as a servant, within such district, and shall continue in such service during one whole year." Brightly, Purd. Dig. p. 1705, pl. 50. The sixteenth section of the same act provides that, "on complaint made by the overseers of any district to one of the magistrates of the same county, it shall be lawful for said magistrate, with any other magistrate of the county, where any person has or is likely to become chargeable to such district into which he shall come, by their warrant or order, directed to such overseers, to remove such person, at the expense of the district, to the city, district or place where he was last legally settled, whether in or out of Pennsylvania," etc. Brightly, Purd. Dig. p. 1706, pl. 58. Pursuant to these provisions, the overseers of Bellefonte borough, alleging that James McFadden, the poor person in question, was last legally settled in Somerset county poor district, on April 16, 1892, obtained an order to remove him to that district; and nine days thereafter the overseers of Somerset, by leave of the court below, appealed from said order of removal.

At the hearing it was conclusively shown, and virtually conceded, that McFadden, "an unmarried person, not having a child," had acquired a legal settlement in Somerset county by having served therein, from the spring of 1884 to the fall of 1885, in pursuance of a hiring with Messrs. Collins & Shoemaker; but it was contended by the overseers of said district that he subsequently gained a settlement in another poor district, by hiring as a servant therein, and continuing "in such service during one whole year," as required by clause 5, above quoted. They thus assumed the burden of proof, and introduced testimony from which the court was fully warranted in finding facts establishing a subsequent legal settlement in another poor district, and consequently the order of removal was rightly quashed. As bearing on the fact of a subsequently acquired settlement, the court found substantially the following facts: That from February, 1888, until September, 1889, McFadden was hired by the Bellefonte Furnace Com-

Digitized by Google

pany, owner of a large furnace in Spring township, Center county, adjoining the borough of Bellefonte, and during that period continued in the service of said company, in said township, under the same contract of hiring; that while said service was thus being performed in Spring township, McFadden boarded and lodged with his mother, in the borough of Bellefonte, paying his board to her as he would have done to a stranger. These findings of fact were fully warranted by the testimony, and, not being excepted to, must be accepted as conclusively established. We thus have a contract of hiring for service in Spring township by an "unmarried person, not having a child," and his continuance "in such service during one whole year"; thus fulfilling, in both letter and spirit, every requirement of the clause above quoted. There is no merit in the suggestion that there must be both residence and service in the same poor district. While, in other clauses of the ninth section of the act, residence in the district is made a condition of gaining a legal settlement therein, clause 5, under consideration, contains, as we have seen, no such requirement. The construction suggested would require us to read into the clause something that is neither there, nor ever intended to be there. While, upon the established facts of the case, the learned judge was mistaken in locating McFadden's subsequently acquired settlement in Bellefonte, instead of in Spring township, he was nevertheless clearly right in his general conclusion that the order of removal should be quashed on the sole ground that Somerset poor district was not his last place of legal settlement. The sole controlling fact was that he had gained a legal settlement in another poor district after he left Somerset county. That definitely determined the only issue between the two parties then and now in court. To that issue the overseers of Spring township were not parties, and, of course, cannot be affected by the decree therein. Decree affirmed and appeal dismissed, with costs to be paid by appellants.

DOWLING v. MERCHANTS' INS. CO. OF NEWARK.

(Supreme Court of Pennsylvania. May 20, 1895.)

INSURANCE—WARRANTY—MISDESCRIPTION BY AGENT.

Though the policy provided that the description of the insured property should be part of the contract, and a warranty by the insured, the fact that the agent misdescribed the property did not defeat a recovery on the policy, where the insured accurately described the property, and did not know of the error in the description till after the fire.

Appeal from court of common pleas, Monroe county.

Assumpsit by Joseph Dowling against the Merchants' Insurance Company on a policy of fire insurance. From a judgment for plaintiff, defendant appeals. Affirmed.

A. R. Brittain and Willard, Warren & Knapp, for appellant. John B. Storm and S. Holmes, for appellee.

FELL, J. The fraud or mistake of an insurance agent within the scope of his authority will not enable his principal to avoid a contract of insurance to the injury of the insured, who acted in good faith; and the fraud or mistake of the agent may be proved by parol evidence, notwithstanding it is provided in the policy that the description of the property shall be a part of the contract and a warranty by the insured. This is clear upon principle, and it is abundantly sustained by authority. Smith v. Insurance Co., 89 Pa. St. 287; Ellenberger v. Insurance Co., Id. 464; Insurance Co. v. Cusick, 109 Pa. St. 157; Kister v. Insurance Co., 128 Pa. St. 553, 18 Atl. 447; Meyers v. Insurance Co., 156 Pa. St. 420, 27 Atl. 39. This case is much stronger for the plaintiff than those above cited. In all of these, written applications had been signed by the insured, and in each case the application was made a part of the contract. In this case no written application was made, and the policy was written by the agent, and not read by the insured until after the fire. The building insured was built for and used as a boarding house, and was erroneously described in the policy as "occupied by the insured as a dwelling only." The testimony was clear and uncontradicted that there was no mistake or deception on the part of the plaintiff, who fully and accurately described the property to the agent as a boarding house, and spoke to him of its capacity and use. It was seen and examined by the agent, and its use, which was apparent, was fully known to him. The misdescription was his act alone, in the face of light and knowledge, and was unknown to the insured until after the loss occurred. The defendant cannot be released from its contract because the plaintiff, acting in good faith, accepted without examination the policy written by its agent. In Swan v. Insurance Co. 96 Pa. St. 37, the insured signed an application which had not been finished. He directed another to fill it up, and expressed a doubt as to the manner in which it should be done. It was held that he knew facts to incite him to read the policy, and was charged with knowledge of its contents, and should, under the circumstances, be presumed to have accepted it as written. No such presumption arose in this case. Having made a full and frank disclosure of the facts to the company's agent, who was empowered to write the policy, and who, from observation, knew the character and use of the building, there was nothing to induce or warn the insured to read the policy, un-

Digitized by Google

less it was the anticipation of fraud or mistake, and this could impose no duty in protection of the rights of the defendant.

The question as to the furnishing of proofs of loss was properly submitted. There was ample evidence to justify a finding by the jury that they had in point of fact been furnished within the limit of time fixed by the policy, and from which also a waiver by the company could properly be inferred. The judgment is affirmed.

SCHAEFFER et al. v. PHILADELPHIA & R. R. CO.

(Supreme Court of Pennsylvania. May 20, 1895.)

CARRIERS — LIMITING COMMON-LAW LIABILITY — BURDEN OF PROOF—INJURIES TO STOCK — OPINION EVIDENCE AS TO CAUSE — NEGLIGENCE IN RUNNING TRAIN.

1. In trespass against a carrier for breach of duty in carrying stock, the burden of showing a contract limiting the carrier's common-law liability rested on defendant.

2. In trespass for negligence in carrying mules, it was proper to permit witnesses who for years had shipped mules, and knew their habits, and saw those in suit when they were unloaded, to give their opinion as to the cause of the injuries the mules sustained while in the car.

3. Injuries received by stock while on board cars, resulting from known causes which can be explained on no other ground than that of negligence in managing the train, furnish ground for an inference of want of ordinary care in transportation.

Appeal from court of common pleas, Berks county.

Trespass by Adam B. Schaeffer and another, trading as A. B. & J. Schaeffer, against the Philadelphia & Reading Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Defendant's assignments of error are as follows, viz.: "(1) The court below erred in affirming the fifth point of the plaintiffs, which was as follows: 'If the jury cannot find that there was a special contract, or what the special contract was, then the defendant was liable as an insurer against all injuries except those arising from the act of God, the public enemy, or from the peculiar propensities of the animals carried.' Answer of the court to said point: 'That is the rule, gentlemen, if there was no contract limiting or restricting the liability of the railroad company.' (2) The court below erred in allowing the plaintiffs to testify as follows: 'By Mr. Hiester: Q. State whether or not, from your experience with mules, you believe that these animals would have been injured in this way if the car had been properly handled. (Mr. Snyder: Objected to, as irrelevant and incompetent. We have nothing to do with the belief of the witness. The Court: Admitted. Exception for defendant.) A. No; they could not have been injured this way if the car had been properly handled.' (3) The court below erred in allowing the witness John Hill to testify as follows: 'Q. State whether or not, from your experience with mules, you believe that these animals would have been injured in this way if the car had been properly handled. (Mr. Snyder: Objected to, as not competent. It is a mere opinion. The witness described what the injuries were, and he is not competent to testify. The question is a mere inference,—a mere guess or belief. The Court: Objection overruled. Exception for defendant.) By Mr. Hiester: Q. State whether or not, from your experience with mules, you believe that these animals would have been injured in this way if the car had been properly handled. A. No, sir; they would not.' (4) The court below erred in not affirming the defendant's first point, which was as follows: 'There is no evidence in this case that will warrant a verdict for the plaintiffs.' Answer of the court to said point: 'Reserved.' (5) The court below erred in not affirming the defendant's second point, which was as follows: 'Under the terms of the special contract made by the plaintiffs' agents, Wills & Garnett, with the Kentucky Central R. R. Co., the verdict must be for the defendant.' Answer of the court to said point: 'Declined.' (6) The court below erred in not affirming the defendant's third point, which was as follows: 'Under all the evidence in the case the verdict must be for the defendant.' Answer of the court to said point: 'Declined.'"

Philip S. Zieber and Baer & Snyder, for appellant. D. Nicholas Schaeffer and Isaac Hiester, for appellees.

FELL, J. Whether the plaintiffs' mules, which were injured while being carried in a car on the defendant's road, had been shipped under a special contract restricting the defendant's liability as a carrier, was a question in dispute at the trial. As the action was founded upon the common-law liability of a carrier, the burden of proof as to any limitation thereof rested with the defendant; and, unless it was admitted or clearly established by proof, the question was necessarily for the jury. That the preponderance of evidence was in favor of such a limitation would not have justified the court in treating it as an established fact. The question was properly submitted, with full and accurate instructions as to the effect of such an agreement, if found to exist. This disposes of the first assignment of error, and the remaining assignments may be considered together. They relate to the admission of testimony as to the cause of the injuries, and to the sufficiency of this testimony to sustain a finding for the plaintiffs.

The plaintiffs had a car load of young mules and colts shipped from Cynthiana, Ky., to Fleetwood, Pa. The car was received by the defendant from another railroad company at Harrisburg. When the car reached Fleetwood, a number of the mules were

Digitized by Google

found to be seriously injured. To meet any defense based upon the ground of a restricted contractural liability, the plaintiffs assumed the burden of proving that the injuries resulted from negligence while the car was on the defendant's road and in charge of its employés. Testimony was presented to show that the animals were in good condition and uninjured when they were received at Harrisburg; that the injuries were of recent occurrence, and not such as the animals would have inflicted upon each other, except involuntarily if they were thrown down and trampled or jammed together by a collision or rough handling of the cars. Witnesses who had been for years engaged in shipping mules, who knew their habits and disposition, and the causes likely to lead to their injury while on board cars, and who saw these mules when they were unloaded, were allowed to express their opinions as to the cause of the injuries. The value of their opinions was for the jury to determine, and we see no valid objection to admitting the testimony. There was no evidence of an injurious accident to the train, nor was there any direct evidence of improper or negligent handling of the cars. Injury to the contents of a car may, however, furnish ground for an inference of want of ordinary care in transportation. Express Co. v. Sands, 55 Pa. St. 140; Grogan v. Express Co., 114 Pa. St. 523, 7 Atl. 134; Phoenix Pot-Works, v. Pittsburgh & L. E. R. Co., 189 Pa. St. 284, 20 Atl. 1058; Buck v. Railway Co., 150 Pa. St. 170, 24 Atl. 678; Railroad Co. v. Eby, 22 Wkly Notes Cas. 92. There is no reason why this rule, with proper limitations, should not apply to animate objects. It, of course, would have no application in the case of injuries which are such as animals voluntarily inflict upon each other, or which cannot be accounted for, or which can be satisfactorily explained on any other ground than that of negligence in managing the train; nor in cases of death from natural causes, or causes entirely unknown, as in Railroad Co. v. Raiordan, 119 Pa. St. 577, 13 Atl. 324. The case, on the facts, was one of great doubt, but the jury was not left to mere conjecture. The testimony furnished the basis for an intelligent finding, and its submission was free from error. The judgment is affirmed.

FISCHER v. AMERICAN LEGION OF HONOR.

(Supreme Court of Pennsylvania. May 20, 1895.)

BENEFIT INSURANCE—INTEREST OF BENEFICIARY.

Under a benefit certificate payable to the holder's wife, issued by a benevolent association, the by-laws of which provided that, if all the beneficiaries should die before the death of the member, the benefit should be paid to the member's dependent heirs, and, if he had none, that it should revert to the benefit fund, the beneficiary took no vested interest in the benefit before the member's death; Act April 15, 1868 (P. L. 103), providing that all life insurance taken out by a person for the benefit of his wife or children shall be vested in her or them clear from the claims of his creditors, not applying.

Appeal from court of common pleas, Philadelphia county.

Action by Margaret Fischer, to the use of J. & P. Baltz Brewing Company, against the American Legion of Honor. Case stated by Margaret Fischer, Charles C. Fischer, guardian, and others, Margaret Fischer, guardian, and Charles C. Fischer, administrator of the estate of Louisa A. Fischer, deceased. From a judgment for Margaret Fischer, Charles C. Fischer, administrator, appeals. Affirmed.

William W. Porter and Benjamin Alexander, for appellant. J. H. Shoemaker, for appellee.

FELL, J. Charles F. Fischer was a member of the American Legion of Honor, and at the time of his death held a benefit certificate for $1,000, in which Louisa A. Fischer, his former wife, was named as beneficiary. She died in 1889, leaving children, and he remarried, and at his death, in 1894, left surviving him a widow, Margaret Fischer, and children of both marriages. No change was made after the death of his first wife in the name of the beneficiary, and at his death the amount due by the defendant was claimed by his widow, the plaintiff, and by the administrator of the estate of his first wife, and by his children as dependent heirs. Upon a case stated judgment was entered by the court for the plaintiff, and this appeal is by the administrator of Louisa A. Fischer. The American Legion of Honor is a beneficial association, and one of the purposes of its organization is to establish a fund from which, upon the death of a member, "a sum shall be paid to the family, orphans, or dependents, as the member may direct." At the time when Charles F. Fischer became a member the by-laws provided: "Sec. 5. In the event of the death of all the beneficiaries selected by the member before the decease of such member, if no other or further disposition thereof be made in accordance with the provisions of section 3 of this law, the benefit shall be paid to the dependent heirs of the deceased member; and, if no person shall be entitled to receive such benefit, by the laws of the order it shall revert to the benefit fund." The by-laws in force at the time of his death provided that, "in the event of the death of all the beneficiaries selected by the member before the decease of such member, if no other or further disposition thereof be made in accordance with the provisions of these by-laws, the benefit shall be paid to the widow. If none, then to the heirs of the deceased member; and if no person or persons shall be entitled to receive such benefit, it shall revert to the benefit fund." If the beneficiary first named had a vested interest in the fund, payable at the death of her husband, her administrator is entitled to recover; otherwise he

Digitized by Google

has no standing. It seems clear that she had no such interest. There is a material and fundamental distinction between philanthropic or beneficial associations, which issue benefit certificates to their members, and life insurance companies, which was pointed out in Com. v. Equitable Beneficial Ass'n, 137 Pa. St. 412, 18 Atl. 1112, and has since been recognized in Dickinson v. A. O. U. W., 159 Pa. St. 258, 28 Atl. 293, and in Lithgow v. Supreme Tent, etc., 165 Pa. St. 292, 30 Atl. 830. It appears from the charter and by-laws that the association defendant was organized for social, moral, and intellectual purposes, and for the relief of sick and distressed members. Insurance is not its only, nor its primary, object. It limits the persons and classes of persons who may be named as beneficiaries to "the family, orphans, or dependents," and provides that, in the event of the failure of all such persons or classes of persons, the sum due shall revert to the order. The amount secured by the certificate is subject to deductions for relief benefits paid in case of sickness or disability to the member, and for his funeral expenses. Where the beneficiary has died, the member may name another. These provisions are in entire harmony with the object of the order as a fraternal and beneficial organization, and they are entirely incompatible with the vesting of an interest in the fund in the beneficiary before the death of the member. Such a construction would in many cases, by giving the fund to the legal representatives of the beneficiary, divert it entirely from the purpose intended by the member, and for which the organization was formed. It was the right of Charles F. Fischer, after the death of his first wife, to name a new beneficiary within the limits as to persons and classes prescribed. Upon his failure to do so the law of the association fixed the persons to be benefited. Of this law he presumably had knowledge, and his acquiescence in the selection made by it had all the effect of a new appointment by him. The act of April 15, 1868 (P. L. 103), referred to by the appellants, was intended to secure to the wife and children and dependent relatives of the insured, as against his creditors, an insurance taken out or assigned in good faith for their benefit. We do not see that it affects the question involved in this case. The judgment of the court of common pleas is affirmed.

TREXLER v. GREENWICH TP.

(Supreme Court of Pennsylvania. May 20, 1895.)

ROADS — UNGUARDED EMBANKMENTS — DUTY OF TOWNSHIP—INSTRUCTIONS—SKITTISH ANIMALS.

1. In an action for personal injuries received through the township's failure to guard a steep declivity at the side of a narrow road, it was proper to instruct that, if the road was dangerous, it was the duty of the township to exercise common prudence to insure the safety of travelers, and to erect barriers, if necessary.

2. A township is not required to keep its roads in such condition that unmanageable horses may be driven thereon without risk.

3. In an action to recover for injuries caused by defects in a road, where the place of accident was manifestly dangerous, and there was no evidence that the plaintiff's horse was unsafe, it was harmless error to instruct without qualification that "a highway must be kept in such repair that skittish animals can be employed without risk."

Appeal from court of common pleas, Berks county.

Trespass by Richard G. Trexler against the township of Greenwich for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

D. Nicholas Schaeffer, for appellant. Rodermel Bros., for appellee.

FELL, J. The plaintiff was injured by falling with his team and wagon down a steep declivity at the side of a public road. At the place of the accident the road was only 11 feet wide. On one side there was an embankment, and on the other the declivity extended some 70 feet to a stream. The descent for the first 10 feet was vertical, and for the rest of the way it was so steep that the plaintiff and his horses rolled down it 50 feet, until their motion was arrested by a stump. There was no guard rail or barrier of any kind at this point. The case was submitted to the jury, with instructions that, if the road was dangerous by reason of its proximity to a precipice, it was the duty of the township to exercise common prudence to insure the safety of travelers, and to erect barriers if they were necessary for that purpose. This was the real point of the case, and the instructions were correct and adequate.

The fourth and fifth assignments relate to the statement that "a highway must be kept in such repair that skittish animals can be employed without risk." These words are almost identical with those found in the opinion in Macungie Tp. v. Merkhoffer, 71 Pa. St. 276. They appear in the syllabus, but not in the opinion, in Borough of Pittston v. Hart, 89 Pa. St. 389. They were essential to the decision of neither case, and apply to no question which necessarily arose in either. This definition of duty in the maintenance of a country road is probably broader than was intended, and, if it is left unnoticed, it may lead to the establishment of a rule which will impose unreasonable burdens upon townships. It should, however, be distinctly stated that the learned trial judge followed what appeared to be a binding authority. Whether a horse which is "skittish," in the sense of being easily frightened, can be safely driven on an ordinary road, depends mainly upon his disposition and training in other respects. It depends not so much upon his liability to become frightened, which is in a greater or less degree common to all horses, as upon what he is likely to do when frightened. A horse that bolts or turns or backs cannot be

Digitized by Google

safely used on any road. If, while easily frightened, he is also easily controlled, he may be safely driven on any ordinary country road. The question of safety relates not only to the tendency of the horse to become frightened, but also to the facility with which he can be controlled, and it is too broad a statement to say that country roads must be so kept that skittish horses may be driven upon them with safety. There is no duty whatever to provide for the use of vicious, untrained, or unmanageable horses, and whoever drives such horses upon the road does so at his peril. Gutters provided for drainage, banks, and depressions at the sides, and any obstacles outside of the beaten path, become in such cases objects of danger, and it is utterly impracticable to guard against them. There is, however, a reasonable limit to which protection from injury should extend. It is common experience that horses neither vicious nor unmanageable are liable to shy, and, while they may be readily controlled, they cannot be prevented from stepping aside from the beaten path. This is not ordinarily attended with danger where the road is of adequate width, or where the dangerous places are protected by guards. Where the road is of the ordinary width, the driver is not carried by such a departure to a position of danger before he has an opportunity to control the movements of his horse. Where, however, the road is so narrow that a slight deviation leads to the edge of a precipice or other place of danger, the duty to erect guards is apparent. The rule was well stated in Borough of Pittston v. Hart, supra, where it was said: "The horse is naturally a timid animal, and is so liable to fright that those having charge of the public highways ought to make reasonable provision for a matter so common and so likely to happen at any time." The duty is to make provision against such dangers as are probable in the use of ordinarily manageable horses, and not in the use of such as are untrained and uncontrollable. This duty is performed when the roads are maintained in a reasonably safe condition for the ordinary public travel. The instruction referred to did the defendant no harm in this case. The place where the accident happened was one of manifest danger, and there is no evidence that the horse was unsafe for use. The judgment is affirmed.

NEILSON v. HILLSIDE COAL & IRON CO.

(Supreme Court of Pennsylvania. May 20, 1895.)

INJURIES TO MINOR EMPLOYE—CHARACTER OF EMPLOYMENT—INFORMATION OF DANGER—CONTRIBUTORY NEGLIGENCE.

1. In a personal injury suit by a boy under 14 years of age, against his employers, where the evidence was conflicting as to the dangerous character of the employment, and as to whether plaintiff was informed of the danger, and instructed how to avoid it, it was proper not to instruct to find for defendant.

2. Plaintiff, a boy under 14 years of age, was employed at a colliery to unhook one end of a sling chain from cars drawn back from the dump, the other end being fastened to an endless moving chain between the tracks. In order to detach the sling chain from the car, the moving chain had to be stopped, and plaintiff was required to stand on the car bumpers. *Held*, that where, through another's failure to stop the moving chain, plaintiff was unable to unhook the sling chain, it was for the jury whether plaintiff was negligent in jerking the sling chain with one hand to get the necessary slack to unhook it with the other hand, which prevented his holding on to the car, instead of jumping from the car upon seeing that the moving chain was not stopped.

Appeal from court of common pleas, Susquehanna county.

Trespass by Judson T. Neilson, by his next friend, Carl Neilson, against the Hillside Coal & Iron Company, for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Defendant assigned as error that: "Twenty-First. The learned trial judge erred in refusing defendant's sixteenth point; the point and the answer thereto being as follows: 'Sixteenth. Under all the evidence in this case, your verdict must be for the defendant. Answer. This is refused.'"

Edward N. Willard, Everett Warren, and Henry A. Knapp, for appellant. C. Smith and L. P. Weideman, for appellee.

FELL, J. The plaintiff, a boy under 14 years of age, was employed by the defendant at its colliery, and at the time of his injury he was stationed at the head of a breaker, to assist in the movement of cars. The loaded cars received from the mine were run to the dump or tipple, and, after being emptied, were drawn back, and shifted to another track. An endless chain moved between the tracks and the power was communicated from this to the cars by means of a sling chain some 15 feet long, one end of which was hooked to the moving chain and the other to the front of the car. When a car had been drawn back the desired distance the chain was unhooked at both ends and carried back to be used in moving the next car. In order to detach the sling chain, it was necessary to stop the movement of the endless chain. When this was done, and the sling chain had become sufficiently slack, it was unhooked from the car by the plaintiff, and from the endless chain by another boy. The plaintiff, in the performance of this work, was required to stand on the front bumper of the car. At the time of the accident, because of the failure of the boy who had charge of the moving chain to stop it at the right time, the plaintiff was unable to unhook the sling chain from the car with one hand while he held fast to the car with the other. In his effort to unfasten the chain he took hold of it with both hands, and attempted to jerk it with one in order to

Digitized by Google

get the necessary slack to unhook it with the other. As a consequence of this, when the chain was loosened he fell in front of the car, and was injured. There was testimony that the plaintiff had been employed as a slate picker, and that a month before the accident he had been directed to work on the cars; that his father, on account of the dangerous character of this work, had objected to his doing it; that he had been sent back to pick slate, and remained at that work until two weeks before he was injured, when, without his father's knowledge, he had again been sent by the foreman to the cars. The testimony was conflicting as to the dangerous character of the employment, and whether the plaintiff had been informed of it, and instructed how to do the work so as to avoid its danger. Two grounds of negligence were alleged upon the trial. The first was in placing a boy of the plaintiff's age, without knowledge or experience, at a dangerous work, without such instructions as would enable him to understand it and avoid its risk. The second was in placing an incompetent boy in charge of the machinery by which the motion of the endless chain was regulated. The case was submitted on the first ground only, the learned judge instructing the jury that there was not sufficient evidence to sustain a finding that the boy in charge of the machinery was incompetent.

While, upon its facts, the case is a very close one, it could not have been properly withdrawn from the jury. Both the place and the character of the employment were dangerous. The plaintiff had not reached the age when capacity to see and appreciate danger is to be presumed. Under these circumstances it was the duty of the employer to see that he received such instructions as would inform him of the dangers which surrounded him, and would enable him, as far as practicable, to avoid them. Whether this duty was performed was necessarily a question of fact. Rummel v. Dilworth, 131 Pa. St. 509, 19 Atl. 345; Kehler v. Schwenk, 151 Pa. St. 505, 25 Atl. 130. The only ground upon which the plaintiff, under the evidence, could be charged with contributory negligence, was that he attempted to unhook the sling chain when he found that the machinery had not been applied so as to slacken it, instead of jumping from the car at once. But this was to be determined in view of his knowledge and judgment, and the surroundings. Without fault on his part, he was suddenly placed in a position of peril, and he could not be held to the duty of quickly deciding and acting upon the wisest course to escape the threatened danger. Even an adult, under the same circumstances, would not be held to such a duty. We find no error whatever in the manner in which the case was submitted to the jury. The charge of the learned judge fully covered every point which was presented or arose at the trial, and the instructions were clear and adequate. The judgment is affirmed.

In re STEINMETZ'S ESTATE.

Appeal of COBB.

(Supreme Court of Pennsylvania. May 20, 1895.)

SEPARATE USE TRUST—MARRIED WOMEN—POWER TO MAKE WILLS.

1. Testator provided for the management of his undivided estate by his executors during his widow's life,—the widow to have one-third of the net income, and the balance to go to the children,—and directed that if, after the widow's death, the children should divide the estate, the portions of the daughters should be separately secured to their use, beyond the dictation of their respective husbands. *Held*, that the interest of a daughter dying during her mother's lifetime was a present interest in net revenue only, and a remainder in fee, subject to a separate use trust.

2. Such daughter, being a married woman, in the absence of a power in the will creating the trust, could not pass her estate by will.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of Daniel Steinmetz, deceased. From a decree dismissing his exceptions to the adjudication of the final account of the executors, William B. Cobb appeals. Affirmed.

By his last will, Daniel Steinmetz, inter alia, thus provided: "Third. It is my will that my real estate remain as at present undivided and unapportioned, the rents to be collected, the repairs to be made, and the interest on incumbrances paid; and, when the principal of any debt due by my estate becomes due, it shall be paid as though I myself acted in the premises, and my executors are hereby authorized to act, and are hereby empowered so to act, that my real estate may be kept intact as it now is. Fourth. It is further my will that after my executors shall have provided for all bills for repairs, interests for moneys borrowed (due or about to fall due), taxes, water rents, and any other demands against my real-estate property to be paid, then the net residue shall be distributed as follows, viz.: One-third of said net amount shall be paid to my said wife, Emma G. Steinmetz, and the remainder shall be equally divided between my children, Daniel, Henry K., Philip J., John, Charles G., Burtis, Emma M., Martha G., and Fanny J., share and share alike. This arrangement I desire to continue during the life of my wife, the said Emma G. Steinmetz. At her decease, it is my will that my children shall do as they think best. It is, however, my will, should my children agree to a division of my estate after the death of my wife, that the separate portions of my daughters, Emma M., Martha G., and Fanny J., shall be separately secured to them and their use, beyond the dictation of the husband of either of them."

Digitized by Google

Following, among others, are appellant's assignments of error: "(2) The learned court erred in dismissing the second exception of the appellant, Cobb, which was in these words: 'Second. The learned judge erred in not finding that Mrs. Cobb died seised of a vested interest in an undivided one-ninth part of testator's real estate, subject only to the right of her mother (since terminated) to receive one-third of the rents during her life.' (3) The learned court erred in dismissing the third exception of the appellant, Cobb, which was in these words: 'Third. The learned judge erred in not finding that said one-ninth interest in the realty passed, under Mrs. Cobb's will, to her husband, William B. Cobb, in fee simple.' (4) The learned court erred in dismissing the fourth exception of the appellant, Cobb, which was in these words: 'Fourth. The learned judge erred in not finding that, if Mrs. Cobb's will was not effectual to pass her share of the realty, then her husband, William B. Cobb, is entitled to the same for life, as tenant by the curtesy.'"

John G. Johnson, for appellant. Henry James Hancock, for appellee Rutherfoord.

MITCHELL, J. In Steinmetz's Estate, Appeal of Duffield (opinion filed herewith) 31 Atl. 1070, it was held that the testator's intent to secure the shares of his daughters to their separate use, and that the contingency of the widow's death, and the partition by the children, of the common estate, did not go to the creation of the separate use, but to the time and occasion for putting it into formal operation. The testator created two trusts by his will—First, for the management and administration of his whole estate, undivided, and the distribution of the net income, during his widow's life, and as much longer as the children should agree to continue that arrangement; and, secondly, on the severance of the joint management, a separate use trust for his daughters. His intention to exclude the husbands of his daughters covered both situations. Under the first trust the husbands had no control, because the daughters were only entitled to their shares of the net income. In the second situation a formal separate use was established. As the intent to exclude the husbands in both cases is therefore clear, and as that is all that is required, the interest of Mrs. Cobb in her father's estate, from the time of his death, must be treated as a present interest in net revenue only, and a remainder in fee, subject to a separate use trust; and whether her death occurred during the prior life estate of the widow, or after its termination, made no difference in the substance, but only in the form, of the trust, and of her control over the property. We have therefore, the question whether, in the absence of express authority given by the instrument creating the trust, a married woman can pass such an estate by will. It has been argued with great force that as the remainder is in fee simple, and the restriction of alienation is in derogation of an essential incident of that estate, it should not be carried beyond the extent actually necessary to reach the end equity has in view,—the protection of the wife from the influence as well as the power of her husband,—and that does not go beyond her life. The question, however, is no longer open. It is perhaps somewhat notable that a principle of so much practical importance in its results, and of such frequent occurrence, should be so little discussed in the case which first decided it (Thomas v. Folwell, 2 Whart. 11), where the conclusion was stated rather briefly, as a necessary corollary of Lancaster v. Dolan, 1 Rawle, 231. The latter case, however,—one of the landmarks in Pennsylvania law,—had been decided only a few years before, and the professional mind was so filled with it, controversially and otherwise, that probably a brief reference to it was considered all that was necessary. The intensity of professional feeling on the subject is illustrated by Horace Binney, who, writing 30 years after, says: "It has taken more than one act of assembly to patch the hole in the law that was made by Lancaster v. Dolan, and it is not well patched yet." Leaders of the Old Bar (page 59). Notwithstanding the brevity of the discussion, however, Thomas v. Folwell has been followed uniformly from Stahl v. Crouse, 1 Pa. St. 111, down to Quin's Estate, 144 Pa. St 444, 22 Atl. 965; and is not now to be questioned. Whether, in view of the present statutory powers of a married woman to make a will, the reasoning of Thomas v. Folwell would now lead us to the same conclusion, if the question were new, is not material, as the cases are clear that the acts of 1848 and 1887 apply to the common-law rights of a married woman over her property, not to trusts in equity for separate use. MacConnell v. Lindsay, 131 Pa. St. 476, 19 Atl. 306. Decree affirmed.

In re LONG'S ESTATE.

Appeal of BARNER.

(Supreme Court of Pennsylvania. May 20, 1895.)

APPEALABLE ORDERS — EXECUTOR'S ACCOUNT — OPENING OF CONFIRMATION—PROCEDURE.

1. No appeal lies from an order opening the confirmation of an executor's account.

2. Where issues of fact are raised by an answer as to error alleged in the items of an executor's account as a ground for opening the confirmation of the same, such items cannot be disposed of without the taking of testimony.

Appeal from orphans' court, Cumberland county.

In the matter of the estate of Christian Long, deceased. From a decree vacating the confirmation of the first and partial account of John L. Barner, executor, and authorizing

Digitized by Google

James H. Loh, guardian of Mabel M. Wade, to file exceptions to the account, the executor appeals. Appeal quashed.

Edw. B. Watts, for appellant. A. G. Miller, for appellee.

WILLIAMS, J. Christian Long died in January, 1892, disposing by his last will and testament of an estate estimated at about one-half million of dollars. The appellant, John L. Barner, was named as his executor, and, after the death of Long, proceeded to make probate of the will and take letters testamentary. In March, 1893, he settled an account, which is described in the petition as a partial account, and which was at that time confirmed nisi. It was finally confirmed early in May. On the 8th day of May, the petition of Mabel M. Wade, of Alexandria, Va., by her guardian, James H. Loh, was presented in the orphans' court, asking to have the decree of confirmation set aside or opened, and the account re-examined as to several items specified in the petition. A rule to show cause was granted, upon which the appellant came in and made answer, distinctly denying the several allegations on which the prayer for relief in the petition rested. No testimony seems to have been taken to dispose of the issues so made, but the rule was taken up for hearing on petition and answer, and made absolute generally. The order appealed from is thus seen to be an interlocutory one. It opens a decree of confirmation upon an application promptly made by one who was a minor when the account was filed, and unrepresented by a guardian or otherwise. No appeal lies from such an order. Jones' Appeal, 99 Pa. St. 124. But, as we have the papers before us, we feel that it is proper for us to speak of the practice in these cases, and the course this proceeding ought now to take. The only item among those enumerated as mistaken or erroneous that could be disposed of by the orphans' court without testimony was that of compensation. A distinct issue of fact was raised by the answer as to the others, and upon this issue the answer must stand until overcome by evidence. The only subject that is open to examination, therefore, under the order now made by the orphans' court, is that of the compensation to which the executor is entitled for his services between the probate of the will and the filing of his account. If the petitioner desires to go further than this, he must take up the burden that the answer imposes upon him, and satisfy the court by the evidence that he shall produce that such items, or some of them, should be re-examined; and the order made should state the items as to which the account is opened and a re-examination allowed. The motion to quash is sustained, and the record remitted to the orphans' court, that further proceedings may be had in accordance with this opinion.

BEAVER v. SLEAR.

(Supreme Court of Pennsylvania. May 27, 1895.)

OPENING OF JUDGMENT—EVIDENCE.

On an application to open a judgment on a note it appeared that in 1893 the judgment was confessed under a warrant of attorney, and included interest thereon; that the note was given by defendant to his wife, plaintiff's beneficiary, in 1876, and that the proceeds thereof were invested in a farm on which, and out of the income of which, defendant and his wife lived up to the latter's death, in 1893; that the note was for one day, and was silent as to interest; and that the wife had repeatedly said that she was getting no interest, and that her money was invested in the farm. *Held*, that it was not error to open the judgment.

Appeal from court of common pleas, Union county.

Judgment for William H. Beaver, trustee of Sarah J. Slear, against George M. Slear, on a promissory note. From a decree opening the judgment, plaintiff appeals. Affirmed.

The judgment in suit was confessed by virtue of a warrant of attorney contained in the note on which the judgment was founded. The note was given by defendant to his wife, the beneficiary named therein, in 1876. It matured in one day, and was silent as to interest. The judgment, however, included interest from maturity to date of entry, 1893. It was established on the hearing that the proceeds of the note were invested in a farm on which defendant and his wife lived up to the latter's death in 1893, and out of which both received their only income; that the wife had repeatedly said that she was getting no interest on the note, and that her money was invested in the farm; and that the entire proceeds of the farm were used for family expenses.

J. M. & P. B. Linn, for appellant. Jos. C. Bucher and Andrew A. Leiser, for appellee.

PER CURIAM. While we cannot assent to the proposition that, in a case such as this, the burden is on the plaintiff to show affirmatively that the defendant agreed to pay interest from the maturity of his note, we are not prepared to say, in view of the facts and circumstances of the case, that the court erred in opening the judgment, and letting the defendant into a defense. There was no such abuse of discretion as would justify us in reversing the decree complained of. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

YOUNG v. COLVIN.

(Supreme Court of Pennsylvania. May 27, 1895.)

APPEAL FROM JUSTICE COURTS—CORPORATIONS—BAIL.

Act March 15, 1847 (P. L. 361), providing that when any corporation, not a municipal cor-

Digitized by Google

poration, shall appeal or take a writ of error, the bail shall be taken absolute for the payment of the debt, interest, and costs, on affirmance of the judgment, applies to appeals from justices of the peace.

Appeal from court of common pleas, Bedford county.

Scire facias by Daniel D. Young against Frank E. Colvin on a recognizance. From a judgment for plaintiff, defendant appeals. Affirmed.

The opinion of the lower court (J. H. Longenecker, J.) is as follows:

"The defense interposed in this case raises the single legal question whether a corporation (other than municipal), on appealing from the judgment of a justice of the peace, must give bail absolute for the payment of debt, interest, and costs, on affirmance of the judgment, as was provided in section 4, Act March 22, 1817 (P. L. 128; 6 Smith, Laws, 438), and section 1, Act March 15, 1847 (P. L. 361). The phraseology of the two statutes is identical, viz.: 'When any corporation shall be sued and shall appeal or take a writ of error, the bail requisite in that case shall be taken absolute for the payment of the debt, interest, and costs, on affirmance of the judgment,'—the only difference being that in the act of 1847 are inserted these words, 'municipal corporations excepted'; but the courts had already incorporated this exception into the practice under the earlier act. Robinson v. Jefferson Co., 6 Watts & S. 16; King v. District of Penn., 1 Phila. 402. Notwithstanding the intervening legislation, the act of 1817 was probably still in force at the time of the passage of the act of 1847. Rush v. Association, 4 Pa. Co. Ct. R. 523. But if it be regarded as repealed, and that of 1847 as a re-enactment of its provisions, the same construction which the earlier act received from the courts must also apply to the latter act, because the re-enactment of the statute which had received judicial interpretation amounts to a legislative adoption of such construction. Evans v. Ross, 107 Pa. St. 231; End. Int. St. §§ 368, 369. In the brief submitted to us by defendant, he contends that the act of 1847 'regulates appeals in writs of error to the supreme court alone,' and relies on the cases of Erie & A. R. Co. v. Atlantic & G. W. R. Co., 3 Pittsb. R. 232, and Throop v. Insurance Co., 2 Pears. 306, to support this theory. That was not the construction placed on the act of 1817. Navigation Co. v. Thomas, 13 Serg. & R. 431; Morris v. Canal Co., 4 Watts & S. 461; Turnpike Co. v. Naglee, 9 Serg. & R. 227. From these cases it will be seen that the act of 1817 was held to apply to appeals from arbitrators, aldermen, and justices of the peace. Hence, under the rule of construction just mentioned, 107 Pa. St. 231, 232, it follows that the act of 1847 must likewise be held to apply to appeals in such cases. The latter act was passed, as its language indicates, to settle existing doubts as to the effect of the first section of the act of 1845 on appeals and writs of error by corporations, and those doubts were dispelled by a re-enactment of the precise words of the act of 1817. We regard the act of 1847 as being in full force to-day, as far as it relates to appeals from justices of the peace, unaffected by the later enactments of March 21, 1849 (P. L. 216), and April 25, 1850 (P. L. 571). The first of these relates only to foreign corporations in suits brought in courts of record, while the twelfth section of the other concerns only appeals from awards of arbitrators and leaves untouched the subject of appeals from justices of the peace. The industry and acumen of counsel on both sides, aided by our own examination, have failed to discover any expression of the supreme court since the passage of the latter statutes as to their effect on the act of 1847, and those of the lower courts are in conflict. By far the best considered case we have seen of the common pleas courts is that of Rush v. Association, supra, in which Judge Archibald, after a very intelligent review of the various statutes and decisions, holds that the act of 1847 is still in force except as modified by the act of 1850 concerning appeals from awards of arbitrators alone. He says its 'provisions as to other appeals by corporations than those from awards of arbitrators, of course, remain unaffected and in force.' Though the very point is not decided in Shivery v. Grauer, 2 Pa. Dist. R. 387, yet Judge Furst treats the act of 1847 as in force and applying to appeals from justices of the peace, and the only reason the bail was not held in that case was because the appeal was not filed, and, there being no affirmance of the judgment, the condition of the recognizance was not broken. In the case at bar, the appeal was filed and the judgment affirmed or sustained by a recovery in the common pleas. Being of opinion that the Pennsylvania & West Virginia Railroad Company were required to enter into a recognizance with bail to secure the debt and interest as well as the costs, and the recognizance having been properly given in that form by the defendant, and the plaintiff's judgment being affirmed, the liability of the defendant thereupon became fixed for the full amount of the debt, interest, and costs. And now, April 4, 1894, the court find for the plaintiff, Daniel D. Young, and against the defendant, Frank E. Colvin, Esq., the sum of $36.43, with interest thereon from February 3, 1893. The prothonotary is directed to give notice of this finding to the parties or their attorneys, and, if no exceptions are filed thereto within thirty days after the service of such notice, let judgment be entered by the prothonotary hereon according to said finding."

Alexander King, for appellant. Harry Cessna, for appellee.

PER CURIAM. It is unnecessary to add anything to what has been said on the question involved by the learned president of the court below. We find no error in the judgment, and affirm it on his opinion. Judgment affirmed.

Digitized by Google

In re YOUGHIOGHENY RIVER COUNTY BRIDGE.

Appeal of YOUGHIOGHENY BRIDGE CO.

(Supreme Court of Pennsylvania. May 27, 1895.)

COUNTY BRIDGES—DECREE APPROVING VIEWER'S REPORT—APPEAL.

Act June 13, 1836 (P. L. 560) § 35, provides that if, on the report of viewers, it shall appear that a bridge proposed to be erected by a township is necessary, and would be too expensive for the township, it shall be entered as a county bridge. The decree approving the viewers' report and the finding of the grand jury that the bridge was necessary, and too expensive for the township, referred the matter to the county commissioners, and ordered that, if approved by them, the same should be entered as a county bridge. *Held* that, in the absence of a showing that the commissioners acted in the matter, an appeal from the decree was premature.

Appeal from court of quarter sessions, Fayette county.

In the matter of the application for a county bridge over the Youghiogheny river, from Apple street, in the borough of Connellsville, to Trader's alley, in the borough of New Haven. From an order overruling their exceptions to the report of the viewers the remonstrants appeal. Appeal quashed.

R. H. Lindsey, S. E. Ewing, W. G. Guiller, and P. S. Newmyer, for appellants. Boyd & Umbel, James C. Work, and William A. Hogg, for appellees.

PER CURIAM. This proceeding for the erection of a county bridge over the Youghiogheny river, between the boroughs of Connellsville and New Haven, appears to be under the act of June 13, 1836 (P. L. 560), the thirty-fifth section of which provides, among other things, that "if, on the report of viewers, it shall appear to the court, grand jury, and commissioners of the county, that such bridge is necessary and would be too expensive for such township or townships, it shall be entered on record as a county bridge." In the decree of court, finding "that said bridge is necessary, and would be too expensive for said boroughs of Connellsville and New Haven," and approving "the report of the viewers and finding of the grand jury," it is accordingly ordered that "the same be referred to the commissioners * * * for such action as they may deem expedient and proper in accordance with law; and, if approved by them, that the same be recorded as a county bridge." This decree is at best only provisional. It is neither effective nor final unless the county commissioners concur in the findings of the court and the grand jury. If they refuse to concur, without more the proceeding falls. If they elect to exercise the authority vested in them by the first section of the act of May 25, 1887 (P. L. 207), and merely assist in building the bridge, a different result is accomplished. It does not appear in this case, nor is it even alleged, that the commissioners have taken any action in the premises. If they have not, this appeal is clearly premature; and, acting on that assumption, we think the appeal should be quashed. Appeal quashed.

WERTHEIMER v. THOMAS et al.

(Supreme Court of Pennsylvania. May 20. 1895.)

VENDOR AND PURCHASER — BREACH OF CONTRACT —NOTICE.

In an action for breach of contract to convey land subject to a lease, the fact that the lease contained a stipulation giving the tenant an option to purchase the land, which option the tenant had enforced, did not justify a peremptory charge for defendant.

Appeal from court of common pleas.

Assumpsit by S. Wertheimer against William H. Thomas and another for breach of contract to sell land. From a judgment for defendants, plaintiff appeals. Reversed.

George P. Rich, for appellant. Wendell P. Bowman, for appellees.

FELL, J. The general rule is that notice of a lease will affect the purchaser of real estate with notice of the covenants contained in it. If, with knowledge of a lease, he buys without examining it, he cannot afterwards object that he had no notice of a particular covenant. The equity of a tenant in possession may extend still further, and notice of unusual covenants, and even of a collateral agreement to purchase, may be imputed to the vendee. This equity, however, rests upon the fact of possession, which is notice to the purchaser of the occupant's title, and of the fact that the property is affected, and imposes upon him the duty of inquiry. The purchaser is therefore chargeable with notice, not only when the evidence raises a presumption that he knew, but also when there is just ground for inferring that reasonable diligence would have led him to discover the truth. But this rule of constructive notice by tenancy does not apply to controversies between the vendor and the vendee. Facts which, in a controversy with a third party whose rights have been prejudiced by the sale, would affect the vendee with constructive notice, will not charge him with defects in the vendor's title. 2 White & T. Lead. Cas. Eq. pt. 1, p. 145. While the vendee is put to inquiry as to the tenant's title, the duty of inquiry arises because of the possession. In protection of innocent parties, the doctrine of implied notice has been carried to its fullest extent. As between the vendor and the vendee, the latter is held to have had notice of the covenants of a lease of which he knew, but had not examined, and as to the contents of which he has not been misled, but he is not charged with notice of a distinct collateral agreement.

Digitized by Google

When the agreement in this case was made, the plaintiff's agent knew that the property purchased was in the possession of a tenant under a lease from the defendant. The agreement was made expressly subject to this lease. Actual notice of the lease carried with it constructive notice of all its covenants and conditions relating to the tenure or intended to secure or enforce the rights and duties of the parties to it as landlord and tenant; but there does not seem to be ground, as between the parties, for carrying the implication of notice further. The agreement giving the tenant an option to purchase, although incorporated in the lease, was not a part of it. It was a distinct agreement, having no necessary connection with the lease. It was unusual, and not to be expected. Had this agreement been separate and distinct from the lease in form, as it was in substance, it clearly would not have been, as between the parties to this action, notice of the tenant's equity. We are of opinion that the case should not have been withdrawn from the jury on the ground that the plaintiff was charged with notice of the agreement to sell. That his agent had actual notice or purposely avoided it, and in fact secured by the agreement only the right to take title to the property in the event of the failure of the tenant to do so, the jury might well have found from the testimony. The judgment is reversed and a venire de novo awarded.

BOLTON v. HEY et al.

(Supreme Court of Pennsylvania. May 27, 1895.)

JUDGMENT OF SUPREME COURT — CONCLUSIVENESS — SUBSEQUENT OVERRULING OF DECISION — EFFECT—MECHANIC'S LIEN—WAIVER OF RIGHT TO FILE.

Where, in an action on a subcontractor's mechanic's lien, the sole ground for refusal to enter judgment for want of a sufficient affidavit of defense was that in the building contract the contractor waived the right to file a lien, and on appeal the judgment was affirmed, though the judgment of the supreme court was subsequently overruled in a different case, plaintiff could not maintain another action on the same cause, unless he could avoid the effect of the judgment of affirmance by proving a subsequent agreement relieving the contractor of the covenant against filing liens.

Appeal from court of common pleas, Delaware county.

Alias scire facias by Frank H. Bolton, trading as Bolton's Sons, against Susanne B. Hey, owner, and husband, and Frank R. Hill, contractor, to enforce a subcontractor's mechanic's lien. From a judgment for plaintiff, defendants Hey appeal. Reversed.

Lewis Lawrence Smith and A. Lewis Smith, for appellants. E. H. Hall and Robert N. Simpers, for appellee.

STERRETT, C. J. This alias scire facias was issued March, 1894, on the same mechanic's lien on which the original scire facias of 1891 was issued. That case was before us for adjudication two years ago, and is reported in 148 Pa. 156, 23 Atl. 973. Aside from the legal effect of our judgment and the subsequent proceedings in that case, the parties, subject-matter of the controversy, etc., in both actions are precisely the same now as they were then. The original scire facias came here on appeal by plaintiff, from refusal of the court below to enter judgment for want of a sufficient affidavit of defense. The sole ground of the refusal was that in the building contract of October 11, 1890, between the defendant Mrs. Hey and the contractor, Frank R. Hill, and the supplement thereto of same date, the right to file a lien against the building, etc., was waived by the contractor. The sole question in the court below and here was the construction of those written instruments. If, as defendants contended, the contractor had agreed not to file any liens, the plaintiff had no case. The question was a purely legal one. In sustaining the construction given by the court below, this court, in a per curiam opinion by the then chief justice, said: "The learned judge of the court below held that the affidavit of defense was sufficient to prevent judgment. In this, we think, he was right. The case comes directly within the ruling in Schroeder v. Galland, 134 Pa. St. 277, 19 Atl. 632. Indeed, the contract appears to have been drawn with reference to that decision, as its language is identical with the opinion of Mr. Justice Green. We adhere to the law of that case. It follows that the judgment of the court below must be affirmed." In strict form, the entry of this judgment is not in the words of the act of 1874 (P. L. 64). If it had followed the language of the act, it would read thus: "Appeal dismissed, at the costs of plaintiff, but without prejudice," etc., but it is nevertheless a judgment construing the building contract and supplement thereto, and holding that they in effect contain, inter alia, a covenant on the part of the contractor that no mechanic's lien shall be filed against the building. That being the cardinal, and in fact the only, question in the case, the judgment was practically conclusive against the plaintiff's right to maintain the action of scire facias on the alleged lien, unless he could avoid its effect by proving a valid, subsequent agreement, relieving the contractor from the operation of his covenant against filing liens, or something equivalent thereto. Nothing of the kind was ever attempted, for the reason, doubtless, that the covenant never was in any manner eliminated from the contract. Following the adjudication in this court, a plea was filed in the court below, and on June 20, 1892, "judgment of nonsuit against plaintiff" was entered. This was followed by a rule to take off the nonsuit, and on argument, January 3, 1894, that rule was

Digitized by Google

discharged. No exception was taken, and no further proceedings appear to have been had in the original scire facias. The alias scire facias, now before us was afterwards issued. Defendants' pleas thereto are nil debent, and three special pleas, viz. (1) the building contract; (2) prior decision of the supreme court; (3) entry of nonsuit in the original scire facias; and certain matters of estoppel mentioned in the fourth assignment of error. There being no controversy as to the amount of plaintiff's claim, a verdict therefor was directed and taken subject to the opinion of the court on questions of law reserved. The points on which those questions arose are recited in the first, second, and third specifications, respectively. Judgment having been subsequently entered on the verdict in favor of the plaintiff, this appeal was taken.

One of the reserved questions presented in the third specification is whether the judgment of this court in the original scire facias, construing the building contract, and in effect holding that the contractor bound himself thereby not to file any liens against defendants' building, is a bar to plaintiff's recovery on the alleged lien. We think it is; and the court below should have so held, notwithstanding the subsequent ruling of this court in Nice v. Walker, 153 Pa. St. 123, 25 Atl. 1065, and more recent cases. As we have already seen, the only question for adjudication in the original scire facias was whether the contractor had substantially agreed with the owner that no liens should be filed. The only way in which that question could possibly be determined was by construing the building contract and supplement thereto. These written contracts between the owner and the contractor were the only evidence of their agreement. They were accordingly construed by the court, and it was then and there adjudged that they did embody a contract against filing liens. That judgment thus became the law of the case, and, having never been reversed or set aside, it is still the law of that case, notwithstanding a different rule of construction may have been since applied, with a different result, to contracts of like tenor and effect. As was said by Mr. Justice Kennedy, in Marsh v. Pier, 4 Rawle, 273, 288: The "judgment of a proper court, being a sentence or conclusion of law upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the courts and juries ever afterwards, as long as it shall remain in force and unreversed." This case has since been cited with approval in Brenner v. Moyer, 98 Pa. St. 278, and elsewhere. In Chonteau v. Gibson, 76 Mo. 38, the supreme court of that state, after referring to the fact that they and other courts of last resort have reversed their own rulings when they found that a rule laid down in a former decision was so unfounded in law, or so mischievous in its consequences, that they felt compelled to overrule it, proceed to say: "But while this may be, and is often, done, the right of a party to reagitate and sue again upon the same cause of action adjudged in a case subsequently overruled in another case between other parties, or the same parties upon another cause of action is concluded, and forever gone." It follows from what has been said that the judgment in the first scire facias was a bar to plaintiff's recovery in this case, and judgment for defendants should have been entered accordingly. Judgment reversed, and judgment is now entered, non obstante veredicto in favor of the defendants and against the plaintiff, on the reserved question specified in the third assignment of error.

PHILADELPHIA & R. R. CO. v. RIVER FRONT R. CO.

(Supreme Court of Pennsylvania. May 20, 1895.)

RAILROADS — JOINT OWNERSHIP — GOVERNMENT — CONTRACTS — CONSTRUCTION — SPECIFIC PERFORMANCE.

1. Upon the completion of a connecting line, two railroad companies, being the joint owners of the line, agreed, through their general managers, to rules for the government of the road, which provided that a joint dispatcher should be appointed and paid by the two companies jointly, and removed at the instance of either; that the maintenance of the line should be divided between the companies so that each should have charge for 12 months at a time, specifying the company first to take charge; that the cost of maintaining the line, and other expenses, except the pay of the dispatcher, should be borne in proportion to the actual tonnage of the two interests; and that the adjustment of the tonnage in a specified manner should be made quarterly; and, after fixing charges for tolls and motive power, provided that all questions as to the management of the line should be referred to the general managers of the respective interests. *Held*, that such rules constituted a contract, subject to modification on the concurrence of both companies, and to either company's right to withdraw upon giving suitable notice.

2. In the absence of any modification or a withdrawal, it was proper to compel a company, which had been in possession of the road for 12 months, to surrender the road to the other company for a like period.

Appeal from court of common pleas, Philadelphia county.

Bill by the Philadelphia & Reading Railroad Company against the River Front Railroad Company for specific performance and an injunction. From a decree for plaintiff, respondent appeals. Affirmed.

The two railroad companies in suit jointly constructed a railroad on Delaware avenue, in Philadelphia, and entered into the following agreement regarding the same:

"Rules for the Government of the Railroad on Delaware Avenue, Philada., between Cumberland St. and Callowhill Street. Taking

Digitized by Google

effect May 1st, 1882. There shall be appointed a joint dispatcher, whose sole duty shall be the traffic management of the line between Cumberland and Callowhill streets, on Delaware avenue. The maintenance of the line shall be divided between the two interests in such a manner that the engineer's department of the Reading's interest shall have charge of the maintenance of the line for twelve (12) months at a time, and that of River Front Railroad for like periods, neither interest, except by an agreement, to retain charge for a longer continuous period than one year; it being understood that the first year's management, dating from May 1st, 1882, and terminating April 30th, 1883, shall be assumed by the River Front Railroad Company. The intention of the joint ownership is that the cost of maintaining the line, and all other expenses, except the pay of the dispatcher, shall be borne in proportion to the actual tonnage represented by the two interests; but the strict enforcement of the actual tonnage method may, by mutual consent, be suspended, and instead an estimated weight, to be agreed upon, may be applied to each loaded car, which, until the removal of the actual weight method, shall become the basis for determining the proportion of expenses chargeable to the respective interests; or in lieu of either of the foregoing methods, having in view more especially the avoidance of the expense that would be incurred in keeping an accurate account of cars moved, and so long as it shall be mutually satisfactory, it may be proper to assume that there has been an equal division of the tonnage between the respective interests, parties to this agreement, and the expenses may be so adjusted; subject, however, to an immediate restoration of the tonnage basis whenever a desire that such be done be expressed by either interest. The adjustment of the tonnage, and all other accounts appertaining to the operation and maintenance of the line, shall be made quarterly through such officers as shall be designated by the respective interests. The pay of the dispatcher shall be fixed by the joint interests, and each shall bear an equal share of the same, each interest paying direct to the dispatcher their proportion of the salary, the purpose of this method being that the dispatcher shall keep in constant mind, that as between the two interests he is a joint representative of a joint ownership; it is also agreed that under no circumstances will it be proper for either interest to pay to the dispatcher more than one-half of the agreed salary, and that an expression of dissatisfaction from either interest shall be considered a good and sufficient reason for the dispatcher's removal. The charge for tolls and motive power, applying from May 1st, 1882, which each interest shall make and collect from consignees or shippers upon cars delivered or taken from private sidings, shall be one dollar ($1.00) per eight-wheeled loaded car, which rate shall continue in force until changed by an agreement between the proper officers of the respective interests. All questions as to the management of the joint line that may arise hereafter shall be referred to the general managers of the joint interests, or to such officers as they may delegate for that purpose. The foregoing has been approved and accepted on behalf of the receivers of the Philada. & Reading Railroad Company by J. E. Wootten, General Manager. The foregoing has been approved and accepted on behalf of the River Front Railroad Company by O. E. McClellan."

The railroad in question was governed by this agreement up to May 1, 1887, when it became the plaintiff's right to take charge. Being then in the hands of receivers, however, plaintiff consented that the road be operated by defendant for the ensuing year. In 1889, when it again fell to plaintiff to run the road, defendant refused to surrender possession, claiming that the agreement was only tentative, and that, since it (defendant) contributed 80 per cent. of the running expenses of the road, it should operate the same. It also contended that the agreement was not binding, since it was never approved by the board of directors of either of the parties. Plaintiff then brought this bill for a specific performance of the agreement, and for an injunction restraining defendant from interfering with it in the operation of the road.

The decree of the lower court, and defendant's assignments of error, are as follows:

Decree: "And now, October 20, 1894, this cause coming on to be heard upon exceptions on behalf of the defendant to the report of the master, it is ordered, adjudged, and decreed: (1) That the defendant keep, observe, and perform all the terms, covenants, and conditions of the agreement of May 1, 1882, and especially that it keep and observe the covenant of said agreement authorizing the plaintiff in each alternate year to take charge of the maintenance of the line of railroad described in the bill in equity in this suit. (2) That the year commencing May 1, 1895, is the alternate year within which, according to the said agreement, the plaintiff is entitled to take charge of the maintenance of the said railroad. (3) That a perpetual injunction be granted, enjoining the defendant, its officers, agents, and servants, from obstructing or interfering with the plaintiff, its officers, agents, and servants, from taking charge of the maintenance of the said line of railroad during the year commencing May 1, 1895, and during each alternate year thereafter, as provided in said agreement. (4) That the costs of this suit be paid by defendant."

Assignments of error: "(1) The court below erred in dismissing the exceptions of respondent to the report of the master, which were: The master erred in his conclusion that the writing of May 1, 1882, was permanent in character, and obligatory upon and

Digitized by Google

enforceable against the defendant, for the following reasons, inter alia: First. Because it is not pretended to have the authorization of the board of directors of either company. Second. The paper itself was experimental and tentative in character, and entered into by operating officers for their convenience in facilitating operation; and it was consequently temporary in character, and at most only binding upon such officers while personally so acting, and their action was unquestioned by their principals. Third. In May, 1887, Mr. McLeod having succeeded Mr. Wootten as operating officer of the plaintiff, and Mr. Pugh and Mr. Latta having succeeded Mr. McClellan as operating officers of the defendant, the defendant's officers desired and insisted upon a new arrangement, which insistence was practically acquiesced in by Mr. McLeod from May, 1887, to May, 1889,—a fact of itself conclusive against the alleged permanent character of said writing. Fourth. That the action of the board of managers of the plaintiff company taken in April, 1889, was the first and only authoritative action by the plaintiff company, which, being made two years after practical abandonment of the writing referred to, and not being assented to by the board of directors of the defendant company, was inoperative. (2) The court below erred in the entry of the decree of October 20, 1894."

David W. Sellers, for appellant. Thomas Hart, Jr., for appellee.

PER CURIAM. We are disposed to affirm this decree upon the record as it is now presented to us. In doing so we think it just to the parties that we state our view of the relations they occupy to each other.

1. The rules adopted by the joint action of the officers of these companies for the management and maintenance of that part of the River Front Railroad that is the subject of this contention, amount to an agreement or contract upon the subjects to which they relate.

2. Such contract is not irrevocable, but is subject to such modification as circumstances may require, in order to promote the purpose in view and the interests of the parties.

3. Such changes cannot be made arbitrarily at the will of either party, but require the concurrence of both.

4. Either party may give suitable notice of its purpose to withdraw from the arrangement at and after a day named. Thereafter, if the parties cannot readjust their relations to each other, the courts must make such ad interim orders as shall protect the rights of the parties and secure the preservation and operation of the road.

Finally, in disposing of such a question, the relative ownership, tonnage, and other relevant circumstances, should be considered.

We have no doubt the parties will be able to give intelligent attention to all such considerations, and arrange for the future without the aid of the courts. The decree is affirmed, subject to such qualification as to its conclusiveness as this opinion indicates.

HICKOK v. STILL.

(Supreme Court of Pennsylvania. May 20, 1895.)

EXERCISE OF POWER TO SELL.

Under a power to sell during the life of testator's husband, and a peremptory direction to sell immediately after his death, the executor cannot grant the privilege of buying at any time within 3½ years.

Appeal from court of common pleas, Philadelphia county.

Case stated by Geraldine H. Hickok against Albanus C. Still, as trustee of the estate of Sarah K. Still, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

George Stuart Patterson, for appellant. John G. Johnson, for appellee.

FELL, J. The case stated is intended to take the place of a bill in equity to enforce the specific performance by the defendant of a contract for the sale of real estate made by his predecessor in the trust. The primary question is whether the agreement entered into by Charles Still, as executor, was a valid exercise of the power of sale conferred upon him by the will of Sarah K. Still. The power given is in these words: "I authorize and empower my executor, at any time during the lifetime of my husband, with his assent, and I direct him, immediately upon the decease of my said husband, or so soon thereafter as may be, to sell the whole or any part of my real estate, for cash, upon credit, or ground rent," etc. On October 20, 1890, Charles Still, executor, agreed with the plaintiff, in writing, as follows: "* * * That if Geraldine H. Hickok desire to become a purchaser of that piece of ground or land, with house and appurtenances thereon, * * * of which she is now lessee and occupier, at any time during her leasing of the property, she may do so for the sum of nine (9) thousand dollars, to be paid as follows," etc. The plaintiff was then in possession under a lease from the executor which did not end until May 1, 1894. Charles Still died February 13, 1892, and letters of administration de bonis non cum testamento annexo were granted to Albanus C. Still, the defendant in the case stated, and the appellee. On December 3, 1893, the plaintiff notified the defendant of her intention to purchase under the agreement.

The power conferred is an authority to sell during the life of the husband, and a peremptory direction to sell immediately after his death. As the husband of the testatrix was the executor, and during his life the sole

Digitized by Google

possessor of the power, he might have made a sale deferring the time of settlement. This, however, he did not do. He did not sell the property, but entered into an agreement with the plaintiff which gave her the privilege of buying at any time within 3½ years. By this agreement she was entirely free; she was not bound to purchase. But he—and, in the event of his death, his successor in the trust—was bound to sell to no one else during the period fixed. The vice of the agreement is this: that it bound the trust estate, no matter what the detriment to it might be, without giving it any corresponding advantage. This was not a use of the power, but a surrender of it for the time. It suspended the exercise of the discretion which had been given the executor, and defeated the direction in the will for an immediate sale upon his death. A trustee cannot be permitted to deprive himself of a power conferred for the benefit of the trust, or so to fetter its exercise by himself or his successor as to defeat the purpose of the trust. We do not find that the question involved has been decided in our cases, but it has been considered in two English cases (Clay v. Rufford, 5 De Gex & S. 768, and Navigation Co. v. Sutherberry, 16 Ch. Div. 236), which, while differing somewhat in their facts from the one under consideration, are decided upon principles which are fully applicable to it. Although they are against his contention, our notice has been directed to these cases by the learned counsel for the appellant with the highly-commendable purpose of aiding the court in the examination of a question which is almost barren of authority. We are of opinion that the contract made with the plaintiff by Charles Still was not a valid exercise of the power of sale conferred upon him by the will of Sarah K. Still, and the judgment of the court of common pleas is affirmed, at the cost of the appellant.

WYCKOFF et al. v. FERREE. (No. 179.)

(Supreme Court of Pennsylvania. May 20, 1895.)

MODIFICATION OF CONTRACT—EVIDENCE—CORROBORATIVE CIRCUMSTANCES.

Plaintiffs authorized defendant, "upon conditions * * * expressed herein only, to insert our advertisement, as per copy to be furnished by us," in certain cars. To establish a breach of the contract, in that defendant refused to insert advertisements of others in plaintiffs' spaces, a witness for plaintiffs testified that the contract was made with a parol stipulation that defendant would allow a substitution of advertisements of others, which stipulation defendant denied. *Held*, that the fact that, under a similar contract made between the parties in the year previous, defendant permitted plaintiffs to substitute advertisements, as a favor, did not justify the submission to the jury of the question of the modification of the written contract.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by Wyckoff, Seamans & Benedict against Samuel P. Ferree, trading as the Street-Railway Advertising Company, for breach of contract. From a judgment for plaintiffs, defendant appeals. Reversed.

The following, among others, are defendant's assignments of error: "(1) The court erred in refusing to affirm the appellant's first point, which was as follows: 'First. That the contracts sued on are in writing, and their construction is for the court.' (2) The court erred in refusing to affirm the appellant's third point, which was as follows: 'Third. There is no sufficient evidence in the cause from which the jury can find that Wyckoff, Seamans & Benedict had the right, under the contract in suit, to substitute the advertisements of other parties for their own advertisements, and require Mr. Ferree to accept them in lieu of their own.' (3) The court erred in refusing to affirm the appellant's fourth point, which was as follows: 'Fourth. It requires two witnesses, or one witness and corroborating circumstances, to vary or alter the terms of a written contract, and there is no such evidence in this case establishing the right of Wyckoff, Seamans & Benedict to alter the terms of the contracts sued on, so as to authorize them to substitute the advertisements of other parties for their own advertisements, and require Mr. Ferree to insert them in lieu thereof.' (4) The court erred in refusing to affirm the appellant's fifth point, which was as follows: 'Fifth. The fact that Mr. Ferree consented, under the contract between the parties in force in the summer of 1892, to substitute the advertisements of other parties for the advertisements of Wyckoff, Seamans & Benedict, is not such corroborating circumstance which can be considered by the jury in connection with the evidence of Mr. Soby, so as to authorize the altering or varying of the contract sued on.' (5) The court erred in instructing the jury as follows: 'They both agree that they came together and modified, and the question is, what was the modification? Now, Mr. Soby contends that they agreed to let him put in such advertisements as he pleased, without saying one word about the price; that he considered he had a right, from the conversation with them, to put in an advertisement at any price he chose. Mr. Ferree, with whom the agreement was made in 1892, says it was distinctly and positively understood that they were not to underlet for less than seventy-five cents for the short term. Now, there is the contradiction between the parties. What was it? Which was the agreement?'"

M. Hampton Todd, for appellant. Thomas Earle White, for appellees.

FELL, J. The defendant was engaged in the business of street-railway advertising, and in 1893 entered into a written agreement with the plaintiffs to place their advertising

Digitized by Google

cards in a number of street cars. During the running of the contract, the plaintiffs desired to withdraw their cards, and substitute in place thereof the cards of other parties, to whom they had sublet the spaces for the summer months. Upon the refusal of permission to do this, the plaintiffs gave notice that they would no longer be bound by the contract, and brought this action to recover damages for the alleged breach. Under a similar contract a substitution had been permitted in 1892. It was claimed by the plaintiffs that the agreement of 1893 was made on the faith of a parol stipulation that a substitution of the advertisements of others would be allowed. This was testified to by one witness called by the plaintiff, and distinctly denied by the defendant, and the issue of fact raised was submitted to the jury. Whether it should have been submitted under the testimony produced is the only question now to be considered.

The agreement reads: "You are hereby authorized (upon conditions expressed or referred to herein only) to insert our advertisement, as per copy to be furnished by us, in one hundred and twenty-four cars, as per other side of this contract, to occupy a space of eleven by forty-two," etc. This order was prepared by the plaintiffs' agent, sent by mail to the defendant, and accepted by him without change. The authority given by the plaintiffs was to insert their advertisement, and this is what the defendant agreed to do. There was no hiring of space to be used as the plaintiffs might elect, but a stipulation that their advertisement, of a fixed size, should be placed in cars for a fixed time. The agreement gave no right to sublet the space or substitute the cards of other persons. The right claimed was based upon the modification of the agreement of the previous year. The change then permitted was requested by letter. It was not claimed as a right under the agreement, but asked as a favor to enable the plaintiffs to reduce their expenses during a period when it was not advantageous for them to advertise. A compliance with a request in 1892 was made evidence upon which to base a right in 1893. There had been no omission through fraud, accident, or mistake; there was no ambiguity in the language of the contract; there had been established no business usage which threw light upon the intention of the parties; and there was nothing to explain. The alleged parol agreement was at variance with the written contract. It was supported by the testimony of one witness only, and denied by that of another. The previous modification, claimed as a corroborating fact, was based upon a request which negatived any claim of right, and its weight would seem to be with the defendant. We are of opinion that this evidence was not sufficient to sustain a finding by the jury which changed or modified the written agreement between the parties, and binding instructions should have been given as requested in the defendant's third, fourth, and fifth points. The first, second, third, and fourth assignments of error are sustained, and the judgment is reversed.

FERREE v. WYCKOFF et al.

(Supreme Court of Pennsylvania. May 20, 1895.)

Appeal from court of common pleas, Philadelphia county.

Assumpsit by Samuel P. Ferree, trading as the Street-Railway Advertising Company, against Wyckoff, Seamans & Benedict, for breach of contract. From a judgment for defendants, plaintiff appeals. Reversed.

M. Hampton Todd, for appellant. Thomas Earle White, for appellees.

FELL, J. This action was to recover an amount claimed for advertising under the same contract which was the basis of the suit in Wyckoff v. Ferree (No. 179 of July term. 1894), 31 Atl. 1101, in which the opinion of the court has been filed. The cases were tried together in the common pleas, and argued together in this court. For the reasons stated in the opinion filed, the judgment in this case is reversed, with a venire facias de novo.

BARKER v. FAIRCHILD et al.

(Supreme Court of Pennsylvania. May 20, 1895.)

STATEMENT OF CLAIM — AFFIDAVIT OF DEFENSE — SUFFICIENCY — NEGATIVE PREGNANT.

Where a statement of claim alleged "that plaintiff, on October 31, 1891, sold and delivered to defendants certain merchandise as follows, and the following is a copy of the book entry thereof: 'Oct. 31st, 1891. 23,908 lbs. onions, @ 80c., $189.65,'"—an affidavit of defense which averred that "plaintiff did not sell and deliver to defendants, or either of them, or to the firm which they composed, the merchandise mentioned, on the day named, and that neither defendants nor the firm received the merchandise or any portion of it, at any price, on the said date or at any subsequent time," was sufficient.

Appeal from court of common pleas, Bradford county.

Assumpsit by George S. Barker against A. C. Fairchild and others, late copartners, trading as Fairchild, Grace & Co. From a judgment for plaintiff, defendants appeal. Reversed.

Rodney A. Mercur and Ulysses Mercur, for appellants. S. W. & Wm. Little, for appellee.

FELL, J. It is alleged in the statement of claim filed that "the plaintiff, on the 31st of October, 1891, sold and delivered to said defendants certain goods and merchandise as follows, and the following is a copy of the book entry thereof: 'Oct. 31st, 1891. 23,908 lbs. onions, @ 80c., $189.65.'" The affidavit and supplemental affidavit of defense contain averments that the plaintiff did not sell and deliver to the defendants, or either of them, or to the firm of Fairchild, Grace &

Digitized by Google

Co., the merchandise mentioned on the day named, and that neither the defendants nor the firm received the said merchandise or any portion of it, at any price, on the said date or at any subsequent time. The caution with which both parties to the action have avoided entering into the details of the transaction suggests that on each side something material has been kept in the background, and makes applicable the remark of Mitchell, J., in the opinion in Fritz v. Hathaway, 135 Pa. St. 280, 19 Atl. 1011: "It is not always possible to determine whether an affidavit of defense is skillfully drawn to suggest a defense without really swearing to it, or, on the other hand, whether the statement is with equal skill so worded as to avoid a defense." The copy of the book adds nothing to the statement, as it does not show a charge against any one, and the plaintiff's case rests upon the allegation of a sale and delivery of merchandise on a day fixed. These averments are squarely met by the affidavit, and the only suggestion of evasion arises from the fact that the denial is so exact and literal. An affidavit of defense is sufficient which denies the grounds of liability averred in the statement, and those which arise by implication from the averments made. While the construction of an affidavit should be in favor of the plaintiff, and against the party making it, a defendant is under no duty to deny a liability not fairly arising from the statement. The defendants deny a sale and delivery of the goods on the day fixed for both in the statement, and their delivery at any subsequent date. They were not bound to make further denial. If the sale was on some other date, the defendants were not liable under the statement filed. At a trial no recovery could be had against them without an amendment, and to permit one here with the record in its present state would subject them to the peril of another action for the price of the same goods. There may be a fair presumption that, in the course of business, the delivery was on a date following the sale; but this is expressly denied, and there is no presumption that the delivery was before the sale. The affidavit of defense, while not full, is quite as full as the statement of claim, and squarely meets all its allegations and all inferences fairly to be drawn from it which impose liability. The judgment is reversed, with a procedendo.

END OF CASES IN VOL. 31.

Digitized by Google

Digitized by Google

INDEX.

Abatement.

Of nuisance, see "Nuisance."
Plea in, see "Pleading."

ABATEMENT AND REVIVAL.

A bill for partition praying for division of the proceeds in case of sale, but not for the determination of the rights of one C., interested therein, is not a bar to a bill by C. to determine such rights.—Dodge v. Hogan (R. I.) 1059.

A garnishment process abates on the death of the debtor, after process has been served on the garnishee.—Reynolds v. Howell (Del. Err. & App.) 875.

Accident.

See "Negligence."
At crossing, see "Railroad Companies."

ACCORD AND SATISFACTION.

See, also, "Payment."

An agreement with the maker's widow that certain sums paid by the maker and by the widow after his death should be in full settlement constitutes a valid satisfaction.—Beck v. Snyder (Pa.) 555.

Accounting.

Between partners, see "Partnership."
By executors and administrators, see "Executors and Administrators."
In equity, see "Equity."

ACKNOWLEDGMENT.

To toll statute of limitations, see "Limitation of Actions."

A grantor of a deed signed and delivered may be compelled by arrest to acknowledge it.—Sullivan v. Chambers (R. I.) 167.

Right of notary public to correct his certificate of acknowledgment.—Hanson v. Cochran (Del. Super.) 880.

ACTION.

See, also, "Abatement and Revival"; "Limitation of Actions"; "Parties"; "Pleading"; "Practice in Civil Cases."
By and against administrator, see "Executors and Administrators."
On judgment, see "Judgment."
On note, see "Negotiable Instruments."
On policy, see "Insurance."
Particular actions, see "Action on the Case"; "Assumpsit"; "Creditors' Bill"; "Divorce"; "Ejectment"; "Injunction"; "Malicious Prosecution"; "Mandamus"; "Partition"; "Quieting Title—Removal of Cloud"; "Quo Warranto"; "Replevin"; "Specific Performance"; "Trespass."

The mere fact that plaintiff's statement recites a contract does not render the action one of contract.—Dungan v. Read (Pa.) 639.

Question whether the statement by plaintiff averring a trespass by defendant was in contract, owing to a recital of the contract whereby defendant became possessed of the property which was injured.—Dungan v. Read (Pa.) 639.

ACTION ON THE CASE.

An action on the case *held* proper against one who entered plaintiff's property with his consent, but wrongfully removed and destroyed the furnace therein.—Vogel v. McAuliffe (R. I.) 1.

Acts.

See "Statutes."

ADJOINING LANDOWNERS.

See, also, "Boundaries"; "Party Walls."

Where a landowner in constructing a wall, projects it, for an inch under ground, onto an adjoining lot, he may be compelled to remove it.—Pile v. Pedrick (Pa.) 647.

Administration.

See "Executors and Administrators."

Admissions.

As evidence, see "Evidence."

Advancement.

See "Descent and Distribution."

ADVERSE POSSESSION.

Presumption of grant of land leased for railroad purposes from possession thereof for 21 years by the railroad company and its assigns, who used it for purposes not contemplated in the lease.—Kugel v. Painter (Pa.) 338.

Admissibility of certain evidence as to deeds made to defendant while in possession in common with her mother, under whom she claimed, as bearing on the exclusiveness of the mother's possession.—Collins v. Lynch (Pa.) 921.

Admissibility of parol evidence, on issue as to adverse possession of a spring, to show that defendant's grantors informed him that their use of the spring was merely under a license.—Coffrin v. Cole (Vt.) 313.

Propriety of certain charges in an action of ejectment where defendant claimed by adverse possession on the part of decedent, under whom she claimed.—Collins v. Lynch (Pa.) 921.

AFFIDAVIT.

For attachment, see "Attachment."
Of defense, see "Pleading."

The jurat to an affidavit need not be at the foot thereof.—Hanson v. Cochran (Del. Super.) 880.

Agency.

See "Principal and Agent."

Digitized by Google

Alcoholic Liquors.

See "Intoxicating Liquors."

Alimony.

See "Divorce."

ALTERATION OF INSTRUMENTS.

Where an official affixes a seal to his signature after the bond had been signed by his sureties they are released.—State v. Smith (Del. Err. & App.) 516.

Amendment.

Of pleading, see "Pleading."

ANIMALS.

Shipments by carrier, see "Carriers."

Where defendant's cattle break through plaintiff's fence, he can recover for entries made by them until he has had a reasonable time to repair the break.—Watkins v. Rist (Vt.) 413.

Question as to the application of Laws 1873, c. 452, and Laws 1875, c. 65, in regard to impounding live stock running on a highway.—Spruance v. Truax (Del. Err. & App.) 589.

One who harbors a dog in the habit of attacking passing teams is liable for injuries caused by the dog's attack, though plaintiff knew of the dog's habit, and was not cautious in driving by defendant's house.—Jones v. Carey (Del. Super.) 976.

APPEAL.

See, also, "Certiorari"; "Error, Writ of"; "Exceptions, Bill of"; "New Trial."
Costs on appeal, see "Costs."
In criminal cases, see "Criminal Law."

Proceedings to review the action of an officer of registration, under Act 1890, c. 573, § 21, must show on their face that everything was done required by law as the basis of the court's authority.—Cox v. Bryan (Md.) 852.

An appeal does not lie on the ground that evidence does not support the facts found, but supports a different state of facts, which the court found were not proven. — Curtis v. Bradley (Conn.) 591.

Under the practice act, the circuit court must settle all disputed facts before it can certify a case as one of doubt and difficulty to the supreme court.—Destefano v. Calandriello (N. J. Sup.) 385.

Appealable judgments and orders.

The appointment of an administrator de bonis non may be reviewed on appeal. — Emsley v. Young (R. I.) 692.

No appeal lies from a judgment by a justice on confession of defendant.—Gum v. Adams (Del. Super.) 895.

No appeal lies from an order opening confirmation of an executor's account.—In re Long's Estate (Pa.) 1093; Appeal of Barner, Id.

Requisites.

A ruling cannot be considered, where no exception was taken.—Mixel v. Betz (Pa.) 1007.

Exceptions need not set out all the grounds on which they are based.—Scanlon v. Walshe (Md.) 498.

Where, under Act June 13, 1836, the decree approved the report of viewers that a bridge was necessary and too expensive for a township, and referred the matter to the county commissioners, an appeal from the decree was premature before the commissioners had acted in the matter. — In re Youghiogheny River County Bridge (Pa.) 1096; Appeal of Youghiogheny Bridge Co., Id.

Assignments of error.

An assignment of error in general terms will not be considered.—Carroll v. Weaver (Conn.) 489.

Record.

A copy of the judgment must be returned with the writ of error.—Mershon v. Castree (N. J. Sup.) 602.

Where the statement of evidence has not been presented to or allowed by the trial justice, it forms no part of the record on appeal.—Denison v. Foster (R. I.) 894.

An appeal will not be dismissed for failure to file the transcript in time, when this was due to the negligence of the clerk of the court.—Hall v. Tennallytown & R. Ry. Co. (Md.) 809.

The court, by agreement of counsel, cannot allow a petition for appeal to be filed nunc pro tunc after the time for filing allowed by statute has expired.—Cox v. Bryan (Md.) 447.

Appeals from inferior courts.

The failure of plaintiff to file an appeal from a justice in the county court in due time is waived by an entry by defendant of a general appearance without objection.—Mack v. Lewis (Vt.) 888.

On appeal from a justice in an action of trespass, the cause may be continued in the form of trespass or case, under Rev. Code, p. 648, § 1.—Conner v. Reardon (Del. Super.) 878.

A declaration in an action in the probate court may be amended, on appeal to the county court.—Leonard's Adm'r v. Leonard's Ex'r (Vt.) 783.

On appeal from a justice of the peace, a corporation, under Act March 15, 1847, must give bail absolute for the payment of the debt, interest, and costs.—Young v. Colvin (Pa.) 1094.

Under Act March 24, 1892, on appeal from the district court the court of common pleas shall try the case de novo either with or without a jury.—Valentino v. Bird (N. J. Sup.) 606.

Review.

In an action by the trustee of an insolvent for a debt due the latter, error in overruling the insolvent's demurrer to defendant's answer cannot avail the trustee on an appeal by him alone.—Carroll v. Weaver (Conn.) 489.

On appeal under Acts 1893, p. 318, § 6, errors claimed in the conclusions of fact can be considered only with reference to claimed errors of law assigned upon the record, for the sole purpose of completing the record.—Carroll v. Weaver (Conn.) 489.

When the relation of the claimed error in the conclusion of facts to the error of law assigned in the record is obscure, the finding will not be corrected.—Carroll v. Weaver (Conn.) 489.

Error claimed in the findings of fact can be considered by the supreme court of errors only in connection with claimed errors of law assigned upon the record.—Sargent & Co. v. New Haven Steamboat Co. (Conn.) 543.

Where judgment is taken against a defendant for want of an affidavit of defense, he cannot question the jurisdiction of the court over receivers appointed by the federal courts, and made garnishees.—Conshohocken Tube Co. v. Iron Car Equipment Co. (Pa.) 934.

A refusal to grant a new trial will not be reviewed.—Mixel v. Betz (Pa.) 1007.

Where the court corrected an erroneous statement of fact in the charge before the jury re-

Digitized by Google

tired, the error was harmless.—Sommer v. Gilmore (Pa.) 884.

Improper evidence admitted over exceptions is not cured by a charge to disregard it.—Norton's Adm'r v. Perkins (Vt.) 148.

—— Weight and sufficiency of evidence.

A finding of mental incapacity will not be disturbed, where there was evidence to support it.—Kedward v. Campbell (Pa.) 114.

A finding of fact that depositions, objected to as being copies, are the originals, will not be disturbed on appeal.—Trumbull v. Hewitt (Conn.) 492.

In review, the facts found in the court below will be taken as true, whether found by the court or by a jury, if there is any evidence to sustain the finding.—Doolittle v. Willet (N. J. Err. & App.) 385.

A decree of the orphans' court will not be disturbed where the testimony fairly sustains the findings.—In re Livingood's Estate (Pa.) 550.

—— Matters not apparent of record.

It cannot be said that rebutting evidence adduced by plaintiffs was not proper in rebuttal, where defendant's evidence to which it was directed, is not in the record. — Swerdferger v. Hopkins (Vt.) 153.

An instruction will not be *held* misleading in the absence of the testimony from the record.—Bradley v. Vernon (Pa.) 330.

Effect of appeal.

Where an appeal does not operate as a supersedeas, the proper remedy against any threatened injury pending appeal is an application to the appellate court for a special order of supersedeas.—Haught v. Irwin (Pa.) 260.

An appeal from an order appointing a temporary receiver as an adjunct to a preliminary injunction does not authorize defendant to refuse to deliver his books to the receiver.—Haught v. Irwin (Pa.) 260.

Decision.

The failure to dispose of a motion which is not pressed is no ground for reversal.—Commonwealth v. Ramsay (Pa.) 345.

Where defendant paid a judgment pending appeal therefrom, and it was reversed, it was proper to award him a writ of restitution.—Benscoter v. Long (Pa.) 863.

Application.

Of payments, see "Payment."

Appointment.

Of administrator, see "Executors and Administrators."
Of receiver, see "Receivers."

ARBITRATION AND AWARD.

A party is not bound by an award where the arbitrators exceeded their authority against his protest.—Leslie v. Leslie (N. J. Err. & App.) 724.

Evidence of secret offers made by both parties to an arbitration to purchase the common property is not admissible, in an action to set aside the award, to show an agreement to a change in the original submission.—Leslie v. Leslie (N. J. Err. & App.) 724.

Where, in an action to set aside an award, it appears that the arbitrators considered matters not submitted to them, the burden is on defendant to show that plaintiff, after seeing the award, consented to its execution.—Leslie v. Leslie (N. J. Err. & App.) 724.

Parties to an arbitration cannot, in a suit on the award, raise questions which might have been presented to the arbitrators. — Gowen v. Pierson (Pa.) 83.

Argument of Counsel.

See "Criminal Law"; "Trial."

ARREST.

Execution against the person, see "Execution."

Where a conductor telegraphs ahead for an officer, who, on the arrival of the train, arrests, on the conductor's complaint, a passenger for disorderly conduct, the arrest is lawful, though without a warrant.—Baltimore & O. R. Co. v. Cain (Md.) 801.

Sufficiency of writ directing the imprisonment of one until he shall have paid alimony and a fine, without stating the amount of the alimony. —Jernee v. Jernee (N. J. Ch.) 716.

ARSON.

Propriety of charge reciting that there seemed to be no controversy that defendant, before the burning, was anxious to sell the property.—State v. Gorham (Vt.) 845.

Propriety of charge, on prosecution for arson, stating that if the jury found the accused guilty of burning certain buildings they would probably also find him guilty of having done it to defraud an insurance company, as charged.—State v. Gorham (Vt.) 845.

Assessment.

By association, see "Associations."
For highway purposes, see "Highways."
Of benefits from public improvements, see "Municipal Corporations."

Assignment.

See "Assignment for Benefit of Creditors."
Of errors, see "Appeal."

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See, also, "Insolvency."
By corporation, see "Corporations."

An ascertainment of the amount or priority of liens on the property should be made before a sale thereof by an assignee.—In re Handy's Estate (Pa.) 983; Appeal of Larned, Id.

Applicability of Act Feb. 17, 1876, providing for the sale, by an assignee for creditors, of property which is so incumbered that it is difficult to determine whether it can be sold for enough to pay the incumbrances.—In re Handy's Estate (Pa.) 983; Appeal of Larned, Id.

Question whether money given by a father to his son was an advancement or a loan, which, being charged by will on the son's share in the father's estate, constituted an incumbrance, within the meaning of Act Feb. 17, 1876, providing for sales of incumbered property by assignees for the benefit of creditors. — In re Handy's Estate (Pa.) 983; Appeal of Larned, Id.

Right of court, under Act Feb. 17, 1876, in ordering the sale by the assignee of real estate, also to order the assignor's interest in the personalty of his father's estate to be sold at the same time, it being impossible to separate them. —In re Handy's Estate (Pa.) 983; Appeal of Larned, Id.

Digitized by Google

An assignee is not liable for loss arising from delay in the sale of the assets, he having exercised what seemed like good business discretion, considering the condition of the market.—In re Schofield's Estate (Pa.) 742; Appeal of Webb, Id.

ASSOCIATIONS.

See, also, "Benevolent Societies"; "Corporations."

Where the articles of an association provide for notice of assessment to be published in two cities, a forfeiture, where notice is published in only one city, is void.—Morris v. Metalline Land Co. of Lake Superior (Pa.) 114.

ASSUMPSIT.

Right to recover on the common counts for money loaned when the written contract under which the loan was made is not shown to have been delivered.—Badart v. Foulon (Md.) 513.

The relationship of brother and sister does not negative the implied contract to pay for board furnished.—Stafford v. Devereux (Pa.) 87.

Where the purchaser of clay, to be removed from the beds by him, is prevented by the owner from taking the same after the surface earth has been removed, the cost of removing such surface earth cannot be recovered in assumpsit, but only in an action on the contract.—Ryan v. Remmey (N. J. Sup.) 766.

Action against stakeholder, for money placed in his hands to be delivered on certain conditions, which was prematurely brought, the conditions not having been complied with.—Fidelity Insurance, Trust & Safe-Deposit Co. v. Commonwealth Title Insurance & Trust Co. (Pa.) 344.

A count in the common form, with exact dates, amounts, and particulars of the contract, is not defective as being more formal and elaborate than required by the act of 1875.—Smith, Kline & French Co. v. Smith (Pa.) 343.

Sufficiency of affidavit of defense in an action on an account stated by an agricultural company against the treasurer of another company, which acted with it in holding a joint fair, the proceeds of which were received by such treasurer for both companies.—Pennsylvania State Agricultural Soc. v. Jermyn (Pa.) 660.

Where the evidence in support of a claim under a contract for taking care of a decedent consisted of loose declarations as to compensation, a will was admissible to show that plaintiff took a bequest thereunder.—Hughes v. Keichline (Pa.) 887.

Assumption of Risks.

See "Master and Servant."

ATTACHMENT.

See, also, "Execution"; "Exemptions"; "Garnishment."

Property covered by a bill of sale intended as a mortgage is in the hands of the vendor subject to attachment.—Good v. Rogers (R. I.) 264.

Mere inconvenience in the service of summons or other process does not justify the issue of an attachment against one as a nonresident debtor.—Stafford v. Mills (N. J. Sup.) 1023.

An affidavit against a nonresident, stating that defendant, "not being a citizen of the state of Maryland, and not residing therein, is indebted," etc., is sufficient, under Code, art. 9, § 4.—Gunby v. Porter (Md.) 324.

The failure of the officer to file with the clerk of the county the forthcoming bond, under Pub. St. c. 207, § 18, is no defense in an action thereon.—Wilson v. Donnelly (R. I.) 966.

Where defendant gives a forthcoming bond, the officer is the proper person to bring suit thereon.—Wilson v. Donnelly (R. I.) 966.

One attaching property conditionally sold as the property of the purchaser acquires no lien.—Cleveland Mach. Works v. Lang (N. H.) 20.

The time at which the writ of attachment is issued and served is the time as of which the nonresidence of the debtor is to be determined.—Stafford v. Mills (N. J. Sup.) 1023.

ATTORNEY AND CLIENT.

Arguments of counsel, see "Criminal Law"; "Trial."
Powers of attorney, see "Powers."
Privileged communications, see "Witness."

Attorneys may charge their clients reasonable fees for services rendered, without an express contract for a specific sum.—Mundy v. Strong (N. J. Err. & App.) 611.

Attorneys of record will not be required, by a summary proceeding, to turn over funds collected, to their client, in the absence of dishonest or oppressive conduct.—Mundy v. Strong (N. J. Err. & App.) 611.

Where an attorney, who, as executor, is plaintiff in a suit, approaches the other side fraudulently pretending to know certain facts, and offering to sell the knowledge to induce a settlement, he will be disbarred.—In re Enright (Vt.) 786.

Evidence examined, and *held* to show such misconduct as attorney as to justify disbarment.—In re Wartman (N. J. Sup.) 1040.

Award.

See "Arbitration and Award."

Bailment.

See "Carriers"; "Pledge."

Bankruptcy.

See "Assignment for Benefit of Creditors"; "Insolvency."

Banks and Banking.

Taxation of banks, see "Constitutional Law."

BENEVOLENT SOCIETIES.

A person is eligible as a physician for a benevolent society, though not a member thereof, none of its by-laws requiring that he should be.—State v. Boucher (R. I.) 1058.

Bequest.

See "Wills."

Best and Secondary Evidence.

See "Evidence."

Bicycles.

Toll for using highway, see "Turnpikes and Toll Roads."

Bills and Notes.

See "Negotiable Instruments."

Bona Fide Purchasers.

See "Sale."

Digitized by Google

Bonds.

Alteration, see "Alteration of Instruments."
Attachment bonds, see "Attachment."

Boroughs.

See "Municipal Corporations."

BOUNDARIES.

Of city, see "Municipal Corporations."

Right to fix the boundary of a lot by determination of a boundary of an adjoining lot as claimed and occupied by the owners thereof at the time of the conveyance of the previous lot.—Smith v. Horn (Pa.) 1078.

Admissibility on issue as to boundaries, under claim of adverse possession, of evidence that plaintiff's predecessor in title claimed the boundaries asserted by him.—Swerdferger v. Hopkins (Vt.) 153.

Right of one claiming by adverse possession on an issue as to the location of a boundary to show the understanding of his predecessor in title as to the boundary.—Swerdferger v. Hopkins (Vt.) 153.

Right of plaintiffs, on an issue as to boundary, to show, by cross-examination of defendant, that defendant knew that they had claimed title up to a certain line.—Swerdferger v. Hopkins (Vt.) 153.

BRIDGES.

Used by street railroad, see "Horse and Street Railroads."

A board of chosen freeholders of a county is, under Act March 3, 1848, liable for a death caused by their failure to repair a bridge.—Murphy v. Board of Chosen Freeholders of Mercer County (N. J. Sup.) 229.

Brokers.

See "Factors and Brokers."

Building Contracts.

See "Contracts."

Cancellation.

Of contracts, see "Equity."

CARRIERS.

See, also, "Horse and Street Railroads"; "Railroad Companies."

Of goods.

That the loss of a car of potatoes was caused by delay is sufficiently shown where three experienced witnesses testify that the decay had commenced within two or three days.—Ruppel v. Allegheny Valley Ry. Co. (Pa.) 478.

Where a carrier accepted freight for transportation to a point beyond its line, and charged a through rate, the measure of damages for loss through delay caused by negligence on its line is the market value of the goods at the point of destination.—Ruppel v. Allegheny Valley Ry. Co. (Pa.) 478.

Where delay in transportation of a car was caused by a hot box, it was for the jury to determine whether the defect could have been discovered when defendant received the car from a connecting road.—Ruppel v. Allegheny Valley Ry. Co. (Pa.) 478.

A provision in a bill of lading that the lose shall be computed at the value of the property at the place of shipment, unless a lower value has been agreed upon, is void in case of loss caused by negligence.—Ruppel v. Allegheny Valley Ry. Co. (Pa.) 478.

In trespass for negligence in carrying stock, the burden of showing a limitation of the common-law liability is on defendant.—Schaeffer v. Philadelphia & R. R. Co. (Pa.) 1088.

Injuries to stock while on the cars from causes showing negligence are proof of want of ordinary care in transportation.—Schaeffer v. Philadelphia & R. R. Co. (Pa.) 1088.

Of passengers.

Where a boy 10 years old enters a street car on the invitation of its conductor, and is injured, the company is liable.—New Jersey Traction Co. v. Danbech (N. J. Sup.) 1038.

Where a passenger on a street car makes a timely request for a transfer, but it is not given to him until just as he is leaving the car, he is not bound by a condition requiring him to see that it is correct.—Laird v. Pittsburgh Traction Co. (Pa.) 51.

Where a transfer check, given a passenger on leaving a street car, has two punches, one correctly indicating the hour, and the other showing it to be two hours old, the company is liable if the conductor ejects the passenger therefor.—Laird v. Pittsburgh Traction Co. (Pa.) 51.

Evidence that a passenger got on a car on the conductor's statement that there was room inside, that when he got on the platform he could not get in the door, and that he was prevented from leaving by the crowd, is sufficient to warrant a finding of negligence on the part of defendant.—Dennis v. Pittsburgh & C. S. R. Co. (Pa.) 52.

Erroneous instruction, in action for injuries received by passenger while alighting from a moving car, as to company's duty to control the car's speed so as to insure the passenger's safety.—New Jersey Traction Co. v. Gardner (N. J. Err. & App.) 893.

Where a passenger leaves a street car in obedience to the order of a policeman called by a conductor to remove him, he is not restricted to damages for the trouble and additional expense necessary to complete his journey.—Laird v. Pittsburgh Traction Co. (Pa.) 51.

When an injury to a passenger results solely from the crowded condition of the car, the burden of proof is on the passenger to show the injuries due to defendant's negligence.—Dennis v. Pittsburgh & C. S. R. Co. (Pa.) 52.

Where a passenger is injured, the burden to remove the presumption of negligence is on the carrier.—Dampman v. Pennsylvania R. Co. (Pa.) 244.

Sufficiency of evidence to sustain a finding that a passenger on a street car, riding on the footboard, did not hear the conductor's warning to watch out for trolley poles.—Elliott v. Newport St. Ry. Co. (R. I.) 694.

Duty of one riding on the front of an electric street car to listen for warnings by the conductor to watch out for trolley poles.—Elliott v. Newport St. Ry. Co. (R. I.) 694.

CERTIORARI.

The dissolution of an attachment issued under Act 1869 cannot be reviewed on certiorari.—Elk County Bank v. Ridgway Bank (Pa.) 1007.

Certiorari will lie to review the action of a city board in purchasing land in excess of the authority conferred by the council.—Jackson v. City of Newark (N. J. Ch.) 233.

Digitized by Google

The action of a magistrate in issuing a search warrant upon complaint will not be reviewed by certiorari.—Farrow v. Springer (N. J. Sup.) 215.

Where one of two judgment debtors wishes to prosecute a certiorari to review a judgment on the ground that process was not served, he must summon the other defendant, and, if he refuses to join, procure an order permitting him to prosecute the writ alone.—Hulick v. Casler (N. J. Sup.) 223.

A writ of certiorari should not be quashed because directed to persons interested, to whom no command was addressed.—Hutchinson v. Woodruff (N. J. Sup.) 224.

Return by petitioners for an election, to whom no command was addressed in the writ, is irregular, and not to be noticed. — Hutchinson v. Woodruff (N. J. Sup.) 224.

On certiorari to review an election contest the conclusions on the merits cannot be reviewed.—Commonwealth v. Ramsay (Pa.) 345.

Certiorari brings up for review only the record proper, of which the evidence forms no part, and the return need not set it out.—Smith v. Town Council of the Town of Burrillville (R. I.) 578.

On certiorari to review a contract awarded by a city board, the court will not weigh conflicting evidence on which the discretion of the board was exercised.—McGovern v. Board of Public Works of City of Trenton (N. J. Sup.) 613.

On certiorari to review the decision of a justice of the peace on a motion to quash an attachment, a rule may be granted to take affidavits of the facts upon which the justice decided the case.—Stafford v. Mills (N. J. Sup.) 1023.

CHAMPERTY AND MAINTENANCE.

Champertous agreement by one to collect certain notes at his own expense, and divide the proceeds.—Hamilton v. Gray (Vt.) 315.

Chancery.

See "Equity."

CHARITIES.

A devise for the benefit of the poor "of E. Township, W. county, Pa.," is a charitable use.—Trim v. Brightman (Pa.) 1071.

A gift for the purpose of building residences for the laboring classes, to be let to them for rent, and to be improved so as to improve the condition of the youth of the city, *held* to create a charitable trust.—Webster v. Wiggin (R. I.) 824.

A provision for the payment of a fund for salaries of additional teachers in the public schools, or for the education of children residing in certain tenements, *held* to create a charity.—Webster v. Wiggin (R. I.) 824.

A devise for the benefit of the poor to be managed by the officers of the poor in a certain county vests an estate in such overseers, though their correct corporate name is not given.—Trim v. Brightman (Pa.) 1071.

A bequest for the relief of the poor of a town is not void for uncertainty.—Sheldon v. Town of Stockbridge (Vt.) 414.

A bequest to a town to use the income for the improvement of a cemetery is not invalid because it requires the town to keep the amount intact for all time.—Sheldon v. Town of Stockbridge (Vt.) 414.

A corporation whose charter limits the amount of property it can hold can only take so much of the property devised subject to a life estate as would, with the property owned at testator's death, make up the maximum amount.—Coggeshall v. Home for Friendless Children (R. I.) 694.

An amendment to the charter of a corporation, after testator's death, increasing the amount of property it can hold, will not enable it to take any balance over the amount allowed at testator's death.—Coggeshall v. Home for Friendless Children (R. I.) 694.

CHATTEL MORTGAGES.

A description of the mortgaged property as "two two year old heifers" is too indefinite where neither the possession nor location of the property is stated in the mortgage.—Huse v. Estabrooks (Vt.) 293.

Sufficiency of a chattel mortgage securing a collateral agreement to show the consideration for which it was given as against creditors of the mortgagor. — Horowitz v. Weidner (N. J. Ch.) 771.

A chattel mortgage on goods conditionally bought is superior to the lien of the contract of sale, when not recorded, under Act 1889, p. 421.—Knowles Loom Works v. Vacher (N. J. Sup.) 306.

Under Act 1875, a chattel mortgage lien attaches, if the mortgage is filed for record within 10 days, as of the date of its execution.—Hanson v. Cochran (Del. Super.) 880.

Where there is no stipulation to the contrary, the mortgagee is entitled to immediate possession.—Good v. Rogers (R. I.) 264.

Time within which the administrator of a deceased mortgagor may redeem.—Murphy v. Eddy (R. I.) 435.

Checks.

See "Negotiable Instruments."

Civil Damage Laws.

See "Intoxicating Liquors."

Commerce.

Regulation of, see "Constitutional Law."

Commission.

Of broker, see "Factors and Brokers."

Common Carrier.

See "Carriers."

Compensation.

For land taken for public use, see "Eminent Domain."
Of attorney, see "Attorney and Client."
Of broker, see "Factors and Brokers."
Of county officers, see "Counties."
Of executors, see "Executors and Administrators."
Of justices, see "Justices of the Peace."

Compromise.

See "Accord and Satisfaction"; "Payment."

Condemnation Proceedings.

See "Eminent Domain."

Condition.

Of policy, see "Insurance."

Digitized by Google

Conditional Sales.

See "Sale."
What law governs contract, see "Conflict of Laws."

Confession.

As evidence, see "Criminal Law."

CONFLICT OF LAWS.

Where personal property is sold in Massachusetts conditionally, under a contract valid in Massachusetts, and is removed into New Hampshire, it is not within the provisions of Laws 1885, c. 30, requiring a memorandum and record of the lien, though when sold it was understood it was to be taken to New Hampshire.—Cleveland Mach. Works v. Lang (N. H.) 20.

Notes of a firm indorsed by the wife of a member in New Jersey, and fraudulently misappropriated in payment of the debt of one of the firm in New York, are, as to the rights of the parties, governed by the laws of New York.—Frank v. Morehead (N. J. Ch.) 1016.

Consideration.

On note, see "Negotiable Instruments."

CONSTITUTIONAL LAW.

Titles of acts, see "Statutes."

Gen. St. § 91, authorizing grand jurors to require a justice to commit to jail witnesses refusing to answer, is constitutional.—In re Clark (Conn.) 522.

Laws 1856, c. 1911, authorizing the union of two railroad companies, and authorizing the united company to discontinue such portions of the road as the directors should deem necessary, is not unconstitutional, as being a delegation of legislative power.—Northern R. R. v. Manchester & N. W. R. R. (N. H.) 17.

The supplement to the crimes act of 1893 directing that on indictment for murder, if defendant plead guilty, a plea of not guilty shall be substituted, is constitutional.—Genz v. State (N. J. Sup.) 1037.

Acts 1894, c. 274, relating to the treatment of habitual drunkards, is constitutional.—City of Baltimore v. Keeley Institute of Maryland (Md.) 437.

Const. U. S. Amend. 14, does not control the power of a state to abridge the privileges of its own citizens.—Short v. State (Md.) 322.

Acts 1892, c. 295, authorizing the county commissioners to issue bonds to pay a subscription to the capital stock of a railroad company, is unconstitutional.—Baltimore & E. S. R. Co. v. Spring (Md.) 208.

Permission given by the city to construct a bulkhead, acted upon by a riparian owner, *held* to vest certain rights in the bulkhead as constructed, which could not be divested by the city.—Classen v. Chesapeake Guano Co. of Baltimore City (Md.) 808.

Act 1894, c. 620, directing the authorities of a city to issue bonds for a public school building, is not unconstitutional as beyond the power of the legislature, nor as being a special act, nor as constituting a taking of private property without due process of law.—Revell v. City of Annapolis (Md.) 695.

A corporation is not a citizen, within the provision of the United States constitution securing to a citizen the rights and immunities granted to the citizens of the several states.—State v. Delaware & A. Telegraph & Telephone Co. (Del. Super.) 714.

Local and special laws.

School laws are not special or local because the children of one district are given a higher grade of education than those in another.—Landis v. Ashworth (N. J. Sup.) 1017.

Act 1893 (P. L. p. 280), providing for the assessment of taxes on official mortgages to the beneficiary, is unconstitutional.—Cox v. Truitt (N. J. Sup.) 168.

Code, art. 24, § 9, requiring security for costs from nonresident plaintiffs, is not repugnant to Const. U. S. art. 4, § 2, giving the citizens of each state the privileges of citizens of the several states.—Holt v. Tennallytown & R. Ry. Co. (Md.) 809.

Regulation of commerce.

City ordinances imposing an annual charge on the poles and wires of a telegraph company within its limits are not regulations of interstate commerce.—City of Philadelphia v. American Union Tel. Co. (Pa.) 628.

The tax imposed by the corporation tax act on foreign pipe-line companies transporting oil from points in Pennsylvania and New York to points in New Jersey is not an interference with interstate commerce.—Tide Water Pipe Co. v. State Board of Assessors (N. J. Sup.) 220.

Code, art. 72, imposing a license on packers of oysters for sale or transportation, does not seek to regulate interstate commerce.—State v. Applegarth (Md.) 961.

Taxation.

Act March 31, 1876, providing that fees of county officers shall belong to the several counties, when they contain a population of over 150,000, is constitutional.—Commonwealth v. Mann (Pa.) 1003.

Act June 8, 1891, providing for taxation of the capital stock of banks, is constitutional.—Commonwealth v. Merchants' & Manufacturers' Nat. Bank (Pa.) 1065.

The imposition of a tax on oyster packers, in proportion to the amount of oysters packed by them, does not violate the provision of the bill of rights requiring equality and uniformity in taxation.—State v. Applegarth (Md.) 961.

Compulsory labor, imposed for the purpose of keeping the roads in repair, with the privilege of providing a substitute or paying a stipulated sum, is not a poll tax prohibited by the constitution.—Short v. State (Md.) 322.

CONTEMPT.

On appeal from an order attaching defendant for contempt, the only inquiry as to the jurisdiction of the lower court is whether prima facie it had jurisdiction.—Haught v. Irwin (Pa.) 260.

Contest.

Of will, see "Wills."

CONTRACTS.

See, also, "Accord and Satisfaction"; "Arbitration and Award"; "Assignment for Benefit of Creditors"; "Carriers"; "Chattel Mortgages"; "Covenants"; "Deed"; "Factors and Brokers"; "Fraudulent Conveyances"; "Insurance"; "Landlord and Tenant"; "License"; "Master and Servant"; "Mortgages"; "Negotiable Instruments"; "Orders"; "Partnership"; "Pledge"; "Sale"; "Specific Performance"; "Vendor and Purchaser."

Cancellation, see "Equity."
Damages for breach, see "Damages."
Of city, see "Municipal Corporations."
Of corporations, see "Corporations."
Of married woman, see "Husband and Wife."
Reformation, see "Equity."

Digitized by Google

Where plaintiff for several years dyed clothing for defendant, a notice that he received goods only on condition that they were subject to a general lien for the dyeing, and also for the balance of any former amount due, printed on most of the orders written by defendant, will be considered a part of a contract, in the absence of any denial by defendant that such notice was read by him or his employés.—Firth v. Hamill (Pa.) 676.

Preliminary negotiations are merged in a contract of sale.—Badart v. Foulon (Md.) 513.

Where a contract is in a foreign language it is for the jury to ascertain the meaning of the terms from the evidence of persons skilled in the language.—Badart v. Foulon (Md.) 513.

A contract for furnishing water construed.—Scranton Gas & Water Co. v. Lackawanna Iron & Coal Co. (Pa.) 484.

To explain the meaning of a contract written in a foreign language, the original and translations are admissible.—Badart v. Foulon (Md.) 513.

Contract construed, and *held* to sustain the claims contended for by plaintiff.—Matchette v. Colburn (Pa.) 74.

Under a contract to deliver certain corporate shares on completion of certain subscriptions to the securities of the company, the shares are not demandable if the subscriptions are not completed.—In re Becker's Estate (Pa.) 95; Appeal of Kuehne, Id.

Rules for the general management of a connecting line between railroads considered, and *held* to constitute a contract subject to modification and to the right of revocation.—Philadelphia & R. R. Co. v. River Front R. Co. (Pa.) 1098.

Propriety of instructions in an action on a building contract causing the jury to find fraud in withholding the certificate of the architect, though there were material variations from the contract, if the jury found that such variations under the circumstances did not afford a substantial reason for withholding the certificate.—Bradner v. Roffsell (N. J. Err. & App.) 387.

Where plaintiffs contracted to furnish a monument according to a certain design, it is for the court to say whether the contract was complied with.—Cutler v. Dix (Vt.) 780.

Evidence examined, and *held* insufficient to show modification of the contract sued on.—Wyckoff v. Ferree (Pa.) 1101.

CONTRIBUTION.

The question of contribution under a joint decree against several defendants may be settled in the same suit.—Hickey v. Dole (N. H.) 900.

Contributory Negligence.

See "Negligence."

Of servant, see "Master and Servant."

CONVERSION.

Ground rent redeemable at any time by the grantee will be treated as realty till the grantee exercises his option.—In re White's Estate (Pa.) 569.

Where ground rent is paid to trustees by the tenant, acting on his legal right, there is no conversion to personalty, though the trustees had a discretion to sell.—In re Ingersoll's Estate (Pa.) 860; Appeal of Lindenberger, Id.

A will which gives trustees the power to convert real estate into personalty, without giving any direction to sell, does not work a conversion.—In re Ingersoll's Estate (Pa.) 860; Appeal of Lindenberger, Id.

Sales and purchases of land by trustees under power to sell any of the estate, and to purchase and sell real estate, work conversions from realty to personalty, and vice versa.—In re Ingersoll's Estate (Pa.) 859; Appeal of Maury, Id.

Conveyances.

See "Chattel Mortgages"; "Covenants"; "Deed"; "Fraudulent Conveyances"; "Mortgages"; "Sale"; "Vendor and Purchaser."

CORPORATIONS.

See, also, "Carriers"; "Horse and Street Railroads"; "Insurance"; "Municipal Corporations"; "Railroad Companies."

Service of process on, see "Writs."

Taxation, see "Taxation."

An act amendatory of an act establishing a corporation, and providing for its extension under the same name, does not create a new corporation.—Frostburg Min. Co. v. Cumberland & P. R. Co. (Md.) 698.

Power of corporation to administer a trust created by a will, the corporation having been formed for the purpose by the testator and others.—Webster v. Wiggin (R. I.) 824.

Mandamus will not issue to compel a domestic corporation to aid a foreign corporation to conduct its business in Delaware.—State v. Delaware & A. Telegraph & Telephone Co. (Del. Super.) 714.

Officers.

Liability of directors to creditors of the corporation for injury to the latter because of their mismanagement of the corporation.—Landis v. Sea Isle City Hotel Co. (N. J. Ch.) 755.

Liability of directors to stockholders for depreciation in the value of the stock caused by the directors' negligence and fraud.—Landis v. Sea Isle City Hotel Co. (N. J. Ch.) 755.

Where salaries are paid to the officers to deprive mortgagors of the corporation stock of their share of the profits, they must account for the whole salary.—Eaton v. Robinson (R. I.) 1058.

The action of a de facto board of directors in allotting stock to themselves to the prejudice of other stockholders is void, though they paid for the stock.—Shellenberger v. Patterson (Pa.) 943.

Question as to the right of the directors of a corporation as against a stockholder to rescind a resolution to distribute certain stock among the stockholders.—Dock v. Schlichter Jute Cordage Co. (Pa.) 656.

Contracts.

Where a mortgagee had no notice that one of the directors had ceased to be a stockholder when the mortgage was made, such director will be deemed a director de facto, and the mortgage valid.—Kuser v. Wright (N. J. Err. & App.) 397.

One taking a mortgage from a corporation is not bound to know that proper notice of a meeting authorizing the mortgage was given to all of the directors.—Kuser v. Wright (N. J. Err. & App.) 397.

Certain chattel mortgages made by two directors of a corporation in the absence of a third director, who had ceased to be a stockholder, *held* to be valid as between the mortgagees and the receiver of the corporation.—Kuser v. Wright (N. J. Err. & App.) 397.

A contract by the officers of an insolvent corporation transferring all its property to a successor, and accepting stock in the new corporation in payment, is void, in the absence of an

Digitized by Google

thority under the charter.—Byrne v. Schuyler Electric Manuf'g Co. (Conn.) 833.

Stock.

Subscription of a president of a corporation to untaken capital stock *held* valid though not made with the prescribed formalities.—Shellenberger v. Patterson (Pa.) 943.

When a subscriber for stock agrees to take only a specified number of shares, without expressly promising to pay assessments, he cannot be personally sued for an assessment until his shares have been sold to pay it.—Rockingham Bldg. Co. v. Burlingame (N. H.) 23; Same v. Brown, Id.

Members and stockholders.

A stockholder, by becoming a director and attempting to retrieve the loss caused the company by the gross negligence of former directors, does not waive his right of action against the latter for their misconduct.—Landis v. Sea Isle City Hotel Co. (N. J. Ch.) 755.

Right of stockholder to sue directors for gross negligence without first requiring the directors or the corporation to do so.—Landis v. Sea Isle City Hotel Co. (N. J. Ch.) 755.

A bill to enforce the statutory liability of stockholders cannot be maintained until after judgment obtained against the corporation and execution returned unsatisfied.—Allen v. Arnold (R. I.) 268.

Where a stockholder, on learning of an ultra vires contract, served a notice on the directors to sue to set it aside, and a like demand on the stockholders, he was not guilty of laches estopping him from suing to enjoin the same.—Byrne v. Schuyler Electric Manuf'g Co. (Conn.) 833.

The fact that a stockholder is not injured by an ultra vires contract of the corporation does not prevent his maintaining an action to enjoin its performance.—Byrne v. Schuyler Electric Manuf'g Co. (Conn.) 833.

Insolvency.

A corporation is insolvent when unable to pay its debts in the usual course of business.—Mish v. Main (Md.) 799.

Testimony of a notary that he had protested the paper of a corporation is admissible to show insolvency.—Mish v. Main (Md.) 799.

The board of directors of an insolvent corporation cannot secure a corporate debt to one of the directors.—Montgomery v. Phillips (N. J. Err. & App.) 622.

The receiver of an insolvent incorporation cannot successfully assail a corporate mortgage because it was executed for an antecedent debt.—Kuser v. Wright (N. J. Err. & App.) 397.

Question for jury whether, after an assignment, the treasurer of a corporation performed services for the corporation which made it liable to him.—Potts v. Rose Valley Mills (Pa.) 655.

Question for jury whether, in effecting a settlement for a corporation with its creditors, its treasurer acted merely to protect his interest as a stockholder.—Potts v. Rose Valley Mills (Pa.) 655.

In replevin by a receiver of a corporation for chattels alleged to have been fraudulently transferred to one of its directors, evidence of the consideration and that the property was removed from the corporate premises in the night is admissible.—Mish v. Main (Md.) 799.

COSTS.

Security by nonresidents, see "Constitutional Law."

Costs in equity are within the discretion of the chancellor.—Pile v. Pedrick (Pa.) 646.

Question whether the right to enforce a rule security for costs was waived by a delay of eight months.—Holt v. Tennallytown & R. Ry. Co. (Md.) 809.

A rule security for costs may be enforced against a nonresident plaintiff in a county to which the case is removed from the county in which the rule was laid.—Holt v. Tennallytown & R. Ry. Co. (Md.) 809.

Act March 20, 1857, as amended (Revision, p. 412), providing for a uniform rate of charges for legal advertising, and fixing such rate, is not repealed by Act April 14, 1891 (P. L. p. 416), fixing the amount certain municipal officers shall pay for official printing.—Daly v. Ely (N. J. Ch.) 396; Gnecco v. Gentelle, Id.; Ex parte Lehlbach, Id.; Ex parte Skinner, Id.

The rate of charges for legal printing allowable by a special master is fixed by Act March 20, 1857, as amended (Revision, p. 412), and not by Act April 14, 1891 (P. L. p. 416).—Daly v. Ely (N. J. Ch.) 396; Gnecco v. Gentelle, Id.; Ex parte Lehlbach, Id.; Ex parte Skinner, Id.

Where an appeal is taken for delay, 6 per cent. damages on the judgment, with an attorney's fee of $20 and costs of printing, will be awarded.—Pennypacker v. Dear (Pa.) 89.

Counterclaim.

See "Set-Off and Counterclaim."

COUNTIES.

Aid to railroads, see "Constitutional Law."

Act March 10, 1810, relating to fees of county officers, was repealed by Act March 31, 1876.—Commonwealth v. Mann (Pa.) 1003.

Act April 6, 1871, as amended by Act March 6, 1872, providing that the fees of the county officers of Allegheny county shall belong to that county, repealed Act March 10, 1810.—Commonwealth v. Allegheny County (Pa.) 1061.

An action of tort cannot be maintained against the commissioners of the levy court of a county.—Carter v. Wilds (Del. Super.) 715.

COURTS.

See, also, "Justices of the Peace."
Mandamus to, see "Mandamus."

The jurisdiction of the circuit court of Anne Arundel county extends to the channel of the Patapsco river.—Acton v. State (Md.) 419.

R. L. 1214–1217, conferring equity powers on courts having jurisdiction of actions of account, is confined to actions in which the legal title is involved.—Leonard's Adm'r v. Leonard's Ex'r (Vt.) 783.

Under Act July 7, 1885, courts of common pleas have jurisdiction of partition by the widow of an heir against the other heirs.—Palethorp v. Palethorp (Pa.) 917.

Jurisdiction of the court of common pleas to try de novo a case appealed from a district court on account of the absence of a state of the case settled by the district judge.—Feeney v. Rueger (N. J. Sup.) 217.

The common pleas division has no authority to review a ruling of the district court in overruling a demurrer.—Denison v. Foster (R. I.) 894.

The orphans' court has no power to confirm an allotment of land made by a widow to the children under an express power in a will to do so in her discretion.—In re Schwartz's Estate (Pa.) 1085.

The orphans' court cannot transmit to a court of law issues assailing as fraudulent parts of a

Digitized by Google

will and codicil not distinct and severable.—Fisher v. Boyce (Md.) 707.

The probate court has no jurisdiction over an equitable claim against a decedent's estate.—Leonard's Adm'r v. Leonard's Ex'r (Vt.) 783.

COVENANTS.

See, also, "Deed."

A lessee who is entitled. under a covenant of the lease, to purchase the leased premises on specified terms, may recover damages arising from the loss of his bargain by the wrongful refusal of the lessor to convey.—Congregation of Sons of Abraham v. Gerbert (N. J. Err. & App.) 383.

Question whether the failure of a grantor to perform a covenant to pave certain streets excuses the purchaser of a lot from compliance with his covenant to build on the lot.—McConaghy v. Pemberton (Pa.) 996.

Right of defendant, in an action for breach by the grantee in a deed of a covenant therein, to show that the land received in exchange for the deed was not worth what it was valued at at the time of the trade.—McConaghy v. Pemberton (Pa.) 996.

Coverture.

See "Husband and Wife."

Credibility.

Of witness, see "Witness."

CREDITORS' BILL.

A creditor of a decedent by judgment in another state is entitled to sue to reach moneys given by the debtor to his wife and children in fraud of the creditor.—Merchants' & Miners' Transp. Co. v. Borland (N. J. Ch.) 272.

CRIMINAL LAW.

See, also, "Arrest"; "Grand Jury"; "Indictment and Information"; "Jury"; "Witness."

Particular crimes, see "Arson"; "Disorderly Conduct"; "Extortion"; "False Pretenses"; "Homicide"; "Incest"; "Perjury."

Insanity produced by continued dissipation is a good defense.—State v. Harrigan (Del. O. & T.) 1052.

A motion to withdraw the plea of guilty, and substitute one of not guilty, is addressed to the discretion of the court.—Clark v. State (N. J. Sup.) 979.

One who, under false pretenses, obtains goods ordered through a salesman, may be tried in the county from which the goods were shipped.—Commonwealth v. Karpowski (Pa.) 572.

It is not error to allow the state to offer to call defendant's wife as a witness if defendant did not object.—Commonwealth v. Weber (Pa.) 481.

There was no error in permitting defendant, before indictment found, to be brought handcuffed into court in the presence of the grand jury.—Commonwealth v. Weber (Pa.) 481.

Propriety of statement by court, upon the jury reporting a disagreement, that the trial was expensive to the state, and that a decision would serve the defendant's interest.—State v. Gorham (Vt.) 845.

Right to consider, on a motion in arrest of judgment, a statement of facts agreed upon as showing the conduct of defendants for which they were indicted.—State v. Crusius (N. J. Sup.) 235.

Reception of evidence.

Admission of evidence in rebuttal objected to because part of the case in chief is not assignable as error.—Commonwealth v. Bell (Pa.) 123.

The order of introducing testimony is in the discretion of the court.—Commonwealth v. Weber (Pa.) 481.

Arguments of counsel.

Improper argument of counsel, if not objected to when made, is waived.—Commonwealth v. Weber (Pa.) 481.

The prosecuting attorney may comment on defendant's failure to call his wife, who saw him kill her father, as a witness.—Commonwealth v. Weber (Pa.) 481.

Evidence.

The voluntary confession of one accused of arson, though made while in custody, without counsel, and expecting to die from poison, is admissible against him.—State v. Gorham (Vt.) 845.

Effect of testimony of a witness that he had advised the prisoner to confess, as ground for questioning on appeal the admissibility of a confession previously admitted.—State v. Gorham (Vt.) 845.

Conclusiveness of ruling of lower court as to the admissibility of a confession, where the evidence of the circumstances was conflicting.—State v. Gorham (Vt.) 845.

Instructions.

It is not error to state without comment the claims of the state and defendant.—State v. Smith (Conn.) 206.

Propriety of charge that the jury, in considering the truth of the confession, might see whether defendant would have been likely to have constructed a false story fitting all the circumstances of the crime.—State v. Gorham (Vt.) 845.

In the absence of a request, a failure to explain the meaning of the term "reasonable doubt" is not error.—State v. Smith (Conn.) 206.

Where the jury is instructed as to reasonable doubt, a failure to charge, in the absence of request, as to the presumption of innocence, is not error.—State v. Smith (Conn.) 206.

New trial.

The use of intoxicating liquors by the jurors will not be ground for a new trial unless excessive.—State v. Harrigan (Del. O. & T.) 1052.

The fact that one of the two bailiffs in charge of the jury went home to sleep will not vitiate the verdict.—State v. Harrigan (Del. O. & T.) 1052.

Question whether the fact that the jury had the range of the upper part of the building in which they were, and that two assistant janitors had access to them, was ground for a new trial.—State v. Harrigan (Del. O. & T.) 1052.

Appeal.

The admission of a question objected to will not be considered where no exception is taken.—State v. Sawyer (Vt.) 285.

Unless the record shows the contrary, it will be presumed a motion for new trial was properly overruled.—State v. Perrigo (Vt.) 844.

The admission of hearsay evidence is harmless where the facts it tends to prove have been shown by other evidence.—State v. Stevens (Conn.) 496.

The error of permitting a question to be asked in an objectionable form is cured where the answer is proper and admissible.—State v. Stevens (Conn.) 496.

Cross-Examination.

Of witness, see "Witness."

Digitized by Google

CURTESY.

Curtesy is not defeated by the fact that the estate tail held by the wife terminated at her death.—Holden v. Wells (R. I.) 265.

DAMAGES.

For land taken for public use, see "Eminent Domain."
For loss of goods shipped, see "Carriers."

Right to recover, as damages for a breach by the grantee in a deed of a covenant to build on the lot purchased by him, possible profits which the grantor expected to make from sales of adjoining lands.—McConaghy v. Pemberton (Pa.) 996.

In an action for breach of contract to sell a store, evidence of the profits realized by plaintiff while in the store before the breach is admissible.—Collins v. Lavelle (R. I.) 434.

Propriety of verdict for $400 in an action for the destruction of a furnace in plaintiff's house at a time when there was sickness in plaintiff's family, and the furnace was necessary for the proper heating of the house.—Vogel v. McAuliffe (R. I.) 1.

Action for wrongful destruction of plaintiff's furnace, in which evidence that his child was ill, and had to be removed to another room in consequence of such destruction, is admissible, as showing cause for mental suffering, though the child suffered no injury.—Vogel v. McAuliffe (R. I.) 1.

Damages in an action for breach of contract to sell a store examined, and *held* not excessive.—Collins v. Lavelle (R. I.) 434.

Propriety of verdict for $6,950 for the loss of the front part of a foot by a man 21 years of age, whereby he was prevented from working for 14 months, and permanently incapacitated for standing long periods of time.—Elliott v. Newport St. Ry. Co. (R. I.) 694.

Death.

Of party, see "Abatement and Revival."

Decedents.

See "Executors and Administrators"; "Wills."
Transactions with, see "Witness."

Declarations and Admissions.

See "Evidence."

DEED.

See, also, "Acknowledgment"; "Boundaries"; "Covenants"; "Fraudulent Conveyances"; "Mortgages"; "Vendor and Purchaser."
Compelling acknowledgment, see "Acknowledgment."
Estoppel by, see "Estoppel."
When a mortgage, see "Mortgages."

There is a presumption that the grantee in a deed paid the consideration therefor.—Jones v. Cannon (Del. Super.) 521.

The presumption that a deed was delivered when executed is rebutted by the execution and delivery of a similar deed several years later.—Flynn v. Flynn (N. J. Ch.) 30.

Construction of description by metes and bounds in a deed as not conveying any part of the roadbed of a street on which the lot was bounded.—Rieman v. Baltimore Belt R. Co. (Md.) 444.

A deed which was not delivered until seven years after its execution *held* to have passed no title till its delivery.—Paddock v. Potter (Vt.) 784.

Question whether a condition subsequent was created in a deed to a city by a statement that the land conveyed was to be used for a street.—Kilpatrick v. City of Baltimore (Md.) 805.

Where, when receiving a deed, the grantee executes an instrument setting forth the conditions thereof, the papers should be read together in determining his title.—Norton's Adm'r v. Perkins (Vt.) 148.

Examined and *held* to convey a free and common use of an alley mentioned therein.—Haas v. Bergen (Pa.) 652.

Construction of conveyance of an alley way, as conveying the entire interest of the grantor in the alley, so that he cannot thereafter convey any right to the use thereof to an abutting owner.—McNeal v. Rebman (Pa.) 1002.

A restriction in a deed that all buildings shall be a certain number of feet back from the front line applies to a roofed porch permanently attached, though uninclosed.—Ogontz Land & Improvement Co. v. Johnson (Pa.) 1008.

Evidence examined, and *held* that the grantor waived a breach of conditions.—Norton's Adm'r v. Perkins (Vt.) 148.

Defective Appliances.

See "Master and Servant."

Defective Bridges.

See "Bridges."

Defective Highways.

See "Highways."

Defective Streets.

See "Municipal Corporations."

Delegation.

Of legislative power, see "Constitutional Law."

Delivery.

Of deed, see "Deed."

Demurrer.

See "Pleading."

DESCENT AND DISTRIBUTION.

See, also, "Curtesy"; "Executors and Administrators"; "Wills."

An illegitimate child cannot inherit from her mother's mother, under Act April 8, 1833, § 17.—In re Rees' Estate (Pa.) 254; Appeal of Tennent, Id.

Presumption that children of married woman are legitimate.—Scanlon v. Walshe (Md.) 498.

Marriage of woman to one alleged to be the father of children born to her while living with a former husband *held* not proof of their illegitimacy.—Scanlon v. Walshe (Md.) 498.

A conveyance by a mother to her son who for 17 years had turned over his earnings to her, and improved her property, is not an advancement.—Beakhurst v. Crumby (R. I.) 758.

Where notes given an heir in payment of his share were based on a settlement subsequently set aside, they were properly disallowed as payment.—Macomber v. Macomber (R. I.) 753.

Digitized by Google

Description.

In mortgage, see "Chattel Mortgages."

Devise and Legacy.

See "Wills."

Disbarment.

Of attorney, see "Attorney and Client."

DISCOVERY.

Sufficiency of reply to interrogatories calling for official reports by an agent of defendant company as to the matters in controversy, as showing that such reports were made for submission to the counsel, and hence were confidential. —Davenport Co. v. Pennsylvania R. Co. (Pa.) 245.

DISORDERLY CONDUCT.

The complaint, under Revision, p. 305, § 5, for a refusal of a father to support his family, must aver that the township may become chargeable.—Heller v. Brown (N. J. Sup.) 168.

Dissolution.

Of partnership, see "Partnership."

DIVORCE.

A decree awarding as alimony the husband's "personal estate" *held* not to entitle the wife to the personalty which he was to receive under a will on a division of testator's property.—In re Fisher (R. I.) 579.

Documents.

As evidence, see "Evidence."

Due Process of Law.

See "Constitutional Law."

EASEMENTS.

The owner of land across which there is a private way can protect his fields by gates.—Hartman v. Fick (Pa.) 342.

Right of an heir to discharge water upon property, which has passed to another heir, in the same way as it was discharged in the lifetime of the ancestor.—Mason v. Horton (Vt.) 291.

Evidence examined, and *held* not to show that the use of a water privilege was adverse to the right of the owner, who had ceased to use it.—Mason v. Horton (Vt.) 291.

Evidence examined, and *held* sufficient to show an easement in favor of the grantee of land.—Ehret v. Gunn (Pa.) 200.

Ejection.

Of passenger, see "Carriers."

EJECTMENT.

See, also, "Adverse Possession."

Where a purchaser enters under an agreement to purchase, but refuses a sufficient deed when tendered, the vendor can bring equitable ejectment.—Hall v. Clearfield & M. Ry. Co. (Pa.) 940.

In equitable ejectment by a mortgagor, where the complaint alleges payment, the court will take an accounting.—Crouse v. Binkley (Pa.) 551.

The grantee in an unrecorded conveyance of land by a debtor in fraud of creditors cannot maintain ejectment against a purchaser at a sale under execution against the debtor.—Hartley v. Millard (Pa.) 641.

A mortgagee may maintain ejectment notwithstanding the statute requiring a foreclosure as the first proceeding in the collection of the debt. —Mershon v. Castree (N. J. Sup.) 602.

It is no defense, in an action to recover land because of conditions broken, that the deed was made in fraud of the grantor's creditors.—Norton's Adm'r v. Perkins (Vt.) 148.

ELECTIONS AND VOTERS.

On application, a person is entitled to registration on the day appointed for the revision of the registry list, under Acts 1890, c. 573, § 14.—Blackford v. Robinson (Md.) 448.

The provision that an appeal from the officer of registration must be taken within one week after the final day of the October sitting, is mandatory.—Cox v. Bryan (Md.) 852.

The fact that a person's name does not appear on the police census of the registered voters of a city does not prove that he is not entitled to vote in such city.—Langhammer v. Munter (Md.) 300.

Where it is undisputed that a registered voter has lived in the city and precinct for the statutory period, the fact that he has no particular home in the precinct does not render his registration invalid.—Langhammer v. Munter (Md.) 300.

The entries in the registry of voters are admissible to show that the register acted properly in placing the names thereon.—Langhammer v. Munter (Md.) 300.

An order requiring the polls on a borough election to be open for an hour less than that prescribed by the act is fatally defective, though the result is not affected thereby.—Hutchinson v. Woodruff (N. J. Sup.) 224.

EMINENT DOMAIN.

An act authorizing a street-railway company to acquire by condemnation an easement in the roadway of a turnpike company is not unconstitutional.—President, etc., of Baltimore & F. Turnpike Road v. Baltimore, C. & R. M. P. R. Co. (Md.) 854.

Immateriality of repeal of certain provision in the flowage act when the petition for the assessment of damages was filed before the alleged repeal.—Dow v. Electric Co. (N. H.) 22.

Right of railroad company, a right to cross the tracks of which below grade was condemned by another company, to show that, if it wished to build more tracks on its right of way, it would have to construct additional abutments and bridges.—National Docks & N. J. J. Connecting Ry. Co. v. Pennsylvania R. Co. (N. J. Sup.) 462.

Compensation.

Damages for changing the grade of a street are the difference in value of the premises before and after the change.—May v. Carbondale Traction Co. (Pa.) 667.

The jury may consider whether the tract was ripe for city improvements, and could have been sold by the front foot.—Warden v. City of Philadelphia (Pa.) 928.

Where, pending condemnation proceedings, an owner with notice erects a building on the

Digitized by Google

land to be taken, his damages will be assessed without reference to the building. — Lloyd v. Town of Fair Haven (Vt.) 164.

Evidence of the value of the buildings separate from the land is admissible.—Warden v. City of Philadelphia (Pa.) 928.

In proceedings to condemn property of a gas company, for which it claimed $25,000 damages, evidence that its capital stock was only that amount was admissible.—Spring City Gaslight Co. v. Pennsylvania, S. V. R. Co. (Pa.) 368.

Question whether, in proceedings to condemn unoccupied land of a gas company, the jury could consider the possible future growth of the towns supplied by the company.—Spring City Gaslight Co. v. Pennsylvania, S. V. R. Co. (Pa.) 368.

Where land held in common and unimproved had been platted, but the plat had never been recorded, it was error to assess the damages on the theory that the streets and lots laid out in the plat were actual streets and lots.—Phillips v. St. Clair Incline-Plane Co. (Pa.) 69.

Measure of damages, in proceedings by a railroad company to condemn the right to cross tracks of another below grade, for the cost of the building by the latter of additional abutments and bridges in case it was desired to use all of its right of way for trackage.—National Docks & N. J. J. Connecting Ry. Co. v. Pennsylvania R. Co. (N. J. Sup.) 462.

Remedies of landowners.

The construction of a street railway on a country road will be enjoined until damages are paid to abutting owners.—Pennsylvania R. Co. v. Montgomery County Pass. Ry. Co. (Pa.) 468.

Where street railways have been constructed over country roads without opposition, and by mutual mistake as to the rights of the parties, the only remedy of abutting owners is by action for damages.—Pennsylvania R. Co. v. Montgomery County Pass. Ry. Co. (Pa.) 468.

An abutting owner on a borough street may enjoin the construction of a street railway not having permission from the local authorities.—Thomas v. Inter-County St. Ry. Co. (Pa.) 476.

Entry.

Of judgment, see "Judgment."

EQUITY.

See, also, "Creditors' Bill"; "Discovery"; "Fraudulent Conveyances"; "Injunction"; "Mortgages"; "Partition"; "Partnership"; "Receivers"; "Specific Performance"; "Subrogation"; "Trusts."

Jurisdiction of equity to compel payment of counsel's claim for compensation for collecting county moneys out of funds due the county, there being a good remedy at law.—Chew v. Perkins (Md.) 507.

Where title to land purchased by several is taken in one, the others can establish their interests in the proceeds of its sale only in equity.—Leonard's Adm'r v. Leonard's Ex'r (Vt.) 783.

Equity has no jurisdiction in a direct proceeding to determine whether the election of the directors of a private corporation has been legally held.—Kean v. Union Water Co. (N. J. Err. & App.) 282.

Sufficiency of a showing of license, by a landowner to a railroad company to erect improvements thereon, to justify the interposition of equity in a proceeding to condemn the land for purposes of the company.—Pennsylvania, P. & B. R. Co. v. Trimmer (N. J. Ch.) 310.

Right of company which built improvements on land of another to ask equity to assume jurisdiction of proceedings to condemn such land on the ground that it erected such improvements under mistake.—Pennsylvania, P. & B. R. Co. v. Trimmer (N. J. Ch.) 310.

A bill to compel the surrender of corporate stock, alleged to have been given to defendant in consideration of illicit relations between the owner and defendant, will be stricken from the files because such contract is immoral, and parties will be left to their legal remedy.—Brindley v. Lawton (N. J. Ch.) 394.

One holding the legal title to land, but as to a moiety thereof in trust for another, cannot acquire such other's interest by a parol agreement of such other to relinquish the same on the payment of certain claims against both.—Tynan v. Warren (N. J. Ch.) 596.

Reformation of contracts.

One seeking to modify a written contract on the ground of fraud must establish the fact by undoubted evidence.—Thayer v. Seep (Pa.) 1072.

Cancellation and rescission of contracts.

The lessee of a mill after possession for a year cannot rescind the lease for misrepresentations as to the capacity of the mill.—Richardson v. Horn (Del. Super.) 896.

Mere delay by one party to an executory contract that may be performed within reasonable time, does not of itself entitle the other party to rescind.—Sea Isle City Lot & Building Ass'n No. 3 v. McTague (N. J. Err. & App.) 727.

A confidential physician and agent of a patient 70 years of age has the burden of proving that a deed of all her real estate in trust for herself for life, and thereafter to him, was honestly made.—Unruh v. Lukens (Pa.) 110.

Accounting.

Where an administrator reports a sale of assets when no sale was made, the decree allowing the account will be set aside, and an accounting of the value of the assets will be required.—Schweitzer v. Bonn (N. J. Ch.) 24.

On enjoining a breach of covenant of good will, equity will take an account of the profits lost in consequence of the breach.—Patterson v. Glassmire (Pa.) 40.

A bill for an account by an administrator of a mortgagor against the mortgagee, alleging merely the existence of complicated accounts, is insufficient.—Murphy v. Eddy (R. I.) 435.

Suit for an accounting of profits of defendant's store of which plaintiff claimed a part, in which the answer denying plaintiff's right to a share in the profits was held responsive to the bill.—Bailie v. Bailie (Pa.) 246.

Laches.

Laches in bringing suit is no defense unless, because thereof, defendant has been prejudiced.—Tynan v. Warren (N. J. Ch.) 596.

Eight years after the confirmation of an account of an executrix, one who has taken no steps to appeal cannot apply to have the executor and executrix file an account showing the dispositions of a mortgage to the executrix's testator.—In re Young's Estate (Pa.) 373.

Evidence showing gross laches on the part of one claiming under an alleged oral contract for the conveyance by defendant of land which was sold to defendant under execution against plaintiff, plaintiff having delayed for 12 years to take any action thereunder, though knowing of a sale by defendant to a third person.—Burr v. Kase (Pa.) 954.

A suit in which plaintiff has taken no steps for six years, during which time all the defendants and their witnesses have died, will be dismissed.—Lang v. Belloff (N. J. Ch.) 604.

Digitized by Google

Pleading.

A general demurrer must fail if there is any ground on which the bill can be retained.—Meyers v. Schuman (N. J. Ch.) 460.

A bill for relief and discovery must, as against a general demurrer, show a right to some part of the relief, independent of the discovery.—Meyers v. Schuman (N. J. Ch.) 460.

Sufficiency of a bill to enjoin the pollution of a spring in connection with an answer denying the allegations thereof as putting in issue the rights of the parties to the use of the spring.—Coffrin v. Cole (Vt.) 313.

Right in a suit to enjoin the pollution of a spring under a prayer for general relief to obtain a confirmation of orator's title to the spring.—Coffrin v. Cole (Vt.) 313.

A bill by a decedent's wife to recover money on a policy of insurance assigned to her by her husband examined, and *held* sufficient, though it admitted a prior formal assignment to defendant.—Meyers v. Schuman (N. J. Ch.) 460.

Where the answer to a bill to enforce a trust created by parol, admits the trust and does not claim the benefit of the statute of frauds, the trust will be enforced though the answer is not signed by defendant.—Tynan v. Warren (N. J. Ch.) 596.

An answer to which the oath has been waived, having, under Judiciary Act, c. 20, § 19, the effect of a pleading at law, can be excepted to for insufficiency. — McTwiggan v. Hunter (R. I.) 693.

Evidence.

Burden of proof on complainant to overcome the answer by two witnesses, or by one witness and corroborative circumstances, the answer denying the charge, and averring ownership, independent of the property alleged to have been misappropriated by him.—Huston v. Harrison (Pa.) 987.

Practice.

All proceedings under a bill not indorsed with notice to appear in conformity with Amended Equity Rules Jan. 15, 1894, are void.—Cassidy v. Knapp (Pa.) 638.

Where the amount of damages for breach of covenant against incumbrances, is admitted by the party liable, such damages may be assessed by a court of equity without the intervention of a jury.—Schmid v. Lisiewski (N. J. Err. & App.) 603.

Where an objection is made to a question before an examiner because it is leading, the ground of the objection should be stated and recorded by the examiner. — Freeny v. Freeny (Md.) 304.

Province of jury on an equitable issue arising in an action at law.—Baldwin v. Taylor (Pa.) 250.

Sufficiency of exceptions to testimony taken before an examiner.—Freeny v. Freeny (Md.) 304.

ERROR, WRIT OF.

See, also, "Appeal"; "Certiorari."

A rule striking out a sham plea is not reviewable by writ of error.—Mershon v. Castree (N. J. Sup.) 602.

Estates.

Created by deed, see "Deed."
—— by will, see "Wills."

ESTOPPEL.

A grantor is estopped by a clause in a deed conveying his five-twelfths interest in certain land, with a covenant of warranty, to deny that the deed conveyed five-twelfths.—Logan v. Eaton (N. H.) 13.

Where goods are placed in defendant's hands with notice that they were pledged, and in reliance on his promise not to interfere with them, he is estopped to allege that the pledge was invalid.—Tradesmen's Nat. Bank v. Indiana Bicycle Co. (Pa.) 337.

Right of one, availing himself of the privilege granted by a statute to flow others' lands, to attack, as unconstitutional, part of the law providing for damages.—Dow v. Electric Co. (N. H.) 22.

Question whether one of two adjoining owners was estopped to refuse the use of a stairway on his premises to the other.—Baldwin v. Taylor (Pa.) 250.

Sufficiency of evidence to estop one from objecting to the erection of telegraph poles in front of his residence.—Western Union Tel. Co. v. Bullard (Vt.) 286.

Where heirs, not acting in ignorance of the true state of facts, have claimed in a will, they are estopped to deny its validity. — Fisher v. Boyce (Md.) 707.

Estoppel of woman to deny statements made by her in previous proceedings as to the paternity of her children.—Scanlon v. Walshe (Md.) 498.

Right of parties interested in an estate to deny the power of a special administrator to allow a certain set-off after they approved such allowance on the settlement of the administrator's account.—Foster's Ex'x v. Stone (Vt.) 841.

EVIDENCE.

See, also, "Assumpsit."
In criminal cases, see "Criminal Law."
Objections to, see "Trial."
Of adverse possession, see "Adverse Possession."
Of boundary, see "Boundaries."
Of partnership, see "Partnership."
Reception, see "Trial."

Proof that land has long been used as a pasture raises no presumption that at a period long prior to the present time it was so used.—Martin v. Curtis (Vt.) 296.

Under 1 Rev. St. N. Y. c. 3, marg. p. 756, the record of a mortgage is a record, within Const. U. S. art. 4, § 1, and can be exemplified and used in evidence in another state. — Chase v. Caryl (N. J. Sup.) 1024.

Where an employé of defendant carrier denies on a cross-examination making certain statements as to the cause of the accident, such statements may be shown by other persons for the purpose of affecting his credibility, but not as showing defendant's liability. — Dampman v. Pennsylvania R. Co. (Pa.) 244.

Judicial notice.

The court will not take judicial notice of a local option election.—Whitman v. State (Md.) 327.

The court will not take judicial notice of the contents of city ordinances.—Shanfelter v. City of Baltimore (Md.) 439.

Best and secondary evidence.

Where a party made no search for a lost instrument executed 12 years before trial, within three years of the trial, parol proof of its contents was not admissible. — Burr v. Kase (Pa.) 954.

Declarations and admissions.

Admissibility of declarations of decedent, under whom defendant claimed, while in possession of the land, as to how she obtained and kept possession, decedent having claimed by adverse possession.—Collins v. Lynch (Pa.) 921.

Digitized by Google

In an action against a surety on a lease, declarations by the lessee, when the surety was not present, as to the amount of the rent, are inadmissible.—Nickols v. Jones (Pa.) 329.

On an issue as to whether a bond absolute on its face was given to secure the obligee's support, his statements made before its execution and after to that effect are admissible.—Davidson v. Young (Pa.) 557.

Declarations by the grantor as to a breach by the grantee of the conditions of deed made in his absence are inadmissible. — Norton's Adm'r v. Perkins (Vt.) 148.

Statements by a former owner of plaintiff's land that he had always occupied to the line claimed by plaintiff are inadmissible on an issue as to a boundary.—Swerdferger v. Hopkins (Vt.) 153.

Declarations of one alleged to be an officer of defendant corporation are not admissible, where the witness cannot identify such officer. —Mason Fruit-Jar Co. v. Paine (Pa.) 98.

Opinion evidence.

Admissibility of expert evidence on the question of damages in an action for the breach of a covenant to build on land.—McConaghy v. Pemberton (Pa.) 996.

A witness, acquainted only with the value of gas machinery and the fixtures of a gas plant, cannot testify as an expert as to the value of vacant land owned by the company, which is sought to be condemned.—Spring City Gaslight Co. v. Pennsylvania, S. V. R. Co. (Pa.) 368.

Admissibility of the opinion of an officer as to whether certain facts to which he had testified on trial of one he had arrested were suspicious circumstances.—State v. Gorham (Vt.) 845.

Witnesses who have shipped mules, and know their habits, can testify as to the cause of injuries certain mules had sustained while in the cars.—Schaeffer v. Philadelphia & R. R. Co. (Pa.) 1088.

Documents.

An account in a ledger not a book of original entries is inadmissible to prove indebtedness.—In re Huston's Estate (Pa.) 553.

Admissibility as original evidence, in an action to recover from the owner of a building money advanced to the contractor, of memoranda furnished plaintiff of the labor performed and material furnished, which other evidence tended to show to be correct.—Curtis v. Bradley (Conn.) 591.

Parol evidence.

Admissibility of parol evidence to show what defendant's grantors meant by conveying to him "all right" possessed by them to the spring in dispute.—Coffrin v. Cole (Vt.) 313.

Where a contract provided for a monument in accordance with a certain design of certain specified dimensions, parol evidence is inadmissible to show that variations from the dimensions were made in order to conform to the design.—Cutler v. Dix (Vt.) 780.

An unambiguous written contract, when sued on in the court of law, is unalterable.—Martin v. Insurance Co. of North America (N. J. Sup.) 213.

Where a mortgage describes the property as everything in stock or in process of manufacture in a shop, parol evidence that it included the machinery and books of account is inadmissible, but it may be shown of what the stock consisted.—Coombs v. Patterson (R. I.) 428.

Examination.

Of witness, see "Witness."

Examiners.

In chancery, see "Equity."

EXCEPTIONS, BILL OF.

See, also, "Appeal."

When an unsigned bill of exceptions is connected with the one succeeding, its recitals of fact form part of the latter.—Schaeffer v. Farmers' Mut. Fire Ins. Co. of Dug Hill (Md.) 317.

Where exceptions are not presented until after the extended time has expired, they are properly disallowed.—Wilson v. Donnelly (R. I.) 966.

Excessive Damages.

See "Damages."

EXECUTION.

See, also, "Attachment"; "Exemptions"; "Garnishment."

A capias will issue on a judgment against an employer for injuries to an employé from a defective scaffold.—Romberger v. Henry (Pa.) 634.

Where a forthcoming bond is given by the execution debtor the parties thereto are liable to the sheriff to whom it is made, and to his successor, on breach thereof.—Stocker v. Dech (Pa.) 555.

A return on levy reciting, "Levied on goods and chattels as per inventory and appraisement annexed," is sufficient, when made in conformity with the practice of the county.—Flinn v. Fennimore (Del. Super.) 586.

Where a purchaser at an execution sale of a debtor's land knows of a resulting trust in it in favor of the debtor's wife, he acquires no rights against her.—Miller v. Baker (Pa.) 121.

On judgment in ejectment by a landlord for breach of covenant for subletting under Act July 12, 1842, no execution against the person is allowable.—Lang v. Finch (Pa.) 84.

EXECUTORS AND ADMINISTRATORS.

See, also, "Descent and Distribution"; "Wills."

An executor of a surety cannot consent to the discharge of a mortgage given to secure the debt, for which testator was surety, until all the conditions have been complied with.—Monroe v. De Forest (N. J. Ch.) 773.

An administrator may apply the income of a legacy to the satisfaction of a judgment obtained by him against the legatee for a debt due the estate.—In re Fisher (R. I.) 579.

A resolution of the general assembly accepting a legacy and its conditions, is a sufficient assurance to justify the executor in paying over a legacy to the state.—Webster v. Wiggin (R. I.) 824.

Where family settlements of an estate were continued for 16 years, and participated in by all interested, they can be set aside only for gross fraud.—In re Palethorp's Estate (Pa.) 885.

The appointment of an administrator de bonis non, in no way interested in the property, over a legatee who was a qualified applicant, was improper.—Emsley v. Young (R. I.) 692.

A foreign administrator may execute a power of sale contained in a mortgage on land to his intestate.—Thurber v. Carpenter (R. I.) 5.

Right of one entitled to the funds of decedent to proceed in equity against the executor in order to procure the payment of the proceeds of the estate.—Garrison v. Hill (Md.) 794.

Digitized by Google

Insufficiency of affidavit of defense in an action on an administrator's bond by a guardian for failure to pay him money in compliance with an order of distribution.—Commonwealth v. Degitz (Pa.) 635.

Claims against estate.

Evidence in proof of a claim against an estate examined, and *held* sufficient to sustain the judgment.—In re Hambleton's Estate (Pa.) 258; Appeal of Lamborn, Id.

Settlement and accounting.

Right of administrator to allowance for services rendered in part in regard to funds which he appropriated.—Foster's Ex'x v. Stone (Vt.) 841.

An administrator who appropriated funds of the estate is chargeable therewith, with compound annual interest from the several dates of the appropriations.—Foster's Ex'x v. Stone (Vt.) 841.

Right of administrator who appropriated funds of the estate to compensation for services properly rendered by him, and to reimbursement for expenses paid by him.—Foster's Ex'x v. Stone (Vt.) 841.

In the absence of evidence of fraud, an executor should be credited with the amount of an account proven in the orphans' court.—Garrison v. Hill (Md.) 794.

Where an executor holding shares of stock in his own name, and as administrator, reported the sale of testator's stock at a certain price, when none had been sold, and sold the testator's stock later at less than the market price, such latter sale will be considered as from his own holding.—Schweitzer v. Bonn (N. J. Ch.) 24.

Where issues of fact are raised as to items in an executor's account as a ground for opening a confirmation thereof, they cannot be disposed of without the taking of testimony.—In re Long's Estate (Pa.) 1093; Appeal of Barner, Id.

Any person interested in the disposition of decedent's property, may file exceptions to the account of the executor or administrator.—Dunham v. Marsh (N. J. Err. & App.) 619.

Evidence examined in an action to surcharge an administrator, and *held* not to show an admission by an heir of a debt due the estate.—In re Huston's Estate (Pa.) 553.

Actions.

Where an administratrix inventories certain property belonging to third persons as the property of a decedent, the owner can sue at law to recover.—Beekman v. Cottrell (N. J. Err. & App.) 29.

Judgment will be against an executor personally on a contract made by him for the benefit of the estate.—Doolittle v. Willet (N. J. Err. & App.) 385.

Where a husband bequeaths all his property absolutely to his wife with power of disposition, her administrator, on her death, is a proper person to sue for money due his unsettled estate.—Crampton v. Seymour (Vt.) 889.

Where the maker of a note due to an estate resides in a foreign state, a collusive payment of it to an administrator whom such maker procures to be appointed is not a bar to an attachment by the executor in the state in which letters issue.—Amsden v. Danielson (R. I.) 4.

EXEMPTIONS.

From taxation, see "Taxation."

A claim for an exemption need not be in writing.—Hart v. Hart (Pa.) 352.

A claim for an exemption may be made within a reasonable time after defendant has notice of the writ of venditioni exponas.—Hart v. Hart (Pa.) 352.

A claim should not be rejected because made six days after the first advertisement of execution sale, and only ten days before the sale, where the sale was not delayed, and no additional costs were incurred.—Snyder v. Schmick (Pa.) 124.

Expert Testimony.

See "Evidence."

EXTORTION.

The incumbent of an office created by an unconstitutional statute cannot be guilty of extortion.—Kitby v. State (N. J. Sup.) 213.

FACTORS AND BROKERS.

See, also, "Principal and Agent."

A contract giving the proposed purchaser an option to purchase at the price and terms proposed, is not such a contract of sale as entitles the broker to commissions as for sale.—Runyon v. Wilkinson Gaddis & Co. (N. J. Err. & App.) 390.

Where plaintiff obtained an order for goods for defendants, who undertook to fill it, he is entitled to commission, though the purchaser refused the goods as not in accordance with the agreement.—Restein v. McCadden (Pa.) 89.

Sufficiency of an acceptance by a proposed purchaser of the seller's offer, to entitle the seller's agent to commissions.—Runyon v. Wilkinson Gaddis & Co. (N. J. Err. & App.) 390.

FALSE PRETENSES.

Evidence examined, and *held* not to constitute a variance.—Commonwealth v. Karpowski (Pa.) 572.

Fees.

Of justice, see "Justices of the Peace."
Of sheriff, see "Sheriffs and Constables."

Fellow Servant.

See "Master and Servant."

Feme Covert.

See "Husband and Wife."

Foreclosure.

Of mortgage, see "Mortgages."

Forthcoming Bond.

See "Attachment."

FRAUDS, STATUTE OF.

A memorandum of the terms of an order for the purchase of goods, signed by an agent of the buyer, and an acceptance of the order, signed by an agent of the seller, constitutes a valid contract.—Gerli v. Poidebard Silk Manuf'g Co. (N. J. Err. & App.) 401.

Contract examined, and *held* to be within the statute, as a promise to pay the debt of another.—Dougherty v. Bash (Pa.) 729.

Payment by one for the pasturage of a colt after his purchase thereof, the seller having previously paid therefor, constitutes a constructive delivery.—Stockwell v. Baird (Del. Super.) 811.

Digitized by Google

Covenants relating to the sale of land contained in a declaration of trust, which was signed only by the trustee, will not in case of resulting trusts, be considered as limitations of the estate of the beneficiaries; being void under statute of frauds.—Adams v. Carey (N. J. Ch.) 600.

FRAUDULENT CONVEYANCES.

Payments by a debtor of premiums on a life insurance policy for the benefit of his wife are fraudulent as against creditors.—Merchants' & Miners' Transp. Co. v. Borland (N. J. Ch.) 272.

Act Feb. 19, 1851, as amended by Act March 8, 1871, does not authorize a debtor to pay premiums on a life policy for the benefit of his wife, and enable her to hold the proceeds thereof as against creditors.—Merchants' & Miners' Transp. Co. v. Borland (N. J. Ch.) 272.

Where an insolvent conveyed property incumbered for its value to one of the mortgagees, a joinder of the grantor's wife in the conveyance was not a valid consideration, as against his creditors, for his conveyance of other property to her.—Commonwealth Title Insurance & Trust Co. v. Brown (Pa.) 205.

A deed by an insolvent to his wife for a grossly inadequate consideration will be set aside except to the extent of the consideration given.—Hull v. William Deering & Co. (Md.) 416.

Right to question a wife, in an action to set aside a conveyance to her by her husband, as to previous transfers to her by the husband.—Trumbull v. Hewitt (Conn.) 492.

Where the court found that the grantee in a fraudulent conveyance was ignorant of the fraud, the defendant was not prejudiced by the admission of evidence tending to establish such knowledge.—Trumbull v. Hewitt (Conn.) 492.

A case in which a wife was affected with the knowledge of her husband as to the fraud in a conveyance by him to her, the husband having acted as the wife's agent in the matter.—Trumbull v. Hewitt (Conn.) 492.

A mortgage by a corporation to one of its directors that, by agreement, was not placed on record until after the corporation became insolvent, is void as to creditors.—Montgomery v. Phillips (N. J. Err. & App.) 622.

Where a husband conveys a homestead estate to his children, it being small in comparison to the entire amount of his property, and before any estrangement from his wife, the conveyance is not void as to her.—Walker v. Walker (N. H.) 14.

Conveyances of personal property, made by the husband during coverture for the purpose of defeating his wife's rights, are, as to her, fraudulent and void.—Walker v. Walker (N. H.) 14.

The grantee of a judgment creditor purchasing at execution sale cannot sue to set aside a deed made by the judgment debtor before the sale.—Helden v. Hellen (Md.) 506.

It is for the jury to determine whether a debtor's secret conveyance was in fraud of creditors.—Hartley v. Millard (Pa.) 641.

GARNISHMENT.

See, also, "Attachment."

Abatement by death of debtor, see "Abatement and Revival."

The wages of a car conductor cannot be garnished, though the claim is for wages due from such conductor.—Lutz v. Frutchey (Pa.) 638.

A relief fund payable personally to a beneficiary named by an employé belonging to a railroad relief association on such employé's death and the execution by the beneficiary of a release, is not subject to garnishment for a debt of the beneficiary.—Kinsloe v. Davis (Pa.) 934.

Where a contract provides for monthly payments to the contractor as the work progresses, and for a percentage to be retained to insure the performance of the contract, the amounts retained are not subject to garnishment unless the contract was faithfully performed.—American Forcite Powder Manuf'g Co. v. Locust Mountain Coal & Iron Co. (Pa.) 90.

A mortgage debt cannot be garnished by proceedings against one who holds the mortgage as collateral security.—Taylor v. Huey (Pa.) 199.

Where there is a question as to whom funds in the hands of a garnishee belong, a rule for judgment should be discharged, and the title to the funds determined by a jury.—Conshohocken Tube Co. v. Iron Car Equipment Co. (Pa.) 949.

Where a debtor's property was sold at execution, evidence that the purchaser, who was the execution creditor, promised to do the right thing by the debtor, and to turn the property over to the debtor after he obtained what was due him out of it, is insufficient to hold the purchaser as garnishee.—Dowdall v. O'Rourke (Pa.) 749.

GAS COMPANIES.

A company engaged in transporting and selling natural gas before the passage of Act May 29, 1885, and which has not accepted its provisions, cannot lay its pipes in the streets of a borough within which it had not been supplying natural gas without the assent of the borough.—Philadelphia Co. v. Borough of Freeport (Pa.) 571.

GIFTS.

Testimony of a donor who gave money due from the donee by giving a receipt therefor examined, and *held* not to show that the gift was conditional.—Appeal of Fassett (Pa.) 686.

A gift of money due the donor from the donee, by giving a receipt therefor, is valid.—Appeal of Fassett (Pa.) 686.

GOOD WILL.

A covenant not to engage in the business of hair dressing, or any of the branches thereof, within certain limits, is broken by engaging in the business of cutting and dressing natural hair, though at the time of the sale the dressing of artificial hair was the principal business.—Patterson v. Glassmire (Pa.) 40.

GRAND JURY.

Committing witness refusing to answer, see "Constitutional Law."

Under Gen. St. § 91, a justice may commit a witness refusing to testify before a grand jury, without a trial.—In re Clark (Conn.) 522.

Disqualification of grand juror, in view of previous declarations, to sit in the matter of the annexation of a township section to a borough.—In re Annexation to Borough of Plymouth (Pa.) 933; Appeal of Plymouth Tp., Id.

GUARANTY.

An offer to guaranty the debts of a third person, to be contracted in the future, is not binding unless accepted.—Farmers' Bank v. Tatnall (Del. Super.) 879.

Digitized by Google

A special guaranty on a judgment note considered, and *held* that the payee of the note did all that was necessary to keep the guaranty alive.—Ritchie v. Walter (Pa.) 334.

Liability of guarantor of a debt due a corporation, who knew of its custom to charge interest, for interest in addition to the amount of the guaranty.—Hooper v. Hooper (Md.) 508.

One who, in answer to a telegram from the seller, states that he will guaranty the payment of goods sold another, is not liable, unless notified of acceptance of the guaranty. — Evans v. McCormick (Pa.) 563.

GUARDIAN AND WARD.

See, also, "Infancy."

The authority of an attorney, or guardian ad litem, of an infant defendant, expires on the infant's becoming of age.—Lang v. Belloff (N. J. Ch.) 604.

Habitual Drunkard.

Treatment, see "Constitutional Law."

Harmless Error.

See "Appeal."

Heirs.

See "Descent and Distribution."

HIGHWAYS.

See, also, "Turnpikes and Toll Roads."

Validity of assessment for highways in the township of Burlington of property within the city of Burlington.—McNeal Pipe & Foundry Co. v. Lippincott (N. J. Sup.) 399.

Under R. L. § 2920, the selectmen may relocate the highway, whether the lines of the relocation are the same as those of the original survey or not.—Culver v. Town of Fair Haven (Vt.) 143.

Establishment.

An order laying out a lane less than three rods wide, to be used without gates, outside of an incorporated village, is illegal under Acts 1884, No. 16.—Bridgman v. Town of Hardwick (Vt.) 33.

The appointment of a petitioner for a new road as one of the reviewers to determine its necessity vitiates all subsequent proceedings.—In re Road in Ohio and Ross Townships (Pa.) 74.

A highway which intersects an existing highway at only one of its terminal points does not connect existing highways, within the meaning of Acts 1884, No. 16.—Bridgman v. Town of Hardwick (Vt.) 33.

The confirmation of a viewer's report examined, and *held* not to constitute a decree for the payment by the borough of the amount mentioned as damages.—In re Opening of Pringle St. in Kingston Borough (Pa.) 948.

The question of the necessity of a highway cannot be determined on appeal by a court on evidence taken by it.—In re Road in Ohio and Ross Townships (Pa.) 74.

Liability for defects.

Where a road is dangerous by reason of its proximity to a precipice, the township should erect barriers if necessary.—Trexler v. Greenwich Tp. (Pa.) 1090.

A township is not required to keep its road in such condition that unmanageable horses may be driven thereon without risk. — Trexler v. Greenwich Tp. (Pa.) 1090.

Whether a borough was negligent in not erecting barriers along its road is a question for the jury.—Wellman v. Borough of Susquehanna Depot (Pa.) 566.

Notice to a member of the town council of a defect is not notice to the town. — Jordan v. Peckham (R. I.) 305.

One who uses a road, knowing it is unsafe, where there is a safe road, cannot recover for resulting injuries.—Wellman v. Borough of Susquehanna Depot (Pa.) 566.

A borough is not liable to one injured by being thrown from an embankment by a horse having the blind staggers, though it had erected no barrier.—Wellman v. Borough of Susquehanna Depot (Pa.) 566.

A borough is liable to one whose horse, through fright from a train, runs over an embankment which it negligently fails to fence.—Wellman v. Borough of Susquehanna Depot (Pa.) 566.

HOMESTEAD.

A homestead is subject to a claim on a note given after its acquisition in renewal of a note given to the same person before its acquisition.—Robinson v. Leach (Vt.) 32.

The proceeds of a homestead are liable for debts which accrued prior to the time the homestead was acquired.—Titus v. Warren (Vt.) 297.

Under R. L. § 1894, land on which a house is being constructed may be claimed as a homestead.—Woodbury v. Warren (Vt.) 295.

HOMICIDE.

Evidence examined, and *held* sufficient to show defendant guilty of murder in the first degree.—Commonwealth v. Cook (Pa.) 56.

Where one pleads guilty of murder, the fact that he is guilty of murder in the first degree may be shown from the nature of the weapon, and the degree of deliberation by the defendant.—Commonwealth v. Cook (Pa.) 56.

Where the evidence shows there was no reasonable ground to fear an attack, an instruction as to self-defense is unnecessary.—State v. Perrigo (Vt.) 844.

Question whether defendant was justified in killing deceased, who had insisted on visiting defendant's home in spite of his orders to stay away.—State v. Harrigan (Del. O. & T.) 1052.

On an issue as to defendant's insanity, evidence of his mental capacity several months before the homicide is admissible.—State v. Harrigan (Del. O. & T.) 1052.

Where the defense is insanity, a charge that the act is presumed to have been done while sane until the contrary is shown is proper.—Commonwealth v. Woodley (Pa.) 202.

HORSE AND STREET RAILROADS.

See, also, "Carriers."

Street-railway companies lawfully organized under special acts may be incorporated under Act 1889, § 20.—Berks County v. Reading City Pass. Ry. Co. (Pa.) 474.

A company authorized by a city to carry its trolleys can top the branches of trees overhanging the street, when necessary for its wires.—Dodd v. Consolidated Traction Co. (N. J. Sup.) 980.

Digitized by Google

Where several city railways are consolidated by statute, the rights and franchises of the consolidated company are subject to the original limitations and applications of the respective companies.—Borough of Wilbur v. Trenton Pass. Ry. Co. (N. J. Sup.) 238.

The consent of a town supervisor to the occupation of its roads by a street railway in consideration of employment confers no rights on the company.—Lehigh Coal & Nav. Co. v. Inter-County St. Ry. Co. (Pa.) 471.

A street railway, to reduce time from city to city, cannot locate its route across country.—Rahn Tp. v. Tamaqua & L. St. Ry. Co. (Pa.) 472.

The connection of cities by railways on country roads is not within Act 1889 and those of prior date.—Pennsylvania R. Co. v. Montgomery County Pass. Ry. Co. (Pa.) 468.

In a suit by a street railway to enjoin the construction of a line by another railway company, the decree will not be reversed restraining such construction, though plaintiff had no valid consent to construct its line.—Tamaqua & L. St. Ry. Co. v. Inter-County St. Ry. Co. (Pa.) 473.

Consent of municipalities.

The consent of the local authorities, under Act 1889, for a street railway in a township, must be given by the supervisors, acting officially.—Pennsylvania R. Co. v. Montgomery County Pass. Ry. Co. (Pa.) 468.

The consent of a township supervisor, not taken at the meeting of the supervisors, and not entered in the books of the township, to the building of a street railway on its roads, is invalid.—Tamaqua & L. St. Ry. Co. v. Inter-County St. Ry. Co. (Pa.) 473.

Under Act 1889, the construction of a street railway cannot be commenced until consent has been obtained of the local authorities of all municipalities through which it is to pass.—Pennsylvania R. Co. v. Montgomery County Pass. Ry. Co. (Pa.) 468.

Where a street-railway company obtains a charter authorizing a road connecting several townships under the act of 1889, and only one township consents thereto, an injunction will lie against building it in said township alone, as not authorized by its charter.—Lehigh Coal & Nav. Co. v. Inter-County St. Ry. Co. (Pa.) 471.

A street railway cannot enter on the highways of a township which has consented to its construction till all the townships through which its route lies have consented to such construction.—Rahn Tp. v. Tamaqua & L. St. Ry. Co. (Pa.) 472.

Use of bridge.

A county bridge is part of a highway, within Act 1889, authorizing street railways to extend their lines.—Berks County v. Reading City Pass. Ry. Co. (Pa.) 474.

Where the proper local authorities within whose jurisdiction is a county bridge gave consent to its occupancy by a street railway, the county commissioners cannot arbitrarily refuse the use thereof, but, if necessary, should determine what must be done to strengthen it for the proposed use.—Berks County v. Reading City Pass. Ry. Co. (Pa.) 663.

A county bridge cannot be occupied by a street-railway company without the consent of the county commissioners, who may require, as a condition, the cost of the necessary work and repairs.—Berks County v. Reading City Pass. Ry. Co. (Pa.) 474.

A street railway will be enjoined from using a county bridge, though the county commissioners had given a contract therefor, where the bridge would not bear the additional burden without repairs, for which there was no provision.—Berks County v. Reading City Pass. Ry. Co. (Pa.) 474.

Liability for negligence.

Propriety of instruction as to the liability of defendant street-railway company for injuries received by plaintiff at a street crossing.—Baltimore Traction Co. v. Appel (Md.) 964.

Question for the jury as to whether a street-railway company had notice that the rails were worn and split, and would not hold spikes.—Gilton v. Hestonville, M. & F. P. Ry. Co. (Pa.) 249.

A charge that plaintiff was guilty of contributory negligence, and could not recover unless defendant street-car company could have avoided the accident, was not prejudicial to defendant.—Lake Roland El. Ry. Co. v. McKewen (Md.) 797.

A charge that a street car has a paramount right of way on that portion of the street on which only it can travel is error.—Lake Roland El. Ry. Co. v. McKewen (Md.) 797.

Evidence considered, and *held* that the driver of a wagon was in due care, and a street-car driver was negligent in causing a collision.—Cooke v. Baltimore Traction Co. (Md.) 327.

HUSBAND AND WIFE.

See, also, "Curtesy"; "Divorce."
Competency as witness, see "Witness."
Fraudulent transactions between, see "Fraudulent Conveyances."

Under Pub. St. c. 166, § 4, the covenants of a wife as to her land, made by deed in which her husband joins, are valid.—Schultze v. Hill (R. I.) 165.

A wife may recover from her husband's administrator the value of her separate property taken and sold by her husband.—Jones v. Cannon (Del. Super.) 521.

Evidence examined, and *held* sufficient to show that the property in question was the separate property of the wife.—Saake v. Dorner (Pa.) 574.

Right of plaintiff, as against a husband's creditors, to property given the wife by the husband, and purchased from the wife by plaintiff.—Stockwell v. Baird (Del. Super.) 811.

An assignment of a mortgage to a husband and wife examined, and *held* to be an assignment of one-half the mortgage debt to each in severalty.—In re Young's Estate (Pa.) 373.

Right of wife to hold, as against her husband's creditors, land conveyed to her in payment of a debt due her by her husband.—Jones v. Cannon (Del. Super.) 521.

Where a husband buys land with his own money, and has the title made to his wife, the presumption is that he intended it as a gift.—Leslie v. Leslie (N. J. Ch.) 170.

Under Pub. Laws 1893, c. 1204, a wife can sue her husband without the intervention of a next friend.—Taylor v. Slater (R. I.) 165.

In an action for trespass on land standing in the wife's name, the husband and wife may join as plaintiffs, unless the land is held to the sole and separate use of the wife.—Swerdferger v. Hopkins (Vt.) 153.

A judgment against a married woman, not doing business as a feme sole, on a note in which her husband did not join, is void.—Hoffman v. Shupp (Md.) 505.

Illegitimate Children.

See "Descent and Distribution."

Digitized by Google

Impeachment.

Of witness, see "Witness."

Impounding.

Animals, see "Animals."

Improvements.

See "Municipal Corporations."

INCEST.

Evidence considered, and *held* admissible.—Commonwealth v. Bell (Pa.) 123.

Evidence of illicit relations between the parties prior to the specific offense charged is admissible.—Commonwealth v. Bell (Pa.) 123.

INDEMNITY.

Question whether stockholders of a corporation who agree to indemnify a mortgagee against loss from insufficiency of the mortgage were primarily liable for payment of the note secured thereby, so that the mortgage could not be foreclosed without first suing them.—Stiles v. Stannard (Vt.) 294.

Independent Contractors.

See "Master and Servant."

INDICTMENT AND INFORMATION.

See, also, "Perjury."

For illegal sale of liquor, see "Intoxicating Liquors."

In a prosecution of a druggist for selling liquors where the clause permitting druggists to sell without a license was not in the enacting clause, but in a subsequent clause, the burden is on defendant to prove himself within the exception.—Grant v. Watson (N. J. Sup.) 1040.

Where the county and state are named in the margin, and it is stated that the crime was committed in a certain river, the court will take judicial notice that the river was in the county named.—Acton v. State (Md.) 419.

Indorsement.

Of note, see "Negotiable Instruments."

INFANCY.

See, also, "Guardian and Ward."

An infant party cannot appoint an attorney to represent him in an action.—Lang v. Belloff (N. J. Ch.) 604.

Equity will not permit a defendant to plead infancy as a defense to an action on a loan without returning the money.—Pemberton Bldg. & Loan Ass'n v. Adams (N. J. Ch.) 280.

Infancy is no defense to an action on a loan of money to a minor on his falsely representing himself to be of age.—Pemberton Bldg. & Loan Ass'n v. Adams (N. J. Ch.) 280.

A conditional ratification will not avoid the defense of infancy unless the conditions annexed have happened.—Peacock v. Binder (N. J. Sup.) 215.

Information.

See "Indictment and Information."

Inheritance.

See "Descent and Distribution."

INJUNCTION.

An injunction will not lie at the suit of a taxpayer to restrain a city from erecting a public building, on the ground that it had no authority to purchase the site.—Jackson v. City of Newark (N. J. Ch.) 233.

An action at law will not be enjoined where defendant can set up in it any defense which he has.—Home Life Ins. Co. v. Selig (Md.) 703.

Where two railroad companies exchange property on consideration that a certain road should be discontinued, a successor to one of said roads under a charter granted after such contract was made, wherein no allusion was made to such discontinuance, will be enjoined in using such discontinued road.—Northern R. R. v. Manchester & N. W. R. R. (N. H.) 17.

Propriety of restraining a city from removing from streets, poles and wires which were erected under a contract with a street-railroad company, under which the latter changed its motive power from horse to electricity, which the city threatened to do on the ground that such contract was invalid.—Newark Pass. Ry. Co. v. Inhabitants of Township of East Orange (N. J. Ch.) 722.

Apprehension of irreparable injury, grounded on conflicting evidence, will not justify a preliminary injunction where adequate relief can be granted on final hearing.—Hemsley v. Bew (N. J. Ch.) 210.

A bill by a railroad company which seeks to appropriate, for double tracking, a strip of land used by another railroad, to enjoin interference with such appropriation, should be dismissed without prejudice where plaintiff was not engaged in laying a second track, and no present necessity is shown for its occupancy.—Pennsylvania S. V. R. Co. v. Schuylkill Nav. Co. (Pa.) 858.

INSANITY.

As defense for crime, see "Criminal Law."

—— for homicide, see "Homicide."

An expenditure by a committee which would have been authorized on application may be ratified by the court.—In re Hain's Estate (Pa.) 337; Appeal of Bennetsch, Id.

INSOLVENCY.

See, also, "Assignment for Benefit of Creditors."

Of corporations, see "Corporations."

Act May 12, 1891, providing that certain salaries shall be preferred, does not apply to a traveling salesman.—Mulholland v. Wood (Pa.) 24[illegible]

Under Pub. Laws 1887, c. 631, as amended by Pub. Laws 1889, c. 820, on a disallowance of a claim, the claimant must sue thereon in equity.—Niantic Mills Co. v. Riverside & Oswego Mills (R. I.) 432.

The fact that for four years, while an action at law was pending on a disallowed claim, the assignee did not object to its form, does not constitute a waiver of the failure to sue in equity.—Niantic Mills Co. v. Riverside & Oswego Mills (R. I.) 432.

A debt due from an insolvent at the commencement of the insolvency proceedings may be set off against his trustee as against himself.—Carroll v. Weaver (Conn.) 489.

A landlord who fails to distrain for rent until after the tenant has applied for the benefit

Digitized by Google

the insolvent laws, acquires no lien or priority by a subsequent levy or distress.—Fox v. Merfeld (Md.) 583.

Instructions.

See "Criminal Law"; "Trial."

INSURANCE.

Where the beneficiary of a life policy, who has no insurable interest in the assured, collects the money due on the policy, he is liable to the legal representative of the assured.—Riner v. Riner (Pa.) 347.

Where the insured accurately describes the property, but the agent, without his knowledge, misdescribes it, it will not defeat a recovery on the policy.—Dowling v. Merchants' Ins. Co. of Newark (Pa.) 1087.

Conditions of policy.

Where a devisee takes property under a will at a certain price to be paid in annual installments, the property is incumbered, within a clause against incumbrances.—Renninger v. Dwelling-House Ins. Co. (Pa.) 1083.

The placing and operating of an engine 50 feet from an insured tannery, for the purpose of grinding bark, is not an alteration of the premises, within the terms of the policy.—Schaeffer v. Farmers' Mut. Fire Ins. Co. of Dug Hill (Md.) 317.

A portable engine occasionally employed in grinding bark for a tannery is not a steam engine threshing out crops, within the prohibition of an insurance policy.—Schaeffer v. Farmers' Mut. Fire Ins. Co. of Dug Hill (Md.) 317.

Liability of company under a policy providing that, if an engine be stationed on the premises, the company shall appoint a committee to ascertain the increase of risk, for the amount of which the insured shall give a premium note.—Schaeffer v. Farmers' Mut. Fire Ins. Co. of Dug Hill (Md.) 317.

An agreement by an insurance company after notice of breach of condition to arbitrate the loss is a waiver of such breach.—McGonigle v. Agricultural Ins. Co. of Watertown, N. Y. (Pa.) 626.

To prove a breach of condition by an increase of risk, the insurer must show that the insured knew of such increase, and concealed it.—McGonigle v. Susquehanna Mut. Fire Ins. Co. (Pa.) 868.

Evidence examined, and *held* to show a waiver of condition in the policy as to incumbrances.—McGonigle v. Susquehanna Mut. Fire Ins. Co. (Pa.) 868.

Proofs of loss.

Evidence examined, and *held* that the insurer had waived proofs of loss.—McGonigle v. Susquehanna Mut. Fire Ins. Co. (Pa.) 868.

Agents.

One who solicits insurance at the local insurance agent's instance, takes applications, and delivers policies, is the agent of the company.—McGonigle v. Susquehanna Mut. Fire Ins. Co. (Pa.) 868.

Notice to a general agent of an insurance company that the insured is using an engine on his premises is notice to the company.—Schaeffer v. Farmers' Mut. Fire Ins. Co. of Dug Hill (Md.) 317.

Actions on policies.

A declaration on a contract of insurance is bad if it sets up matter in avoidance which, if true, destroys the effect of the contract sued on.—Martin v. Insurance Co. of North America (N. J. Sup.) 213.

In an action on a policy conditioned on giving proofs of loss and notice, a complaint which fails to show service of notice and proofs within the limited time before action brought is demurrable.—Pierson v. Springfield Fire & Marine Ins. Co. (Del. Super.) 966.

Questions for jury in an action on a fire policy providing that, if an engine be used on the premises, a committee shall be appointed to ascertain the amount of increased risk, for which a premium note shall be given.—Schaeffer v. Farmers' Mut. Fire Ins. Co. of Dug Hill (Md.) 317.

Mutual benefit insurance.

One who takes a certificate subject to the existing rules of a benefit society is not bound by a subsequent amendment restricting the benefits to be received.—Hale v. Equitable Aid Union (Pa.) 1066.

Act April 15, 1868, providing that life insurance for the benefit of a wife or children shall vest in her or them, does not apply to a benefit certificate providing that, in case of the death of the beneficiaries before the death of the member, the benefit shall revert to the association.—Fischer v. American Legion of Honor (Pa.) 1089.

Where a member of a mutual insurance association has a right on certain terms, which he is able and willing to fulfill, to be reinstated after default for nonpayment of dues, his remedy for reinstatement is in equity, rather than by mandamus.—Bradbury v. Mutual Reserve Fund Life Ass'n (N. J. Ch.) 775.

INTEREST.

See, also, "Usury."

Where a partner left his installments of salary in the hands of the firm to be used, on an accounting, he is entitled to interest thereon.—Keiley v. Turner (Md.) 700.

A legacy bears interest only from the time it is payable.—In re Engles' Estate (Pa.) 681; Appeal of Commonwealth Title Insurance & Trust Co., Id.

Interstate Commerce.

Regulation of, see "Constitutional Law."

Intervention.

See "Parties."

INTOXICATING LIQUORS.

Use by jury, see "Criminal Law."

Licenses.

The fact that the number of persons in favor of granting a liquor license greatly exceeds the number opposing it is no ground for reversing a decree refusing the license.—In re Bowman (Pa.) 932.

Where a remonstrance to the granting of a license was filed only three days before the day set for hearing, it was proper to postpone the hearing one week, so as to allow the remonstrants to be heard.—In re Bowman (Pa.) 932.

The fact that there was no remonstrance against the granting of a license does not justify the assumption that the court acted arbitrarily in refusing it.—In re Sandcroft (Pa.) 948.

It is sufficient ground for refusing a distiller license to sell in a certain city that his distillery is not located therein, and does not do a legitimate business.—In re Johnson's License (Pa.) 203.

Digitized by Google

The board of excise of the city of Elizabeth cannot revoke a license after the session at which it was granted, except for cause mentioned in Act 1889, p. 77, § 10, or because it was obtained through fraud.—Decker v. Board of Excise of City of Elizabeth (N. J. Sup.) 235.

The discretionary action of the superior court in granting a license under Gen. St. §§ 3057–3061, as amended by Pub. Acts 1893, p. 319, will not be reviewed.—Appeal of Hopson (Conn.) 531.

Judgments of a justice that an applicant for a license has violated the law, which are vacated by an appeal which is pending, are not convictions within the law making such convictions proof that the applicant is unsuitable.—Appeal of Smith (Conn.) 529.

Judgments by a justice that an applicant for a license has violated the law do not raise an irrebuttable presumption that he is unsuitable, where they were vacated by an appeal which is still pending.—Appeal of Smith (Conn.) 529.

Local option.

Act 1894, c. 484, providing for a local option election in Cambridge, is unconstitutional.—Whitman v. State (Md.) 325.

Illegal sales.

It is no defense on prosecution for a sale of beer that defendant did not know the substance sold was beer.—State v. Tomasi (Vt.) 780.

Criminal prosecution.

Under St. 1888, No. 42, on a conviction for possessing liquor with intent to sell, a prior conviction for the sale will warrant an infliction of an increased penalty.—State v. Sawyer (Vt.) 285.

An indictment for retailing intoxicating liquors construed, and *held* to contain no description of any legal offense.—State v. Schmidt (N. J. Sup.) 280.

On a trial for selling liquors without a license, the prosecution need not show that defendant was not licensed.—Grant v. Watson (N. J. Sup.) 1040.

Civil damage laws.

Where a husband, on receiving his wages, gave it to his wife, the fact that she gave him some of it when she knew he intended to use it for a spree is not such contributory negligence as will prevent her recovery under the civil damage laws.—Bradford v. Boley (Pa.) 751.

A wife cannot recover under the civil damage act for the loss of the earning power of her husband because of his imprisonment for an act committed while he was intoxicated.—Bradford v. Boley (Pa.) 751.

JUDGMENT.

Appealable judgments, see "Appeal."

Entry of judgment on the record of an auditor, instead of noting the decision thereon, is harmless, where the judgment must have been necessarily entered at a later date.—White v. Eddy (R. I.) 823.

Right, in action against two nonresident partners, to proceed against one upon service on him while temporarily in the state.—Nathanson v. Spitz (R. I.) 690.

For want of an affidavit of defense.

A judgment for want of an affidavit of defense will be reversed for a variance between the averment and the assessment of damages.—Edison General Electric Co. v. Thackara Manuf'g Co. (Pa.) 856.

Under Laws 1887, p. 271, § 5, where defendant fails to file an affidavit of defense within 15 days after notice of filing of statement, the prothonotary has authority to enter judgment.—Tobyhanna & Lehigh Lumber Co. v. Home Ins. Co. (Pa.) 564.

Res judicata.

Sufficiency of plea in bar, in an action by an executor on a claim in favor of the estate, it alleging that defendant had presented claims against the estate to the commissioners, and that the probate court had rendered judgment on the commissioners' report.—Kenney v. Howard (Vt.) 850.

A decision of the supreme court is conclusive on the parties, though it is thereafter overruled in another cause.—Bolton v. Hey (Pa.) 1097.

A plea in bar to an action setting out a judgment rendered on the claim need not allege that such judgment is still in force.—Kenney v. Howard (Vt.) 850.

A decree of an orphans' court allowing an administrator's account on a sale of assets is not conclusive where no sale was in fact made.—Schweitzer v. Bonn (N. J. Ch.) 24.

Where a probate court construes a will, and distributes the estate, and no appeal is taken, property rights vested under the decree cannot be disturbed for error in the construction.—Leavens v. Ewins (Vt.) 297.

Defenses considered or admissible in ejectment, and decided against defendant, cannot be reconsidered on a bill to restrain an action for mesne profits based on the recovery in ejectment.—Mershon v. Williams (N. J. Ch.) 778.

Conclusiveness of a judgment to foreclose a mechanic's lien, as to who was the original contractor.—Curtis v. Bradley (Conn.) 591.

Effect of decree sustaining an assignment as binding attachment creditors as to whom the case was dismissed without authority by order of plaintiff's counsel.—Riley v. First Nat. Bank (Md.) 585.

When the record of an action shows that certain matter must have been decided in rendering the judgment, so as to be binding in a future suit, it is immaterial that expressions in the court's opinion indicate that such matter was not decided.—Sargent & Co. v. New Haven Steamboat Co. (Conn.) 543.

Question whether an issue as to the ownership of certain land was determined in a previous suit.—Sargent & Co. v. New Haven Steamboat Co. (Conn.) 543.

Presumption that an answer in a former action was appropriately framed, it putting in issue a question which was evidently the main issue therein, the decision on which question was afterwards set up as res judicata.—Sargent & Co. v. New Haven Steamboat Co. (Conn.) 543.

A person nonsuited in an action for fraudulent warranty in the sale of a horse, who recovers judgment for breach of contract on the same warranty, cannot thereafter obtain a reversal of the first judgment.—McGlade v. McCormick (N. J. Err. & App.) 460.

Remittitur.

The error of rendering an excessive judgment is cured by remitting the excess.—Sweet v. Excelsior Electric Co. (N. J. Err. & App.) 721.

Opening and vacating.

A judgment against an estate, obtained by collusion between the creditor and the executor, whereby a devisee is deprived of his legacy, will be set aside.—First Baptist Church of Hoboken v. Syms (N. J. Err. & App.) 717.

Sufficiency of showing to justify the vacation of a judgment by default, defendant having been improperly served, and being thereafter told by

Digitized by Google

plaintiff's attorney that the matter was "all over."—Pattison v. Hughes (Md.) 320.

Where no abuse of discretion is shown in opening a judgment by confession, the order will not be reversed.—Beaver v. Slear (Pa.) 1094.

Action on judgment.

An action at law may be maintained in New Jersey on a decree for alimony made in New York where the court had jurisdiction.—Bullock v. Bullock (N. J. Sup.) 1024.

Judicial Notice.

See "Evidence."

JUDICIAL SALES.

Execution sales, see "Execution."
Foreclosure sale, see "Mortgages."

It is no valid objection to a sale by an assignee for creditors, under Act Feb. 17, 1876, that the senior lienholder will thereby be deprived of his privilege of using his lien as equivalent to money in bidding at the sale.—In re Handy's Estate (Pa.) 983; Appeal of Larned, Id.

Where a sheriff sells land on execution to defendant, with agreement for a resale at defendant's expense in case he fails to comply with the terms of the sale, and the sheriff afterwards sells the property on foreclosure, he has no right of action on default against the purchaser at execution sale.—Connell v. Shryock (Pa.) 731.

Jurat.

See "Affidavit."

Jurisdiction.

See "Courts."
Of equity, see "Equity."

JURY.

Use of intoxicating liquors, see "Criminal Law."

Where 12 good and lawful men were secured as jurors, as required by statute, defendant cannot complain if more than that number were summoned.—Barber v. James (R. I.) 264.

Where 12 of the 48 jurors drawn were out on another case, and, when 11 jurors had been accepted, all the rest present had been challenged or stood aside, there was no error in calling a juror from those stood aside.—Commonwealth v. Weber (Pa.) 481.

Defendant in a criminal case cannot, after pleading, object to the jury for irregularities occurring before the plea, under Act Feb. 21, 1814.—Commonwealth v. Freeman (Pa.) 115.

A right to jury trial in an action of account is lost after the court notes its decision on the report of the auditor.—White v. Eddy (R. I.) 823.

Under Judiciary Act, c. 26, § 1, where the only entry is defendant's submission to judgment for a certain sum, his application within two days for a jury trial should be granted.—Lavelle v. Kimball (R. I.) 166.

Under Act Feb. 16, 1829, and Const. art. 6, § 22, an heir is not entitled as of right to have the issue devisavit vel non tried by a jury, either in the register's court or on appeal to the superior court.—Cummins v. Cummins (Del. Super.) 816.

JUSTICES OF THE PEACE.

An action for the destruction of fruit in baskets may be tried, as an action of trespass, before a justice.—Conner v. Reardon (Del. Super.) 878.

The fees of justices of the peace in Luzerne County are subject to the provisions of Act May 23, 1893.—Fenner v. Luzerne County (Pa.) 862.

Justifiable Homicide.

See "Homicide."

Laches.

See "Equity."

LANDLORD AND TENANT.

A tenant occupying, under a parol lease for 15 years, a house built by the landlord on the land of another under an agreement to remove it at request, is a tenant at will.—Blanchard v. Bowers (Vt.) 848.

Sufficiency of evidence to show an acceptance by a landlord of a surrender of the premises by the lessee.—Lane v. Nelson (Pa.) 864.

A storehouse built on the land of a railroad company under a license providing for its removal at request was, as to a tenant occupying it, realty.—Blanchard v. Bowers (Vt.) 848.

Evidence examined, and *held*, that the tenant was holding from year to year, and was not a tenant by sufferance.—Amsden v. Atwood (Vt.) 448.

Leases.

Evidence examined, and *held* that defendants had sufficiently performed their part so as to be entitled to a renewal under the terms of the lease.—Balfour v. Russell (Pa.) 570.

Lease construed, and *held* that a notice to determine the tenancy was not necessary at the end of the first or the second year, but only at the end of a succeeding year.—Ashhurst v. Eastern Pennsylvania Phonograph Co. (Pa.) 116.

A lease which extends the liabilities of the parties to their heirs, executors, and administrators does not authorize the legal representatives of the deceased lessor to distrain on the goods of the deceased lessee in the hands of his administrator.—Gandy v. Dickson (Pa.) 127.

Construction of a lease to a railroad company so long as the land should be used for railroad purposes as terminating upon the conveyance of the land by the company for private railroad purposes.—Kugel v. Painter (Pa.) 338.

Rent.

A tenant cannot deduct from the rent due his landlord the amount of damages involved in a diminution of the enjoyment of his tenancy by the tortious act of a stranger.—Vogel v. McAuliffe (R. I.) 1.

Construction of provision in a lease that the lessor should pay a certain rental, so long as he should "occupy" the premises, as rendering him liable for rent for the entire term, in spite of his removal.—Lane v. Nelson (Pa.) 864.

Where a lease for 33 months, payable monthly, provides that if the lessees were sold out by the sheriff the rent for the balance of the term should at once become due, it entitles the landlord, on the happening of that event, to the rent for the balance of term, not to exceed one year, under Act June 16, 1836, § 83.—Platt v. Johnson (Pa.) 935.

Landlord's lien.

A landlord's lien under Rev. Code, c. 120, § 60, is superior to a chattel mortgage executed before the beginning of the tenancy, and before the goods were taken onto the demised premises.—Ford v. Slewell (Del. Super.) 715.

Digitized by Google

Laws.

See "Statutes."

Leases.

See "Landlord and Tenant."

Legacies.

See "Wills."

LICENSE.

To sell liquor, see "Intoxicating Liquors."

A permission by a city to private parties to construct drains on highways is a revocable license.—Eddy v. Granger (R. I.) 831.

Permission to a telegraph company to construct its line in front of one's house gives a mere license, and not an easement.—Western Union Tel. Co. v. Bullard (Vt.) 286.

Evidence examined, and *held*, that a license granted by one adjoining owner to another to use his stairway was restricted and temporary, and not irrevocable.—Baldwin v. Taylor (Pa.) 250.

Liens.

See "Mechanics' Liens."
Of attachment, see "Attachment."
Of landlord, see "Landlord and Tenant."
Of mortgage, see "Chattel Mortgages."
Of taxes, see "Taxation."

Life Insurance.

See "Insurance."

LIMITATION OF ACTIONS.

When statute is applicable.

A contract to purchase land at a sheriff's sale, and to reconvey to the owner on being repaid the amount of the debt, and pay over, if the owner could not redeem, the difference between a fixed valuation and the amount paid, is within Act April 22, 1856, § 6, providing for suit thereon within five years.—Wilson v. Bond (Pa.) 18.

Act April 22, 1856, which prohibits any right of entry by reason of any implied resulting trust but within five years after the trust accrues, applies to an attempted establishment of a trust ex maleficio.—Barry v. Hill (Pa.) 126.

A suit to enforce a charge on land brought 19 years after death of testatrix, but less than 6 years after death of the devisee whose interest was charged, and who performed the trust until his death, is not barred by limitations.—Dodge v. Hogan (R. I.) 1059.

Running of statute.

One who claims that the statute was suspended by the debtor's nonresidence must show that during that time the debtor did not have property within the state liable to attachment.—Batchelder v. Barber (Vt.) 293.

Where coal is removed by a subterranean passageway, limitations do not begin to run against the trespass until discovery thereof.—Lewey v. H. C. Frick Coke Co. (Pa.) 261.

Where one receives money belonging to a decedent's estate before administration is granted, the statute does not run against an action for such money until the grant of administration.—Riner v. Riner (Pa.) 347.

Where defendant, without the knowledge of plaintiff, takes water from pipes for a purpose other than that allowed under the contract by which it is furnished, limitations run against an action therefor where plaintiff had, at all times, access to the pipes, enabling him to know of such taking.—Scranton Gas & Water Co. v. Lackawanna Iron & Coal Co. (Pa.) 484.

Sufficiency of replication to a plea of the statute of limitations, setting up a former action commenced within the time limited, and within a year before the pending suit, and which was dismissed because the writ was not served more than 15 days before the return day.—Scott v. School Dist. No. 9 in Williamstown (Vt.) 145.

Time of beginning of running of statute, as against a guaranty to pay on 30 days' notice.—Hooper v. Hooper (Md.) 508.

Running of limitations against a claim by sureties for contribution from a cosurety, the guarantors having agreed to pay on 30 days' notice any sum that might be due.—Hooper v. Hooper (Md.) 508.

Acknowledgment.

The allowance of a dividend on a note barred by the statute on distribution of a balance in the hands of a committee of a lunatic does not prevent the ward pleading the statute after his restoration to reason.—In re Raeder (Pa.) 929.

Evidence on presentation of claim examined, and *held* insufficient to overcome the presumption of payment under the statute.—Appeal of Ferguson (Pa.) 733; In re Taggart's Estate, Id.

A request by a mortgagor to a third person to write the mortgagee to produce the mortgage in person, or send it by some friend, and that in such case he would pay the same, is such an acknowledgment as to prevent the operation of the statute of limitations.—Miller v. Teeter (N. J. Ch.) 394.

Pleading and practice.

When the statute is not pleaded, it is not available as a defense.—White v. Eddy (R. I.) 823.

Limiting Liability.

Carrier's contracts, see "Carriers."

Liquor Selling.

See "Intoxicating Liquors."

Live Stock.

Shipments by carrier, see "Carriers."

Local and Special Laws.

See "Constitutional Law."

Local Option.

See "Intoxicating Liquors."

LOST INSTRUMENTS.

Sufficiency of evidence as to a lost instrument providing that a purchaser under execution sale should reconvey the land to the execution defendant upon payment of the amount of the debt.—Burr v. Kase (Pa.) 954.

Sufficiency of evidence to show that an agreement had been made by which a purchaser at execution sale was to reconvey to the execution debtor on payment of his expenditures, the contract being alleged to have been lost.—Burr v. Kase (Pa.) 954.

Magistrate.

See "Justices of the Peace."

MALICIOUS PROSECUTION.

Where the declaration fails to allege that the proceedings on which the action is based terminated in plaintiff's favor, it is bad on demurrer.—Collins v. Campbell (R. I.) 832.

Digitized by Google

MANDAMUS.

Right of street-railway company to mandamus to compel the mayor to issue a permit to allow it to dig up the streets, the issuance of such permit being, in view of previous ordinances, in the discretion of the mayor.—State v. Latrobe (Md.) 788.

A writ of mandamus will not issue to compel the performance by one of something which is purely within his discretion.—State v. Latrobe (Md.) 788.

Mandamus will not lie to the judge of the court of quarter sessions commanding him to grant a liquor license or show cause.—In re Johnson's License (Pa.) 203.

Mandamus will lie to compel a city railway company which has accepted an ordinance to comply with its provisions as to the manner of locating its road.—Borough of Wilbur v. Trenton Pass. Ry. Co. (N. J. Sup.) 238.

On a petition by a street-railway company for mandamus to compel the mayor of a city to grant a permit to tear up streets, the mayor may set up that the petitioner had forfeited its rights to a permit by delay in prosecuting the work of laying its tracks. — State v. Latrobe (Md.) 788.

Mandamus will lie to restore a school teacher entitled to her position on the decision of the state superintendent. — Thompson v. Board of Education of Borough of Elmer (N. J. Sup.) 168.

In mandamus to restore a school teacher to her position on a decision of the state superintendent, relator must show his jurisdiction.—Thompson v. Board of Education of Borough of Elmer (N. J. Sup.) 168.

MASTER AND SERVANT.

See, also, "Principal and Agent."

The relation and its incidents.

One who receives as compensation a house and road commission on approved sales, and pays his own expenses, is a traveling salesman.—Mulholland v. Wood (Pa.) 248.

Whether a workman erecting a bridge under a contract by a rolling-mill company with defendant railroad company was an employé of the railroad company was for the jury.—Hardy v. Delaware, L. & W. R. Co. (N. J. Sup.) 281.

In an action against two railroads, where the complaint alleges that plaintiff, as an employé of the third person, was working in a tunnel under their tracks, he must be held to be working, as to such companies, as a volunteer.—Wendell v. Pennsylvania R. Co. (N. J. Sup.) 720.

Consideration of evidence on issue as to whether an agreement of employment was to extend until the first of the next year.—Kane v. Moore (Pa.) 631.

A fireman is not an employé of the taxpayers, so as to create an implied invitation to enter their premises to extinguish fires, thus rendering them liable for injuries caused by the dangerous condition of the premises.—Behler v. Daniels (R. I.) 582.

Construction of contract of employment, by which the employé was to share in the profits, as to whether the computation of profits was to be made as of July 1st in each year, as claimed by the employé, there being evidence that the employer acted on this construction.—Dwyer v. Bonitz (N. J. Ch.) 172.

Bill by employé for accounting of profits by employer, to a part of which plaintiff claimed to be entitled, wherein defendant's evidence, supported by his sworn answer, was entitled to more weight than plaintiff's testimony, which was contradicted by inconsistent acts on his part.—Bailie v. Bailie (Pa.) 246.

Liability to third persons.

Liability of master for the acts of his servants in destroying plaintiff's furnace, there being evidence that the master ordered his servants to destroy the furnace, and that he thereafter refused to replace it.—Vogel v. McAuliffe (R. I.) 1.

Negligence of master.

Where, in an action for personal injuries, the evidence as to the condition of machinery causing the accident was conflicting, a refusal to direct a verdict for defendant was proper.—Fritz v. Jenner (Pa.) 80.

A railroad company using reasonable care in furnishing safe appliances is not liable where machinery becomes suddenly defective before an opportunity had to remedy its condition.—Fenderson v. Atlantic City R. Co. (N. J. Err. & App.) 767.

Where a master selects an agent to perform his duty of keeping machinery and appliances in repair, the master is liable for the negligence of such agent.—Ingebregtsen v. Nord Deutscher Lloyd Steamship Co. (N. J. Err. & App.) 619.

In the absence of notice to the contrary, a servant is entitled to assume that the master has exercised care in furnishing proper machinery for the work, and in keeping it in repair.—Ingebregtsen v. Nord Deutscher Lloyd Steamship Co. (N. J. Err. & App.) 619.

Independent contractor.

A county is not liable for injuries caused by the negligence of independent contractors, where it did not interfere with the work.—Eby v. Lebanon County (Pa.) 332.

Negligence of fellow servants.

To constitute the relation of fellow servants, a service must be under the same master, and the employment one for a common object. — Hardy v. Delaware, L. & W. R. Co. (N. J. Sup.) 281.

Where the employé's duty to inspect or repair machinery is incident to his use of the machinery in a common employment with fellow servants, the master is not liable to the fellow servants for the negligence of such employé.—Ingebregtsen v. Nord Deutscher Lloyd Steamship Co. (N. J. Err. & App.) 619.

Assumption of risk.

Evidence examined, and *held* that the accident to the employé was due to a risk incident to the employment. — Moore v. Pennsylvania R. Co. (Pa.) 734.

Evidence examined, and *held* that an employé injured by the backing of a train against a car under which he was working assumed the risk. —Marean v. New York, S. & W. R. Co. (Pa.) 562.

Contributory negligence.

Where plaintiff placed his hand in a machine in motion, knowing that it was dangerous, a verdict for his employer was proper.—Gaffney v. J. O. Inman Manuf'g Co. (R. I.) 6.

Whether a minor injured while engaged in the work for which he was employed was guilty of contributory negligence is for the jury.—Neilson v. Hillside Coal & Iron Co. (Pa.) 1091.

Material Men.

See "Mechanics' Liens."

Measure of Damages.

See "Damages."

Digitized by Google

MECHANICS' LIENS.

A boiler battery consisting of a stone foundation on which a furnace is erected, with brick walls above, which run drums and smokestacks, to be used, in connection with machinery, in the manufacture of pig iron, is a new building, within Act June 16, 1836.—Wheeler v. Pierce (Pa.) 649.

Where a building contract provides that the contractor shall do all the work and furnish all materials, it is not necessary to file with the contract the specifications.—Freedman v. Sandknop (N. J. Ch.) 232.

Where the lien was filed against "a double dwelling house" as one building, and it was a block of two buildings, separated by a brick wall, the lien was not enforceable.—Roat v. Frear (Pa.) 861.

Defendant cannot complain of an instruction restricting plaintiff's recovery to the materials furnished on the credit of the building, and used in its construction.—Scranton Lathe Turning Co. v. Cassidy (Pa.) 734.

Act May 18, 1887, requiring notice of a material man's intention to file a lien, applies only to such cases as do not fall within Act June 16, 1836, or Act April 21, 1856.—Wheeler v. Pierce (Pa.) 649.

MERGER.

Question as to the merger of a charge for support in an absolute interest in the land obtained by the beneficiary of the charge.—Dodge v. Hogan (R. I.) 268.

Minor.

See "Guardian and Ward"; "Infancy."

MORTGAGES.

See, also, "Chattel Mortgages."
Ejectment by mortgagee, see "Ejectment."
Of corporation, see "Corporations."
Of railroad, see "Railroad Companies."

Construction of mortgage conveying any interest that the mortgagees may have in land in a certain town, as not covering an after-acquired interest.—Paddock v. Potter (Vt.) 784.

Equity will not decree a deed in terms one of trust to convey a fee simple unless the evidence is clear.—Martling v. Martling (N. J. Ch.) 27.

Construction of a deed by a corporation as being executed merely as security for a loan.—Montgomery v. Beecher (N. J. Ch.) 451.

Where one buys land subject to two mortgages, and on foreclosure of the first becomes the purchaser again, he takes subject to the second mortgage.—Kennedy v. Borie (Pa.) 98.

Payment and release.

The mere possession of a bond and mortgage by a person other than the obligee will not warrant payment thereof to such person.—Lawson v. Nicholson (N. J. Err. & App.) 386.

Question whether a mortgagor was released by the fact that the mortgagee released a part of the land conveyed by the mortgage to a third person, the amount received for such part being applied on the mortgage debt.—Norton v. Henry (Vt.) 787.

Foreclosure and sale.

A sale under foreclosure is not invalid because the mortgagee's administrator signed the notice of sale as "assignee of the mortgagee," and did not state therein that he was administrator.—Thurber v. Carpenter (R. I.) 5.

A foreclosure sale will not be set aside for inadequacy of price, in the absence of assurance that a higher price would be realized at resale.—Fidelity Insurance, Trust & Safe-Deposit Co. v. Byrnes (Pa.) 255.

Liability of a fund deposited in consideration of the postponement of a sale on foreclosure, under a contract that, should the property not bring enough to pay the decree, the deficit might be retained therefrom, where the sale was afterwards made on advice of counsel for an insufficient amount.—Dodd v. Fisher (N. J. Err. & App.) 392.

Sufficiency of affidavit of defense in a suit to foreclose a mortgage, it stating that the mortgage was placed in escrow and was never delivered, and that no part of the consideration was ever paid.—Morgan v. Morgan (Pa.) 1291.

The admission, by all parties in interest, of power in trustees under a will to foreclose a mortgage belonging to the estate, is sufficient to protect a purchaser at the foreclosure sale.—Bradford v. King (R. I.) 166.

Question whether certain persons were the assigns of the original trustees of a mortgage, so as to be able to sell under a power of sale therein.—Bradford v. King (R. I.) 166.

Where the rent of land is payable in crops, the purchaser, on foreclosure, is entitled to the rent out of the crop maturing at the date of the sale.—Williams v. Cochran (Del. Super.) 1050.

Sufficiency of affidavit of defense made by a married woman in a proceeding against her and her husband to foreclose a mortgage, it alleging that plaintiff had received the proceeds of other securities for the debt, and asking an accounting therefor.—First Nat. Bank v. Scofield (Pa.) 1012; Appeal of Madden, Id.

MUNICIPAL CORPORATIONS.

See, also, "Bridges"; "Counties"; "Highways"; "Poor and Poor Laws"; "Schools and School Districts."

Act April 3, 1851, requiring the burgess and council of a borough, on petition of owners of lands adjacent to the limits, to ordain the admission of such lands as part of the borough, is not repealed by subsequent acts.—In re Annexation to Borough of Plymouth (Pa.) 933; Appeal of Plymouth Tp., Id.

Under Act May 24, 1887, the boundaries of the city of Wilkes Barre extend to the middle of the Susquehanna river.—Gilchrist v. Strong (Pa.) 931.

A city may, through its councils, recognize a moral obligation to one who has rendered service to it.—Bailey v. City of Philadelphia (Pa.) 925.

It is no ground for denying incorporation that it is not immediately advantageous to a few of the property owners therein.—In re Incorporation of Borough of Prospect Park (Pa.) 254; Appeal of Oesterle, Id.

Commissioners appointed in any city under Laws 1894, p. 387, to make division of the city into wards, are required to make provisions with regard to equality of population, and divisions made with regard to the equality of the average total vote are invalid.—Griffin v. Wanser (N. J. Sup.) 222.

It will be presumed that a bill filed by a city solicitor in the name of the city was filed with its authority.—City of Baltimore v. President, etc., of Baltimore & Y. Turnpike Co. (Md.) 420.

Ordinances and resolutions.

Authority of town, under its charter, to prohibit domestic animals from running at large within the town limits.—Cochrane v. City of Frostburgh (Md.) 703.

Digitized by Google

Under Act May 23, 1889, art. 5, § 3, a city of the third class cannot license milk wagons, when not done in the exercise of police power.—City of Reading v. Bitting (Pa.) 359.

A burgess may sue to enjoin an action under an ordinance which he claims to have vetoed.—McMichael v. Inter-County St. Ry. Co. (Pa.) 477.

Where a burgess receives an ordinance an hour before a called meeting, a veto returned within 24 hours thereafter is in time.—McMichael v. Inter-County St. Ry. Co. (Pa.) 477.

Under the general borough law (Act May 23, 1893), a burgess of the borough of Bridgeport has a veto power, though not a member of the council.—Commonwealth v. Schneipp (Pa.) 118.

Officers and agents.

A removal of a city assessor from office without notice was not a trial, as provided by a clause in the city charter.—Maroney v. City Council of Pawtucket (R. I.) 265.

A superintendent appointed by board of water commissioners of New Brunswick pursuant to Act March 27, 1873, is not such a public officer as can be discharged by such board.—Cramer v. Water Com'rs of New Brunswick (N. J. Sup.) 384.

Contracts.

Under Act March 9, 1893, the board of street and water commissioners may contract with railroad companies whose roads enter the city by resolution, without concurrence of any other board, and notwithstanding the veto of the mayor.—United New Jersey Railroad & Canal Co. v. National Docks & N. J. Junction Connecting Railroad Co. (N. J. Sup.) 981.

Right of a citizen to invoke equity to set aside the award of a contract in violation of law.—Frame v. Felix (Pa.) 375.

The board of water commissioners of the city of Reading *held* to be a mere department of the city government, and hence bound to comply with the statutory requirements as to the awarding of city contracts.—Frame v. Felix (Pa.) 375.

The fixing by a municipal board of a minimum price to be paid for labor under a city contract violates a statute requiring such work to be awarded to the lowest responsible bidder.—Frame v. Felix (Pa.) 375.

Where a city in good faith advertises for proposals for paving streets, it may contract for the use of such material as it deems for the best interest of the city, though such material is subject to private ownership, and the product of an exclusive manufacture.—City of Newark v. Bonnel (N. J. Err. & App.) 408.

A township, in contracting under Act May 22, 1894, for the lighting of streets, need not award a contract to the lowest bidder, but they are bound to exercise the power in a bona fide manner for the benefit of the township.—Schefbauer v. Board of Township Committee of Kearney Tp. (N. J. Sup.) 454.

Under Act May 22, 1894, a township committee may contract for lighting streets and public places for a term of five years, and cause the annual expense thereof to be raised by taxation, as for the repair of streets.—Schefbauer v. Board of Township Committee of Kearney Tp. (N. J. Sup.) 454.

The curative act of May 1, 1894, does not validate contracts for lighting streets that were made without first advertising for proposals.—Board of Finance of Jersey City v. City of Jersey City (N. J. Err. & App.) 625.

Before the board of street and water commissioners of Jersey City can make a contract for street lighting involving an expenditure in excess of $500, it must advertise for proposals for the contract.—Board of Finance of Jersey City v. City of Jersey City (N. J. Err. & App.) 625.

Under Trenton City Charter, § 107, authorizing contracts for street improvements to be given to the lowest bidder "who shall give satisfactory proof of his" ability to properly perform the work, the board of public works cannot exercise an arbitrary discretion in awarding the contract, but must base their discretion on facts reasonably tending to support its determination.—McGovern v. Board of Public Works of City of Trenton (N. J. Sup.) 613.

Control of streets.

The vacation of a street by a municipal board does not involve the infringement of any private right.—United New Jersey Railroad & Canal Co. v. National Docks & N. J. Junction Connecting Railroad Co. (N. J. Sup.) 981.

Where a city permits a private party to make a drain on a highway, he acquires no vested right therein.—Eddy v. Granger (R. I.) 831.

Construction of Act March 4, 1851, incorporating the city of Burlington, and the creation of a dual municipal government over the territory within the township of Burlington, as to the duty of each municipality as to repairs of streets.—McNeal Pipe & Foundry Co. v. Lippincott (N. J. Sup.) 399.

Under Act March 4, 1851, incorporating the city of Burlington, the city has exclusive power to maintain in repair the highways within the city, and the township of Burlington has the power of maintaining highways outside of the city limits.—McNeal Pipe & Foundry Co. v. Lippincott (N. J. Sup.) 399.

Act May 22, 1894, relating generally to the lighting of streets by municipal corporations, applies to the township of Kearney, in Hudson county, though that township was created by special acts conferring additional powers.—Schefbauer v. Board of Township Committee of Kearney Tp. (N. J. Sup.) 454.

Liability for torts and negligence.

Where a municipal corporation furnishes, through a bureau, light to private citizens and corporations, it is liable for the negligence of its servants connected with such bureau.—Bodge v. City of Philadelphia (Pa.) 728.

Sufficiency of petition in an action against a town for injury caused by a domestic animal belonging to one of the inhabitants, which, with others, was allowed by the town to run at large.—Cochrane v. City of Frostburgh (Md.) 703.

A lot owner is liable to a city for the amount of a judgment paid by it to one who fell through the sidewalk in front of the lot while in possession of the tenant.—City of Reading v. Reiner (Pa.) 357.

A city has actual notice of a defect in a sidewalk which might have been discovered by the ordinary care of the street commissioner who examined it.—Fee v. Borough of Columbus (Pa.) 1076.

Where a scaffolding was being erected over the sidewalks on a bridge, and both ends of the sidewalks were barred, the city was not negligent in not having some one at each end of the bridge to warn passengers of the danger.—Heidenwag v. City of Philadelphia (Pa.) 1063.

A city is not liable for the negligence of a company which contracted for a display of fireworks for injuries caused by a defective scaffold erected by it.—Heidenwag v. City of Philadelphia (Pa.) 1063.

An exhibition of fireworks by a city is not unlawful by Act Aug. 26, 1721 (Brightly's Purd. Dig. p. 814, pl. 1).—Heidenwag v. City of Philadelphia (Pa.) 1063.

Public improvements.

An appointment of commissioners to assess damages for lands for public improvements, under Laws 1892, c. 287, § 1, will be set aside,

Digitized by Google

where it is not shown that they were qualified, as provided by such act.—Green v. City of Perth Amboy (N. J. Sup.) 980.

Where an owner constructs, with the city's permission, a private sewer, and other owners on the street connect with it, the owner is liable for his proportion of the cost of a sewer subsequently laid by the city along the street.—City of Philadelphia v. Odd Fellows' Hall Ass'n (Pa.) 917.

Inequalities in the surface of land abutting on a street do not authorize a departure from the front-foot rule assessment when expressly enjoined by the statute under which the improvements are made.—City of McKeesport v. Busch (Pa.) 49.

Under Act April 3, 1867, relating to street improvements in the borough of McKeesport, an amendment, allowed on a claim which is defective in not defining the depth of the lot, after verdict, is proper.—City of McKeesport v. Busch (Pa.) 49.

A city cannot set off, against special damages to an abutting owner by a change of grade, an increase of value common to the entire neighborhood.—City of Philadelphia v. Rudderow (Pa.) 53.

Though a change of street grade was ordered to enable the city to construct sewers which would abate a nuisance, it is liable for compensation to the abutting owners.—City of Philadelphia v. Rudderow (Pa.) 53.

Certiorari lies when commissioners fail to report any damage on change of grade in favor of an abutting landowner, where the report shows that the question was passed on.—Stewart v. City of Hoboken (N. J. Sup.) 278.

Provisions in city charters as to notices on the making of an assessment for benefits applied to that portion of the assessment which is for damages.—Stewart v. City of Hoboken (N. J. Sup.) 278.

Under P. L. 1888, p. 471, and P. L. 1889, p. 378, the city of Hoboken, by the proper officers, may assess for damages for a change of street grade.—Stewart v. City of Hoboken (N. J. Sup.) 278.

Where an abutting owner knows that a street grade is to be raised and of an assessment, and delays for two years in suing out certiorari, it is ground for dismissal.—Stewart v. City of Hoboken (N. J. Sup.) 278.

Where benefits are assessed for a change of street grades, the assessment of damages should be made at the same time.—Stewart v. City of Hoboken (N. J. Sup.) 278.

Expenses incurred in unsuccessfully defending suits brought against a borough, because of its negligence in executing a public improvement, cannot be specially assessed as part of the cost of such improvement.—De Witt v. Borough of Rutherford (N. J. Sup.) 228.

Where the damages to a lot owner exceed the advantages caused by change of grade, he is entitled to the difference, though he requested the change to be made.—Lewis v. Borough of Darby (Pa.) 335.

Damages because of uncertainty as to what a city may hereafter do in regard to opening streets through the lands of an abutting owner cannot be recovered.—J. G. Brill Co. v. City of Philadelphia (Pa.) 348.

On appeal from the assessment of benefits on opening a public street, the jury need not review the question of damages.—City of Baltimore v. Smith & Schwarz Brick Co. (Md.) 423.

Opinions of witnesses acquainted with the land as to any increase in value by opening a street are admissible.—City of Baltimore v. Smith & Schwarz Brick Co. (Md.) 423.

On the question of benefits in opening a public street, evidence as to the cost of filling the lots to the proposed grade is relevant.—City of Baltimore v. Smith & Schwarz Brick Co. (Md.) 423.

Prices at sales of land in the vicinity within a reasonable time are admissible to show present value.—City of Baltimore v. Smith & Schwarz Brick Co. (Md.) 423.

The burden of proof is on the city to show increase in value of lots from opening a street.—City of Baltimore v. Smith & Schwarz Brick Co. (Md.) 423.

Right of owner of land covered by the prospective site of a city courthouse to damages against the city on account of delay in purchasing the property or condemning it.—Shanfelter v. City of Baltimore (Md.) 439.

Where a grade crossing of a street railroad was changed by agreement, damage to an adjoining landowner by reason of the increased cost of unloading freight from the track cannot be collected of a city.—In re Tucker and Frankford Streets (Pa.) 117; Appeal of Plumb, Id.

An agreement by the owner of property with a city for an amicable sci. fa. on the claim is an admission of the service of notice required on such claim.—City of Philadelphia v. Schofield (Pa.) 119.

The owner of a lot abutting on a street occupied by a railroad company, under Act June 9, 1857, can set up the liability of the company to pave the street in an action against him by the city to enforce an assessment therefor.—City of Philadelphia v. Bowman (Pa.) 142.

On scire facias by a city to the use of a contractor on a municipal lien, averments in the answer denying any authority from the city to the contractor to do the work put the plaintiff to proof thereof, and are sufficient to take the case to the jury.—City of Chester v. Eyre (Pa.) 634.

Fiscal management.

The term "department" in the provision of Act June 1, 1885, art. 6, that a warrant shall be signed by the head of the "appropriate department," includes city officials as well as technical departments.—Bailey v. City of Philadelphia (Pa.) 925.

The functions of a city department of education are not interfered with by the appropriation of money to another department to pay a moral obligation of the city to a teacher for services rendered.—Bailey v. City of Philadelphia (Pa.) 925.

The "appropriate department" whose head is, under Act June 1, 1885, to sign a warrant for the payment of money from the city treasury, is the department to which the appropriation is made.—Bailey v. City of Philadelphia (Pa.) 925.

Taxation.

Under Act May 23, 1889, certification by the city treasurer of schedules of unpaid taxes is necessary to authorize filing of the liens.—City of Reading v. Krause's Estate (Pa.) 366.

Act March 15, 1893, providing for the licensing of dogs, supersedes any power of exacting license fees for dogs which the city of Newark possessed under its charter.—Mulcahy v. City of Newark (N. J. Sup.) 226.

Murder.

See "Homicide."

Mutual Benefit Insurance.

See "Insurance."

Digitized by Google

NEGLIGENCE.

Defective streets, see "Municipal Corporations."
Of carrier, see "Carriers."
Of master, injury to servant, see "Master and Servant."
Of railroad, see "Railroad Companies."
Of street railroad, see "Horse and Street Railroads."

Where the evidence is conflicting, the question of negligence is for the jury.—Baltimore Traction Co. v. Appel (Md.) 964.

Right to recover of railroad company for injuries caused by the frightening of plaintiff's horse when about to cross the railroad by the approach of a hand car.—Plummer v. New York Cent. & H. R. R. Co. (Pa.) 887.

Sufficiency of evidence to show negligence on the part of defendant, causing water from a pipe in his room to flow down upon plaintiff's goods in the room beneath.—Lane v. Scagel (Vt.) 289.

Where a railroad company agrees to notify one working in a tunnel under its track of the approach of trains, a failure to give such notice constitutes negligence.—Wendell v. Pennsylvania R. Co. (N. J. Sup.) 720.

Where there is a reasonable doubt as to facts and the inferences to be drawn, negligence is a question for the jury.—Howett v. Philadelphia, W. & B. R. Co. (Pa.) 336.

Action for personal injuries caused by falling over a cellar door in the sidewalk, which was partly open, in which defendant owner of the house was *held* not negligent.—Stackhouse v. Vendig (Pa.) 349.

Construction of Act June 11, 1879, as amended by Act June 3, 1885, making the owner of a certain class of buildings liable for injuries caused by his failure to erect fire escapes.—Sewell v. Moore (Pa.) 370.

In an action against the owner of a building for personal injuries on the ground that he failed to provide fire escapes as required by statute, a certificate of approval of the escapes erected by him issued after the fire is inadmissible.—Sewell v. Moore (Pa.) 370.

The owner of a building is not liable for injuries sustained in consequence of a fire because of his failure to erect fire escapes, where this failure does not contribute to the injury.—Sewell v. Moore (Pa.) 370.

Pub. Laws 1878, c. 688, § 25, requiring elevators to be protected, does not render a property owner liable for injuries sustained by a licensee falling into an unprotected elevator well.—Behler v. Daniels (R. I.) 582.

Evidence examined, and *held* insufficient to show that plaintiff's horse was frightened by the negligent speed of defendant's electric car.—Yingst v. Lebanon & A. St. Ry. Co. (Pa.) 687.

Contributory negligence.

The burden of establishing contributory negligence is on defendant.—Baltimore Traction Co. v. Appel (Md.) 964.

The question of contributory negligence on conflicting evidence is for the jury.—Lake Roland El. Ry. Co. v. McKewen (Md.) 797.

One who, in the daytime, stumbles over a partly-open cellar door in the sidewalk, which he fails to see, for want of attention, is negligent.—Stackhouse v. Vendig (Pa.) 349.

No presumption of contributory negligence arises from the mere occurrence of the accident resulting in the death of plaintiff's decedent.—Pennsylvania R. Co. v. Middleton (N. J. Err. & App.) 616.

Sufficiency of evidence to show that one was injured by the turning of a wagon in the street through his own negligence.—Grabrues v. Klein (Md.) 504.

NEGOTIABLE INSTRUMENTS.

In an action on a note, a plea alleging that plaintiff is not the owner thereof, but holds it merely for collection, is demurrable.—Mumford v. Weaver (R. I.) 1.

A payee of a check, who deposits it with a bank for collection, is chargeable with the negligence of such bank in collecting the same.—Wagner v. Crook (Pa.) 576.

Evidence examined, and *held* to show that a note was given for a valuable consideration.—Browning v. Kempton (N. J. Ch.) 380.

A delivery of a note is necessary to its transfer by indorsement.—Middleton v. Griffith (N. J. Err. & App.) 405.

Ownership.

Question whether ownership of bonds is shown by the fact that the claimant authorizes another in writing to collect interest thereon.—Huston v. Harrison (Pa.) 987.

The possession of interest coupons is not evidence of ownership of the bonds from which they were cut.—Huston v. Harrison (Pa.) 987.

Possession of a note by the payee is presumptive evidence of his ownership thereof, though it had been indorsed by him.—Middleton v. Griffith (N. J. Err. & App.) 405.

Where the payee of a note indorses it to another, whether for value or for collection, and it again comes to his possession, he is presumed to be the owner thereof, and may cancel his own and subsequent indorsements.—Middleton v. Griffith (N. J. Err. & App.) 405.

Payment.

The taking by the payee of a check of another check in payment *held* not to relieve the original drawer from liability, though the drawee failed shortly after such transaction.—First Nat. Bank v. Buckhannon Bank of West Virginia (Md.) 302.

Sufficiency of an offer of parol evidence in an action on a note to establish a contemporaneous agreement as to a particular manner for the payment of the note.—Middleton v. Griffith (N. J. Err. & App.) 405.

Demand, protest, and notice.

Question whether a check payable in Baltimore, which was sent to the payee's correspondent in Philadelphia, and by him to Baltimore, was presented within a reasonable time.—First Nat. Bank v. Buckhannon Bank of West Virginia (Md.) 302.

A notice of protest is sufficient if it informs the indorser that the note has been dishonored, and that he is looked to for payment.—Salomon v. Pfeister & Vogel Leather Co. (N. J. Err. & App.) 602.

New Promise.

To toll statute of limitations, see "Limitation of Actions."

NEW TRIAL.

In criminal cases, see "Criminal Law."

A petition for a new trial cannot be heard by the appellate division on a statement which was not presented to the justice to be allowed and signed within the time fixed by law.—Reynolds v. Chapman (R. I.) 832.

A mere assertion that plaintiffs were forced to trial without preparation is no ground for new trial.—Denison v. Foster (R. I.) 894.

Digitized by Google

Under Judiciary Act, c. 31, § 6, a petition for new trial on the ground that a juror was an interested party should be filed in the common pleas division.—Duffy v. Webster (R. I.) 433.

Nonsuit.

See "Practice in Civil Cases."

Notes.

See "Negotiable Instruments."

Notice.

Of assessment by association, see "Associations."
Of lien, see "Mechanics' Liens."
Of nonpayment of note, see "Negotiable Instruments."

NUISANCE.

Acts which, under the common law, would have constituted a public nuisance, are in New Jersey a statutory misdemeanor. — State v. Crusins (N. J. Sup.) 235.

It is the duty of a town to abate a nuisance arising from the running at large, in the streets, of domestic animals.—Cochrane v. City of Frostburgh (Md.) 703.

Act Feb. 27, 1893, declaring that certain acts which, by the common law, would amount to a public nuisance, shall not be criminal, does not apply to such acts committed before the passage of the act.—State v. Crusins (N. J. Sup.) 235.

Office and Officer.

See "Justices of the Peace"; "Receivers"; "Sheriffs and Constables."
Corporate officers, see "Corporations."
Municipal officers, see "Municipal Corporations."

Opinion Evidence.

See "Evidence."

ORDERS.

Appealable orders, see "Appeal."

Sufficiency of answer as alleging that defendant accepted and paid an order drawn on him by plaintiff.—Carroll v. Weaver (Conn.) 489.

Ordinance.

See "Municipal Corporations."

Parol Evidence.

See "Evidence."

PARTIES.

See, also, "Specific Performance."

Right of plaintiff, after a ruling on a demurrer, to dismiss the action as to certain plaintiffs and attaching creditors brought in by him.—Riley v. First Nat. Bank (Md.) 585.

Erroneous order, in suit by the trustee of an insolvent, compelling plaintiff to make the insolvent a party plaintiff.—Carroll v. Weaver (Conn.) 489.

In a suit to establish an interest in the proceeds of the sale of certain land, others interested therein must be made parties. — Leonard's Adm'r v. Leonard's Ex'r (Vt.) 783.

Where C. sues to determine her rights under a will charging certain land with her support, W., for whose support the land is also charged, is entitled to intervene.—Dodge v. Hogan (R. I.) 1059.

PARTITION.

Where parents devise all their property to their children, the widow of one of the children can sustain partition.—Palethorp v. Palethorp (Pa.) 917.

Tenants in remainder of several undivided shares cannot have partition without the consent of the tenant of a single particular estate in the property.—Roarty v. Smith (N. J. Ch.) 1031.

PARTNERSHIP.

One who loans a merchant money for a specified interest and a certain per cent. of the profits of the business is a partner. — Wessels v. Weiss (Pa.) 247.

Where one loans money in consideration of interest and a share of the profits, and the agreement as to the interest is not in writing, Act April 6, 1870, providing that he shall not be a partner, does not apply.—Wessels v. Weiss (Pa.) 247.

A bill of sale of the stock in trade by two partners to the third is valid between the parties, though no possession was taken under it, and it was executed to delay creditors.—Frank v. Morehead (N. J. Ch.) 1016.

Admissions of a person that he is in partnership with another is evidence against him of such fact.—Appeal of Waddell (Pa.) 727; In re McNeilan's Estate, Id.

Authority of partners to bind firm.

A chose in action accruing to a partnership from a transaction in the ordinary course of business may be transferred by a single member of the firm.—Gerli v. Poidebard Silk Manuf'g Co. (N. J. Err. & App.) 401.

Firm and private creditors.

A firm creditor cannot have a conveyance by a partner to his wife of his individual land set aside unless there are no firm assets and no individual creditors, or unless he is also an individual creditor.—Hull v. William Deering & Co. (Md.) 416.

Dissolution, settlement, and accounting.

Where the partnership continues after the expiration of the time fixed, without a new contract, and the partners ceased to make entry on salaries on the firm books, on the settlement of accounts, the members are not entitled to salaries after the last entry thereon. — Keiley v. Turner (Md.) 700.

Where, on the dissolution of a firm, one member appropriated the firm stock with the other's consent, on the settlement of accounts he should be charged with the value of the stock at the time it was appropriated. — Keiley v. Turner (Md.) 700.

Construction of articles as to the right of members to compensation from the firm.—Keiley v. Turner (Md.) 700.

A provision in articles that the salaries of members shall not be considered as losses, entitles a partner to his salary unconditionally.—Keiley v. Turner (Md.) 700.

Evidence as to dissolution of partnership examined, and the day of the dissolution determined.—Smith v. Ervin (Pa.) 1067.

An executor of a deceased partner in a banking association need not accept the stock of his testator, so as to charge the general estate with

Digitized by Google

firm debts contracted after testator's death, because of a stipulation that the death of the partner shall not dissolve the association.—Wilcox v. Derickson (Pa.) 1080.

PARTY WALLS.

Where one intending to construct a wall within the line of his lot extends the foundation, by mistake, onto an adjoining lot, it does not thereby become a party wall.—Pile v. Pedrick (Pa.) 646.

Passengers.

See "Carriers."

PATENTS FOR INVENTIONS.

The surrender of a patent by the joint owner on an application for a reissue is not a cancellation where the reissue is refused.—Culp v. Allen (Pa.) 93.

One with a license to manufacture a patent can defend for failure of consideration where the patent is void, and others are manufacturing without paying a royalty, contrary to the agreement that the licensee shall have exclusive rights of manufacture.—Edison General Electric Co. v. Thackara Manuf'g Co. (Pa.) 856.

Pauper.

See "Poor and Poor Laws."

PAYMENT.

See, also, "Accord and Satisfaction."
Of mortgage, see "Mortgages."
Of note, see "Negotiable Instruments."

Sufficiency of transfer of credits to constitute a payment, so as to authorize a suit by the surety for distribution. — Hooper v. Hooper (Md.) 508.

Payment of a bond to a person wrongfully in possession thereof is invalid.—Lawson v. Nicholson (N. J. Err. & App.) 386.

The fact that a note was received in payment may be proven by the circumstances surrounding the transaction. — Macomber v. Macomber (R. I.) 753.

Sufficiency of evidence to show that a legacy was satisfied by a check given to the legatee by testator before the latter's death.—In re Turner's Estate (Pa.) 867; Appeal of Whitney, Id.

Sufficiency of reply to a plea of payment in a suit by an insolvent's trustee, it alleging that the payment was made after defendant was garnished by creditors of the insolvent, whose claims were subsequently allowed against the estate.—Carroll v. Weaver (Conn.) 489.

Voluntary payment of pension money to a soldiers' home by an inmate, in pursuance of an agreement under which he entered the home, cannot be recovered.—Bryson v. Home for Disabled and Indigent Soldiers (Pa.) 1008.

Where a debtor makes no application of a payment, the creditor may do so.—City of Philadelphia v. Kelly (Pa.) 47.

PERJURY.

Right of court reporter to read the evidence given in the action in which the alleged perjury was committed, in order to show its materiality. —State v. Camley (Vt.) 840.

An allegation that defendant committed perjury sufficiently alleges that he was legally sworn, and that he willfully testified falsely.—State v. Camley (Vt.) 840.

Personal Injuries.

See "Carriers"; "Damages"; "Horse and Street Railroads"; "Master and Servant"; "Negligence"; "Railroad Companies."

Personal Representatives.

See "Executors and Administrators."

PLEADING.

See, also, "Assumpsit"; "Equity"; "Malicious Prosecution"; "Trespass."
In action on note, see "Negotiable Instruments."

Substantial defects in a complaint are not cured by pleading over.—Pierson v. Springfield Fire & Marine Ins. Co. (Del. Super.) 966.

When several facts are stated in one continuous sentence, or in several sentences, connected by the conjunction "and," a single allegation of time applies to every fact.—Kenney v. Howard (Vt.) 850.

Pleas in abatement.

A plea to the jurisdiction must be signed by the defendant in person, and not by his attorney. —Kenney v. Howard (Va.) 850.

Sufficiency of a plea to the jurisdiction of the county court of a claim in favor of the estate of a decedent, it merely alleging that the probate court had jurisdiction. — Kenney v. Howard (Vt.) 850.

Demurrer.

A demurrer reaches back to the first defect in the pleading.—Pierson v. Springfield Fire & Marine Ins. Co. (Del. Super.) 966.

Upon the overruling of a demurrer to a declaration, defendant may plead over.—Municipal Court of City of Providence v. McElroy (R. I.) 435.

Error in overruling a demurrer to an answer for its failure to allege defendant's acceptance of an order *held* to be harmless, defendant subsequently alleging acceptance, and there being a finding for defendant on that issue.—Carroll v. Weaver (Conn.) 489.

Affidavit of defense.

In an action against the members of an unincorporated association, an affidavit of defense alleging defendant's withdrawal before the goods sued for were bought, and that the plaintiff knew it, states a good defense.—Rhoads v. Central Coal Dealers' Ass'n (Pa.) 79.

In assumpsit for work and labor on defendant's premises as ordered by her husband as agent, an affidavit of defendant which does not deny the agency is insufficient.—Mack Paving Co. v. Young (Pa.) 85.

Affidavit of defense construed, and *held* to be sufficient to carry the case to the jury.—Smith v. Elder (Pa.) 735.

Where the affidavit of defense denies all liability under the paper sued on, and alleges violation of obligations by plaintiff, it is a sufficient affidavit of defense.—Hostetter v. United Brethren Mut. Aid Soc. (Pa.) 333.

Affidavit of defense examined, and *held* sufficient.—Barker v. Fairchild (Pa.) 1102.

Reply.

A replication alleging a conclusion of law, without disclosing the facts upon which it is based, is demurrable.—Holmes v. Seashore Electric Ry. Co. (N. J. Sup.) 227.

A replication which sets up a new promise different from that laid in the declaration is a departure, and is demurrable.—Holmes v. Seashore Electric Ry. Co. (N. J. Sup.) 227.

Digitized by Google

Amendment:

In an action for unliquidated damages, the amount claimed in the ad damnum clause of the declaration cannot be increased after verdict, without requiring a new trial.—Sweet v. Excelsior Electric Co. (N. J. Err. & App.) 721.

If at the trial the issues are confined to the pleadings, the pleadings cannot be amended after verdict so as to change the issues.—Sweet v. Excelsior Electric Co. (N. J. Err. & App.) 721.

Where it appears during trial that plaintiff, after his cause of action arose, assigned for benefit of creditors, the court, after verdict, may amend the title by adding that of plaintiff's assignee.—Felty v. Deaven (Pa.) 333.

Right to allow the amendment of a declaration in trespass by husband and wife, so as to avoid a variance arising from the fact that the deed to the land was in the wife's name while the declaration stated that it was in the name of both plaintiffs. — Swerdferger v. Hopkins (Vt.) 153.

PLEDGE.

Securities deposited by a bank with a clearing-house association *held*, after payment of daily balances, to provide for payment of clearing-house certificates issued to aid in maintaining credit.—Philler v. Jewett (Pa.) 204.

A pledge by a debtor to his creditor is not within Act April 17, 1843, requiring an assignment to one person in trust for another to be recorded within 30 days.—In re Handy's Estate (Pa.) 983; Appeal of Larned, Id.

The indorsement of a bill of lading for goods shipped by one to himself as assignee, to a bank, attached to a draft, constitutes the pledge of the property mentioned in the bill of lading.—Richardson v. Atlas Nat. Bank (Pa.) 740.

One to whom goods are pledged by delivery of a bill of lading, with a draft attached, on the property being attached, and on dissolution thereof on bond given, and on notice to the creditors, can sell the property without being liable if the property does not sell for enough to pay the liens.—Richardson v. Atlas Nat. Bank (Pa.) 740.

Poll Tax.

See "Constitutional Law."

POOR AND POOR LAWS.

Question as to a pauper's legal residence, as between two towns, on an issue as to the liability for his support.—Town of Sandgate v. Town of Rupert (Vt.) 289.

Evidence examined, and *held*, that there was no implied contract by defendant town to pay a father for the support of his son.—Town of South Burlington v. Town of Worcester (Vt.) 891.

A person incapable of supporting himself, because imbecile, who lives with his family in defendant town, and removes with them to plaintiff town, and, on his father's death, comes to want, has not obtained a settlement in defendant town.—Town of Fairfax v. Town of Westford (Vt.) 847.

A town is not liable for the support of a pauper after the expiration of an express contract by one who removed the pauper from the town during the contract.—Newton v. Town of Waterford (Vt.) 782.

Where one supporting a pauper under express contract with a town removes him against the will of the overseer to another town, there is no implied contract to pay for his support after the termination of the express contract.—Baldwin v. Town of Worcester (Vt.) 413.

An order of removal of a pauper will not be disturbed because the justices who issued the order of relief did not hear any evidence, or because one of them was a director of the poor asylum to which the order was directed.—Great Bend Tp. Poor Dist. v. Auburn and Rush Poor Asylum (Pa.) 628.

Where a father, who had supported his son under an agreement by defendant town to pay therefor until a certain time, removed to plaintiff town, taking the son, and supported him, with the aid of the son, till the father's death, the son at the time of such death was a resident of plaintiff town.—Town of South Burlington v. Town of Worcester (Vt.) 891.

Under Act June 13, 1836, § 9, cl. 5, an unmarried person bound or hired as a servant may gain a settlement, though he does not reside in the district of his service.—Overseers of Poor of Borough of Bellefonte v. Somerset County Poor Dist. (Pa.) 1086

Possession.

See "Adverse Possession."

POWERS.

Under a power of attorney authorizing releases of certain judgment liens, a parol agreement to release is valid.—Young v. Coray (Pa.) 856.

Will construed, and *held* to confer no authority to place any limitation on the remainder.—In re Ingersoll's Estate (Pa.) 858; Appeal of Thomas, Id.

A testator can require a power of sale to be exercised jointly by his executors and trustee.—Poole v. Anderson (Md.) 207.

Where the will of a donee of a power merely devises all her estate, and the realty subject to the power was vested in the donee's father, the devise was not an execution of the power.—Mason v. Wheeler (R. I.) 426.

Right of executor empowered to sell to grant the privilege of buying at any time within a number of years.—Hickok v. Still (Pa.) 1100.

Under a will devising lands to the widow for life, and empowering her to divide the same among the sons and their heirs, on the death of a son before division the widow could allot his portion to his heirs.—In re Schwartz's Estate (Pa.) 1085.

PRACTICE IN CIVIL CASES.

See, also, "Abatement and Revival"; "Appeal"; "Attachment"; "Certiorari"; "Costs"; "Courts"; "Damages"; "Equity"; "Evidence"; "Injunction"; "Judgment"; "Jury"; "Mandamus"; "New Trial"; "Parties"; "Pleading"; "Trial"; "Witness"; "Writs."

A plaintiff has a right to a nonsuit on his own motion at any time before the jury retire.—Bauman v. Whiteley (N. J. Sup.) 982.

In an action for the wrongful death of another, a nonsuit should not be granted because of contributory negligence of decedent, unless such negligence is clearly shown.—Pennsylvania R. Co. v. Middleton (N. J. Err. & App.) 616.

Prescription.

See "Adverse Possession"; "Limitation of Actions."

Presumption.

See "Evidence."

Digitized by Google

PRINCIPAL AND AGENT.

See, also, "Attorney and Client"; "Factors and Brokers"; "Master and Servant."
Insurance agents, see "Insurance."

Evidence showing that one who furnished stone for the building of a bridge by one doing the work under a contract with the town knew that the contractor was not the agent of the town.—Ladd v. Town of Grand Isle (Vt.) 34.

Where there is evidence that defendant, a purchase-money mortgagor, bought the property for which the mortgage was given on fraudulent representations of plaintiff's agent, he is entitled, on proof thereof, to the damages suffered, though the principal did not know the fraud.—McNeile v. Cridland (Pa.) 939.

PRINCIPAL AND SURETY.

See, also, "Guaranty."

Where a creditor, who holds a collateral security, consents to a material alteration therein, to the prejudice of a surety, the latter is discharged.—Monroe v. De Forest (N. J. Ch.) 773.

Where one contracts to support a pauper for a year at a fixed price, and removes the pauper to another town, the first town is liable for his support until the termination of the contract.—Newton v. Town of Waterford (Vt.) 782.

Where a building contractor abandons the work, the guarantor of his contract, who cooperates with the owner in completing it, is liable as surety.—Lender v. Kline (Pa.) 550.

The payment by the principal of interest on a claim before it is barred by limitation extends the statute as to the guarantor, there being no contract to the contrary.—Hooper v. Hooper (Md.) 508.

A surety is not discharged by the delay of the creditor in demanding payment of a principal who was unable to pay.—Hooper v. Hooper (Md.) 508.

Privileged Communications.

See "Witness."

Probate Courts.

See "Courts."

Process.

See "Writs."

Promissory Notes.

See "Negotiable Instruments."

Proof of Loss.

See "Insurance."

Protest.

See "Negotiable Instruments."

Public Improvements.

See "Municipal Corporations."

Public Roads.

See "Highways."

Public Schools.

See "Schools and School Districts."

QUIETING TITLE — REMOVAL OF CLOUD.

Plaintiff, to maintain the action, must be in possession.—Helden v. Hellen (Md.) 506.

QUO WARRANTO.

Where a public office has been intruded upon without color of right, a fine will be imposed on the usurper.—Davis v. Davis (N. J. Sup.) 218.

In quo warranto to determine title to office, the defendant's title alone is put in issue.—Davis v. Davis (N. J. Sup.) 218.

RAILROAD COMPANIES.

See, also, "Carriers"; "Horse and Street Railroads"; "Master and Servant."
Consolidation, see "Constitutional Law."
Municipal aid, see "Constitutional Law."

The causeway to be built by a railroad company under Act 1849, § 12, may be built on, over, or under the tracks, according to the lay of the land.—Port v. Huntingdon & B. T. R. Co. (Pa.) 950.

The assessment of damages for the taking of land under Act 1849, § 11, cannot be reconsidered in assessing damages for failure of a railroad to build a causeway connecting land severed by its road.—Port v. Huntingdon & B. T. R. Co. (Pa.) 950.

The measure of damages for failure to build a causeway under Act 1849, § 12, is the inconvenience suffered by the landowner.—Port v. Huntingdon & B. T. R. Co. (Pa.) 950.

A recital in a deed of right of way of payment of all damages does not take away the grantor's right to have them assessed according to law, where the railway company has not constructed the road within the time specified in the deed.—Bredin v. Pittsburgh & W. Ry. Co. (Pa.) 39.

Construction of Act 1869, giving railroads the right to widen their roads and to take the necessary land, as supplementing all railroad charters granted by special acts before the act of 1849.—Marlor v. Philadelphia, W. & B. R. Co. (Pa.) 255.

A location of a railroad across a corner of a lot is not a passing through any dwelling house within Act Feb. 19, 1849, § 10, where the house is 125 feet distant.—Rudolph v. Pennsylvania S. V. R. Co. (Pa.) 131.

The commonwealth is the proper party to complain that the construction of a branch is an attempt to connect an individual siding in violation of law.—Rudolph v. Pennsylvania S. V. R. Co. (Pa.) 131.

Bonds and mortgages.

Where a creditor receives bonds with notice of the facts rendering them invalid, he will be protected if he was entitled to the bonds under a contract prior to such notice.—Baker v. Guarantee Trust & Safe-Deposit Co. (N. J. Ch.) 174.

Railroad bonds in excess of the amount of cash paid on the capital stock, or to pay for a branch line not specified in the charter and secured by a mortgage, with a provision to observe the law, are valid in the hands of bona fide holders, but are void in the hands of officers or directors or those having notice of the invalidity.—Baker v. Guarantee Trust & Safe-Deposit Co. (N. J. Ch.) 174.

Where a contractor is to be paid for building a railroad in its stocks and bonds, in determining the amount of stock paid for by him in work at a particular time, as affecting the validity of bonds then issued, only the labor and materials actually paid for by the contractor can be taken into account.—Baker v. Guarantee Trust & Safe-Deposit Co. (N. J. Ch.) 174.

Where associations pay par in good faith for bonds illegally issued, and which are valid in the hands of a bona fide holder, they may estab-

Digitized by Google

lish them against the railroad, though some of the directors and stockholders in the association were directors of the railroad company when the bonds were issued.—Baker v. Guarantee Trust & Safe-Deposit Co. (N. J. Ch.) 174.

Under Revision, p. 175, § 1, subsec. 4, and Act April 2, 1873, § 20, as amended by Act 1878, a railroad can mortgage its property and franchises only to borrow money on its bonds, and to the amount of cash paid in on account of subscriptions to its capital stock, but a mortgage can be given on a railroad not yet built, and on property not yet acquired.—Baker v. Guarantee Trust & Safe-Deposit Co. (N. J. Ch.) 174.

Liability for negligence.

The lessee of a railroad is not liable for injury to land, caused by the overflow of a stream, due to the lessor's improper construction of the road and a bridge thereon.—Kearney v. Central R. Co. of New Jersey (Pa.) 637.

Where one goes on a railroad track immediately in front of an approaching train it is negligence.—Sheehan v. Philadelphia & R. R. Co. (Pa.) 120.

The negligence of one who, in spite of the warning given by the gates being down, passes onto the railroad track, will bar his recovery for injuries.—Sheehan v. Philadelphia & R. R. Co. (Pa.) 120.

Question whether one who was injured, while attempting to cross between cars standing on a highway crossing, was negligent.—Magoon v. Boston & M. R. Co. (Vt.) 156.

Real-Estate Agents.

See "Factors and Brokers."

Reasonable Doubt.

See "Criminal Law."

RECEIVERS.

An appointment of a receiver for a partnership is in the discretion of the trial court.—Beaumont v. Beaumont (Pa.) 336.

Where a chattel mortgagee files a bill to foreclose his mortgage, and an attaching creditor of a third person seizes the goods, and offers them for sale, the court will restrain the sale, and appoint a receiver.—Wiedemann v. Sann (N. J. Ch.) 211.

Where books are ordered to be given to a receiver, the court should provide against a disclosure of outside matters.—Haught v. Irwin (Pa.) 260.

In proceedings to establish bonds illegally issued, but valid in the hands of a bona fide holder, the burden is on the claimant to show that he is a bona fide holder.—Baker v. Guarantee Trust & Safe-Deposit Co. (N. J. Ch.) 174.

Reconvention.

See "Set-Off and Counterclaim."

Records.

On appeal, see "Appeal."

Redemption.

From foreclosure, see "Chattel Mortgages."

Reformation.

Of contracts, see "Equity."

Registration.

Of voters, see "Elections and Voters."

Regulation of Commerce.

See "Constitutional Law."

Release and Discharge.

See "Accord and Satisfaction"; "Payment."
Of mortgage, see "Mortgages."
Of surety, see "Principal and Surety."

Rent.

See "Landlord and Tenant."

Repeal.

Of statute, see "Statutes."

REPLEVIN.

Where the sheriff has taken mortgaged chattels under execution, and refuses to deliver them to the mortgagee, replevin will lie.—Koenig v. Smith (N. J. Sup.) 979.

A writ returnable to the county in which the property is detained may be served in a county to which it has been transferred since suit brought.—Crosier v. Stillson (Vt.) 779.

Where defendants claim to hold the property for certain charges, and plaintiffs allege that there are no charges against the property, a judgment of nonsuit is erroneous.—Fitzwater v. Roberts (Pa.) 204.

Reply.

See "Pleading."

Rescission.

Of contracts, see "Equity"; "Sale."

Res Judicata.

See "Judgment."

Return.

Of execution, see "Execution."

Review.

On appeal, see "Appeal."

RIPARIAN RIGHTS.

See, also, "Waters and Water Courses."

Permission by the city to a riparian lot owner to construct a pier may be revoked at any time before the pier is constructed.—Classen v. Chesapeake Guano Co. of Baltimore City (Md.) 808.

A riparian owner has a right to the reasonable use of the water as it passes his land, either for his own purposes, or for a sale to others.—Gillis v. Chase (N. H.) 18.

Method of adjusting the frontage of a riparian owner on the pierhead lines with reference to his bulkhead frontage.—Classen v. Chesapeake Guano Co. of Baltimore City (Md.) 808.

Whether the use by a riparian owner of the water as it passes is reasonable is a question of fact for the jury.—Gillis v. Chase (N. H.) 18.

Risks of Employment.

See "Master and Servant."

Roads.

See "Highways."

Digitized by Google

SALE.

See, also, "Fraudulent Conveyances"; "Judicial Sales"; "Vendor and Purchaser."
Foreclosure sale, see "Mortgages."
Of assigned property, see "Assignment for Benefit of Creditors."
Under execution, see "Execution."

Where goods sold are to be paid for on delivery by a note, and are delivered without obtaining it, the title passes.—England v. Forbes (Del. Super.) 895.

Whether a contract for the sale of goods was intended as such, or was a mere banter, and so understood by the parties, is for the jury.—Theiss v. Weiss (Pa.) 63.

Where the seller agrees to deliver goods in installments, and the buyer agrees to pay the price in installments, which are payable on the delivery of each installment, default by either party with reference to any one installment will not ordinarily entitle the other party to rescind the contract.—Gerli v. Poidebard Silk Manuf'g Co. (N. J. Err. & App.) 401.

Seller's rights and remedies.

Where, after a buyer obtains possession of goods purchased under fraudulent representations, they are levied on by a creditor of the buyer the lien is good as against the seller.—England v. Forbes (Del. Super.) 895.

Where property conditionally sold is left with the vendee nine months after default, the vendor cannot recover it against a bona fide purchaser.—Mathews v. Smith (Del. Super.) 879.

An affidavit of defense in an action for price of goods sold, setting up a breach of warranty, examined, and *held* sufficient.—Baugh & Sons Co. v. Mitchell (Pa.) 341.

A sale cannot be rescinded for fraud in the absence of any artifice or false representations made by the purchaser.—Labe v. Lewis Bremer's Sons (Pa.) 342.

A merchant induced to sell goods at a reduced price by false statements can rescind the sale.—Smith, Kline & French Co. v. Smith (Pa.) 343.

Where the buyer of goods gives notice before the day of delivery that he will not accept them, and it appears in an action by the seller for a breach of contract that, if the notice had not been given, he could not have delivered the goods at the time specified, the seller will not be entitled to more than nominal damages.—Gerli v. Poidebard Silk Manuf'g Co. (N. J. Err. & App.) 401.

In replevin to recover goods obtained by fraudulent representations, a statement of defendant's nominal assets when he failed is admissible.—Talcott v. Brenniser (Pa.) 574.

One who sells goods and takes notes therefor cannot, before maturity, sue for the price, though he alleges the sale was procured by fraud.—Jones v. Brown (Pa.) 647.

An action for the price of goods sold cannot be maintained until they are accepted.—Grier v. Simpson (Del. Super.) 587.

Under a contract to deliver an engine to connect with the vendee's machinery, the engine is not accepted while the vendor is working to adjust it to the purposes of the machinery.—Grier v. Simpson (Del. Super.) 587.

Buyer's rights and remedies.

In an action for breach of contract to deliver goods sold, defendant can show the actual cost to the plaintiff of the goods which plaintiff bought from other parties to fill his orders for the goods purchased.—Theiss v. Weiss (Pa.) 63.

To render a vendor liable in tort for fraudulent representations on the sale of a horse, knowledge on his part of the falsity of the representations must be proved.—McGlade v. McCormick (N. J. Err. & App.) 460.

Conditional sales.

Act 1889, p. 421, requiring conditional sales to be recorded, applies to a sale made in New York of property delivered to and held by purchasers in New Jersey.—Knowles Loom Works v. Vacher (N. J. Sup.) 306.

Right of execution creditors of conditional vendee, as against the vendor, who retakes possession on default.—Durr v. Replogle (Pa.) 645.

A contract to erect a refrigerating plant in a brewery, on foundations furnished by the brewer, and title not to pass until the price is paid, is a conditional sale, and not a bailment.—Ott v. Sweatman (Pa.) 102.

Satisfaction.

See "Accord and Satisfaction"; "Payment."

SCHOOLS AND SCHOOL DISTRICTS.

The decision of the state superintendent on matters within his authority is as conclusive as a judgment of a court.—Thompson v. Board of Education of Borough of Elmer (N. J. Sup.) 168.

The fact that for several years the district used a certain form of warning of a district meeting, to provide for the instruction of scholars out of the district, does not cure defects in such form of warning.—Scott v. School Dist. No. 9 in Williamstown (Vt.) 145.

Where two candidates for school directors have the same number of votes, and one of them refuses to determine their rights as provided by Acts 1862, p. 471, § 2, and the board adjourns, no vacancy is created, and the reorganized board should determine such rights as prescribed by the act.—Commonwealth v. Meanor (Pa.) 552.

If the inhabitants of a school district so defined by the county school superintendent assent to its organization, and assume the functions of the school district, the corporate entity is complete.—Landis v. Ashworth (N. J. Sup.) 1017.

Under Act 1892, making each town a single school district, the new corporation is entitled to wood which the school district had on hand when the law took effect.—School Dist. No. 20 in Chester v. Pierce (Vt.) 783.

A school district existing under Act 1873 is not affected by the supplement to the general school law (Pub. Laws 1894, p. 506), providing that each township shall constitute a separate school district, and excepting from its provision "any district acting under a special charter."—Conover v. Parker (N. J. Sup.) 769.

Right of one to recover for services rendered by him as teacher without authority, there being evidence of ratification of his action by the district.—Scott v. School Dist. No. 9 in Williamstown (Vt.) 145.

A person acting as prudential committee of a school district cannot teach the school himself.—Scott v. School Dist. No. 9 in Williamstown (Vt.) 145.

School districts are political organizations, possessing the power of taxation.—Landis v. Ashworth (N. J. Sup.) 1017.

Evidence examined, and *held*, that plaintiff's farm was not within the school district in which it was taxed.—Dodge v. South Royalton Graded School Dist. (Vt.) 784.

Digitized by Google

Location and erection of schoolhouse.

A void location by county commissioners of a schoolhouse may be validated by vote of the district.—Leighton v. Ossipee School Dist. (N. H.) 899.

Right to correct records of school districts by filing a written location for a school.—Leighton v. Ossipee School Dist. (N. H.) 899.

Right of parties to object, in a proceeding to enjoin the building of a schoolhouse, that the written location was not filed, after having waived objections to the location on appeal to the county commissioners.—Leighton v. Ossipee School Dist. (N. H.) 899.

Question whether error of the county commissioners in stating the name of the owner of land taken by them for a schoolhouse was cured by the action of the district committee in obtaining deeds of the land.—Leighton v. Ossipee School Dist. (N. H.) 899.

The purchase of land and erection of a schoolhouse include fencing and grading the lot, supplying the school property with drinking water, and providing school furniture.—Chamberlain v. Board of Education of Cranbury Tp. in Middlesex County (N. J. Sup.) 1033.

Elections.

Act 1889, p. 132, enjoining the use of the ballot in voting to raise money for a school district, is not repealed by Act 1894, p. 506.—Chamberlain v. Board of Education of Cranbury Tp. in Middlesex County (N. J. Sup.) 1033.

Act 1887, p. 148, giving females the right to vote at a school meeting, is invalid only so far as it gives the right to vote for school trustees.—Chamberlain v. Board of Education of Cranbury Tp. in Middlesex County (N. J. Sup.) 1033.

Under Act April 8, 1887, women may vote at school meetings for all purposes except the election of officers.—Landis v. Ashworth (N. J. Sup.) 1017.

Right to vote money for the purchase of land and erection of a school building at a special meeting of a school district.—Chamberlain v. Board of Education of Cranbury Tp. in Middlesex County (N. J. Sup.) 1033.

Effect of vote to appropriate school money for school purposes, and to issue bonds, as giving power to assess the school district property therefor.—Chamberlain v. Board of Education of Cranbury Tp. in Middlesex County (N. J. Sup.) 1033.

Secondary Evidence.

See "Evidence."

Self-Defense.

See "Homicide."

Servant.

See "Master and Servant."

Service.

Of process, see "Writs."

SET-OFF AND COUNTER-CLAIM.

In an action on a note against two defendants for horses sold to one of them, breach of warranty cannot be pleaded as a set-off beyond the amount of the note.—Johnson v. Kelley (Vt.) 849.

Admissibility of evidence on issue as to whether a purchaser of property could set off against the price a claim on a note made by the vendor's father, which the vendor is alleged to have assumed.—Benedict v. Lawrence (Vt.) 291.

A note deposited before maturity by a bank with a clearing-house committee to secure debts to other members of the association is not subject to set-off by the maker of any sum due from the bank.—Philler v. Jewett (Pa.) 204.

A plea of set-off, alleging that plaintiff was indebted to defendant as stated "in the second defense," which "defense" set up merely a payment, *held* informal and defective.—Carroll v. Weaver (Conn.) 489.

Settlement.

See "Accord and Satisfaction"; "Payment."

SHERIFFS AND CONSTABLES.

In an action against a constable for refusal to sell property under execution, defendant may explain by parol evidence his return, to show that a third person claimed the property, and indemnity was refused by plaintiff.—Commonwealth v. Rooney (Pa.) 562.

A declaration in an action by chattel mortgagee against the sheriff to recover for failure to pay over the proceeds of mortgaged goods sold on execution *held* sufficient.—Fournier v. Wilson (R. I.) 306.

A sheriff who, in good faith, advertises a sale under execution, is entitled to the fees allowed by statute for advertising the sale, though a sale is prevented by a payment of the debt.—Daly v. Ely (N. J. Ch.) 396; Gnecco v. Gentelle, Id.; Ex parte Lehlbach, Id.; Ex parte Skinner, Id.

Under Act April 2, 1868, a sheriff is entitled to 50 cents for each person received on one commitment for the same matter.—Wilhelm v. Fayette County (Pa.) 1009.

Societies.

See "Associations"; "Benevolent Societies"; "Corporations."

Special Laws.

See "Constitutional Law."

SPECIFIC PERFORMANCE.

A custodian of a fund who contracts with a claimant for a payment to him of a portion thereof, in consideration of retaining the balance for himself, cannot, in a suit on the contract, in the absence of a provision therefor, require plaintiff to bring in other claimants as a condition precedent to a right of recovery under the contract.—Ludlow v. Strong (N. J. Ch.) 409.

One who has disposed of all his interest in the property, and against whom no relief is demanded, should not be made a party.—Burrill v. Garst (R. I.) 436.

Right of purchaser to specific performance when he failed to make formal tender of the price, he having had notice that defendants would not give a deed.—Shattuck v. Cunningham (Pa.) 136.

Spirituous Liquors.

See "Intoxicating Liquors."

Statute of Frauds.

See "Frauds, Statute of."

Statute of Limitations.

See "Limitation of Actions."

Digitized by Google

STATUTES.

The construction of a statute placed upon it for 20 years by those affected by it is to be considered.—Commonwealth v. Mann (Pa.) 1003.

Act May 11, 1886, intended to protect the planting and cultivating of oysters in the county of Ocean, does not apply to a district subsequently annexed to that county.—State v. Parker (N. J. Sup.) 214.

A court can inquire whether the notice of intention to apply for the passage of a local act, required by Const. Amend. art. 4, § 7, par. 9, has been given.—Inhabitants of Ewing Tp. v. Inhabitants of City of Trenton (N. J. Sup.) 223.

An action is pending where summons is issued, though defendant is not found.—Rice v. McCaulley (Del. Err. & App.) 240.

Act June 24, 1885, relating to the recording of deeds and other instruments, and providing that the county shall pay the fees, is unconstitutional.—Gackenbach v. Lehigh County (Pa.) 142.

Titles and subjects of acts.

Question whether the provision in Act 1894, c. 380, requiring a license to be paid by persons engaged in packing oysters, does not embrace a subject different from its title and the body of the act, the purpose of which is to regulate and preserve the oysters of the estate.—State v. Applegarth (Md.) 961.

The rule that language which will have full force if applied to the future only shall not have retroactive effect governs in the interpretation of the title of an act.—Allen v. Commissioners of Taxation for Bernards Tp. (N. J. Sup.) 219; Post v. Same, Id.

Under the New Jersey constitution, the title of an act limits the sphere within which the enacting clauses can operate.—Allen v. Commissioners of Taxation for Bernards Tp. (N. J. Sup.) 219; Post v. Same, Id.

Section 4 of the act relative to statutes (Revision, p. 1120) prescribed a rule for the interpretation of statutes which repealed prior penal statutes, and hence is within the object expressed by the title of the act.—State v. Crusins (N. J. Sup.) 235.

Acts 1894, c. 274, relating to the treatment of habitual drunkards, does not contain more than one subject.—City of Baltimore v. Keeley Institute of Maryland (Md.) 437.

The part of Act Feb. 8, 1871, which annexed the territory in the East Fork road district to the school district of Coudersport, was unconstitutional, as containing more than one subject not expressed in the title.—Payne v. School Dist. of Borough of Coudersport (Pa.) 1072.

Repeal.

Act 1876, c. 64, requiring a railroad company to furnish reasonable facilities for transporting coal, is not inconsistent with Act 1849, c. 469, § 21, limiting the right to corporations thereafter to be incorporated, and does not repeal said section.—Frostburg Min. Co. v. Cumberland & P. R. Co. (Md.) 698.

Act June 6, 1893, relating to township collectors, repeals a local law, relating to the same subject, in conflict therewith.—Commonwealth v. Wunch (Pa.) 551.

STATUTES CONSTRUED.

ENGLISH STATUTES.

43 Eliz. ch. 4, 7 Stat. 43.. 824

UNITED STATES.

CONSTITUTION.

Art. 4, § 1.....1025
Art. 4, § 2..... 810
Amend. 14..... 322

STATUTES AT LARGE.

1804, March 27, ch. 56, 2 Stat. 298.....1025

REVISED STATUTES.

§ 4916..... 93

CONNECTICUT.

GENERAL STATUTES 1888.

§ 91..... 522
§§ 3057-3061. Amended by Laws 1893, p. 319..... 531

LAWS.

1893, p. 318, § 6..... 489
1893, ch. 319..... 531

DELAWARE.

CONSTITUTION.

Art. 6, § 22..... 816

REVISED CODE 1852.

Page 648, § 11..... 878
Page 680, ch. 3, § 28.....1050
Ch. 60..... 974
Ch. 89, § 4..... 816
Ch. 120, § 60..... 715

REVISED CODE 1898.

Page 840, § 45..... 875
§ 1..... 811

LAWS.

1829, Feb. 16. Register's Court..... 816
1873, vol. 14, ch. 452..... 589
1875, vol. 15, p. 616, § 1.. 880
1875, vol. 15, ch. 65..... 589
1881, p. 708..... 240

MARYLAND.

CODE PUBLIC GENERAL LAWS.

Art. 9, § 4..... 324
Art. 16, § 220..... 304
Art. 24, § 9..... 810
Art. 72. Amended and Re-enacted by Laws 1894, ch. 380..... 961
Art. 72, §§ 66, 67. Re-enacted by Laws 1894, ch. 380..... 961

CODE PUBLIC LOCAL LAWS.

Art. 4, § 806..... 423
Art. 4, § 818..... 420
Art. 10, §§ 207-213, 218.. 325
Art. 10, §§ 286-270..... 322

BALTIMORE CITY CODE.

§§ 343, 351..... 808

LAWS.

1704, ch. 92..... 419
1726, ch. 1..... 419
1825, ch. 105..... 420
1847, ch. 306..... 698
1849, ch. 469, § 21..... 698
1862, ch. 161..... 501
1876, ch. 64..... 698
1878, ch. 409..... 698
1890, ch. 536..... 298
1890, ch. 573, § 14..... 448
1890, ch. 573, § 21....447, 852
1892, ch. 295..... 208
1894, ch. 114..... 298
1894, ch. 162..... 854
1894, ch. 185.....801, 964
1894, ch. 274..... 437
1894, ch. 380..... 961
1894, ch. 484, § 10..... 325
1894, ch. 620..... 695

NEW HAMPSHIRE.

PUBLIC STATUTES.

Ch. 142, §§ 12, 18..... 22

LAWS.

1856, ch. 1911..... 17
1885, ch. 30..... 20

NEW JERSEY.

CONSTITUTION.

Art. 4, § 7, par. 9..... 223

REVISION 1877.

Page 86, § 1..... 229
Page 119, § 79..... 611
Page 175, § 1, subsec. 4.. 174
Page 261, § 192..... 235
Page 294..... 229
Page 399..... 611
Pages 412, 413..... 396
Page 640..... 272
Page 925. Amended by Laws 1878, p. 20..... 174
Page 1120, § 4..... 235
Page 1274, § 113..... 611

SUPPLEMENT REVISION 1878.

Page 44..... 224
Page 614..... 219
Page 824..... 174

CITY CHARTERS.

Trenton, § 107. Laws 1874, p. 385..... 613

Digitized by Google

LAWS.

1851, p. 34. Amended by Laws 1871, p. 25..... 272
1851, p. 149..... 399
1857, p. 381..... 396
1863, p. 180..... 396
1867, p. 253..... 454
1868, p. 551.....1020
1871, p. 25..... 272
1871, p. 1371..... 454
1873, p. 88. Amended by Laws 1878, p. 20..... 174
1873, p. 613..... 769
1874, p. 385, § 107. Trenton City Charter..... 613
1878, p. 20..... 174
1880, p. 52..... 982
1886, p. 122..... 214
1887, p. 149.....1017, 1033
1888, p. 24..... 217
1888, p. 471..... 278
1889, p. 77, § 10..... 235
1889, p. 132.....1033
1889, p. 378..... 278
1889, p. 421..... 306
1891, p. 416..... 396
1891, p. 538..... 214
1892, p. 257..... 606
1892, p. 444, ch. 287, § 1.. 980
1893, p. 31..... 235
1893, p. 157..... 981
1893, p. 193..... 280
1893, p. 328..... 226
1894, p. 170..... 625
1894, p. 387..... 222
1894, p. 477..... 454
1894, p. 506.....769, 1033
1894, ch. 46..... 219
1894, ch. 55..... 219

NEW YORK.

REVISED STATUTES.

Volume 1.

Ch. 3 1024

PENNSYLVANIA.

CONSTITUTION 1790.

Amended by Const. 1838, art. 11, § 8, and Consts. 1850, 1857, 1864.....1072

CONSTITUTION 1838.

Art. 11, § 8.....1072

CONSTITUTION 1874.

Art. 9, § 1.....1003, 1065
Art. 16, § 8.....53, 335

PURDON'S DIGEST 1885.

Page 814, pl. 1.....1063
Page 1386..... 91
Page 1658, pl. 64..... 46
Page 1705, pl. 50.....1086

LAWS.

1721, p. 129.....1063
1810, p. 105. Repealed by Laws 1871, p. 476.....1061
1814, p. 60..... 115
1821, p. 367, § 13..... 330
1827, April 14. Taxation. 91
1832, p. 135..... 58
1833, p. 249..... 96
1833, p. 315, § 17..... 254
1834, p. 163..... 118
1836, p. 541, § 9, cl. 5....1086
1836, p. 560, § 35.....1096
1836, p. 579, § 41..... 633
1836, p. 695..... 649
1836, p. 777, § 83..... 935
1842, p. 339..... 634
1842, No. 111, p. 339..... 84
1845, p. 459..... 638
1846, p. 411..... 983
1847, p. 361.....1094
1849, p. 83, § 10..... 255
1849, p. 84, §§ 11, 12..... 950
1849, No. 76, p. 83, § 10.. 131
1849, No. 356, p. 533..... 124
1851, p. 115..... 118
1851, p. 327, § 30..... 933
1852, p. 153..... 551
1854, p. 663..... 751
1856, p. 5..... 59
1856, p. 485..... 330
1856, p. 496..... 649
1856, p. 532..... 126
1856, p. 532, § 6..... 78
1857, p. 802..... 142
1862, p. 471, § 2..... 552
1866, p. 28..... 260
1866, p. 1363..... 740
1866, No. 275, p. 303..... 119
1867, p. 732..... 49
1868, p. 3.....862, 1009
1868, p. 103.....1089
1868, No. 726, p. 785..... 46
1869, p. 12..... 255
1870, p. 56..... 247
1871, p. 476. Amended by Laws 1872, p. 208.....1061
1871, p. 539..... 931
1871, No. 33, p. 31.....1072
1872, p. 208.....1061
1874, p. 271..... 220
1874, p. 277..... 89
1874, p. 285..... 740
1875. Pleading..... 343
1876, p. 4..... 983
1876, p. 13.....1003
1878, p. 111..... 474
1879, p. 9.....468, 471
1879, p. 128..... 370
1879, p. 150..... 933
1879, No. 122, p. 119..... 91
1883, p. 36..... 933
1885, p. 29.....1077
1885, p. 29, §§ 13, 14, 16.. 571
1885, p. 45, art. 6....925, 926
1885, p. 52, art. 15..... 256
1885, p. 68..... 370
1885, p. 70, § 3.....370, 371
1885, p. 257..... 917
1885, No. 127, p. 160..... 142
1887, p. 118..... 649
1887, p. 158, § 5, subd. e.. 867
1887, p. 203..... 931
1887, p. 271, § 5..... 564
1889, p. 8..... 330
1889, p. 44..... 918
1889, p. 211..... 474
1889, p. 217, § 20..... 474
1889, p. 277, art. 4, § 6... 375
1889, pp. 277, 317, et seq.. 395
1889, p. 286, art. 5, § 3... 359
1889, No. 332, p. 437..... 91
1891, p. 54..... 248
1891, p. 69..... 49
1891, p. 236..... 292
1891, p. 240.....1085
1891, p. 248..... 932
1893, p. 113.....118, 477
1893, p. 117..... 882
1893, p. 333..... 551
1893, p. 451..... 471

RHODE ISLAND.

PUBLIC STATUTES.

Chs. 64, 65..... 305
Ch. 65, §§ 3–10, 33..... 430
Ch. 104, § 4..... 264
Ch. 166, § 4..... 165
Ch. 173, §§ 6, 7..... 167
Ch. 176, § 11..... 435
Ch. 184, § 22..... 692
Ch. 207, § 18..... 966
Ch. 223, § 6..... 306

PUBLIC LAWS.

Ch. 1204 165

JUDICIARY ACT.

Ch. 13, § 18..... 690
Ch. 17, § 3..... 823
Ch. 19, § 17..... 166
Ch. 20, § 19..... 693
Ch. 26, § 1..... 166
Ch. 28, § 1..... 692
Ch. 30, § 12..... 894
Ch. 31, § 6..... 433
Ch. 31, § 7..... 832

LAWS.

1878, ch. 688, § 25..... 582
1887, ch. 631. Amended by Laws 1889, ch. 820.. 432
1889, ch. 820..... 432
1893, p. 280..... 168

VERMONT.

REVISED LAWS 1880.

§§ 515, 521, 973..... 145
§§ 1214–1217..... 783
§ 1894..... 295
§ 2920..... 143
§ 3192..... 414

LAWS.

1884, No. 16..... 33
1888, No. 42..... 925
1890, No. 29..... 846
1892, No. 20..... 772
1892, No. 28, § 18..... 822
1892, No. 55..... 847

Stock.

Corporate stock, see "Corporations."
Live-stock shipments, see "Carriers."

Street Railroads.

See "Horse and Street Railroads."

Streets.

See "Highways"; "Municipal Corporations."

SUBROGATION.

Where a bona fide holder of railroad bonds illegally issued holds them as security for the debt of a third person, but has other security, the railroad company or its receiver, on payment of the debt and redemption of the bonds, is subrogated to the rights of such holder as to such other security.—Baker v. Guarantee Trust & Safe-Deposit Co. (N. J. Ch.) 174.

Summary Proceedings.

Against attorney, see "Attorney and Client."

Digitized by Google

Summons.

See "Writs."

SUNDAY.

An executory contract made on Sunday is void and incapable of ratification.—Gennert v. Wuestner (N. J. Ch.) 609.

Supersedeas.

See "Appeal."

TAXATION.

See, also, "Constitutional Law."
By city, see "Municipal Corporations."
For school purposes, see "Schools and School Districts."
Of bank, see "Constitutional Law."

The lien of the state for taxes on land is not lost by the failure of the auditor general to transmit to the proper county a certified copy of the lien under Purd. Dig. p. 1386.—In re Goodwin Gas-Stove & Meter Co.'s Estate (Pa.) 91; Appeal of National Bank of the Republic, Id.

Act 1890, c. 536, providing for a tax upon the authorized capital stock of corporations incorporated "since Jan. 1st, 1890," applies to all corporations incorporated after that date.—Roland Park Co. of Baltimore City v. State (Md.) 298.

Under Act June 8, 1891, taxing corporations on the capital stock, the actual value is not necessarily a sum 6 per cent. of which is equal to the net earnings, but other circumstances affecting the actual value may be considered.—Commonwealth v. Pittsburgh & W. Ry. Co. (Pa.) 202.

Acts 1894, cc. 46, 55, are not intended to legalize taxes levied by a body having no authority to impose them.—Allen v. Commissioners of Taxation for Bernards Tp. (N. J. Sup.) 219; Post v. Same, Id.

"Partnership associations" organized under the Pennsylvania statutes, and doing business in New Jersey, are taxable there, under the corporation tax act.—Tide Water Pipe Co. v. State Board of Assessors (N. J. Sup.) 220.

Land included in Act March 30, 1868, entitled "An act to enable the United Railroad and Canal Companies to increase their terminal facilities in Jersey City," cannot be taxed by that city unless it is used for other than railroad, canal, and depot purposes.—United New Jersey Railroad & Canal Co. v. City of Jersey City (N. J. Sup.) 1020.

Power of commissioners of taxation to change the amount raised by the local authorities for the support of the poor and the maintenance of highways.—Allen v. Commissioners of Taxation for Bernards Tp. (N. J. Sup.) 219; Post v. Same, Id.

The power of the commissioners of taxation is confined to cases where the local officers failed to provide for the performance of public duties referred to in the title of the commissioners of taxation act.—Allen v. Commissioners of Taxation for Bernards Tp (N. J. Sup.) 219; Post v. Same, Id.

Sufficiency of evidence to justify a finding that one-half of the stock of a phonograph company authorized to manufacture phonographs for sale only outside the country was invested in manufacturing carried on in the state, so as to exempt it from taxation.—Edison United Phonograph Co. v. State Board of Assessors (N. J. Sup.) 1019.

In an action to enforce a collection of taxes, an answer alleging that the property was exempt, without setting out the grounds, is defective.—McTwiggan v. Hunter (R. I.) 693.

Bill by a natural gas company to restrain the sale of their lands for local taxes examined, and *held* sufficient to sustain a preliminary injunction.—St. Mary's Gas Co. v. Elk County (Pa.) 1077.

Taxation of Costs.

See "Costs."

Telegraph Companies.

Imposition of license tax, see "Constitutional Law."

TENANCY IN COMMON.

See, also, "Partition."

Where a cotenant living on the land receives the entire profits, he is chargeable with the rent, and the other cotenants with their proportionate shares of the net receipts.—White v. Eddy (R. I.) 823.

Testamentary Capacity.

See "Wills."

Testamentary Powers.

See "Powers."

Torts.

See "Malicious Prosecution"; "Negligence"; "Nuisance"; "Trespass."
Liability of city, see "Municipal Corporations."
Measure of damages, see "Damages."

TOWNS.

Bequests for charitable purposes, see "Charities."

Under Pub. St. c. 65, defining the duties of highway supervisors, a contract for a bridge entered into by one without the approval of the town council is invalid.—Mathewson v. Hawkins (R. I.) 430.

Transactions.

With decedent, see "Witness."

Transcript.

On appeal, see "Appeal."

TRESPASS.

In an action of trespass quare clausum, a description of the premises in the declaration as "plaintiff's close, situate in the town of Hardwick," is sufficient.—Swerdferger v. Hopkins (Vt.) 153.

TRIAL.

See, also, "Appeal"; "Certiorari"; "Evidence"; "Judgment"; "Jury"; "New Trial"; "Pleading"; "Practice in Civil Cases"; "Witness."
In criminal cases, see "Criminal Law."
Right to jury trial, see "Jury."

Reception of evidence.

Exclusion of testimony already brought out is not error.—Barber v. James (R. I.) 264.

The admission of improper evidence is harmless where the fact is subsequently established by unobjectionable testimony.—Baltimore & O. R. Co. v. Cain (Md.) 801.

Digitized by Google

The admission of evidence subject to objection, in view of a possible contingency rendering it admissible, *held* not to have been prejudicial.—Trumbull v. Hewitt (Conn.) 492.

The erroneous reception of cumulative evidence is harmless where the facts thus proven are otherwise legally shown.—Chase v. Caryl (N. J. Sup.) 1024.

Objections to evidence.

An indefinite motion to strike out a portion of the testimony at the end of plaintiff's case, which has occupied two days, is properly denied.—Warden v. City of Philadelphia (Pa.) 928.

It is proper to refuse a motion to strike out evidence, when part of it is admissible.—Spring City Gaslight Co. v. Pennsylvania, S. V. R. Co. (Pa.) 368.

Arguments of counsel.

Question whether the remarks by counsel on a petition to assess damages under the flowage act, to the effect that the law not only gives compensation, but gives more, was ground for complaint by petitioner.—Dow v. Electric Co. (N. H.) 22.

Remarks by counsel tending to impress the jury with the idea that a witness for defendant was hired to swear falsely is, in the absence of evidence of such fact, ground for reversal.—Magoon v. Boston & M. R. Co. (Vt.) 156.

Instructions.

A verdict cannot be directed where there is a conflict of testimony as to the main question in issue.—McKnight v. Bell (Pa.) 942.

The court is not bound to comment to the jury on the testimony of any witness in the absence of a request.—Warden v. City of Philadelphia (Pa.) 928.

Where the evidence is conflicting as to plaintiff's contributory negligence, it is proper to refuse to direct a verdict for defendant.—Ringrose v. Borough of Bloomsburg (Pa.) 863.

In an action for false imprisonment, where the evidence is conflicting as to whether plaintiff was guilty of the disorderly conduct for which he was arrested, it is error to direct a verdict for defendant.—Baltimore & O. R. Co. v. Cain (Md.) 801.

It is proper to refuse charges rendered unnecessary by a special charge.—Lake Roland El. Ry. Co. v. McKewen (Md.) 797.

It is not error to give an instruction announcing a rule of damages which was not controverted at the trial.—Lake Roland El. Ry. Co. v. McKewen (Md.) 797.

Where there is any evidence to go to the jury, it is proper to refuse a binding instruction.—Smith v. Easton Transit Co. (Pa.) 557.

Where there is some evidence to show that the injuries sued for were caused by the negligence of defendant, it is proper to refuse to direct a verdict for plaintiff.—Goodman v. Delaware & H. Canal Co. (Pa.) 670.

Propriety of giving a special instruction, in an action of ejectment, as to what constitutes adverse possession, in connection with the general instructions.—Griffin v. Mulley (Pa.) 664.

An instruction that a highway must be kept in such repair that skittish animals can be driven without risk is harmless where there is no evidence that plaintiff's horse was skittish.—Trexler v. Greenwich Tp. (Pa.) 1090.

Verdict.

The court need not, under Act 1894, c. 185, submit special questions to the jury, when no request therefor is made until after the close of the arguments, and the jury is about to retire.—Baltimore Traction Co. v. Appel (Md.) 964.

It is error to refuse to submit special interrogatories seasonably presented, and submitting material questions of fact.—Baltimore & O. R. Co. v. Cain (Md.) 801.

It is error to submit to a jury, questions which are not within the issues raised by the pleadings.—Sweet v. Excelsior Electric Co. (N. J. Err. & App.) 721.

Trustee Process.

See "Garnishment."

TRUSTS.

Administration by corporation, see "Corporations."

Under Act April 9, 1868, a trustee will be removed where he has had no intercourse with the beneficiary for several years, and has not consulted with her, or any one on her behalf, with regard to the estate.—In re Marsden's Estate (Pa.) 46.

The court of testator's domicile will not require a bond to be given by a testamentary trustee, where the trust is to be administered under the supervision of the equity courts of another state.—Webster v. Wiggin (R. I.) 824.

Where a bank which is a trustee places the trust money in its general funds, and such money cannot be traced on the insolvency of the bank, the amount of the trust fund is not a preferred claim.—In re Lebanon Trust & Safe-Deposit Bank's Estate (Pa.) 334; Appeal of Carmany, Id.

Effect of assignment of mortgage by trustees, and the sale of property under a power in the mortgage to one of the trustees, as vesting individual title to the property in the latter.—Bradford v. King (R. I.) 166.

Trustees under a foreign will may foreclose in Rhode Island a mortgage acquired after the testator's death, without recording a copy of the will in that state.—Bradford v. King (R. I.) 166.

Where a deed to a trustee requires no duties of him, the title vests in the beneficiary.—Sullivan v. Chambers (R. I.) 167.

A writing intended as a will, but which is imperfectly executed, is not a declaration of trust, unless it clearly declares that the title to the land has been held in trust by the would-be testator for the devisee named.—Leslie v. Leslie (N. J. Ch.) 170.

Where a trustee expends his individual funds in the betterment of the estate, and on his death proves insolvent, the costs of such betterments cannot be charged up against the estate when they were incurred on his individual responsibility, and there was no fraud.—Hepburn v. Spotts (Pa.) 1083.

Implied trusts.

Where a judgment debtor gives money to a person to pay the judgment, but instead he buys the land at execution, he acquires no title as against the debtor.—Everly v. Harrison (Pa.) 668.

A mere refusal to perform a parol contract to hold or convey land is not sufficient to create a trust ex maleficio.—Barry v. Hill (Pa.) 126.

Powers, duties, and liabilities of trustees.

Right of successors under a trust created by will to exercise duties imposed upon the original trustees which were discretionary in their nature.—Security Co. of Hartford v. Cone (Conn.) 7.

The estate of a trustee, who, without the consent of his beneficiaries, expends rents in pur-

Digitized by Google

chasing an outstanding title to the land, is liable for the amount so expended.—Shaw v. Devecmon (Md.) 709.

One in possession of a fund, under a contract, cannot impose additional conditions by his agreement with another claimant to the fund made subsequent to the contract, and without the consent of the claimant with whom the contract was made.—Ludlow v. Strong (N. J. Ch.) 409.

Accounts and compensation of trustees.

On accounting, in order to hold a trustee, it must be shown that the moneys claimed actually came to his hands.—Crampton v. Seymour (Vt.) 889.

An account of a trustee is conclusive only as to the items contained therein. — Crampton v. Seymour (Vt.) 889.

A mother who for 25 years takes charge of a fund belonging to her daughter, who is incompetent to manage her affairs, and supplies her with board and clothing during that time, on her death will be charged only with the principal, and not with legal interest for the whole time.—In re Harker's Estate (Pa.) 553; Appeal of Titlow, Id.

Equity jurisdiction.

Where a will creating a trust for the maintenance of testator's minor children does not authorize a mortgage of the trust lands, chancery cannot order the trustee to mortgage them to raise money to execute the trust.—Jamison v. McWhorter (Del. Err. & App.) 517.

TURNPIKES AND TOLL ROADS.

Under Act April 23, 1889, providing that persons using bicycles shall have the same rights and liabilities as to public highways as persons using carriages, a toll on a bicycle for the same amount as on a two-wheeled carriage is proper.—Geiger v. President, etc., of Perkiomen & R. Turnpike Road (Pa.) 918.

A turnpike company is authorized to collect tolls from one using a bicycle on its roads.—Geiger v. President, etc., of Perkiomen & R. Turnpike Road (Pa.) 918.

A turnpike company can cede under Act 1825, c. 105, any portion of its road taken into the city by extension of its limits.—City of Baltimore v. President, etc., of Baltimore & Y. Turnpike Co. (Md.) 420.

A turnpike company under Act 1825, c. 105, cannot cede a portion of its road in the city of Baltimore to the city incumbered with a franchise assigned by it to a street railway.—City of Baltimore v. President, etc., of Baltimore & Y. Turnpike Co. (Md.) 420.

Where a turnpike company cedes a part of its road in the city of Baltimore to the city under Act 1825, c. 105, the road becomes a public street without acceptance by the city.—City of Baltimore v. President, etc., of Baltimore & Y. Turnpike Co. (Md.) 420.

Where a turnpike grades a portion of its road within a city so as to compel the city to lower the grade of the intersecting streets, it is liable to the city for the expenses thereof.—City of Baltimore v. President, etc., of Baltimore & Y. Turnpike Co. (Md.) 420.

Ultra Vires.

See "Corporations."

USURY.

Where a loan is made for an indefinite period, the fact that the money to be paid for the loan exceeds the lawful rate of interest does not render the transaction usurious.—City of Philadelphia v. Kelly (Pa.) 47.

Vacation.

Of judgment, see "Judgment."

VENDOR AND PURCHASER.

See, also, "Covenants"; "Deed"; "Fraudulent Conveyances"; "Sale"; "Specific Performance."

An agreement for the purchase of a right of way provided for a deed on payment of the price, and that the company should maintain a crossing over the right of way. *Held*, that a tender of a deed with a covenant for a crossing is sufficient.—Hall v. Clearfield & M. Ry. Co. (Pa.) 940.

Conditional contract of purchase construed, and *held*, that timber cut on the land could only be applied on the purchase price.—Sargent v. King (Vt.) 781.

The provisions of a contract for the sale of land are, as a general rule, merged in the deed subsequently made in full execution of the contract of sale.—West Boundary Real-Estate Co. of Baltimore City v. Bayless (Md.) 442.

A contract to convey land on or before a certain date gives the option as to the date to the vendor.—Vittum v. Estey (Vt.) 144.

The description of land in a contract of sale by its street number will control a description thereof by metes and bounds.—Shattuck v. Cunningham (Pa.) 136.

In an action for a breach of contract to convey land subject to the lease, it is no defense that the tenant exercised his option under the lease to purchase the land. — Wertheimer v. Thomas (Pa.) 1096.

Venue in Criminal Cases.

See "Criminal Law."

Verdict.

See "Trial."

Vested Rights.

See "Constitutional Law."

Vice Principal.

See "Master and Servant."

Villages.

See "Municipal Corporations."

Voluntary Payment.

See "Payment."

Voters.

See "Elections and Voters."

Wages.

See "Master and Servant."

Ward.

See "Guardian and Ward."

Digitized by Google

WATER COMPANIES.

A contract between a street and a water company considered, and *held* not to exempt schoolhouses from reasonable rates for water supplies.—St. Clair School Dist. v. Monongahela Water Co. (Pa.) 71.

WATERS AND WATER COURSES.

A lower riparian owner need not be in possession of his lands in order to maintain trespass for the diversion of the stream by an upper riparian owner.—Hogg v. Connellsville Water Co. (Pa.) 1010.

WAYS.

See, also, "Easements"; "Highways."

Where a dedication of a street on defendant's land is invalid, an owner of adjoining land may use it when he surrendered the right to a private way over defendant's land in consideration of an agreement to open the street.—Wilkinson v. Suplee (Pa.) 86.

Widow.

See "Executors and Administrators."

Wife.

See "Husband and Wife."

WILLS.

See, also, "Descent and Distribution"; "Executors and Administrators."

Bequests for charitable purposes, see "Charities."

A man may bequeath his property to his mistress, in preference to his wife.—Arnault v. Arnault (N. J. Prerog.) 606.

The existence of influence which arises from unlawful relations, operating on testator when his will was made, does not raise a presumption against its validity.—Arnault v. Arnault (N. J. Prerog.) 606.

The fact that legatees were in the presence of testator while the will was made does not affect the validity of the will.—Ethridge v. Bennett's Ex'rs (Del. Super.) 813.

Instruments in the form of judgment notes considered, and *held* not to have been executed with testamentary intent.—In re Sunday's Estate (Pa.) 353; Appeal of Koller, Id.

A bequest to a town directing that the income shall be divided among its school districts is not invalid because the town, which was, when the will was made, divided into several districts, is consolidated into one district.—Sheldon v. Town of Stockbridge (Vt.) 414.

Testamentary capacity.

Evidence examined, and *held* insufficient to show testamentary incapacity.—In re Knight's Estate (Pa.) 682; Appeal of Bond, Id.

Evidence examined, and *held* sufficient to go to the jury on the question of the mental capacity of testatrix.—Crockett v. Davis (Md.) 710.

A physician may testify as to the mental capacity of testatrix without stating the facts on which his opinion is based.—Crockett v. Davis (Md.) 710.

A clergyman who visited testatrix during her last sickness is competent to express an opinion, together with the facts on which it is based, as to her testamentary capacity.—Ethridge v. Bennett's Ex'rs (Del. Super.) 813.

Evidence as to testamentary capacity examined, and *held*, that the refusal of an issue as to such capacity was proper.—In re Cox's Estate (Pa.) 747; Appeal of Potts, Id.

Insufficiency of evidence to justify the submission of an issue as to the mental capacity of testator, a man over 80 years old, and who was alleged to have been subject to hallucinations for years before his death.—In re Boyer's Estate (Pa.) 359.

Contest.

The receipt by a legatee of a pecuniary legacy does not estop him from contesting the will where it is returned before he proceeds beyond the entry of an appeal from a decree refusing his petition for leave to appeal.—In re Miller's Estate (Pa.) 58.

The appeal provided for in the act of 1856 by one desiring to contest the validity of a will may be taken at any time within five years after probate, and notice to a party to the proceedings is sufficient, without making such person a party to the proceedings.—In re Miller's Estate (Pa.) 58.

Under the act of 1832, prescribing the issue to be framed on the contest of a will, the application for an appeal cannot be dismissed for want of parties, all that is necessary being a notice to the parties who have not appeared of the pending issue.—In re Miller's Estate (Pa.) 58.

On the contest of a second will, evidence of declarations by testator, made between the making of the first and second wills, relative to the disposition of the property, is admissible.—Ethridge v. Bennett's Ex'rs (Del. Super.) 813.

Evidence of mental capacity considered, and *held* that an issue devisavit vel non was properly refused.—In re Loeser's Estate (Pa.) 732.

Construction.

When the insertion of certain words in a will elucidates the testator's intention, in construing the will the court may treat those words as inserted.—Cooper v. Cooper (Del. Err. & App.) 1043.

Construction of the words "survivor and survivors" as meaning "other and others" when used in a will to designate testator's children who should receive the share of a child dying without issue.—Cooper v. Cooper (Del. Err. & App.) 1043.

Construction of will, as to whether an annuitant was entitled to be paid out of the general estate upon the failure of the particular fund which was set apart for payment of her annuity.—Boomhower v. Babbitt's Adm'rs (Vt.) 838.

Construction of will on death of one of the devisees without issue.—In re Pepper's Estate (Pa.) 100.

Construction of codicil to will, as continuing a trust provided for in the will, and not as creating spendthrift trusts in favor of testator's sons.—In re Handy's Estate (Pa.) 986; Appeal of Philadelphia Trust, Safe-Deposit & Insurance Co., Id.

A devise to grandchildren, born and unborn, when the youngest shall arrive at the age of 40 years, being opposed to the rule of perpetuities, the doctrine of cy-pres will allow the estate to vest in the grandchildren when the youngest reaches 21 years.—Edgerly v. Barker (N. H.) 900.

Construction of clause providing for payment of a certain yearly amount to a son of testator who was a spendthrift, and authorizing the trustees to withold the sum entirely, or to pay him such part as seemed best.—Security Co. of Hartford v. Cone (Conn.) 7.

A devise to H. for life, and after his decease unto his then surviving heirs in fee, gives H.

Digitized by Google

the fee-simple title.—Hiester v. Yerger (Pa.) 122.

Construction of will as giving testator's two daughters the net income of two-thirds of the estate so long as one of them remained single.—Security Co. of Hartford v. Cone (Conn.) 7.

Construction of will providing for the payment of a certain yearly sum to testator's son, who was a spendthrift, with a further provision for a contingent payment to him of a sum not exceeding $4,000 from his portion of his estate.—Security Co. of Hartford v. Cone (Conn.) 7.

Effect of limitation of property, the full fee to go to testator's grandchildren when they attained the age of 21 years, as vesting an estate in the grandchildren already born, to let in after-born grandchildren.—Security Co. of Hartford v. Cone (Conn.) 7.

Construction of will vesting an interest in testator's grandchildren many years after his death as intending that the children of grandchildren deceased at that time should take the interest their parents would have received.—Edgerly v. Barker (N. H.) 900.

Question whether all but the first of certain legacies, which were to be paid in order out of testator's book accounts and the income of the estate, were void for remoteness, there being assets sufficient for the payment of all the legacies.—Webster v. Wiggin (R. I.) 824.

Question whether after-acquired real estate was affected by a will in which no express reference was made to after-acquired property.—Webster v. Wiggin (R. I.) 824.

Property on which testator had a mortgage before the date of the will, and to which he subsequently acquired absolute title under a power of sale in the mortgage, was after-acquired property.—Webster v. Wiggin (R. I.) 824.

Land conveyed before the date of the will to a trustee who was under obligation to transfer it to testator at any time, *held* not to be after-acquired real estate.—Webster v. Wiggin (R. I.) 824.

Construction of will directing payment of certain legacies out of the book accounts and credits and income, the balance to go to a residuary legatee, as giving a legal estate in fee simple, and a vested interest in the personal property, to the residuary legatee.—Webster v. Wiggin (R. I.) 824.

A legacy to each of the children of L. begotten during his natural life, to be paid when they severally arrive at the age of 21 years, at the death of testator, vests in those that are living, and in after-born children at their birth.—Parker v. Leach (N. H.) 19.

Where testator devised to one A. certain land, and, by a further clause, provided that, in the event of her dying unmarried, or, if married, without offspring, the property should be sold, and the proceeds divided among others, on her surviving the testator, she takes an absolute estate.—Mitchell v. Pittsburgh, Ft. W. & C. Ry. Co. (Pa.) 67.

Where a will provided for a payment of income to a niece during her life for her support, and that of a minor child until the daughter attained 21 years, and "thereupon, her interest in the annuity ceasing," a certain sum was paid to the daughter, the right of the niece to the annual income does not cease on the majority of the daughter.—In re Engles' Estate (Pa.) 76; Appeal of Philadelphia Trust, Safe-Deposit & Insurance Co., Id.

Question whether the invalidity of a provision for the division of the estate among testator's grandchildren and their heirs on the death of his last child defeated other provisions for the payment of the income to his children until the death of his last child.—Morris v. Bolles (Conn.) 538.

Where a will gave a widow one-third of the net income, and directed that after her death the children should divide the estate, the portions of the daughters to be separately secured to their use, the interest of a daughter dying during her mother's lifetime was the interest in net revenue only, and the remainder in fee, subject to a separate use trust.—In re Steinmetz's Estate (Pa.) 1092; Appeal of Cobb, Id.

A devise to a wife of a homestead to be used during widowhood does not create a fee simple.—Patton v. Church (Pa.) 1079.

Will construed, and *held*, that a separate use was created as to the daughters of the testator.—In re Steinmetz's Estate (Pa.) 1070; Appeal of Duffield, Id.

Where testator leaves his estate in an active trust, the widow to receive one-third of the income, she does not take a fee.—In re Steinmetz's Estate (Pa.) 1070; Appeal of Duffield, Id.

Question as to the termination of a trust estate under a will by the death of the beneficiaries named in the will.—Roarty v. Smith (N. J. Ch.) 1031.

A will providing that land should be sold, the income of $600 of the proceeds to be paid to a daughter during her life, and at her death the principal to go to her heirs, gives the daughter only the income, and not the principal sum.—Gross v. Sheeler (Del. Super.) 812.

Questions as to the distribution of testator's estate, there being a devise to his children subject to a valid life estate in the wife, and a void devise over to the heirs of any child who might die.—Ketchum v. Corse (Conn.) 486.

A devise to a daughter and her assigns, forever, providing that she die leaving heirs of her body, otherwise to others, conveys an estate tail.—Holden v. Wells (R. I.) 265.

Construction of devise to testator's children with a life estate in the wife, and provision that, in case of a child's death, his share should be paid to his heirs and legal representatives, who were to take by way of representation, as violating the statute of perpetuities.—Ketchum v. Corse (Conn.) 486.

Will construed, and *held*, that testator's widow was entitled to an undivided third of the residue remaining after the deduction of specific legacies.—Addeman v. Rice (R. I.) 429.

A devise to a wife of all testator's estate, in fee simple, with power to use as he could do if living, is not limited by a provision that whatever was not disposed of by the wife should be, after her death, disposed of in the manner provided by the will.—Evans v. Smith (Pa.) 346.

Where testator devises land to his daughters, and on their decease without issue to his heirs, according to the statute of descent, the heirs and the statute are to be determined at the time of the death of the surviving daughter.—De Wolf v. Middleton (R. I.) 271.

A provision that on the death of testator's last child the estate shall be divided equally among his grandchildren and their heirs, *held* to violate the statute of perpetuities.—Morris v. Bolles (Conn.) 538.

A devise of one-half of testator's income, to be paid to his children until the death of the last child, *held* to give each child a share as a tenant in common, so that on the death of a child his share of the income became assets of his estate.—Morris v. Bolles (Conn.) 538.

Devise of estate to testator's brother, and, in case of his death, to his children, or the issue of such, and if without children, or the issue of such, to his brothers, vests in him an estate for life.—Jamison v. McWhorter (Del. Err. & App.) 517.

Will construed, and *held* that the devisees take an equitable estate in fee, subject to be de-

Digitized by Google

feated by their dying without issue living at the time of their respective deaths.—Hutchins v. Pearce (Md.) 501.

Will construed, and *held*, that certain pecuniary legacies were not a charge on the real estate.—Pearson v. Wartman (Md.) 446.

Under a bequest to pay on the death of a life tenant a certain amount to the nephews of testatrix, when they should reach majority, the legacy of a nephew does not vest on the death of the life tenant, but is contingent on his reaching majority.—In re Engles' Estate (Pa.) 681; Appeal of Commonwealth Title Insurance & Trust Co., Id.

Where testator leaves a widow and brothers and sisters as his only heirs at law, the latter take, after the death of the widow, the property which he leaves with a provision that after her death it shall revert to the "natural heirs of my own blood relations."—Philadelphia Trust, Safe-Deposit & Insurance Co. v. Isaac (Pa.) 651.

Construction of clause providing for the distribution of testator's property when his youngest son was 40 years old, in view of a previous clause providing that the taxes and repairs on the property devised to his wife should be paid from the estate.—In re Fisher (R. I.) 579.

A will relates back, as to the law governing the property disposed of, to the date of testator's death.—Coggeshall v. Home for Friendless Children (R. I.) 694.

Rights and liabilities of devisees and legatees.

Where a devise contained in the residuary clause lapses, testator must, with reference thereto, be considered as having died intestate.—In re Gorgas' Estate (Pa.) 86; Appeal of Robinson, Id.

The fact that one who would take under the intestate law is one for whom the will did not provide because she already was rich does not prevent her from taking her share of a residuary legacy which lapses by the death of the legatee during testator's life.—In re Gorgas' Estate (Pa.) 86; Appeal of Robinson, Id.

Effect of allowance of account, in which a certain sum was charged as a provision for the payment of annuities, as determining that the interest from this sum alone was to be used for that purpose.—Boomhower v. Babbitt's Adm'rs (Vt.) 838.

Where testatrix devises land to her husband charged with the support of her son, it creates a personal duty to be performed by the devisee, and a charge so long as the duty continues.—Dodge v. Hogan (R. I.) 1059.

Question whether a charge created on land for the support of testatrix's daughters was a rent charge, so that a conveyance by such daughters of a part of the land extinguished the charge as to the other part.—Dodge v. Hogan (R. I.) 268.

Right of persons entitled to the benefit of a charge on land, after conveying part thereof, to maintain a bill to enforce a charge on the other part.—Dodge v. Hogan (R. I.) 268.

Right of administrator of widow of testator to claim under a provision that a certain sum should be paid to testator's wife, it having been decided, on an appeal 25 years before, that testator gave nothing but income to his wife, and she, during her life, never having claimed such sum.—Security Co. of Hartford v. Cone (Conn.) 7.

Where a will gives an income to testator's daughter for life, and, on her death, the principal to "all my grandchildren," the death of any grandchildren during testator's life, or that of the life tenant, will not cause their shares to lapse, but they will pass to their issue.—In re Bradley's Estate (Pa.) 96.

Where a married woman has a present interest in the net revenue of an estate, and a remainder in fee, subject to a separate use trust, in the absence of a power in the will creating the trust she cannot pass her estate by will.—In re Steinmetz's Estate (Pa.) 1092; Appeal of Cobb, Id.

The condition of a will for the payment of an annuity requiring a legatee to devote certain services to the interest of testator's estate is complied with where the services are tendered and rejected without a valid excuse.—Seeley v. Hincks (Conn.) 533.

WITNESS.

See, also, "Evidence."

Committing witness refusing to answer before grand jury, see "Constitutional Law."

Erroneous refusal to give a witness summoned on an investigation of the city council, who refused to answer a question, time in which to answer a petition to the court for an order commanding him to testify.—In re Paist (Pa.) 256; Appeal of Simon, Id.

Witnesses residing in West Chester are entitled to one dollar per day for attendance at court.—Bradley v. Vernon (Pa.) 330.

Admissibility, in assumpsit to recover witness fees, of the clerk's taxation of costs to show that the witness attended.—Hamilton v. Gray (Vt.) 315.

Competency.

It is within the discretion of the court to allow children of tender years to testify.—Freeny v. Freeny (Md.) 304.

Plaintiff is not a competent witness to contradict evidence on the part of defendant of a conversation between plaintiff and defendant's decedent.—Fountain v. Linn (N. J. Sup.) 982.

Communications to an attorney by one who had occasionally employed him, but who was not doing so on this occasion, *held* not to be privileged.—In re Turner's Estate (Pa.) 867; Appeal of Whitney, Id.

A legatee who received the amount of her legacy from testator after the making of his will, but before his death, cannot testify that testator told her that the payment was a gift, and should not affect her legacy.—In re Turner's Estate (Pa.) 867; Appeal of Whitney, Id.

Right of mortgagor to testify in foreclosure proceedings as to the scope of the mortgage when one of the mortgagees is dead.—Paddock v. Potter (Vt.) 784.

A legatee and executor, having renounced his rights as executor, is a competent witness in a contest of the will.—Ethridge v. Bennett's Ex'rs (Del. Super.) 813.

That a representative party to an action has not testified to a transaction with his decedent, does not preclude testimony by the other party concerning transactions and conversations at which decedent was not present.—Woolverton v. Van Syckel (N. J. Err. & App.) 603.

In an action by the administrator of H. against the sheriff for levy on the property of H. under an execution against K., a surety on the indemnity bond of the sheriff is incompetent to testify as to a conversation with H.—Kyte v. Foran (Pa.) 575.

Right of one who committed adultery with a married woman to testify on issue as to the legitimacy of her children.—Scanlon v. Walshe (Md.) 498.

A husband or wife is incompetent to testify that children born to the wife during wedlock are bastards.—Scanlon v. Walshe (Md.) 498.

Digitized by Google

Where, in an action against a firm for goods sold, one of the members, a married woman, defaults, her husband is a competent witness for plaintiff on the trial of issues raised by the other defendant.—Frack v. Gerber (Pa.) 640.

Examination.

On an issue whether the sum charged for serving a writ was more than the legal fee, defendant could be required, on cross-examination, to state whether he knew any reason why the fee, as charged, was not correct.—Hamilton v. Gray (Vt.) 315.

Where plaintiff testifies that defendant's cattle had trespassed on his crops, he may be asked on cross-examination whether the cattle of other persons had not also injured his crops.—Green v. Skoqvist (N. J. Sup.) 228.

Where a witness testified in chief that a former owner of one of the lots pointed out to him its boundary line, he may be asked on cross-examination what such owner said at the time. —Swerdferger v. Hopkins (Vt.) 153.

Credibility and impeachment.

A record showing that a witness was found guilty and fined for having found stolen property is inadmissible in impeachment.—Norton's Adm'r v. Perkins (Vt.) 148.

An offer by a witness to compromise a suit is inadmissible to impeach him.—Neal v. Thornton (Vt.) 296.

Admissibility of certain declarations of a witness for plaintiff to impeach his credibility, though not admissible for other purposes, because made in plaintiff's absence. — Frack v. Gerber (Pa.) 640.

WRITS.

See, also, "Attachment"; "Certiorari"; "Execution"; "Garnishment"; "Injunction"; "Mandamus"; "Quo Warranto"; "Replevin."

A return of summons served on the "general manager" of a corporation is insufficient under Act June 13, 1836. — Dale v. Blue Mountain Manuf'g Co. (Pa.) 633.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

TABLES OF ATLANTIC CASES

IN

STATE REPORTS.

VOL. 56, NEW JERSEY LAW REPORTS.

	Page
Aarnson v. State (27 A. 937)	9
Alexander v. City of Elizabeth (28 A. 51)	71
American Pig Iron Storage Co. v. State Board of Assessors (29 A. 160)	389
Avis v. Borough of Vineland (28 A. 1039)	474
Booth v. City of Bayonne (28 A. 381)	268
Broking v. Van Valen (27 A. 1070)	85
Bumstead v. Judges of Monmouth Pleas (28 A. 558)	414
Burnet v. Crane (28 A. 591)	285
Cahill v. Pennsylvania R. Co. (29 A. 156)	445
Campbell Printing Press & Manuf'g Co. v. Rockaway Pub. Co. (29 A. 681)	676
Catholic Protectory v. Board of Township Committee of Kearney Tp. (28 A. 1043)	385
Central New Jersey Land & Imp. Co. v. City of Bayonne (28 A. 713)	297
Chandless v. Day (29 A. 322)	682
City of Newark v. Watson (29 A. 487)	667
City of Paterson v. Board of Chosen Freeholders of Passaic County (29 A. 331)	459
Columbia Rolling Mill Co. v. Beckett Foundry & Machine Co. (31 A. 770)	714
Congregation of the Mission of St. Vincent de Paul in Germantown v. Street & Sewer Committee of Bordentown (27 A. 799)	48
Connelly v. Lerche (28 A. 430)	95
Connelly v. Trenton Pass. Ry. Co. (29 A. 438)	700
Conover v. Bird (28 A. 428)	228
Cook v. Blairstown Creamery Ass'n (28 A. 384)	262
Crisp v. Dunn (29 A. 166)	355
De Witt v. City of Elizabeth (27 A. 801)	119
Dodd v. Board of Police Com'rs of City of Camden (28 A. 311)	258
Dodson v. Taylor (28 A. 316)	11
Earle v. Willets & Co. (29 A. 198)	334
Edelstein v. Fraser (28 A. 434)	3
Edison Phonograph Co. v. Board of Assessors (32 A. 2)	717
Falk v. New York, S. & W. R. Co. (29 A. 157)	380
Fenderson v. Atlantic City R. Co. (31 A. 767)	708
Flaucher v. City of Camden (28 A. 82)	244
Flavell v. Britton (27 A. 1012)	218
Fry v. Myers (28 A. 425)	115
Garrison v. Farmers' Mut. Fire Ins. Co. (28 A. 8)	235
Goldberg v. Dorland (28 A. 599)	364
Green v. Clarke (27 A. 924)	62
Griffith v. Daly (29 A. 169)	466
Haines v. Merrill Trust Co. (28 A. 796)	312
Hammill v. Pennsylvania R. Co. (29 A. 151)	370
Hudson County Catholic Protectory v. Board of Township Committee of Kearney Tp. (28 A. 1043)	385
Jacobus v. Meskill (28 A. 383)	255
Jennings v. Burnham (28 A. 1048)	289
Jennings v. Scarborough (28 A. 559)	401
Keepers v. Fidelity Title & Deposit Co. (28 A. 585)	302
Kehoe v. Borough of Rutherford (27 A. 912)	23
Kenney v. O'Neill (28 A. 557)	440
Kilburn v. Conlan (29 A. 162)	349
Koccis v. State (27 A. 800)	44
La Valle v. Electric Cutlery Co. (27 A. 1066)	59
Lear v. Budd (28 A. 800)	457
Leavitt v. Dunn (28 A. 590)	309
Lehigh Val. R. Co. v. Snyder (28 A. 376)	326
Lever v. Bailey (27 A. 799)	54
Lewis v. Board of Chosen Freeholders of Cumberland (28 A. 553)	416
Loucks v. Bradshaw (27 A. 939)	1
Lovegrove v. Kuser (28 A. 313)	22
McDermott v. Board of Street & Water Com'rs of Jersey City (28 A. 424)	273
McNamara v. New York, L. E. & W. R. Co. (28 A. 313)	56
McNeal v. City of Burlington (28 A. 552)	443
McNeal v. Ryan (28 A. 552)	443
Matthews v. Delaware, L. & W. R. Co. (27 A. 919)	34
Mechanics' Mut. Loan Ass'n v. Board of Chosen Freeholders of Mercer County (28 A. 310)	6
Merchants' Ins. Co. of Newark v. Gibbs (29 A. 485)	679
Messmore v. Meyer (27 A. 938)	31
Meyer v. Krauter (29 A. 426)	696
Moore v. Smith (29 A. 159)	446
Morris v. City of Newark (31 A. 771)	715
Morris v. O'Connor (28 A. 56)	126
Morris v. Wrightson (28 A. 56)	126
Newark, City of, v. Watson (29 A. 487)	667
O'Hara v. Fagan (27 A. 1089)	279
Otis v. Adams (27 A. 1092)	38
Overseer of the Poor of Town of Clinton v. Overseer of the Poor of Township of Clinton (27 A. 916)	240
Passaic Water Co. v. City of Paterson (29 A. 185)	471
Paterson, City of, v. Board of Chosen Freeholders of Passaic County (29 A. 331)	459
Pennsylvania R. Co. v. Leary (29 A. 678)	705
Post v. City of Passaic (28 A. 553)	421
Potter v. Berry (28 A. 668)	454

Digitized by Google

56 N. J. LAW—Continued.

	Page
Raphael v. Lane (28 A. 421)	108
Raub v. Blairstown Creamery Ass'n (28 A. 384)	262
Raymond v. Borough of Rutherford (29 A. 156)	340
Raymond v. Champion (32 A. 2)	714
Ringle v. Board of Chosen Freeholders of Hudson County (29 A. 483)	661
St. Vincent de Paul v. Street & Sewer Committee of Bordentown (27 A. 799)	48
Snyder v. Snover (27 A. 1013)	20
Spurr v. North Hudson County R. Co. (28 A. 582)	346
State v. O'Connor (28 A. 56)	126
State v. Rogers (28 A. 726; 29 A. 173)	480
State v. Taylor (27 A. 797)	49
State v. Taylor (31 A. 771)	715
State v. Wrightson (28 A. 56)	126
Storage Co. v. State Board of Assessors (29 A. 160)	389
Stroud v. Consumers' Water Co. (28 A. 578)	422
Taylor v. City of Bayonne (28 A. 380)	265
Town of Clinton v. Township of Clinton (27 A. 916)	240
Traction Co. v. Board of Public Works of City of Camden (29 A. 163)	431
Truax v. Pennsylvania R. Co. (27 A. 1063)	277
Trustees of Warren St. Chapel v. Board of Excise Com'rs of Trenton (29 A. 150)	411
Tunison v. Snover (28 A. 310)	41
Van Anglen v. City of Bayonne (29 A. 168)	463
Van Horn v. Van Horn (28 A. 669)	318
Vansyckel v. Woolverton (27 A. 938)	8
Vunk v. Raritan River R. Co. (28 A. 593)	395
Wallace v. Bradshaw (29 A. 156)	339
Wallis Iron Works v. Coster (28 A. 592)	351
Warner v. State (29 A. 505)	686
Warren Manuf'g Co. v. Dalrymple (28 A. 671)	449
Warren Manuf'g Co. v. Donnelly (28 A. 671)	449
Warren Street Chapel v. Board of Excise Com'rs of Trenton (29 A. 150)	411
Waters v. City of Newark (28 A. 717)	361
Wenzel v. Lerche (28 A. 430)	95
Werts v. Rogers (28 A. 726; 29 A. 173)	480
West v. O'Leary (29 A. 427)	699
Westcott v. Hinckley (29 A. 154)	343
West Jersey Traction Co. v. Board of Public Works of City of Camden (29 A. 163)	431
Wheeler v. Ellis (27 A. 911)	28
White v. Borough of Neptune City (28 A. 378)	222
Wilson v. Inhabitants of City of Trenton (29 A. 183)	469
Wilson v. Inhabitants of City of Trenton (31 A. 775)	716
Wirth v. Jersey City (27 A. 1065)	216
Wolcott v. Skahill (27 A. 912)	221
Wood v. Atlantic City (28 A. 427)	232

VOL. 164, PENNSYLVANIA STATE REPORTS.

	Page
Anderson v. Anderson (30 A. 304)	338
Arthur v. Polk Borough School Dist. (30 A. 299)	410
Atkinson v. City of Philadelphia (30 A. 383)	477
Attorney General v. Severn (30 A. 395)	462
Bank v. Cathers (30 A. 262)	343
Bank v. William A. Baeder Glue Co. (30 A. 290)	1
Beck's Appeal (30 A. 296)	427
Biggs v. West Newton Borough (30 A. 204)	341
Blood v. Erie Dime Savings & Loan Co. (30 A. 362)	95
Boteler v. Philadelphia & R. T. R. R. (30 A. 303)	397
Branch's License, In re (30 A. 296)	427
Brick & Paving Co. v. City of Philadelphia (30 A. 383)	477
Bridge, City Ave. & Germantown, In re (30 A. 388)	394
Bridge, Conemaugh River, In re (Westmoreland County v. Nelson, 30 A. 288)	355
Brooking's Appeal (Morris v. Metalline Land Co., 30 A. 240)	326
Brotherton v. Reynolds (30 A. 234)	134
Brundred v. Egbert (30 A. 503)	615
Burford's Appeal (30 A. 298)	435
Butts v. Armor (30 A. 357)	73
Cameron's Admr. v. Owens (30 A. 314)	185
Carter v. Producers' & Refiners' Oil Co. (30 A. 391)	463
Champlin v. Smith (30 A. 447)	481
China Co. v. Brown (30 A. 261)	449
Citizens' Pass. Ry. v. East Harrisburg Pass. Ry. (30 A. 159)	274
City Avenue & Germantown Bridge, In re (30 A. 388)	394
City of Oil City v. Hartwell (30 A. 268)	348
City of Oil City v. Lay (30 A. 289)	370
Coal Co. v. Greenlee (30 A. 489)	549
Coal Co.'s Appeal (30 A. 210)	44
Coal & Iron Co.'s Petitions, In re (30 A. 361)	248
Commonwealth v. Alden Coal Co. (30 A. 127)	284
Commonwealth v. Bell (30 A. 511)	517
Commonwealth v. Delaware L. & W. R. R. (30 A. 127)	284
Commonwealth v. Directors of Brookville Borough School Dist. (30 A. 509)	607
Commonwealth v. Directors of Upper Swatara Tp. School Dist. (30 A. 507)	603
Commonwealth v. Edgerton Coal Co. (30 A. 125, 129)	284
Commonwealth v. Jamestown & F. R. Co. (30 A. 128)	284
Commonwealth v. Philadelphia Co. (30 A. 127)	284
Commonwealth v. Philadelphia & E. R. R. (30 A. 145)	252
Commonwealth v. Provident Life & Trust Co. (30 A. 127)	284
Commonwealth v. Severn (30 A. 395)	462
Commonwealth v. Sharon Coal Co. (30 A. 127, 128)	284
Commonwealth v. Stambaugh (30 A. 293)	437
Commonwealth v. Vrooman (30 A. 217)	306
Commonwealth v. Werling (30 A. 406)	559
Conemaugh River Bridge, In re (Westmoreland County v. Nelson, 30 A. 288)	355
Coulter v. Pine Tp. (30 A. 490)	543
Craft's Estate, In re (30 A. 493)	550
Crawford County v. Merchants' Nat. Bank (30 A. 302)	109
Cupples Wooden Ware Co. v. Howe (30 A. 238)	85
Delamater's Assignee's Appeal (Crawford County v. Merchants' Nat. Bank, 30 A. 302)	109
Delaware County & P. Electric Ry. Co. v. City of Philadelphia (30 A. 396)	457
Derk v. Northern Cent. Ry. (30 A. 231)	243
Dewey v. Reynolds (30 A. 234)	134
Dooner v. Delaware & H. Canal Co. (30 A. 269)	17
Doran v. Piper (30 A. 306)	439
Eberman v. American Ins. Co. (30 A. 398)	515
Eby's Estate, In re (30 A. 124)	249
Electric Co.'s Appeal (30 A. 495)	535

Digitized by Google

164 PA. ST.—Continued.

	Page
Electric Ry. Co. v. City of Philadelphia (30 A. 396)	457
Enders v. Enders (30 A. 129)	266
Ernst's Estate, In re (30 A. 371)	87
Ferguson v. Yard (30 A. 517)	586
First Nat. Bank of Brookville v. Cathers (30 A. 262)	343
Fox's Receiver v. Newland (30 A. 258)	360
Frenchcreek Tp. School Dist. v. Polk Borough School Dist. (30 A. 299)	410
Frick v. Fiscus (30 A. 515)	623
Frome v. Directors of Upper Swatara Tp. School Dist. (30 A. 507)	608
Fry v. Directors of Upper Swatara Tp. School Dist. (30 A. 507)	608
Fullerton's Appeal (30 A. 577)	611
Gardner's Estate, In re (30 A. 300)	420
Geiger v. Peterson (30 A. 262)	352
Germantown Bridge, In re (30 A. 388)	394
Gibson v. Western New York & P. R. R. (30 A. 308)	142
Gilpin's Appeal (Merchants' & Manufacturers' Nat. Bank of Pittsburg v. Baeder Glue Co., 30 A. 290)	1
Glessner v. Patterson (30 A. 355)	224
Gray v. Floersheim (30 A. 397)	508
Hall v. Phillips (30 A. 353)	494
Hart v. Stoyer (30 A. 497)	523
Haskins' Appeal (Crawford County v. Merchants' Nat. Bank, 30 A. 302)	109
Hayes' Appeal (30 A. 371)	87
Henderson, Hull & Co. v. Stryker (30 A. 386)	170
Hughes v. Baltimore & O. R. R. (30 A. 383)	178
Hysong v. Gallitzin Borough School Dist. (30 A. 482)	620
Interstate Vitrified Brick & Paving Co. v. City of Philadelphia (30 A. 383)	477
Iron Co. v. Vandervort (30 A. 491)	572
Irwin v. Nolde (30 A. 246)	205
Irwin v. Patchen (30 A. 486)	51
Kelminski's License, In re (30 A. 301)	231
Kern's Ex'r's Appeal (30 A. 290)	1
Leard's Estate, In re (30 A. 298)	435
Lea's Appeal (30 A. 389)	405
Lee v. Newland (30 A. 258)	360
Lehigh Valley Coal Co.'s Appeal (30 A. 210)	44
Longwell v. Hartwell (30 A. 495)	533
Lovegrove v. Christman (30 A. 385)	390
McCune v. McCune (30 A. 577)	611
McGrew v. Harmon (30 A. 265, 268)	115
McLane v. Hoffman (30 A. 399)	491
McLaughlin v. Hess (30 A. 491)	570
Martin's Appeal (30 A. 493)	520
Marvin's Appeal (Schwartz v. Keystone Oil Co., 30 A. 297)	415
Matheis v. Mazet (30 A. 434)	580
Means v. Gridley (30 A. 390)	387
Mechesney v. Unity Tp. (30 A. 263)	358
Meigs v. Lewis (30 A. 505)	597
Merchants' & Manufacturers' Nat. Bank of Pittsburg v. William A. Baeder Glue Co. (30 A. 290)	1
Miller's Appeal (Morris v. Metalline Land Co., 30 A. 240)	326
Mitchell v. Richmond (30 A. 486)	566
Morris v. Metalline Land Co. (30 A. 240)	826
Oil City v. Hartwell (30 A. 268)	348
Oil City v. Lay (30 A. 289)	370
Oil City Electric Co.'s Appeal (30 A. 495)	533
Packer v. Owens (30 A. 314)	185
Parris v. Directors of Brookville Borough School Dist. (30 A. 569)	607
Passenger Ry. v. East Harrisburg Pass. Ry. (30 A. 159)	274
Patterson v. Graham (30 A. 247)	234
Paving Co. v. City of Philadelphia (30 A. 383)	477
Philadelphia & R. Coal & Iron Co.'s Petitions, In re (30 A. 361)	248
Phillips v. Wilson (30 A. 264)	350
Pittsburg Consolidated Coal Co. v. Greenlee (30 A. 489)	549
Power's License, In re (In re Branch, 30 A. 296)	427
Railway Co. v. City of Philadelphia (30 A. 396)	457
Railway Co. v. East Harrisburg Pass. Ry. (30 A. 159)	274
Reading Coal & Iron Co.'s Petitions, In re (30 A. 361)	248
Reece v. Haymaker (30 A. 404)	575
Rehm v. Pennsylvania R. Co. (30 A. 356)	91
Ringle v. Pennsylvania R. R. (30 A. 492)	529
Rumbaugh's Appeal (30 A. 262)	352
Sager v. Mead (30 A. 284)	125
Samuel Cupples Wooden Ware Co. v. Howe (30 A. 238)	85
School Dist. v. Stambaugh (30 A. 293)	437
Schwartz v. Keystone Oil Co. (30 A. 297)	415
Shackamaxon Bank's Assignee v. Yard (30 A. 517)	586
Sharon School Dist. v. Stambaugh (30 A. 293)	437
Sigua Iron Co. v. Vandervort (30 A. 491)	572
Smiley v. Gallagher (30 A. 713)	498
Smith v. Rishel (30 A. 239)	181
Stauffer v. Penn Mut. Fire Ins. Ass'n (30 A. 384)	199
Stevens' Appeal (Morris v. Metalline Land Co., 30 A. 240)	326
Stevens' Estate, In re (30 A. 243)	209
Stevens' Estate, In re (30 A. 245)	216
Tozer v. Jackson (30 A. 400)	373
Trustees of Metalline Land Co. v. Metalline Land Co. (30 A. 240)	326
Turner v. Flenniken (30 A. 486)	469
Victor v. Pennsylvania R. R. (30 A. 381)	195
Vitrified Brick & Paving Co. v. City of Philadelphia (30 A. 383)	477
Walker v. Gibson (30 A. 399)	512
Weinmann's Estate, In re (30 A. 389)	405
Westmoreland County's Appeal (30 A. 288)	355
White v. Blanchard (30 A. 204)	345
Whitla v. Moore (30 A. 257)	451
Wick China Co. v. Brown (30 A. 261)	449
Wiestling's Appeal (30 A. 245)	216
Wilkinson v. Colley (30 A. 286)	35
Williams' Appeal (30 A. 388)	394
Wilson v. Black (30 A. 488)	555
Wood v. Trustees of State Hospital for Insane (30 A. 237)	159
Wooden Ware Co. v. Howe (30 A. 238)	85

VOL. 165, PENNSYLVANIA STATE REPORTS.

	Page
Allegheny City's Appeal (30 A. 983)	367
American Tube & Iron Co. v. Baden Gas Co. (30 A. 940)	489
American Tube & Iron Co. v. Hays (30 A. 936)	489
Armstrong v. Latimer (30 A. 990)	389
Bank v. Morgan (30 A. 957)	199
Bank v. Third Nat. Bank (30 A. 1008)	500
Bank's Appeal (30 A. 1020)	548
Bank's Assigned Estate (30 A. 1020)	548
Bartley v. Phillips (30 A. 842)	325
Berwald v. Ray (30 A. 727)	192

Digitized by Google

165 PA. ST.—Continued.

Page

Birch v. Pittsburg, C., C. & St. L. Ry. (30 A. 826) 339
Bowman v. Stewart (30 A. 988)..... 394
Boyle v. Mercer (30 A. 501)..... 1
Braden's Estate (30 A. 746)..... 184
Braughler v. Weir (30 A. 835)..... 284
Bredin v. Pittsburg & W. Ry. (31 A. 39).. 202
Broad Street (30 A. 1007)..... 475
Burford v. Fergus (30 A. 844)..... 310

Cameron v. Coy (30 A. 843)..... 290
Carpet Co. v. Latimer (30 A. 1050)..... 617
Cemetery Co. v. Griffin (30 A. 840)..... 81
Church's Appeal (30 A. 1007)..... 475
City of McKeesport v. Soles (30 A. 1019) 628
City of Pittsburg v. Coyle (30 A. 452).... 61
City of Pittsburg v. Logan (30 A. 1017).. 516
City of Pittsburg's Appeal (30 A. 503).... 8
Clay Co. v. Ott (30 A. 1040)..... 563
Coal & Coke Co. v. Boice (30 A. 502).... 27
Collins v. London Assur. Corp. (30 A. 924) 298
Commonwealth v. Blatt (30 A. 674)..... 213
Commonwealth v. Bredin (30 A. 921)..... 224
Commonwealth v. Delaware S. & S. R. R. (30 A. 522, 523)..... 44
Commonwealth v. Kammerdiner (30 A. 929) 222
Commonwealth v. Lehigh Valley R. R. (30 A. 836) 162
Commonwealth v. Mercer (30 A. 501)..... 1
Commonwealth v. Parker (30 A. 675)..... 213
Commonwealth v. Weir (30 A. 835)..... 284
Conger v. National Transp. Co. (30 A. 1038) 561
Crawford v. McKinney (30 A. 1045)..... 605
Crawford v. McKinney (30 A. 1047)..... 609
Crescent Pipe Line Co.'s Appeal (Humphrey v. O'Donnell, 30 A. 992)..... 411

Davis v. Koenig (30 A. 976)..... 347
Dennis v. Pittsburg & C. S. R. R. (31 A. 52) 624
Du Bois Cemetery Co. v. Griffin (30 A. 840) 81

Egbert v. Vanderlin (30 A. 1002)..... 248
Election of Little Beaver Township School Directors (30 A. 955)..... 233
English v. Wilmerding Borough School Dist. (30 A. 506)..... 21
E. S. Higgins Carpet Co. v. Latimer (30 A. 1050) 617

Farmers' Oil Co. v. Phillips (30 A. 842).. 325
Farmers' & Mechanics' Bank of East Birmingham v. Third Nat. Bank (30 A. 1008) 500
Fife v. Miller (30 A. 1015)..... 612
Fifty-Fourth Street (30 A. 503)..... 8
Fire Clay Co. v. Ott (30 A. 1040)..... 563
Fisher v. Hartman (30 A. 513)..... 16
Forsythe's Appeal (30 A. 1043)..... 522
Fralich v. Despar (30 A. 521)..... 24
French Creek Tp. v. Moore (30 A. 848).... 229
Freyer v. McCord (30 A. 1024)..... 539
Friend v. Oil Well Supply Co. (30 A. 1134) 652

Germania Sav. Bank's Appeal (30 A. 1020) 548
Gilchrist v. Brown (30 A. 839)..... 275
Gilliford v. Allegheny City School Dist. (30 A. 1051) 631
Goddard v. Weil (30 A. 1000)..... 419
Grieve's Estate (30 A. 727)..... 126
Groetzinger v. Kann (30 A. 1043)..... 578

Haights Street Sewer (City of Pittsburg v. Logan, 30 A. 1017)..... 516
Hampe v. Pittsburg & B. Traction Co. (30 A. 931) 468
Harris v. Reinhard (30 A. 510)..... 36
Hazlett v. Fergus (30 A. 844)..... 310
Heppenstall v. O'Donnell (30 A. 1003).... 434
Heydrick v. Hutchinson (30 A. 819)..... 208
Hibert v. Lang (30 A. 1004)..... 439
Higgins Carpet Co. v. Latimer (30 A. 1050) 617
Hill v. London Assur. Corp. (30 A. 924).. 298
Hollister v. Vanderlin (30 A. 1002)..... 248
Hooks v. Forst (30 A. 846)..... 238
Huckestein v. Allegheny City (30 A. 982) 367

Page

Humphrey v. O'Donnell (30 A. 992)..... 411
Hurley v. Jones (30 A. 499)..... 34

Iron Co. v. Baden Gas Co. (30 A. 940).... 489
Iron Co. v. Hays (30 A. 936)..... 489

Janeway's Trustee v. Firemen's Ins. Co. (30 A. 450) 55
Jarecki Manuf'g Co. v. Kerr (30 A. 1019) 529
Jobe v. Hunter (30 A. 452)..... 5
Johnson v. Smith (30 A. 675)..... 196
Johnson's License (31 A. 203)..... 315

Kennedy v. Agricultural Ins. Co. (30 A. 724) 179
Kilkeary v. Thackery (30 A. 1013)..... 584
Knowlson v. Fleming (30 A. 519)..... 10
Krumrine v. Grenoble (30 A. 824)..... 98
Kunkle v. People's Natural Gas Co. (30 A. 719) 133

Lafferty v. Milligan (30 A. 1030)..... 534
Lamberton v. Dunham (30 A. 716)..... 129
Lederman v. Pennsylvania R. R. (30 A. 725) 118
Lenox v. Greenwich Ins. Co. (30 A. 940).. 572
Lewis v. Walker's Ex'rs (30 A. 500)..... 30
Link v. Philadelphia & Reading R. R. (30 A. 820, 822)..... 75
Lithgow v. Supreme Tent of Knights of Maccabees of the World (30 A. 830)... 292
Little Beaver Township School Directors' Election (30 A. 955)..... 233
Loan v. Gillmor (30 A. 989)..... 643
Lohr v. Borough of Philipsburg (30 A. 822) 109
Lyle v. Shay (30 A. 940)..... 637
Lynch v. Versailles Fuel Gas Co. (30 A. 984) 518

McClintock v. Fry (30 A. 941)..... 510
McCormick's Appeal (30 A. 986)..... 383
McCowin's Appeal (30 A. 955)..... 223
McDonough v. Jolly (30 A. 1048)..... 542
McKeesport v. Soles (30 A. 1019)..... 628
McMullen's Appeal (30 A. 1051)..... 631
Mansfield Coal & Coke Co. v. Boice (30 A. 502) 27
Martin's Appeal (30 A. 727)..... 126
Maul v. Peck (30 A. 933)..... 571
Mentel v. Hippely (30 A. 1021)..... 558
Mitchell v. Pittsburg, Ft. W. & C. Ry. (31 A. 67) 645
Moffitt v. Lytle (30 A. 922)..... 173
Moore v. Copley (30 A. 829)..... 294
Moore v. Moore (30 A. 932)..... 464

Oil Co. v. Phillips (30 A. 842)..... 325

Park Fire Clay Co. v. Ott (30 A. 1040)... 563
Patrick v. Smith (30 A. 1044)..... 528
Patterson v. Neuer (30 A. 748)..... 66
Paul v. Grimm (30 A. 721)..... 139
Penn Bank's Assigned Estate (30 A. 1020) 548
Pfeiffer v. Brown (30 A. 844)..... 207
Philadelphia Co. v. Central Traction Co. (30 A. 934)..... 456
Pipe Line Co.'s Appeal (Humphrey v. O'Donnell, 30 A. 992)..... 411
Pittsburg v. Coyle (30 A. 452)..... 61
Pittsburg v. Logan (30 A. 1017)..... 516
Pittsburg's Appeal (30 A. 503)..... 8
Pittsburg & W. E. Pass. Ry. v. Point Bridge Co. (30 A. 511)..... 37
Pringle v. Moore (30 A. 848)..... 229

Railway Co. v. Point Bridge Co. (30 A. 511) 37
Reed v. Klaus (30 A. 1005)..... 443
Roberts v. Firemen's Ins. Co. (30 A. 450) 55
Robinson v. Baird (30 A. 1010)..... 505
Roll v. Davison (30 A. 987)..... 392

Saalfield v. Manrow (30 A. 823)..... 114
Sandusky Street (Huckestein v. Allegheny City, 30 A. 983)..... 367
Schempp v. Fry (30 A. 941)..... 510

Digitized by Google

165 PA. ST.—Continued.

Page

Seanor v. McLaughlin (30 A. 717)..... 150
Second Nat. Bank v. Morgan (30 A. 957).. 199
Sewer, Haights St. (City of Pittsburg v. Logan, 30 A. 1017)..... 516
Sewickley M. E. Church's Appeal (30 A. 1007)..... 475
Shiloh Street (30 A. 986)..... 386
Shoninger v. Latimer (30 A. 985)..... 373
Spencer v. Reese (30 A. 722)..... 158
Stevenson's Appeal (30 A. 933)..... 571
Stoltenberg v. Pittsburg & L. E. R. R. (30 A. 980)..... 377
Stoughton v. Manufacturers' Natural Gas Co. (30 A. 1001)..... 428
Street, Broad (30 A. 1007)..... 475
Street, Fifty-Fourth (30 A. 503)..... 8
Street, Sandusky (Huckestein v. Allegheny City, 30 A. 982)..... 367
Street, Shiloh (30 A. 986)..... 386
Sturgis v. Kountz (30 A. 976)..... 358

Taylor v. Pittsburg, C., C. & St. L. Ry. (30 A. 826)..... 339
Taylor v. Trich (30 A. 1053)..... 586
Thomas v. Miller (30 A. 928)..... 216
Township v. Moore (30 A. 848)..... 229
Trich's Ex'r v. Trich (30 A. 1053)..... 586
Tube & Iron Co. v. Baden Gas Co. (30 A. 940)..... 489
Tube & Iron Co. v. Hays (30 A. 936)..... 489

Vincent v. Woodland Oil Co. (30 A. 991).. 402

Wade v. Oakmont Borough (30 A. 959)... 479
Walter v. Sun Fire Office (30 A. 945).... 381
Webb, Appeal of (30 A. 827)..... 330
Webb's Estate (30 A. 827)..... 330
Whissler v. Walsh (30 A. 981)..... 352
Whitesell v. Peck (30 A. 933)..... 571
Whitmire v. Montgomery (30 A. 1016).... 253
Willock's Estate (30 A. 1043)..... 522
Wood's Appeal (30 A. 746)..... 184

Young v. Patterson (30 A. 1011)..... 423

VOL. 78, MARYLAND REPORTS.

Page

A. D. Puffer & Sons' Manuf'g Co. v. May (26 A. 1020)..... 74
Albert v. Albert (28 A. 388)..... 338

Bagby v. Walker (27 A. 1033)..... 239
Baltimore Base Ball Club & Exhibition Co. v. Pickett (28 A. 279)..... 375
Baltimore Breweries' Co. v. Ranstead (28 A. 273)..... 501
Baltimore Traction Co. of Baltimore City v. State (28 A. 397)..... 409
Barrick v. Horner (27 A. 1111)..... 253
Bay v. Posner (26 A. 1084)..... 42
Bittle v. State (28 A. 405)..... 526
Bonaparte v. Clagett (27 A. 619)..... 87
Bond v. State (28 A. 407)..... 523
Bowling v. Turner (28 A. 1100)..... 595
Boyd v. Sachs (28 A. 391)..... 491
Brady v. Brady (28 A. 515)..... 461

Campbell & Zell Co. v. Roediger (28 A. 901) 601
Central Ry. Co. v. Brewer (28 A. 615)..... 394
Clark v. Vannort (27 A. 982)..... 216
Condon v. Sprigg (28 A. 395)..... 330
Coulbourn v. Fleming (27 A. 1041)..... 210
County Com'rs of Calvert County v. Gantt (28 A. 101; 29 A. 610)..... 286
Cox v. Handy (27 A. 227, 501)..... 108
Coyne v. Boyce (26 A. 1021)..... 22
Crocker v. Hopps (28 A. 99)..... 260

Devecmon v. — (28 A. 412)..... 537
Downs v. State (26 A. 1005)..... 128

Eureka Fertilizer Co. of Cecil County v. Baltimore Copper, Smelting & Rolling Co. (27 A. 1035)..... 179
Exchange Bank of Wheeling v. Sutton Bank (28 A. 563)..... 577

Fidelity & Deposit Co. of Maryland v. Haines (28 A. 393)..... 454

German Sav. Bank of Baltimore City v. Renshaw (28 A. 281)..... 475
Green v. City & Suburban Ry. Co. (28 A. 626)..... 294

Hamilton v. Traber (27 A. 229)..... 26
Hiss v. Weik (28 A. 400)..... 439
Hopkins v. Baker (28 A. 284)..... 363
Hopper v. Callahan (28 A. 385)..... 529
Humphreys v. Slemons (28 A. 1101)..... 606

Page

Judefind v. State (28 A. 405)..... 510

Kelly v. Gilbert (28 A. 274)..... 431
Kraft v. Egan (26 A. 1082)..... 36
Kuykendall v. — (28 A. 412)..... 537

Lazard v. Merchants' and Miners' Transp. Co. (26 A. 897)..... 1

McNiece v. Eliason (27 A. 940)..... 168
McRae v. McRae (27 A. 1038)..... 270
Mayor, etc., of City of Baltimore v. Whittington (27 A. 984)..... 231
Mottu v. Fahey (28 A. 387)..... 389

Naylor v. Brady (28 A. 515)..... 461
North Baltimore Pass. Ry. Co. v. Arnreich (28 A. 809)..... 589
North Baltimore Pass. Ry. Co. v. Kaskell (28 A. 410)..... 517

Olmstead v. Bach (27 A. 501)..... 132

Pennington v. Gregg (28 A. 565)..... 545
Piper v. Cambria Iron Co. (27 A. 939)..... 249
Powell v. Curtis (28 A. 390)..... 490
Puffer & Sons' Manuf'g Co. v. May (26 A. 1020)..... 74
Putzel v. Drovers' & Mechanics' Nat. Bank (28 A. 276)..... 349

Robinson v. Cator (26 A. 959)..... 72
Robinson v. Hurst (26 A. 956)..... 59

Sadtler v. Brady (28 A. 515)..... 461
Savage v. Bartlett (28 A. 414)..... 561
Seeger v. Hunting (26 A. 960)..... 54
Sentman v. Baltimore & O. R. Co. (27 A. 1074)..... 222
Shaw v. — (Kuykendall v. Devecmon, 28 A. 412)..... 537
Shaw v. Davis (28 A. 619)..... 308

Thomas v. Gregg (28 A. 565)..... 545

Webster v. Cambridge Female Seminary (28 A. 25)..... 193
Winchester v. County Com'rs of Cecil County (27 A. 1075)..... 266
Worman v. Hagan (27 A. 616)..... 152

Yunger v. State (28 A. 404)..... 574

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google